

NO. 31610-6-III

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Court of Appeals
Division III
State of Washington

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER CARLSON, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable Evan E. Sperline

No. 12-1-00532-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure¹

On October 9, 2012, the Grant County Prosecutor's Office (State) charged Christopher James Carlson (defendant) with one count of rape in the first degree, RCW 9A.44.040, and one count of rape in the second degree by forcible compulsion. CP 1–4. On October 29, 2012, the Grant County Prosecutor's Office (State) charged Christopher James Carlson (defendant) by amended information with one count of rape in the second degree by forcible compulsion, RCW 9A.44.050(1)(a), one count of burglary in the first degree, RCW 9A.52.020, and one count of residential burglary, RCW 9A.52.025—the latter two with a sexual-motivation special allegation under RCW 9.94A.030(47). CP 62–64.

During a status hearing on December 3, 2012, the parties entered a joint motion and order to continue the trial date with the following proposed trial schedule: January 14, 2013 for a readiness hearing; January

¹ The verbatim report of proceedings consists of five volumes that are paginated separately. For clarity, the State will refer to those proceedings as follows:

- **Pretrial/Sentencing RP:** Pretrial and sentencing proceedings that occurred before the Honorable Evan Sperline, John Antosz, and John Knodell on October 16 and 29, 2012, November 14, 20, and 28, 2012, December 3 and 18, 2012, January 3, 14, and 22, 2013, February 4, 11, 19, 25, and 26, 2013, and April 16, 2013. The proceedings on these dates are consecutively paginated in one volume.
- **1RP:** Defendant's jury trial, proceedings on February 27, 2013.
- **2RP:** Defendant's jury trial, proceedings on February 28, 2013.
- **3RP:** Defendant's jury trial, proceedings on March 4, 2013.
- **4RP:** Defendant's jury trial, proceedings on March 5, 2013.
- **5RP:** Defendant's jury trial, proceedings on March 6, 2013.

16 for trial; and February 15 for the new outside date.² CP 93 (Criminal case scheduling order 12/3/2012); Pretrial RP 30.

At readiness on January 14, 2013, the State moved to continue the trial for three reasons. First, Deputy Prosecuting Attorney (DPA) Carole Highland, who was co-chairing the case with Prosecuting Attorney Angus Lee, was recovering from a broken elbow and was unable to physically conduct a trial. Pretrial RP 38–50. Second, one of the State’s witnesses, the doctor who performed the victim’s sexual assault examination, would be unavailable to testify due to a work conflict. Pretrial RP 38–50. Third, the State informed the court that the victim had a prescheduled work trip to Europe during the following two weeks that she had already rescheduled in anticipation of trial. Pretrial RP 38–50. The State reasoned that if the trial continued into a second week, then its key witness—the victim—would be unavailable during that time. Pretrial RP 38, 58.

Defendant objected to the continuance, so the court denied the State’s motion and called the case ready for trial. Pretrial RP 52–60. The court reasoned Prosecuting Attorney Lee could try the case without DPA Highland’s support and that the State’s witnesses had notice about the proceedings and should have made arrangements accordingly. Pretrial RP 55–60. The court did indicate, however, that defendant’s case was the

² The court actually set the new outside date erroneously as February 1, 2013. CP 93 (Criminal case scheduling order 12/3/2012). However, at a CrR 3.5 hearing on January 3, 2013, the court recognized the error and the parties corrected the outside date (which should have been originally set) to February 15, 2013. Pretrial RP 36–38.

fourth trial called ready on the superior court's trial run and noted the limited courtrooms available in Grant County. Pretrial RP 52–55. The court suggested that if the case were set over to the following week, it would consider the State's motion to continue regarding the victim's unavailability during that week. Pretrial RP 60.

As predicted by the court, defendant's case did not go to trial because of courtroom unavailability. Subsequently, the parties appeared on January 22 for readiness. Pretrial RP 62. And, just as the State had previously reported, the victim of the case was in Europe, so the State moved for a continuance. Pretrial RP 62–63. Defendant again objected to the continuance, but when asked whether the continuance would result in any prejudice, defense counsel could not specify any prejudice and stated that only his ability to prepare for other trials would be hampered. Pretrial RP 64. Based on the lack of prejudice and the unavailability of an essential witness to the trial, the court ruled that under CrR 3.2(f)(2) the administration of justice necessitated a continuance. Pretrial RP 65. The parties entered a new schedule with trial on February 7, and the outside date as March 8. Pretrial RP 65.

With the new outside date of March 8, the case was called ready on February 4, 11, 19, and 25. Pretrial RP 71–89. Each week except for the last, the trial was continued to the following week because other cases were prioritized based on outside date. *See* Pretrial RP 74, 76–77. On February 27, 2013, the Honorable Evan E. Sperline conducted defendant's

jury trial. 1RP 1.

In total, defendant's jury trial began just a little over four and a half months after the State originally filed charges against defendant.

Before closing arguments, defendant requested a jury instruction on the inferior-degree offense of third-degree rape. CP 199–200 (Defendant's proposed definitional and to-convict instructions); 4RP 71. Defendant also requested an instruction on voluntary intoxication to the burglary charges. CP 205.

After hearing argument on both matters, the court held that an instruction for rape in the third degree was unwarranted because there was no evidence that the sexual intercourse was not forcible and/or nonconsensual. 4RP 74, 84–85. The court also denied the voluntary intoxication instruction because there had been no affirmative evidence that defendant's intoxication had impacted his intent to commit a crime. 4RP 89–90. The parties made no further objections or exceptions to the proposed instructions.

The jury found defendant guilty as charged. CP 259–60, 263 (Verdict forms A, B, and C).

On April 16, 2013, the court sentenced defendant to 115 months in custody for rape in the second degree,³ 50 months for burglary in the first

³ Defendant had an offender score of 2 with a standard range of 95–125 months. CP 314 Felony judgment and sentence, paragraph 2.3).

degree,⁴ and dismissed the residential burglary charge under the merger doctrine. CP 315–16 (Judgment and sentence, paragraph 4.1). Defendant timely filed a notice of appeal. CP 337.

2. Facts

On October 7, 2012, M.J.⁵ returned to her apartment in Moses Lake, Washington, after spending the day in Seattle with her granddaughter. 2RP 60. Upon arriving at her apartment complex, M.J. saw another tenant, whom she described as suspicious, sitting in his car in the adjacent parking stall. 2RP 60, 93–94. When M.J. got out of her car, the man also got out and began to follow her. 2RP 60.

M.J. rounded the corner and saw defendant, who was another tenant, standing outside of his apartment door, so she motioned defendant to do something about the suspicious man. 2RP 61, 95–96. Defendant responded by calling out to the man and inviting him over while M.J. safely entered her apartment. 2RP 61. Once inside M.J. changed into a pair of sweats and a sweater, sat down at her computer, and began uploading photographs of her granddaughter onto the internet. 2RP 61.

Later that evening M.J. heard a knock on the door. 2RP 62. She walked over to the window, opened the blinds, and discovered it was defendant standing outside holding a water glass. 2RP 62–63. M.J. thought

⁴ Defendant had an offender score of 2 with a standard range of 50–58 months with the aggravating circumstance of committing the crime with sexual motivation. CP 314 (Felony judgment and sentence, paragraph 2.3).

⁵ In the interest of privacy, the State will refer to the victim in this case by her initials.

that perhaps defendant was simply stopping by to check on her because of her encounter with the stranger earlier that day. 2RP 62. Unalarmed, she opened the door and let him enter. 2RP 63.

Defendant immediately sat down in a recliner next to the front door, reached out and grabbed M.J. by the wrist, and pulled her onto his lap. 2RP 63. M.J. tried to stand up while promptly and repeatedly asking defendant what he was doing. 2RP 64. She could not get up, however, due to defendant's strong hold and significant size advantage. 2RP 64. At the time, M.J. was a 5'2" 58 year-old woman who weighed only 125 lbs., compared to defendant, a 27 year-old man of much stronger build. 2RP 58–59.

Defendant forced his hand under M.J.'s sweatpants and digitally penetrated her. 2RP 64. He then removed his penis from his pants and told M.J., "You're going to eat it." 2RP 64–65, 98.

When M.J. refused to perform oral sex on defendant, he pinned her face-up on the ground in front of the recliner, took off her pants, and penetrated her with his penis. 2RP 65, 98–101, 103. During the rape, defendant kept repeating a demand to "look at me," and yelled things such as, "You owe me big time," "Look at me and tell me that you want me to fuck you," and, "I spared you from the audience." 2RP 66, 101. He ordered M.J. to remove her sweater—to which she complied out of fear—and gave her a hickey on her neck. 2RP 100.

Eventually defendant demanded M.J. to turn over onto her stomach

and said, "I bet you want me to fuck you doggie style." 2RP 66, 111. He ordered her to place her hands on a cedar chest above them, continued penetrating her with his penis, and said, "You've let me taste you now. I'm going to want you more. And this was just your pussy, and I'm going to want your ass." 2RP 66–67. At some point while M.J. was on her hands and knees, defendant reached out and pulled her hair, jerking her head towards her back. 2RP 70.

M.J. protested throughout the rape that defendant was hurting her, told him "no" when he ordered her to do things, and tried physically resisting. 2RP 68–70, 91–92. Defendant, however, was too strong. M.J. could not breathe through much of the incident because she was being smashed under defendant's weight. 2RP 67–72.

Once finished, defendant threatened M.J. that he would return that evening and told her to "lock your door and buy some pepper spray." 2RP 68. Defendant also stated that he was not "going to remember any of this. Blame it on PTSD or whatever, but I'm not going to remember any of this." 2RP 67. He left the apartment while M.J. lay crumpled up on the floor feeling numb, embarrassed, and scared. 2RP 72. Feeling as if she was covered in the smell of defendant's body, M.J. stood up, locked the door, and quickly showered. 2RP 82. She then called her friend Taffian Wright to report the rape. 2RP 82, 88.

Ms. Wright, an emergency medical technician with training and experience with posttraumatic shock, testified M.J. called her late that

evening, crying hysterically and explaining that she had just been raped. 2RP 83–84. Ms. Wright described M.J.’s demeanor as one consistent with symptoms of posttraumatic stress, signs such as physical tremors and an inability to use complete sentences. 2RP 88–89.

Two of M.J.’s neighbors, Dan Hennagir and Albert Wise, also testified that M.J. appeared to be badly shaken up the next morning. 2RP 118–120. According to Mr. Hennagir, M.J. had contacted them unusually early that morning and asked if she could stop by for a visit. 2RP 118. Upon doing so, M.J. dropped onto a chair and began shaking and crying as she explained she had been raped. 2RP 119–20, 128, 136.

Later that day M.J. was admitted to the Columbia Basin Hospital and underwent a vaginal exam by Doctor Jonathan Crosier. 2RP 72–75; 3RP 26. Dr. Crosier testified M.J. had noticeable erythema in M.J.’s vaginal canal and tenderness around M.J.’s neck—presumably caused by defendant pulling on her hair. 3RP 29–33. Lori Borlin and Amy Olson, both registered nurses at the hospital, also testified about M.J.’s examination. 2RP 137–61.

Moses Lake Police Department (MLPD) Detective Juan Rodriguez interviewed M.J. and later investigated the crime scene. 2RP 143–166. He discovered defendant’s baseball cap⁶ behind the recliner in M.J.’s apartment. 2RP 166. He also searched defendant’s apartment and found a

⁶ Erica Graham, a Washington State Crime Laboratory forensic scientist, performed DNA testing that verified the baseball cap belonged to defendant. 4RP 4, 18–19.

partially empty fifth of vodka in the refrigerator. 2RP 167.

On October 8, 2012, MLPD Detective Rodriguez and Mike Williams interviewed defendant about the rape. 2RP RP 36. The video of that interview was admitted into evidence and designated by the State as an exhibit for review. Ex. 1 (Plaintiff's exhibit 20). When confronted with the allegation of having intercourse with M.J., defendant smirked and questioned the detectives, "Was I good?" 2RP 36-37; Ex. 1 (11:05). Defendant denied leaving his apartment that evening and alleged he had been drinking Red Bull and vodka before passing out and waking up the next day. 2RP 36.

Defendant did not testify but called Grant County Sheriff's Office Sergeant Phillip Coats, who testified that defendant did not have any visible injuries when he was booked into jail. 4RP 65-66.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY REFUSED TO GIVE AN INSTRUCTION FOR THE INFERIOR-DEGREE OFFENSE OF RAPE IN THE THIRD DEGREE BECAUSE THERE WAS NO EVIDENCE THAT IT WAS COMMITTED TO THE EXCLUSION OF SECOND DEGREE RAPE

A jury instruction on rape in the third degree would not have been proper in this case because the evidence offered by the State showed defendant committed rape in the second degree by forcible compulsion. There was no evidence that the rape was not forced, and the issue of consent was never raised. The trial court thus properly denied defendant's

request to include an instruction on the lesser-degree offense of rape in the third degree.

A trial court's refusal to give a requested instruction, if based on a factual dispute, is reviewable only for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

An instruction for an inferior degree offense is not warranted simply because the State charges the greater offense. *See State v. Wright*, 152 Wn. App. 64, 71, 214 P.3d 968 (2009). Rather, the trial court may instruct the jury on an inferior degree offense when:

- (1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense”;
- (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and
- (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). The first two prongs are not at issue in this case.⁷

When analyzing the third prong, or “factual prong,” of the *Fernandez-Medina* test, “the evidence *must* raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Fernandez-Medina*, 141 Wn.2d at 455 (emphasis added). The trial court should administer an inferior degree instruction

⁷ The State does not contest that second degree rape (RCW 9A.44.050) and third degree rape (RCW 9A.44.060) proscribe the same offense, and the information in this case charges defendant with a crime divisible into degrees.

only if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit on the greater offense. *Id.* at 456.

To prove rape in the second degree, the State had to prove defendant engaged in sexual intercourse with M.J. by forcible compulsion. *Compare* CP 246 (Instruction No. 5), *with* RCW 9A.44.050(1)(a). The court instructed the jury that “forcible compulsion” meant “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.” CP 245 (Instruction No. 4). Third degree rape would have required the State to prove:

[U]nder circumstances not constituting rape in the first or second degrees, [defendant] engages in sexual intercourse with another person: (a) Where the victim did not consent . . . 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.

RCW 9A.44.060.

The courts in Washington have repeatedly held that in order to instruct the jury on third degree rape as an inferior-degree offense to second degree rape, there must be some *affirmative evidence* that the rape was unforced but still nonconsensual. *See, e.g., State v. Charles*, 126 Wn.2d 353, 355–56, 894 P.2d 558 (1995); *Wright*, 152 Wn. App. at 72; *State v. Jeremia*, 78 Wn. App. 746, 754–57, 899 P.2d 16 (1995). *Wright* is

illustrative here.

In *Wright*, the court found that an instruction on third degree rape is unwarranted when the victim's testimony supports a finding of forcible compulsion and no other evidence is offered to contradict that finding. *See* 152 Wn. App. at 73–74. The victim in *Wright* attended a party when she was suddenly pulled into a dark bedroom and forced onto a bed. *Id.* at 67–68. She testified that someone, or possibly two persons, held her down on her back by her shoulders and pulled off her clothes. *Id.* at 68. After unsuccessfully trying to push the perpetrator(s) off of her, she felt a man's hands and penis penetrating her vagina, and she also recalled somebody kissing and rubbing her breasts. *Id.* In response to this force, the victim did not scream out for help, but instead asked the defendant to “stop,” and stated “this isn't right.” *Id.* She also testified that she was scared and was unable to get off of the bed until the person got off of her. *Id.* After DNA samples were obtained from the saliva on her chest, the State charged Wright and another with second degree rape. *Id.* at 70.

Interestingly, in that case, the State requested and received an instruction on third degree rape. *Id.* The prosecutor argued the instruction was proper because the victim's testimony was the only evidence supporting forcible compulsion, and the prosecutor believed the jury might find the force was insufficient to overcome the victim's resistance. *Id.* The defendants objected to the instruction, arguing there was no factual basis to support the instruction on rape in the third degree based on the victim's

testimony alone. *Id.* The defendants had generally denied the sexual intercourse and hoped the jury would consider only the charge of rape in the second degree. *See id.* at 70, 74. Ultimately, the jury convicted the defendants of rape in the third degree, but left blank the verdict forms for rape in the second degree. *Id.* at 70.

On review of the trial court's decision to give the instruction, the Court of Appeals reversed, finding that the victim's testimony of forcible compulsion precluded an instruction on rape in the third degree:

The State maintains that S.F.'s testimony could be consistent with only third degree rape because her description of the incident does not involve force that is more than necessary or usual to achieve penetration. The State points out that S.F. said she was held down in a manner that felt like someone leaning over her, and that only the weight of that individual held her down. But S.F. also testified that (1) she was pushed or pulled into the room; (2) she did not willingly lay down on the bed; (3) someone pulled her clothes off of her body, she did not willingly remove them; (4) she was held down on the bed by the body weight of one man while another man penetrated her; (5) something on her left side was holding her shoulder back so she could not get up; and (6) she told them to stop. Although S.F. was reluctant to say that she was "raped" because she does not like that word, *her testimony consistently reflected rape by forcible compulsion.*

Id. at 73–74 (emphasis added).

Like in *Wright*, the only evidence offered in this case regarding whether the intercourse was a product of forcible compulsion was the victim's (M.J.'s) testimony—and that testimony "consistently reflected

rape by forcible compulsion.” *Id.* at 74. For example, M.J. testified to the following facts that demonstrated forcible compulsion:

- Defendant pulled M.J. onto the recliner and then later pushed her onto the floor during the rape. 2RP 63, 99.
- Defendant put his hand down M.J.’s pants and digitally penetrated her, even though she simultaneously protested that he was hurting her and pleaded, “What are you doing?” 2RP 64–65.
- Defendant pulled off M.J.’s sweatpants. 2RP 65, 99–100.
- Defendant held her down with his body so that he could spread her legs. 2RP 103.
- Defendant used his bodyweight to pin M.J. on her back and pulled her legs up towards her head such that she could not move or breathe. 2RP 102–03.
- After demanding M.J. turn onto her stomach, defendant penetrated her again with his penis while yanking her head back by the hair. 2RP 70.
- M.J. suffered physical pain from the penetration and physical control by defendant, and repeatedly tried to tell him. 2RP 70.
- M.J. attempted, though unsuccessfully, to push defendant away with her strength. 2RP 68, 92.
- During cross-examination, when asked whether she just “let [defendant] have his way with [her],” M.J. insisted she was forced into the intercourse and did not willingly “let” defendant do anything to her. 2RP 106.
- M.J. told defendant “no” whenever he demanded her to do something. 2RP 65, 91–92.

In addition to the physical force defendant used to overcome M.J.’s resistance, defendant’s overall demeanor during the rape demonstrates a disposition of forceful compulsion. This includes:

- Defendant removing his genitals from his pants and commanding M.J. to perform oral sex on him, stating, “You’re going to eat it.” 2RP 64–65.
- Defendant’s command to M.J. to turn onto her stomach so

that he could “fuck [her] doggie style,” and his subsequent orders to M.J. to place her hands on the cedar chest. 2RP 66, 111.

- Defendant’s demands to M.J. to “[l]ook at me. Look at me in the eyes,” throughout the rape. 2RP 66.
- Defendant’s statements, “I want you to tell me that you want this,” and, “You can want me to make you come or not make you come. I don’t really care.” 2RP 69.

Even defendant’s parting words to M.J. after the sexual intercourse are manifestations of the nature of the forcible act he just committed: “But I will be back, and probably tonight *so . . . lock your door and buy some pepper spray.*” 2RP 68 (emphasis added).

There was no affirmative evidence that defendant’s act was either unforced or nonconsensual. In fact, defendant opted not to testify and permitted the jury to consider the story he provided law enforcement during the investigation: he denied leaving his apartment and claimed he did not recall anything from the night in question. Ex. 1. Like in *Wright*, the jury was in a position to believe M.J.’s testimony or discredit it—either the rape occurred by forcible compulsion, or it did not occur at all.

For these same reasons, the trial court refused to give the instruction on third degree rape, pointing out that there was no evidence that the force was unforced or nonconsensual:

I can’t find in this case any affirmative evidence that the intercourse was not forcible and nonconsensual, so I do not intend to give a lesser degree instruction in regard to rape in the 3rd degree.

...

So while I concede that there is evidence for the jury to

consider as to whether or not to decide that the State has proved forcible compulsion beyond a reasonable doubt, I think *what is missing is any affirmative evidence that this was not forced but was also nonconsensual.*

4RP 74, 84 (emphasis added). The trial court appears to have exercised its discretion only after thoughtfully considering all of the relevant authorities on this matter and hearing argument from both parties. *See* 4RP 74–85.

In absence of evidence that the rape was committed by anything but forcible compulsion, defendant cannot demonstrate to this court how he committed the lesser offense to the exclusion of the higher offense. The trial court thus properly excluded an instruction on the inferior-degree offense of rape in the third degree.

2. THE TRIAL COURT PROPERLY REFUSED TO GIVE AN INSTRUCTION FOR VOLUNTARY INTOXICATION BECAUSE THERE WAS NOT SUBSTANTIAL EVIDENCE OF DRINKING, NOR DID DEFENDANT SATISFY HIS BURDEN TO SHOW HIS INTOXICATION AFFECTED HIS ABILITY TO ACQUIRE INTENT

Defendant does not satisfy his burden to show substantial evidence of drinking immediately prior to or at the time of the crime. But even if there was such evidence, case law requires much more than evidence of drinking or intoxication: the evidence must show defendant was so depreciated in body and mind that it impacted his ability to acquire intent. Defendant does not meet that burden here.

When a criminal defendant requests the court to instruct the jury

on voluntary intoxication, it is the defendant's burden to show:

(1) The crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state.

State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). The trial court's decision to refuse the instruction on the latter two prongs is reviewed for an abuse of discretion. *State v. Priest*, 100 Wn. App. 451, 454, 997 P.2d 452 (2000).

Defendant concedes, and the State agrees, the first prong does not apply to defendant's conviction of rape in the second degree. Brief of Appellant at 12. The jury may consider intoxication when the State must prove a mens rea:

No act committed by a person while in a state of intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090. Rape in the second degree does not require the State to prove a particular mental state as an element. *See* RCW 9A.44.050.

Defendant's remaining two charges, burglary in the first degree with a sexual motivation and residential burglary with a sexual motivation, do require a mental state. *See* RCW 9A.52.020 (intent); *see also* RCW

9A.52.025 (intent). The State's argument is thus limited to these latter two charges.

a. There was not "substantial evidence" of drinking prior to the time of the crime

This court's opinion in *Priest* underscores the importance of requiring the defendant to identify evidence of substantial drinking not only on the night in question, but more importantly, immediately prior to or at the time of the crime. In *Priest*, a state trooper had stopped Priest for a suspected DUI while Priest was en route from Spokane to Tacoma. 100 Wn. App. at 452–53. The trooper noticed the vehicle Priest was driving had a broken back window and an ignition that had been punched. *Id.* Suspecting a stolen vehicle, the trooper questioned Priest and his passenger about who owned the vehicle, but they both denied owning the truck and lied about their names. *Id.* After arrest, Priest provided blood alcohol samples with a concentration of .169 and .172. *Id.* He was later charged with taking a motor vehicle without permission. *Id.*

At trial, Priest's passenger testified she had borrowed a friend's truck in Spokane and had asked Priest to accompany her to Tacoma. *Id.* She testified that she and Priest purchased a six-pack of beer and consumed it together before leaving. *Id.* She also testified that they stopped for more beer and gas in Ritzville, then again in Vantage before

being pulled over. *Id.* Priest also testified, claiming he saw the vehicle's broken window but did not observe anything unusual about the ignition.

Id.

Notwithstanding the general evidence of drinking between Priest and his passenger above, the trial court rejected a voluntary intoxication instruction. *Id.* The court reasoned that there was not "substantial evidence" that Priest had been drinking or that he was intoxicated prior to taking the vehicle. *Id.* at 454. The court further reasoned that even if there was evidence of drinking, the evidence (e.g., BAC levels, the parties' testimonies of drinking, etc.) did not amount to showing Priest's intoxication impacted his ability to acquire a mens rea. *Id.*

At trial in the present case, the parties' arguments about the voluntary intoxication instruction centered predominantly on the third prong of the *Gabryschak* inquiry—whether there was evidence that defendant's drinking impacted his ability to acquire intent. *See* 4RP 88–90.⁸ After review of the matter, however, it appears the evidence is extremely limited concerning the amount of alcohol, if any, defendant consumed immediately prior to the crime: Mr. Hennagir testified that at around 8:30 to 9:00 pm he could hear defendant singing loudly in his

⁸ It appears in the heat of argument that even the prosecutor conceded the second prong, basing most of his argument on the third prong. *See* 4RP 88.

apartment and thought defendant was drunk. 2RP 116–17, 121–22. It was clarified, however, that Mr. Hennagir did not directly observe defendant drinking and had no visual observations of the defendant that night. 2RP 117. Mr. Wise testified similarly, stating he heard defendant singing loudly around 8:30 but never saw him that night. 2RP 128.

Next, defendant told MLPD Officer Rodriguez during an interview that he purchased vodka at some point during the day and began drinking it around 6:00 in the evening. Ex. 1 (4:25, 11:30). Defendant claimed he passed out early and could not recall the remainder of the night. Ex. 1 (7:00–7:45).

That concludes the totality of the evidence that defendant was drinking before the crime. Defendant outlines other evidence indicating drinking, including the discovery of a nearly empty bottle of vodka in defendant's apartment the next day and testimony that M.J. told a nurse that she thought defendant was intoxicated. Brief of Appellant at 13–14. But the evidence of a vodka bottle in defendant's apartment the day after the crime is unhelpful to this court's determination because there is no direct evidence of how much of the bottle was consumed before the crime because nobody saw defendant drinking. Defendant ultimately left M.J.'s apartment after he raped her and could have drunk a substantial portion, if

not all, of the bottle upon his return. Additionally, the nurse's testimony that M.J. reported defendant was intoxicated during the rape was merely impeachment evidence, not substantive evidence. *See* ER 801; *see also State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005) ("Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence." (emphasis added)). This evidence does not meet the "substantial evidence" threshold.

More important than the evidence that defendant was heard singing loudly an hour and a half before the rape is the entire lack of evidence pertaining to defendant's drinking at the time of the crime. M.J. testified defendant arrived at her apartment holding a water glass in his hand, but never suggested it was alcohol. 2RP 63, 97. She never testified defendant slurred his speech or manifested other signs of intoxication. *See* 2RP 58–92. Even when cross-examined about this issue, M.J. did not testify defendant appeared to be intoxicated. 2RP 105.

Additionally, nobody saw defendant drinking just before or at the time of the crime. Defendant cannot indicate anywhere in the record besides his assertions during his interview with MLPD that he was drinking at the time of the crime.

This court must determine whether the limited evidence above

satisfies the demanding “substantial evidence of drinking”-inquiry necessary for supporting a voluntary intoxication instruction. Mere testimony of the defendant singing and whooping long before the actual crime is insufficient to meet that standard, especially when considering the dearth of evidence regarding defendant’s intoxication at the time of the crime.

- b. There was not substantial evidence that defendant was so intoxicated that he could not form the intent to commit a crime with sexual motivation

Even if this court finds substantial evidence of drinking, evidence of drinking alone is insufficient to warrant the instruction. *Gabryschak*, 83 Wn. App. at 253. There must be “*substantial evidence* of the effects of the alcohol on the defendant’s mind or body.” *Id.* (quoting *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991)) (emphasis added); *see also State v. Zamora*, 6 Wn. App. 130, 133, 491 P.2d 1342 (1971) (“[I]t is common knowledge that one may exhibit symptoms of having consumed alcohol without necessarily losing the capacity to form an intent to do an act.”). The court should look to the degree of the defendant’s intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state at the time of the crime. *See Priest*, 100 Wn. App. at 455.

For example, even though this court in *Priest* found there was not substantial evidence of drinking, it still looked at other factors from the crime and concluded:

Even assuming Mr. Priest did not realize the vehicle was stolen until sometime after he began drinking, Mr. Priest cannot satisfy the third requirement [evidence that the drinking affected the defendant's ability to acquire the required mental state]. . . . Here, Mr. Priest was able to operate a motor vehicle, communicate with [the trooper], purposely provide false information, and attempt to reduce his charges by being an informant. Based on this evidence, the trial court acted within its discretion in reasoning that Mr. Priest's alcohol consumption did not affect his ability to possess the required mental state of TMVWOP.

100 Wn. App. at 455.

Similarly in *Zamora*, the reviewing court affirmed the rejection of a voluntary intoxication instruction even though there was evidence the defendant had been drinking at a tavern, mumbling to himself, appeared "drunk" and "incoherent" to lay witnesses, stumbled as he walked, and slurred his speech. 6 Wn. App. at 134. Despite these general signs of intoxication, the court highlighted that nobody testified the defendant smelled like intoxicants, no witness actually observed the defendant drink alcohol, and no evidence was presented regarding when the alcohol (if any) had been consumed in relation to the time of the crime. *See id.* at 134–35.

Again in *Gabryschak*, the trial court denied a voluntary

intoxication instruction despite testimony from the officers that Gabryschak had “alcohol on his breath,” he “appeared to be intoxicated,” and testimony from the victim that Gabryschak was intoxicated and had “had a couple of drinks.” 83 Wn. App. at 253. The reviewing court affirmed the denial, reasoning the defendant’s actions throughout the arrest manifested an apparent ability to actively respond to the situation, such as reacting to the officers, trying to break free and run away, and threatening to kill an officer once he was out of jail. *Id.* 254. Further, the court held:

No testimony reflects that Gabryschak’s speech was slurred, that he stumbled or appeared confused, that he was disoriented as to time and place, that he was unable to feel the pain of the pepper spray, or that he otherwise exhibited sufficient effects of the alcohol from which a rational juror could logically and reasonably conclude that his intoxication affected his ability to think and act in accord with the requisite mental states

Id. at 254–55.

Similar to *Priest*, *Zamora*, and *Gabryschak*, there was not substantial, other evidence that defendant’s alcohol intake had sufficiently impeded his mind or body. The trial court recognized this lack of evidence when it rejected the voluntary intoxication instruction:

COURT: The case law suggests that evidence of intoxication alone is not enough for a voluntary intoxication instruction but that there must be evidence of the [e]ffect of the intoxication on the individual.

....

I – I agree – that the defendant, to get this instruction, would not only have to show he was drunk/intoxicated but would have to offer some evidence of the impact that his intoxication had on his ability to form the intent to commit a crime. And I – I don't believe the evidence is sufficient for it.

4RP 81, 89. When defense counsel—as defendant does again on appeal—pointed out that defendant was making strange statements during the rape as evidence of the impact on his intent, the court correctly emphasized that nothing supported those statements as being a result of defendant's inability to acquire intent:

COURT: Right. But are [the statements] related to intoxication or is Mr. Carlson a bizarre person? *There's just no way in this evidence to know.*

....

And, see, this is the problem: You keep going back to signs that he was intoxicated. Let's accept that the evidence establishes that he was completely blasted. What you're required to do is show what impact being in that state would have on his ability to form an intent. *And there isn't any. We just don't have any evidence that that would keep – prevent him from intending to commit a crime.*

So for the reason that I initially indicated and continue to – to find to be the state of the evidence, that voluntary intoxication instruction will not be given.

4RP 90 (emphasis added). The trial court considered all of the evidence and concluded that while there might be signs of intoxication, there was nothing to suggest defendant's ability to acquire intent was actually affected—a decision squarely within its discretion.

Even defense counsel conceded that, at best, any evidence of the impact of defendant's intoxication on his ability to form intent was "circumstantial." 4RP 81.

Defendant's actions at the time of the crime strongly indicate he had the ability to acquire intent. Apparently, defendant was agile enough to grab M.J. by the arm without missing and nimble enough to quickly, digitally penetrate her vagina. He was deft enough to remove her pants as he forced her to the ground. He was cognizant enough to force her face-up on the ground so that he could spread her legs with his body weight and then pin her legs towards her head. Defendant was still alert enough during intercourse that he changed positions—forcing M.J. to her stomach—and sober enough to command M.J. to place her hands on a cedar chest in front of her so that he could penetrate her from behind.

He also recognized the gravity of his actions and suggested at the time an excuse (which, as he predicted, he would later assert as his defense at trial), "I don't know how to describe my memory, but I'm not going to remember any of this. Blame it on PTSD or whatever, but I'm not going to remember any of this." 2RP 67. These statements demonstrate defendant sufficiently contemplated what was transpiring and show his ability to explain them away beforehand.

Another strong indicator that defendant had the ability to form

intent at the time of the crime was that he *coached* M.J. with breathing techniques when she exclaimed she could not breathe under his body weight. 2RP 67–68. Defendant thus had the sufficient cognitive ability to recognize his situation and rationally respond in a manner an extremely intoxicated person could not—similar to the defendant in *Priest*, who tried providing a false name in response to an officer’s question, and the defendant in *Gabryschak*, who insisted on threatening while being taken to jail. *See Priest*, 100 Wn. App. at 455; *see also Gabryschak*, 83 Wn. App. at 254–55.

There is also evidence defendant was fully aware of the time and destination based on his threat to M.J.: “But I will be back, and *probably tonight so. . . lock your door and buy some pepper spray.*” 2RP 68 (emphasis added). His statement to M.J., “You owe me big time,” suggests that, at the time of the crime, he could recall the aid he rendered M.J. earlier in the day.

There were no signs of intoxication commonly associated with heavy drinking, such as watery, bloodshot eyes, odor of intoxicants on defendant’s breath, poor coordination, etc.

Moreover, there is no explanation tendered by the defense how, after an alleged night of drinking, defendant correctly walked over to M.J.’s apartment at 10:30 at night, promptly raped her with the dexterity

described above, and returned to his own bed in a different apartment—all without issue. It is also unreasonable to infer that defendant’s body could sustain an erection for the duration of the rape if he were in an extremely inebriated condition. If defendant was so depreciated in mind and body by his intoxication such that he could not form the intent to rape M.J., then there would be *some* evidence regarding his inability to do any one of these other acts—but there was none.

Defendant unlawfully remained in M.J.’s apartment with the intent to rape her, and defendant cannot specifically identify how his level of intoxication impacted that intent. While there might be evidence defendant was drinking vodka at some point during the night or early morning after the crime—there was not “substantial evidence” that he was drinking before the incident, nor was there evidence that the alcohol impacted his ability to form the intent to commit a crime with sexual motivation. The trial court therefore did not abuse its discretion when it rejected the instruction on voluntary intoxication.

3. DEFENDANT WAIVED HIS CHALLENGE TO THE TRIAL COURT’S DEFINITION OF REASONABLE DOUBT BY FAILING TO OBJECT TO THE ISSUE AT TRIAL⁹

The court may refuse to review any claim which was not raised to

⁹ Arguments 3 and 4 both respond to defendant’s third argument on appeal.

the trial court if the defendant does not demonstrate that it was a manifest error of constitutional magnitude. RAP 2.5(a); *see also State v. Elmore*, 154 Wn. App. 885, 897, 228 P.2d 760 (2010). “‘Manifest error’ requires a showing of actual and identifiable prejudice to the defendant’s constitutional rights at trial.” *Id.* The Washington State Supreme Court has reiterated that challenges to definitional jury instructions are not of constitutional magnitude that may be raised for the first time on appeal. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992).

In *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), the State Supreme Court permitted (but disapproved) of the use of a “*Castle*¹⁰ instruction” to define reasonable doubt, which read:

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

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

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that

¹⁰ *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656 (1997).

overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Bennett, 161 Wn.2d at 309. The Court found this instruction did not relieve the State of its burden to prove every element beyond a reasonable doubt and thus satisfied the minimum requirements of due process. *Id.* at 318. Prospectively, however, the Court exercised its “inherent supervisory power to instruct Washington trial courts” to use Washington Pattern Jury Instruction 4.01 to inform the jury of the government’s burden to prove every element of the crime beyond a reasonable doubt. *See id.*; *see also* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (3d ed. 2008) (WPIC).

Later, Division Two of the Court of Appeals found a trial court’s failure to abide by the State Supreme Court’s mandate in *Bennett* by giving a *Castle* instruction was not a manifest error of constitutional magnitude. *See State v. Jimenez Macias*, 171 Wn. App. 323, 331–32, 286 P.3d 1022 (2012). The court in *Jimenez Macias* reasoned the State Supreme Court found the *Castle* instruction constitutionally sufficient and the “issue preservation rules” required it. *See id.* (citing *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011)).

The WPIC defining the government's burden of proof states:

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

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

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

WPIC 4.01 (emphasis in original).

In this case, the trial court prepared and offered its own instruction—the relevant portions patterned almost exactly after WPIC 4.01—about the State's burden of proof and the standard of reasonable doubt:

CHARGES AND BURDEN OF PROOF

The defendant is charged with three crimes arising from one incident; he is charged with rape in the second degree in Count 1, with burglary in the first degree in Count 2, and with residential burglary in Count 3. A separate crime is charged in each count. You must decide each charge separately, as if it were a separate trial. Your

verdict on one count should not control your verdict on the other count.

Every crime consists of several parts, called “elements.” The elements of each count will be specified for you later in these instructions. The defendant’s plea of not guilty puts in issue, to be decided by the jury, each element of each crime charged. The State is the plaintiff and has the burden of proving each of these elements beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

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

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

CP 244 (Instruction No. 3).

Defendant challenges the trial court’s omission of the second use of the phrase, “lack of evidence,” in its instruction defining reasonable doubt. *Contrast* WPIC 4.01 (paragraph 3), *with* CP 244 (Instruction No. 3, paragraph 4). But defendant waived challenge to this error because he did not object to the trial court’s instruction omitting the challenged phrase. The record does not reflect that either party commented on the discrepancy or even noticed it while the trial court formally took objections and exceptions. Therefore, absent a showing that the omission constitutes a manifest error, defendant cannot raise this issue for the first

time on appeal. RAP 2.5(a).

Whether the omission of the second use of the phrase, “lack of evidence,” is of constitutional magnitude is also matter of first impression for this court.

The omission of the challenged language is not a manifest error because it did not lessen the State’s burden of proof. The State concedes that the definition of “reasonable doubt” has been the subject of much litigation as it pertains to one’s constitutional right to due process. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994); *Bennett*, 161 Wn.2d 303; *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984); *State v. Lundy*, 162 Wn. App. 865, 256 P.3d 466 (2011). But these cases generally hinge on the addition of substantial, superfluous language or erroneous omissions of entire sentences. At the heart of these cases, however, is whether the altered language deviated so substantially that the jury would have convicted the defendant on a lesser burden of proof. *See, e.g., Bennett*, 161 Wn.2d at 317–18.

The omitted language did not deprive defendant of due process because just previous to the omission, the court instructed the jury that a reasonable doubt was one “for which a reason exists and may arise from the evidence or *lack of evidence*.” CP 244 (Instruction No. 3) (emphasis added). The jury was thus instructed that a reasonable doubt contemplated

both the “evidence” and the “lack of evidence” in the same instruction.

Furthermore, the *Castle* instruction—which the State Supreme Court upheld on review—omits not only the second use of “lack of evidence,” but also the entire clause that the contested phrase normally falls within. *See Bennett*, 161 Wn.2d at 309.

Defendant did not object to the jury instruction at trial and thus waived his challenge on appeal. The instruction, despite the omitted language, still comported with due process and required the State to prove its case beyond a reasonable doubt.

4. IF DEFENDANT DID NOT WAIVE THE ERROR, THIS COURT SHOULD FOLLOW DIVISION TWO OF THE COURT OF APPEALS’ HOLDING IN *STATE V. LUNDY* AND FIND THE SLIGHT DEFINITIONAL MODIFICATION TO WPIC 4.01 HARMLESS BEYOND A REASONABLE DOUBT

The court reviews alleged instructional errors de novo to ensure the instructions properly state the law and the State’s burden of proof. *See State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions are sufficient if they accurately state the law, are not misleading, and permit each party to argue its theory of the case. *State v. Haack*, 88 Wn. App. 423, 427, 958 P.2d 1001 (1997). The court does not construe jury instructions in isolation, but rather reviews a challenged instruction within the context of the instructions as a whole. *See id.*; *see*

also *Pirtle*, 127 Wn.2d at 656.

Erroneous jury instructions are generally subject to a constitutional harmless error analysis. *Lundy*, 162 Wn. App. at 871 (citing *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002)). An error is harmless under this standard if the jury verdict would have been the same beyond a reasonable doubt absent the error. *See id.*; *see also Brown*, 147 Wn.2d at 341.

- a. Divisions One and Two of the Court of Appeals are split as to whether changes to WPIC 4.01 are subject to a harmless error analysis

Division One of the Court of Appeals rejected a harmless error analysis for any violation of the Court’s mandate in *Bennett*. *See State v. Castillo*, 150 Wn. App. 466, 472–75, 208 P.3d 1201 (2009). In *Castillo*, the defendant challenged the trial court’s instruction defining “reasonable doubt” because it greatly extrapolated the definition found in WPIC 4.01. *See id.* at 470–71 (defining reasonable doubt as one that is “not a fanciful or ingenious doubt or conjecture,” “an honest misgiving caused by insufficiency of proof of guilt,” “[not] proof to an absolute or mathematical certainty,” “need not exclude every hypothesis or possibility of innocence,” etc.). Even when *Castillo* objected to the superfluous definition and requested the definition under WPIC 4.01, the trial court essentially scoffed, stating the WPIC was “goobley-gook [*sic*].” *Id.* at

469–70.

In rejecting the harmless error analysis, Division One reasoned the parties should have been aware of the *Bennett* opinion (released eight months before trial) and the error directly violated the *Bennett* mandate. *Id.* at 472–75. The court further reasoned that the State Supreme Court never commented on harmless error in *Bennett* (so the reviewing court could not infer that harmless error should apply), and found that the offered instruction lessened the State’s burden of proof. *See id.*

On the other hand, Division Two expressly rejected the *Castillo* court’s analysis when confronted with the same issue. *See Lundy*, 162 Wn.2d at 872–73. In *Lundy*, the trial court reversed the paragraph order of the standard WPIC and modified the first three sentences regarding the State’s burden of proof. *Id.* at 871. On appeal, the defendant argued the alterations to WPIC 4.01 required an automatic reversal of his conviction. *Id.* at 869. Division Two rejected this proposition, reasoning (1) the Court in *Bennett* never held that modifying WPIC 4.01 “automatically constitutes reversible error,” and (2) the error was not structural and should thus be subject to a constitutional harmless error analysis. *Id.* at 872.

For the following reasons, this court should follow Division Two’s *Lundy* holding and adopt a constitutional harmless error analysis for

Bennett violations. First, the Court in *Bennett* did not warn the courts in Washington that a failure to abide by its directive would subject duly-found verdicts to automatic reversal. *See generally Bennett*, 161 Wn.2d 303. The State does not intend to suggest the Court's directive in *Bennett* lacks practical enforcement. Indeed, it seems only proper to advise the trial courts in Washington to abide by a concise, approved definition of reasonable doubt to ensure due process and to limit the quantity and quality of these types of challenges on appeal.

But the error should be subject to a constitutional harmless error analysis because the Supreme Court's directive to use WPIC 4.01 was an exercise of its supervisory powers rather than an invocation of its constitutional error-correcting authority. *See Lundy*, 162 Wn. App. 865, 871–73, 256 P.3d 466 (2011). It seems that if the State Supreme Court were willing to negate *any* verdict that was the result of a modified WPC 4.01—then predictably it would have offered such a heavy-handed warning. But it did not.

Second, the underlying bases for the *Castillo* and *Lundy* courts' reasoning should guide this court's determination: in *Castillo*, Division One was rendering an opinion against a defiant trial judge that rejected all of the standard language from WPIC 4.01 and insisted on using a hand-crafted instruction—which the judge had created years before as a military

judge. 150 Wn. App. at 469–70. The defendant in that case also maintained his objection to the court’s convoluted definition of reasonable doubt. *Id.* at 470.

Far from the actions of the trial court in *Castillo*, however, the trial court here adopted predominantly all of the language under WPIC 4.01 except for the slight omission challenged on appeal. This court’s modifications are more akin to the minor alterations made by the trial court in *Lundy*. Further, like in *Lundy*, defendant did not object to the instruction when the trial court took exceptions—which is at least one factor indicative that the error was not so prejudicial as to warrant reversal.

Third, the *Castillo* opinion is so inflexible that even minor modifications (i.e., “the defendant” as opposed to “a defendant,” or the positional switch of the paragraphs like in *Lundy*) would warrant reversal because they—according to the *Castillo* court—go directly against the Court’s directive in *Bennett*. So long as the modifications did not make WPIC 4.01 “better” per the reviewing court’s discretion, the conviction should be overturned. *See Castillo*, 150 Wn. App. at 472–73. This unyielding standard appears to overextend the intent of the Court in *Bennett*, which ultimately upheld the *Castle* instruction as constitutionally sufficient and, tellingly, only invoked its supervisory authority to direct

the use of WPIC 4.01.

Lundy is a better interpretation of *Bennett*. A constitutional harmless error analysis will still result in critical scrutiny by the reviewing court while offering some leniency to modifications to WPIC 4.01 that do not impermissibly lessen the State's burden of proof. The State requests this court to adopt the analysis under *Lundy* and subject the error alleged in this case to a constitutional harmless error review.

- b. The omission of the repetitive language "lack of evidence" from WPIC 4.01 was harmless beyond a reasonable doubt

As argued *supra* (argument 3), the trial court's instruction on the burden of proof comported with the law and properly underscored the State's duty to prove each element beyond a reasonable doubt. *See* CP 144 (Instruction No. 3). Also, when considering the instructions as a whole, the trial court reiterated the State's burden in each of the to-convict instructions, ensuring the jury understood this demanding burden. CP 246, 248–49, 253, 255 (Instruction No. 5, 7–9, 12, and 14).

The court further ensured defendant due process by instructing the jury that a reasonable doubt is a doubt that arises from the "evidence" or the "lack of evidence"—rendering the challenged phrase superfluous. *See* CP 144 (Instruction No. 3). The State concedes the failure to include the "lack of evidence" language from the reasonable doubt definition

altogether might constitute further debate or error, but that is not the case here. Not every omission or misstatement in a jury instruction relieves the State of its burden. *Brown*, 147 Wn.2d at 339. The omission of the repetitious phrase “lack of evidence” did not alter the jury’s verdict beyond a reasonable doubt.

5. THE TRIAL COURT PROPERLY GRANTED THE STATE’S MOTION TO CONTINUE READINESS BECAUSE IT ADVANCED THE INTERESTS OF JUSTICE WITHOUT PREJUDICING DEFENDANT’S ABILITY TO PRESENT HIS CASE

Defendant challenges the trial court’s decision to grant the State’s two-week continuance on January 22, 2013, even though his trial occurred within the time for trial deadline as allowed by the court rules. The court extended defendant’s time for trial deadline only twice: once by 60 days on an agreed motion,¹¹ and again by 21 days on the State’s motion.¹² In total, defendant’s felony charges of rape, burglary, and residential burglary were adjudicated within a period just over four and a half months. The trial court did not abuse its discretion in granting the State’s 14-day

¹¹ CP 92 (Order on Joint Motion to Strike 3.5 Hearing, Continue the Trial, Modify Pretrial Release Conditions, & Lower Bail).

¹² The State requested a two week continuance of the trial date, which continued the trial from January 22, 2013 to February 7, 2013. Under CrR 3.3(b), “If any period of time is excluded pursuant to [an agreed motion to continue], the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.” CrR 3.3(b)(5). Accordingly, the time for trial deadline was extended 30 days after February 7 to March 8, 2013.

continuance to accommodate the victim's preplanned business trip to Europe.

For clarity, the relevant proceedings are listed below—with the challenged proceeding highlighted in bold font:

DATE	PROCEEDING	ANTICIPATED TRIAL DATE AFTER PROCEEDING	TIME FOR TRIAL DEADLINE
10/16/2012	Arraignment / Omnibus	12/5/2012	12/17/2012
12/3/2012	Agreed continuance ¹³	1/16/2013	2/15/2013
1/14/2013	Readiness	1/16/2013	2/15/2013
1/22/2013	Readiness / continuance	2/7/2013	3/8/2013
2/4/2013	Readiness	2/7/2013	3/8/2013
2/11/2013	Readiness	2/13/2013	3/8/2013
2/19/2013	Readiness	2/20/2013	3/8/2013
2/25/2013	Readiness	2/27/2013	3/8/2013
2/27/2013	Trial	--	--

- a. This court reviews a trial court's decision to grant a motion to continue de novo when based on a constitutional speedy trial claim

When a defendant asserts his constitutional right to a speedy trial was violated (as opposed to a violation of a court rule), the standard of review is de novo. *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

- b. Defendant does not satisfy his burden to demonstrate that the two-week delay was presumptively prejudicial, nor do the remaining Barker factors favor dismissal

A defendant alleging a constitutional speedy trial violation “must [first] show that the length of the delay crossed a line from ordinary to presumptively prejudicial.” *Iniguez*, 167 Wn.2d at 283 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182 (1972)). This inquiry depends on the specific circumstances of each case such as the nature of the charges, the length of the delay, the complexity of the case, etc. *Id.* at 283, 290–293 (finding presumptive prejudice for an eight-month delay in a robbery trial).

Once the defendant has satisfied the threshold inquiry regarding presumptive prejudice, the reviewing court must then consider the *Barker* factors: (1) the length of the delay; (2) the reason for the delay; (3) the extent to which the defendant asserts his speedy trial right; and (4) the prejudice to the defendant as a result of the delay. *Iniguez*, 167 Wn.2d at 290–93.

This court need not consider the four *Barker* factors because defendant has not satisfied his burden to demonstrate the specific continuance in this case was presumptively prejudicial to his defense.

¹³ CP 92 (Order on Joint Motion to Strike 3.5 Hearing, Continue the Trial, Modify Pretrial Release Conditions, & Lower Bail).

Unlike *Iniguez*, where the defendant faced only charges of robbery, defendant in this case faced charges of rape in the second degree, first degree burglary with sexual motivation, and residential burglary. The State's case was not simply based on eyewitness accounts—like the robbery charges in *Iniguez*—but instead required expert testimony from a forensic scientist who performed DNA testing and a physician who performed a vaginal examination on the victim.

The entire trial was conducted before five months had even passed. Moreover, defendant did not object to the time for trial deadline 120 out of the 141 days it took to adjudicate his case. His only objection arose when the State sought to continue trial two weeks on January 22, 2013. This brief continuance did not presumptively prejudice defendant's case.

Even though defendant has not demonstrated how the post-accusatorial delay was not presumptively prejudicial, the *Barker* factors do not support his claim.

i. The length of the delay was only two weeks, a factor which does not favor the extreme remedy of dismissal

A reviewing court should not “consider [the length of delay] in the same way as in the presumptive prejudice analysis.” *Iniguez*, 167 Wn.2d at 293. Instead, the court should consider “the extent to which the delay stretches beyond the bare minimum needed to trigger’ the [*Barker*]

inquiry.” *Id.* (citation omitted). The court in *Iniguez* was clear that reviewing courts should review longer delays with scrutiny. *Id.* However, in that case, the court found an eight-month delay—even though the defendant was incarcerated during that time—“[was] not necessarily an undue delay.” *Id.*

From arraignment to the first day of trial, defendant’s trial occurred in just over *half* of the time compared to *Iniguez* or any of the cases cited therein. *See id.* at 290–93. Even if he was incarcerated for the duration of that time, this factor should not weigh heavily against the State, if at all. More narrowly, defendant’s trial occurred just two weeks after the time of his objection, and his time for trial deadline was only extended three weeks total.

The length of the delay in this case did not unconstitutionally burden defendant and should not weigh against the State.

ii. The reason for the delay was justified because the State’s material witness—the rape victim—was unavailable

The trial court can consider witness unavailability when granting a continuance. *See, e.g., State v. Henderson*, 26 Wn. App. 187, 191–92, 611 P.2d 1365 (1980). Unavailability of a material State witness is a proper ground for a continuance if there is a valid reason for the unavailability, there is reasonable reason to believe the witness will become available

within a reasonable time, and there is no substantial prejudice to the defendant. *Id.* at 191–92, 611 P.2d 1365 (1980). “Whether the continuance is for a day, a week, or a month is a determination *requiring discretion.*” *Id.* at 192 (emphasis added). When a trial court exercises its discretion to grant a continuance pursuant to the court rules and gives the reasons for its actions, “appellate courts should give those reasons credence.” *Id.* at 191.

The entirety of the pretrial proceedings shows the trial court properly and critically assessed each of the State’s motions to continue. Out of the four motions that the State requested, the trial court granted only one—the continuance at issue here. For example, during the proceedings on January 14th, the State moved to continue trial based on a witness’s limited availability and DPA Highland’s broken elbow. *See* Pretrial RP 40–42, 46–50. The court, however, rejected both of those reasons, insisting that the witness could appear despite limited availability and that Prosecuting Attorney Lee could try the case without DPA Highland’s help. Pretrial RP 42, 55–60.

During that hearing the State also informed the court that the victim in the case would be unavailable the last two weeks of January for a preplanned work trip to Europe. Pretrial RP 38. The court indicated it would be open to continuing the trial if it happened to occur within that

timeframe. Pretrial RP 60. Even then, the court thoroughly inquired into the nature of the trip and whether the victim could actually appear. *See* Pretrial RP 43–45.

On January 22, the State moved to continue because the victim was in Europe, just as the State had informed the court the week prior. Pretrial RP 62. The victim had already rescheduled her trip once in anticipation of an earlier trial and could not do so again. Pretrial RP 45. It was not a mere matter of convenience, but rather a certain inability to appear. For those reasons, the court granted the continuance:

Okay. The defendant’s objection to continuance is noted for the record. The court finds under Criminal Rule 3.3(f)(2) that the administration of justice in this case requires continuance because an essential witness is unavailable *just for a brief time*, on the ground or basis that [the prosecutor] recited.

The court finds that the defendant will not be prejudiced in the presentation of a defense, even if counsel will be required to juggle those times when he has available to prepare for other matters.

Pretrial RP 65 (emphasis added). The court properly considered the requirements of CrR 3.3(f) and stated its basis for its determination on the record.¹⁴ Accordingly, this court should “give [that] decision credence.” *Henderson*, 26 Wn. App. at 191. The reason for the delay should thus not weigh against the State.

¹⁴ The time for trial may be tolled where the administration of justice requires it and the court finds the defendant will not be prejudiced. CrR 3.3(f)(2).

iii. Defendant asserted his speedy trial right

Defendant timely objected to the State's motion to continue and asserted his speedy trial right on January 22, 2013. Pretrial RP 62. This factor should favor defendant.

However, defendant's argument that "the court continued Mr. Carlson's case a total of six weeks all over objection" (see Brief of App. at 20) overstates the degree of his objections at trial and understates the trial court's basis for denying all but one of the State's motions to continue. Defendant objected to each of the State's motions to continue (four), but remained silent at the other hearings where the court had to continue the trial in one-week increments to accommodate courtroom availability. *See* Pretrial RP 71-78. And despite the several one-week continuances from February 4 to February 25, defendant's trial still occurred within the time for trial deadline of March 8, 2013.

iv. The trial court properly granted the continuance because defendant did not identify any prejudice in the presentation of his case

Finally, the trial court properly granted the State's motion because it expressly found defendant would not be prejudiced by the brief continuance. When directly asked whether defendant would be prejudiced in the presentation of his defense, the only basis proffered by his attorney

was that his attorney's ability to prepare for other trials would be hindered. Pretrial RP 64. In response, the trial court expressly found defendant had failed to identify how the continuance would prejudice the presentation of his defense. Pretrial RP 65.

Absent any prejudice to the defense, a four and a half month delay is not sufficient to violate one's right to a speedy trial. *See Iniguez*, 167 Wn.2d at 295 ("Certainly longer delays have been allowed. For instance, the *Baker* Court did not consider a 10-month pretrial incarceration to be prejudicial, absent any actual impairment of the defense."). This factor weighs in favor of the State.

v. The totality of the circumstances does not support a finding of a speedy trial violation

The trial court properly granted the State's motion to continue because the administration of justice necessitated it. Defendant has not demonstrated the two-week continuance was presumptively prejudicial, nor does the length or reason of the delay support a violation. Most importantly, defendant did not specifically identify how the presentation of his defense was prejudiced by the delay.

D. CONCLUSION.

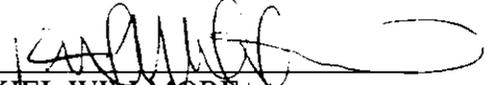
This court should uphold the trial court's refusal to give an instruction for third degree rape and voluntary intoxication. The trial court

properly rejected the instructions because the evidence did not support a finding that defendant committed third-degree rape to the exclusion of second-degree rape. Additionally, defendant did not satisfy his burden to demonstrate substantial drinking prior to the crime or that he was so intoxicated it impacted his ability to acquire intent.

The trial court did not deny defendant due process by slightly modifying WPIC 4.01 or by granting the State's two-week motion to continue. Defendant waived his challenge to the omission of the repeated use of "lack of evidence" from WPIC 4.01 because he did not object to the issue below. If not, the slight modification to the instruction was harmless beyond a reasonable doubt. Furthermore, the trial court properly granted the State's continuance because it did not prejudice defendant's case. For these reasons, the State respectfully requests this court to affirm defendant's convictions and to deny defendant's appeal.

DATED: July 21, 2014

D. ANGUS LEE
Grant County
Prosecuting Attorney


KIEL WILLMORE
Deputy Prosecuting Attorney
WSB # 46290

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent.)	No. 31610-6-III
)	
v.)	
)	
CHRISTOPHER J. CARLSON,)	DECLARATION OF SERVICE
)	
Appellant)	
_____)	

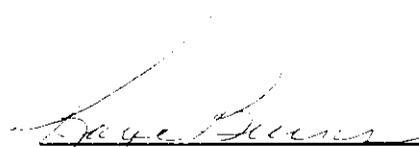
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

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

Christopher J. Carlson - #892366 Coyote Ridge Correction Center PO Box 769 Connell WA 99326	Robert Cossey Robert Cossey & Associates, P.S. Attorneys at Law 902 N. Monroe St. Spokane WA 99201
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A copy of said Brief of Respondent was also sent via e-mail to Robert Cossey, Attorney for Appellant, at rcossey@robertcossey.com.

Dated: July 21, 2014.



Kaye Burns