

65324-5

65324-5

NO. 65324-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TOVAR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. After Tovar failed to establish the falsity of A.P.'s prior rape allegation against another man, did the trial court properly exclude, as irrelevant and inadmissible under the Rape Shield statute, evidence and cross-examination of A.P. concerning the prior allegation?

2. Has Tovar failed to establish that trial counsel's performance was deficient based on a strategic decision not to object to—and thus highlight—an isolated remark? Even if trial counsel should have objected, does Tovar's claim fail because there is no reasonable probability that, but for the lack of an objection, the result of the trial would have been different?

3. Did trial counsel properly concede that, because there was no evidence that Tovar's sexual intercourse with A.P. was unforced but still nonconsensual, Tovar was not entitled to a jury instruction on the inferior degree crime of rape in the third degree?

4. After holding an evidentiary hearing with testimony, declarations and an exhibit, the trial court found Tovar's claim, that trial counsel prevented him from testifying, not credible. The trial court found trial counsels' advice to Tovar not to testify strategically sound because, had Tovar testified, the court likely would have admitted evidence of Tovar's significantly similar assaults on two other victims to rebut a

consent defense. Did the trial court properly deny Tovar's claim that he was prevented from, as opposed to advised against, testifying?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Michael Tovar with one count of rape in the second degree - domestic violence, while armed with a deadly weapon.¹ CP 1-2. On January 15, 2010, a jury found Tovar guilty as charged. CP 43-44.

On January 28, 2010, the trial court granted Tovar's motion to appoint new counsel to investigate whether there were grounds for a new trial. CP 45-46; 11RP 2-5.²

On March 1, 2010, newly appointed counsel, Nicholas Marchi, filed a motion for a new trial. CP 47-51. Marchi alleged that trial counsel: (1) rendered ineffective assistance in myriad ways, and (2) prevented Tovar from testifying.³ CP 47-51.

At the April 1, 2010 evidentiary hearing, Tovar and trial counsel, Brian Todd and Katy Dacanay, testified. See 13RP. The trial court also

¹ Contrary to RCW 9A.44.050(1)(a), RCW 10.99.020 and under the authority of RCW 9.94A.602 and 9.94A.533(4).

² The State adopts the appellant's designation of the verbatim report of proceedings. See Br. of Appellant at 2 n.1.

³ In section C.2.c of this brief, *infra*, the State discusses Tovar's claim that his attorneys prevented him from testifying.

reviewed declarations by Wendy Latham (one of Tovar's ex-wives), Tovar, Todd and Dacanay. CP 47-72, 76-109, 444-45, 447-50. The court said that it found no ineffective assistance of counsel—this was a “well-prepared case.”⁴ 14RP 8-9. The court also ruled that “Tovar was not impermissibly prevented from testifying.” 14RP 11. The court denied the motion for a new trial. 14RP 12.

On April 2, 2010, the trial court imposed an indeterminate minimum sentence of 120 months plus an additional 48 months for the deadly weapon enhancement.⁵ CP 111-22; 14RP 21. Tovar timely appeals. CP 128-30.

2. SUBSTANTIVE FACTS

a. Background.

A.P. and Brent were married for almost nine years before they separated in August 2008. 5RP 102, 105; 8RP 9-11. Together, they have three children, ages four, seven and eight. 8RP 10. A.P. and Brent had an

⁴ The court noted that trial counsel had interviewed “key witnesses.” 14RP 9. Additionally, trial counsel sought funding from the Office of Public Defense to retain various experts. See CP 638-41, 648-51, 658-61. On February 9, 2011, the State filed a motion in this Court to unseal those documents.

⁵ The deadly weapon enhancement was 48 months because Tovar had a previous conviction for unlawful imprisonment committed while he was armed with a firearm. CP 276-83.

unconventional marriage; they were involved in what is loosely referred to as “swinging.” 5RP 105; CP 179-80 (1710-15).⁶

In mid-February 2009, A.P. met Tovar on an adult website set up for “purely carnal sexual relationships.” 8RP 13-14. A.P. and Tovar chatted on-line and exchanged text messages. 8RP 12-14, 18; CP 171-250. Then, a few days later, they met. 8RP 15. The first two days of their relationship were good—A.P. and Tovar had an immediate sexual chemistry. 8RP 14-17, 127. They established a monogamous relationship. 8RP 14, 17.

Soon, the tenor of the text messages changed. 8RP 18-20. Tovar expressed his feelings of inadequacy concerning the size of his penis and his perceived inability to satisfy A.P. sexually. 8RP 18-23.⁷ A.P. tried to reassure Tovar, but he remained jealous and insecure. 8RP 20.⁸

On February 17, 2009, A.P. and Tovar argued at the store where A.P. worked about the size of Tovar's penis and his belief that A.P. preferred “bigger men.” 8RP 24-26. Later that night, Tovar delivered a letter to A.P. at her home, in which he alluded to his “dark guy.” 8RP

⁶ Parenthetical refers to the text message number, listed sequentially on the far left of each page.

⁷ See also CP 184 (1791), CP 190-92 (1908, 1911-41), CP 194-95 (1963-75, 1980-87), CP 207 (2195-98, 2209).

⁸ See also CP 195 (1987), CP 209 (2230, 2236-37, 40), CP 210 (2248).

27-32; CP 265-74. A.P. understood the “dark guy” to be a protective wall that Tovar had built around himself. 8RP 32-33. Tovar said that, as a child, when he experienced difficulties, his dark guy stepped up and protected him. 8RP 32-34. Yet, dark guy was also a primary driving force within Tovar who told him lies. 8RP 33-34. The dark guy told Tovar that he was inadequate—that A.P. would not be satisfied with his penis size and she would cheat on him. 8RP 33-34.⁹

Tovar also told A.P. that she needed to be his “safe place.” 8RP 34. A.P. told Tovar that she could not be his saving place, but that she could help him feel safe on his own. 8RP 35.

Despite Tovar's jealousy and feelings of inadequacy, there were times that A.P. thought her relationship with Tovar went well. 8RP 39. In early March 2009, Tovar moved into A.P.'s house. 8RP 38-40.

b. March 15 And 16: The Charged Incident.

As A.P. and Tovar ran errands, they argued about Tovar's insecurities. 8RP 42. When A.P. told Tovar that they were having too many arguments too early in their relationship, Tovar reacted angrily—he

⁹ See also CP 193 (1945), 213 (2300-17), 215 (2352), 222 (2469), 234 (2682, 2694-95).

drove aggressively and started to punch the dashboard with his fist.¹⁰ 8RP 42-43. Tovar screamed at A.P. 8RP 43. A.P. got out of the car, but Tovar followed her on foot through the parking lot and into a store, where Tovar made a scene. 8RP 44-46. Tovar then apologized and attributed his conduct to a lack of food. 8RP 47.

A.P. and Tovar went to a restaurant for dinner. 8RP 48. Tovar, who never drank alcohol, had about six glasses of wine. 8RP 48. He was obnoxious. 8RP 48. Tovar did not grasp that his relationship with A.P. was over because he relied on her to be his “safe place.” 8RP 50.

After dinner, A.P. took Tovar back to her house. She told Tovar that she wanted him to move out the next morning. 8RP 50. Then, at about 9:00 P.M., she left to pick up her children from Brent. 8RP 51. A.P. returned home around 11:30 P.M. 8RP 53. She put her children to bed. 8RP 53. Tovar was on the bathroom floor making telephone calls to friends and family. 8RP 54.

A.P. went downstairs to watch television. 8RP 55. Tovar came downstairs and yelled, once again, about his inadequacies. 8RP 55. A.P. saw Tovar appear to stab one of his hands (the other hand than the

¹⁰ On another occasion, when A.P. and Tovar argued about the size of his penis, Tovar repeatedly punched himself in the face. 8RP 43.

one injured when he punched the dashboard).¹¹ 8RP 55. A.P. was terrified. She had never seen anyone inflict so much pain on oneself. 8RP 55. Both of Tovar's hands bled. A.P. threw some Band-aids at Tovar. 8RP 55. Then, frightened for her children's safety, A.P. took all of the kitchen knives and locked them in her car. 8RP 56.

A.P. went to bed; she wanted to avoid further conflict. 8RP 57. Tovar followed her to the bedroom. He had a samurai sword (taken from a display in the house) and a hunting knife that he flipped open and shut. 4RP 25; 8RP 58. Tovar vacillated between being “drunk and pathetic” and “tough.” 8RP 58. Tovar talked to himself in a pathetic, sad, crying voice; he commiserated about his life, his past and his mother. 8RP 61. Then Tovar's “dark guy” appeared—his voice strong and angry. 8RP 61. The dark guy told Tovar that Brent was a really good dad and that A.P.'s kids would be “just fine with him.” 8RP 62.

Tovar moved around the bedroom and talked about killing himself. Tovar said that he had tried suicide before, but this time it was for real.

¹¹ A.P. said that she did not see Tovar stab his hand, but she saw him holding a knife, she saw puncture wounds, and she heard Tovar scream in pain. 8RP 56-57. Two defense witnesses, Joe and Teresa Paviglianti—a couple with whom Tovar “swung”—saw Tovar on the morning of March 16. Tovar's right hand looked swollen (like he had punched something) and the back of his left hand had an injury consistent with a knife wound. 9RP 23, 31-35, 41. However, despite A.P.'s belief that Tovar had also made cuts on his neck or chest, the Pavigliantis did not see any such injuries. 8RP 59-61; 9RP 21-22, 40-41.

8RP 59. Tovar wanted A.P. to tell him things like “his dick was too small,” and that she did not care about him, and that she would cheat on him, so that he could muster the courage to kill himself. 8RP 62. A.P. took Tovar's suicide threat very seriously. 8RP 61. He kept playing with the knife. 8RP 59.

Every time that A.P. “freaked out” and started to cry, Tovar became angrier and more aggressive. 8RP 62. Tovar told A.P. not to cry because it made the dark guy want to hurt her. 8RP 64. Tovar jumped on the bed and stabbed a pillow that was about two feet from A.P.'s head with the hunting knife. 8RP 63, 66. He put the knife down on the nightstand. 8RP 81. Tovar put his hands around A.P.'s throat and held a pillow over her face. 8RP 62-65, 71. A.P. was unable to breathe for a few seconds; she kicked and thrashed around in an attempt to get Tovar off her. 8RP 65. Tovar jammed his hands or his thumbs down A.P.'s throat and squeezed her face. 8RP 65, 71.

Suddenly, Tovar realized what he was doing. He got off A.P. and said, “Oh my God, I'm sorry.” 8RP 66. A.P. begged Tovar to let her sleep with her children. 8RP 66. Tovar said no—that she needed to be his “safe place.” 8RP 66. Tovar allowed her to tuck her children in again, but he went with her—still armed with his hunting knife. 8RP 67-68.

Tovar pulled A.P. back into her bedroom; he alternated between his dark guy and his sympathetic guy. 8RP 69. Tovar rambled on about his inadequacies and how he wanted to give A.P. something that nobody else could. 8RP 70. Tovar became enraged about his self-perceived inability to sexually satisfy A.P. 8RP 72.

When A.P. lay on the bed, Tovar forced her legs apart. 8RP 72. Tovar undressed himself and told A.P. that he was going to “fuck [her] like no other guy has ever fucked [her].” 8RP 73. A.P. cried; she told Tovar to leave her alone. 8RP 74. A.P. wanted to fight Tovar off, but she was afraid that he would severely hurt or kill her. 8RP 74-77. The less A.P. resisted, the less she saw dark guy. 8RP 75-77. Tovar forced his penis inside A.P.'s vagina. 8RP 75. After Tovar climaxed, he said, “Oh my God, did I just rape you.” 8RP 77.

A short while later, Tovar asked to make love to A.P. so that the memory of their relationship did not end with the rape. 8RP 79. The second time that Tovar penetrated A.P., she shook her head no, but did not say no; she felt she had no choice.¹² 8RP 80-81.

Tovar left at around 8:30 A.M. on March 16. 8RP 84-85. A.P. felt grateful to be alive that morning. 8RP 97-98.

¹² The State did not charge or argue that the second penetration was the basis for the rape in the second degree charge.

c. "Facebook" And The "Tipped-Receiver" Telephone Call.

Two days later, after A.P. had given King County Detective Priebe-Olson a taped statement, and after Priebe-Olson had gone to A.P.'s house to collect evidence and take photographs, Priebe-Olson reviewed Tovar's recent "Facebook" postings. 4RP 14-21, 37; Ex. 5. A March 14th posting, under recent activity, said, "Michael went from being in a relationship to single." On March 16, at 7:46 P.M.: "Michael Tovar is missing his family." On March 17, at 7:20 P.M.: "Michael Tovar is under the gun," and at 8:01 P.M.: Tovar is "facing some life-altering changes right now," and at 11:19 P.M.: "Michael Tovar is going to miss his son for the next 10 to 20." 4RP 39; Ex. 5.

On March 18, Priebe-Olson met A.P. so that she could overhear a telephone conversation between Tovar and A.P.¹³ 4RP 40; 8RP 99-101. During this "tipped-receiver" telephone call, Tovar asked A.P. what was the worst part of what she remembered, and A.P. said that it was the bruises inside her mouth. 4RP 70. Tovar said that he was sorry and cried. 4RP 71. A.P. told Tovar that he had threatened to kill her and himself. 4RP 73. Tovar told A.P. that it sounded like he owed her a "lot of

¹³ The police were trying to locate Tovar before he hurt himself or another. Tovar did not want to text-message A.P.; he wanted to talk to her on the telephone. Detective Priebe-Olson and A.P. sat in Priebe-Olson's car and A.P. tipped the receiver so that Priebe-Olson could hear the conversation. 4RP 40; 8RP 99-102.

apologies.” Tovar then said, “I can't go to prison. I can't believe you are doing this to me. I cared about you. I can't go to prison.” 4RP 73.

Tovar said that he did not recall hurting her. 4RP 75. Tovar told A.P. that she brought out the dark side in him—that she just wanted to put him down. 4RP 75. Tovar then asked A.P. if she was going to call the police after she hung up—although Tovar suspected that the call was either being recorded or traced.¹⁴ 4RP 73, 77, 79.

Tovar told A.P. that he had called his son, Chaz, and told him good-bye.¹⁵ Tovar told Chaz that he loved him, but that he had to “go away.” 4RP 78. Tovar said, “I'm going to end my life.” 4RP 78. A.P. asked Tovar if he had a gun; he replied, “I have all I need.” 4RP 79. Tovar said that he would let her know “when and where I do it,” and where to find his body. 4RP 81, 87.

d. Arrest.

After the telephone call, the Pierce County Sheriff's Department and Tacoma Police located Tovar's cellular telephone signal and then Tovar. 4RP 89; 5RP 7, 69-76; 6RP 19-24. When Tovar got into his car and drove out of a business park, the police officers activated their sirens

¹⁴ Tovar's brother had called him and told him that there was a warrant out for his arrest. 1RP 40; 4RP 87.

¹⁵ Tovar and Chaz exchanged several text messages regarding Tovar's “going away.” CP 258 (3095-98).

and overhead lights and tried to stop him. 5RP 76-77, 81; 6RP 30. Tovar fled down a dirt road, but reached a dead end. 5RP 80; 6RP 30.

The police officers drew their weapons; they ordered Tovar to turn his vehicle off and put his hands outside the window. 5RP 81-82. Tovar screamed and cried and refused to comply. 5RP 82; 6RP 32. Police officers negotiated with Tovar for 15 - 20 minutes. 6RP 32. Because Tovar had barricaded himself in his car, officers called for a SWAT team and a supervisor. 5RP 85, 87.

Suddenly, Tovar screamed and floored the accelerator. 5RP 87; 6RP 32. Tovar's car sped down an embankment, crashed into a tree and stopped. 5RP 88; 6RP 33. As officers flanked the car, they could see Tovar slumped over the center console toward the passenger seat. 5RP 89. There was a lot of blood inside the car. 5RP 90, 93. Tovar had slit his throat with a hunting knife in an attempted suicide. CP 144; 8RP 7-8. A Pierce County Sheriff's Reserve Deputy, who is a doctor, performed life-saving measures until medics arrived and transported Tovar to a hospital where he was formally arrested. CP 144; 5RP 9-10, 93-94, 96.

3. MOTIONS IN LIMINE

a. Prior Acts.

The State sought to admit evidence of Tovar's prior physical and sexual abuse of Angela Schmitke (one of Tovar's ex-wives) and Brandy

Brazeau (one of Tovar's former girlfriends) to prove a common scheme or plan and to rebut Tovar's assertion that A.P. had consented to sexual intercourse with him on March 16, 2009. CP 155-63, 342-82, 389, 406; 1RP 12-14, 16-18. Tovar sought to exclude the prior acts as inadmissible propensity evidence. CP 472-80; 1RP 11-12, 14-16.

i. Angela Schmitke.

Schmitke was married to Tovar between 1996 and 2002. CP 363. During those 6 years, Tovar raped Schmitke more than 50 times. CP 363, 365. Tovar, who is trained in martial arts, also physically abused her: he kicked Schmitke and cracked three of her ribs; he threw Schmitke down the stairs and broke her collar bone; and Tovar threw Schmitke against a wall, choked her until she dropped to her knees and then threatened her with one of his two guns.¹⁶ CP 358-60, 374-75, 380-81. Tovar also threatened to shoot himself. CP 359. Schmitke ran to a closet, where she cowered and thought, “[O]h my god I’m gonna die.” CP 359. And then the gun went off; Schmitke saw the flash under the door. CP 359. After Schmitke finally summoned the courage to leave the closet, she saw that Tovar had fired the gun into the apartment floor and then Tovar “just started to freak out.” CP 359.

¹⁶ Schmitke said that Tovar “could drop me to my knees in seconds.” CP 381. He had “immense strength.” CP 381. Tovar often choked Schmitke. CP 380-81.

Tovar was jealous about Schmitke's past relationship with a police officer. CP 360. Every time they drove past a patrol car, Tovar screamed at Schmitke, "You fucked him didn't you?" CP 360. Tovar would accelerate to 80 or 90 miles per hour and then slam on the brakes or punch Schmitke in the head or shove her head against the window. CP 360-61. Tovar often hurt or threatened to kill himself in fits of rage. CP 374, 378.

Tovar spoke about his "dark hole." CP 381. He also spoke about his "safe place." CP 381. None of it made any sense to Schmitke, who walked on pins and needles, "never, never knowing if this is the day that he's gonna go over board." CP 381.

ii. Brandy Brazeau.

In 2002, Brazeau dated Tovar for about 8 months. CP 343. Tovar had many "abandonment issues." CP 352. Tovar "needed a lot of reassurance"; he told Brazeau that she was his "safe place." CP 345.

In the early morning hours on October 12, 2003, Tovar went to Brazeau's house and accused her of infidelity. CP 345-46. Enraged, Tovar strangled Brazeau with both hands. CP 292. Brazeau lost consciousness. CP 292, 349.

When Brazeau regained consciousness, she saw Tovar grab a knife from the kitchen. CP 292, 346. He cut himself on his neck and chest. CP 346-47. Tovar then threatened Brazeau with the knife; he wanted Brazeau

to tell him that she loved him. CP 293, 347, 349-50. Frightened, Brazeau called 911, but Tovar grabbed the telephone and told the dispatcher that it was a fake call. CP 347. Tovar then left; "he just ran out." CP 293, 350.

About 30 minutes later, Tovar returned. CP 293. He kicked in Brazeau's back door. CP 293, 351. Tovar had a loaded gun.¹⁷ CP 293, 300, 351. He threatened to kill himself. CP 293. And for the next several hours, Tovar held Brazeau hostage. CP 293, 351.

Brazeau was able to call 911 from her cellular telephone. CP 293. A SWAT team with negotiators responded. CP 292-93. When the police made telephonic contact, Brazeau said that she was not free to leave and she did not know what Tovar would do if the police entered her house. CP 300. Tovar mostly pointed the gun at his head. CP 351.

The negotiator spoke to Tovar, who was concerned that Brazeau was angry with him and that he was going to lose her. CP 300. After several more contacts with the negotiator, Tovar surrendered. CP 300.

On August 17, 2004, Tovar pleaded guilty to one count of burglary in the first degree and one count of unlawful imprisonment (with a firearm enhancement). CP 276-85.

¹⁷ Tovar had a .45 caliber handgun, loaded with six rounds of hollow-point bullets. CP 341.

iii. Argument and the trial court's ruling.

The State argued that the evidence was admissible both to establish a common scheme or plan and to rebut a consent defense. CP 161-63, 406; 1RP 12-14, 16-18. Tovar's fixation with his penis size, his constant need for affirmation about his sexual prowess and his insecurities permeated each relationship. 1RP 12-13; CP 161-63, 406. Tovar spoke often about his “dark guy” and referred to each victim as his “safe place.” 1RP 13; CP 162, 406. When faced with the prospect of losing his intimate partner, Tovar reacted violently. 1RP 12-13; CP 161-63, 406. He choked his victims; he threatened his victims with deadly weapons, and he threatened to injure--or kill--himself. 1RP 12-13; CP 161-63, 406. And, Tovar cut himself—once almost lethally. 1RP 12-13; CP 161. Finally, Tovar held A.P. and Brazeau captive for several hours, thus rebutting any defense of consent (or rape role-play) to the current charge. 1RP 13-14; CP 162-63, 406.

Tovar argued that the incidents were not similar enough to establish a common scheme or plan. 1RP 11, 15; CP 475-79. In particular, Tovar focused on the absence of sexual contact during Brazeau's captivity. 1RP 15-16; CP 476. Tovar also argued that the prior incidents were inadmissible propensity evidence. 1RP 11-12; CP 475-79.

The trial court agreed. 1RP 18. The court said, “I am satisfied that it is character evidence, not common scheme or plan.” 1RP 18. The court said that the prejudice outweighed the probity in the State's case-in-chief. 1RP 18. But, the court said that it would revisit its ruling if Tovar testified, “depending on how the defense of consent is raised.” 1RP 18.

b. Evidence Of Flight.

The State sought to admit evidence of Tovar's flight and his attempted suicide to show consciousness of guilt. 1RP 35-39, 41-42; CP 167-68, 668-71.

The trial court ruled that Tovar's flight from the police after they had contacted him was relevant and admissible. 1RP 44. The court said, “The testimony, I assume, will indicate that he was contacted by the police. He took off and ran into a tree. That seems to me to be the evidence of flight.” 1RP 46.

The court excluded evidence of Tovar's attempted suicide, because it was “so entangled with mental state that has nothing to do with flight,” and it was too prejudicial. 1RP 43-44. The court said, however, that “if the defendant testifies, then we are going to have to revisit the scope of the ruling.” 1RP 45.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED IRRELEVANT EVIDENCE AND LIMITED CROSS-EXAMINATION OF A.P.

Tovar raises two related issues in connection with the trial court's ruling that excluded evidence of A.P.'s previous accusation of rape by another man. The ruling, he contends, violated his right to present a defense and his Sixth Amendment right to confront witnesses. Br. of Appellant at 24-35.

Tovar has failed to show a constitutional violation. Tovar never established that A.P.'s previous rape allegation was false. Thus, the trial court properly ruled that the proffered evidence was irrelevant. The trial court also ruled that because Tovar's knowledge of the previous rape was irrelevant and insufficient to pierce the rape shield statute, cross examination of A.P. as to Tovar's knowledge would not impeach A.P.'s credibility. The limitation was within the trial court's discretion.

a. Prior Allegation.

Tovar sought to admit evidence that A.P. previously made a rape accusation (which Tovar characterized as false) against another man. See CP 8-11; CP 482-95; 1RP 28-30; 2RP 9-14; 8RP 3-6. The allegation arose from former Medina Police Officer Ismael Ramirez's November 23, 2008 traffic stop of A.P., during which Officer Ramirez and A.P. exchanged

“sexual banter” and cellular telephone numbers. CP 394-96. Ramirez told A.P. that he had to cite her for driving while license suspended and for suspected marijuana that he found in a search incident to her arrest, but that he would make the citations “go away.” CP 394.

The next day, Ramirez and A.P. exchanged text messages. CP 395. They agreed to meet on December 5, 2008. CP 395.

On December 5, Ramirez met A.P. at a pub, after which they went to Ramirez's residence. CP 395. Ramirez poured A.P. a drink. CP 525. He said that people are afraid of police officers because they have power, authority and a gun and a badge. CP 525. A.P. told Ramirez that she did not want to have intercourse with him, but Ramirez pushed A.P. down on the bed and, over her objection, had intercourse with A.P. CP 523-25. A.P. acquiesced because she felt that she had a “lot to lose.” CP 395. Based on an earlier conversation with Ramirez, A.P. expected Ramirez to give her a letter to take into court so that the citations would be dismissed, but Ramirez did not give her a letter. CP 395.

Over the next two weeks, in an effort to keep his promise to A.P. to make the case “go away,” Ramirez lied to the city attorney about the feasibility of testing the seized marijuana and he lied to the Medina Police Department Evidence Custodian about the status of the case against A.P. CP 395-96, 524. Yet, when A.P. showed up for her arraignment, the

charges were not dismissed. CP 395. A.P. called Ramirez and told him that she was upset that he had not followed through “with his end of the bargain.” CP 395. Ramirez assured A.P. that the case would be dismissed. CP 395. On February 9, 2009, after Ramirez had sent several duplicitous emails to the city attorney, the case was dismissed. CP 396.

A.P. discussed the traffic stop and Officer Ramirez's conduct with her husband, Brent, from whom she was separated. CP 396. Brent advised A.P. not to report the incident because it would just be her word against that of a police officer. CP 396.

The incident came to light on March 18, 2009, when A.P. sat in Detective Priebe-Olson's automobile and had a telephone conversation with Tovar. CP 396. During the “tipped-receiver” telephone call, Tovar said, “I can't believe your (*sic*) doing this to me. The cop raped you and you didn't do anything about that. ... How come you did not prosecute the cop?” A.P. responded, “You hurt me. He didn't hurt me.” CP 400.

b. Proffers, Argument And The Trial Court's Rulings.

Based on evidentiary considerations and charging standards, the State charged Ramirez with official misconduct with sexual motivation. 1RP 31-33; CP 391-92. Tovar, however, contended that A.P.'s allegation against Ramirez must have been false because the State had not charged

Ramirez with rape. 1RP 28-29. The trial court disagreed, “I am satisfied the State charged what [it] thought [it] could prove.” 1RP 34.

Tovar also claimed that A.P. had a reason to fabricate the allegation against Ramirez because he had not followed through on the *quid pro quo* of sex in exchange for a dismissal of the case: “[I]t wasn't until after she found out her ticket had not been taken care of that she started telling people how mad she was at him and how upset she was and how he *basically just raped her*.” 1RP 29-31. Yet, A.P. had not reported the incident to the police—it was Tovar's remarks during the tipped receiver telephone call that led to an investigation and criminal charges against Ramirez.¹⁸ Moreover, Tovar's remarks demonstrated that he believed A.P. had been raped: Tovar said, “I can't believe your (*sic*) doing this to me. The cop raped you and you didn't do anything about that. . . . How come you did not prosecute the cop?” CP 400.

The trial court ruled that the incident was inadmissible. The court said that A.P. probably believed that she had been raped; however, whether A.P. considered it rape, because she did not receive the benefit of

¹⁸ Tovar also argues that the allegation was false because A.P. did not go to the police. Br. of Appellant at 32. However, the majority of sexual assaults against women go unreported. See CLAIRES L. MOLESWORTH, KNOWLEDGE VERSUS ACKNOWLEDGMENT: RETHINKING THE ALFORD PLEA IN SEXUAL ASSAULT CASES, 6 Seattle J. For Soc. Just. 907, 920-22 (2008) (discussing the incidents and prevalence of sexual assaults in Washington and noting that, based on a 2001 study involving 1,325 women in Washington, on average, only 15% of the incidents were reported to the police.).

her bargain, is a different issue than whether she falsely alleged rape.

1RP 34. The court stated that, “I’m satisfied that it is not within the purview of a false allegation of rape.” 1RP 33-34; 2RP 14.

Tovar brought a motion to reconsider. CP 8-10; 2RP 9-15. The defense sought to cross-examine A.P. about Tovar’s remark: “I’m going to give you something . . . that no one else has ever given you before,” apparently referencing a “rape fantasy.”¹⁹ 2RP 11-12. The trial court denied the motion because the offered evidence was “far afield.” 2RP 14.

Tovar also wanted to ask A.P. whether she had told Tovar about the Ramirez rape to show why Tovar may have been “insecure” in his relationship with A.P. The court denied the motion because the evidence presented showed that Tovar’s insecurities stemmed from his “bodily endowment and performance,” not the Ramirez rape allegation.²⁰ 8RP 5.

Later, Tovar said that A.P. had opened the door to the Ramirez rape when A.P. testified that immediately after Tovar raped her, he proudly said, “Now I have given you something no one else has.” 8RP 119-21. Tovar said that this evidence undermined A.P.’s credibility—

¹⁹ The defense stated that it believed one of the myriad text messages concerned a rape fantasy. The defense said that it would locate the text message and then renew its motion to the trial court. The defense never located a text message concerning a rape fantasy. Although the text messages do discuss other fantasies or “role play,” rape is not mentioned. See, e.g., CP 518-20.

²⁰ See, e.g., CP 209-10, 214 (2240, 2248 and 2319).

because if A.P. had previously been raped, then Tovar's remarks would make no sense. 8RP 120. The court denied the motion to reconsider. The court said:

Just for the record, I'm satisfied that it isn't sufficient to breach the rape shield statute, nor do I think the inference that you are making from the comments are what was in Mr. Tovar's mind, if he made those comments. I'm satisfied that nothing has happened in [A.P.'s] testimony to change that.

8RP 121.

c. The Prior Allegation Was Irrelevant.

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (stating that the “accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence” (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988))).

The Sixth Amendment²¹ and article 1, § 22 of the state constitution²² grant criminal defendants the right to confront and cross-examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). However, a court is well within its discretion to reject lines of questions where the evidence is vague or merely speculative or argumentative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). “[T]he Confrontation Clause guarantees an opportunity for effective cross examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). The scope of cross-examination is within the discretion of the trial court. Hudlow, 99 Wn.2d at 22. An appellate court will not reverse a trial court's ruling on the scope of cross-examination absent a manifest abuse of discretion; *i.e.*, discretion that is manifestly unreasonable, or is exercised

²¹ U.S. Const. Amend. 6 provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor....

²² Const. art. 1, § 22 provides in part:

In criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf....

on untenable grounds or for untenable reasons. State v. McDaniel, 83 Wn. App. 179, 184-85, 920 P.2d 1218 (1996).

The rape shield statute prohibits the introduction of evidence of a victim's prior sexual conduct on the issue of credibility under any circumstances. State v. Gregory, 158 Wn.2d 759, 789, 147 P.3d 1201 (2006); Hudlow, 99 Wn.2d at 8. “In any prosecution for the crime of rape . . . evidence of the victim's past sexual behavior . . . is not admissible if offered to attack the credibility of the victim. . . .” RCW 9A.44.020(3).

There are, however, a number of jurisdictions that, pursuant to ER 608²³, permit cross-examination of the complaining witness about demonstrably false rape allegations. See State v. Demos, 94 Wn.2d 733, 736, 619 P.2d 968 (1980) (citing cases that have held that rape shield laws do not exclude evidence of past false rape accusations). Although jurisdictions vary as to what precise showing must be made to admit evidence of a prior false allegation, generally, a defendant must establish: “(1) the victim made another allegation of rape or sexual assault; (2) this allegation was false; and (3) the victim knew the allegation was false.”

²³ ER 608(b) Specific Instances of Conduct provides in relevant part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness.

JULES EPSTEIN, TRUE LIES: THE CONSTITUTIONAL AND EVIDENTIARY BASES FOR ADMITTING PRIOR FALSE ACCUSATION EVIDENCE IN SEXUAL ASSAULT PROSECUTIONS, 24 QLR 609, 624 & nn. 61-64, 67 (2006); see also Demos, 94 Wn.2d at 736-37 (evidence of prior allegations is irrelevant absent proof of falsity); State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (evidence that a rape victim has accused others is not relevant and, thus, not admissible, unless the defendant can demonstrate that the accusation was false), review denied, 149 Wn.2d 1017 (2000).

This Court reviews a trial court's exclusion of evidence for an abuse of discretion. State v. Posey, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). The trial court's balancing of the danger of prejudice against the probative value of the evidence is a matter within the trial court's discretion, which the Court will overturn "only if no reasonable person could take the view adopted by the trial court." Posey, 161 Wn.2d at 648 (citing Hudlow, 99 Wn.2d at 17).

Additionally, the Court reviews a trial court's relevancy determinations for manifest abuse of discretion. Gregory, 158 Wn.2d at 835. A trial court, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and, therefore, the prejudicial effect and relevancy of evidence. Posey, 161 Wn.2d at 648.

Here, the trial court properly excluded the prior rape allegation. Tovar failed to make the required threshold showing that a reasonable probability of falsity exists. See Demos, 94 Wn.2d at 736-37; Harris, 97 Wn. App. at 872. The court said that whether the *quid pro quo* is legally rape or not, A.P. probably believed that she had been raped. 1RP 34; 2RP 14. And, whether A.P. considered it rape, because she did not receive the benefit of her bargain, is a different issue than whether she falsely alleged rape. 1RP 34.

In addition, the court ruled that the inference that the defense wanted the jury to draw from Tovar's remark, "Now I have given you something no one else has," was speculative at best. The trial court said the evidence "is far afield," and insufficient to breach the rape shield statute. 2RP 14; 8RP 121.

Moreover, the ruling did not preclude the defense from presenting and arguing its theory of the case. See, e.g., 9RP 107 ("What this case boils down to . . . is a wife and mother that will do anything to get what she wants at whatever moment in time she wants that particular thing"); 8RP 122-29; 9RP 109 (regarding A.P.'s reason for permitting Tovar to move in to her house and provide financial stability: "A wife and mother that does what she wants to get what she wants at that exact moment"); 8RP 129; 9RP 111 (regarding A.P.'s desire to renew her "swinging"

lifestyle after Tovar had moved in: “A wife and a mom that will do anything to get what she wants at that exact moment”); 8RP 57, 123; 9RP 114 (“[A] wife and my (sic) mom that will do anything, tell a huge story and exaggerate to get what she wants at that exact moment”); 5RP 111, 129, 132; 8RP 52; 9RP 116 (regarding A.P.'s fabrication of the events so that she could reconcile with her estranged husband: “A wife and mom that will do anything, make up any story that she wants to get at that exact moment”); 9RP 118-19 (“Once again, a wife and mom who will do anything to get what she wants at that exact moment by blowing up this story to all of a sudden be bawling and crying hysterically”).

In addition, the trial court permitted Tovar to call a witness who testified that A.P.'s reputation for truth and veracity in the “Stride Rite community” was bad.²⁴ See United States v. Beardslee, 197 F.3d 378, 383 (9th Cir. 1999) (one consideration in determining whether a defendant's Confrontation Clause right to cross-examination was violated is whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness).

The court's ruling was not an abuse of its considerable discretion.

²⁴ 8RP 11; 9RP 59. The “Stride Rite community” was comprised of five persons, in addition to the witness, Jolyn Hendrix, who were employed at the shoe store where A.P. worked.

d. Any Error Was Harmless Beyond A Reasonable Doubt.

Tovar has failed to show any constitutional violation. However, even if this Court finds that the trial court abused its discretion, any error was harmless.

Confrontation Clause violations are subject to harmless error analysis. State v. Watt, 160 Wn.2d 626, 634-35, 160 P.3d 640 (2007). A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Stated alternatively, an error is harmless if the Court can conclude that the error “in no way affected the final outcome of the case.” State v. Stephens, 93 Wn.2d 186, 191, 607 P.2d 304 (1980) (citation omitted). Whether an error is harmless is a question of law that this Court reviews de novo. State v. Bird, 136 Wn. App. 127, 133, 148 P.3d 1058 (2006).

Here, given the extent of cross-examination permitted, and the overall strength of the prosecution's case, any error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (listing non-exclusive factors to consider when determining whether a Confrontation Clause error is harmless). The

defense had a full opportunity to explore—and impeach—A.P.'s credibility. 8RP 126-63, 167-68. Tovar seemingly agrees: “[A.P.’s] credibility was impeached with her inconsistent statements[,] behavior following the alleged rape and the defense evidence she had a bad reputation for truthfulness.” Br. of Appellant at 38.

Finally, the State's evidence was strong. The police seized physical evidence that corroborated A.P.'s testimony, such as two knives (both fit the description of the black-handled, folding steel-bladed knife that A.P. had described) and a pillow that Tovar had stabbed. 4RP 32; 5RP 26-33, 65. A.P. had bruises and petechia on the inside of her mouth (on both sides near the jawbone), which were the result of considerable force being used. 7RP 24-27, 36, 41; 6RP 8-9, 12. Witnesses, who saw A.P. hours after Tovar had raped her, described A.P. as “shaking, upset,” “a bit disoriented” and “distraught.” 4RP 19; 5RP 116; 6RP 9-10. And, the “tipped-receiver” telephone conversation that Detective Priebe-Olson overheard contained damning admissions. 4RP 69-88; CP 530-35.

Any error in excluding the prior rape allegation was harmless beyond a reasonable doubt.

**2. TOVAR HAS FAILED TO ESTABLISH
INEFFECTIVE ASSISTANCE OF COUNSEL.**

Tovar contends that trial counsel was ineffective for: (1) failing to object to inadmissible evidence, (2) failing to request a jury instruction for an inferior degree crime, and (3) disregarding his right to testify. This Court should reject these claims. First, counsel's decision to forego an objection to an isolated remark was a legitimate trial strategy. Second, under the facts of this case, Tovar was not entitled to a jury instruction on rape in the third degree. Finally, the trial court heard conflicting testimony from Tovar and trial counsel concerning Tovar's right to testify and the court concluded that, "Tovar was not impermissibly prevented from testifying." 14RP 11.

To prevail on a claim of ineffective assistance of counsel, Tovar must establish both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

A failure to prove either element defeats the claim. Strickland, 466 U.S. at 700.

First, a defendant must show deficient performance, i.e., that counsel's performance fell below an objective standard of reasonableness based on consideration of all of the circumstances. State v. Thomas,

109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). “Effective assistance of counsel” does not mean “successful assistance,” nor is counsel’s competency measured by the result. State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972).

The defendant alleging ineffective assistance of counsel “must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). “[S]crutiny of counsel’s performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 689). Accordingly, reviewing courts make “every effort to eliminate the distorting effects of hindsight.” In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

Second, the defendant must show prejudice—“that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. Thomas, 109 Wn.2d at 226; Strickland, at 694. “The likelihood of a different result must be *substantial*, not just conceivable.” Harrington v. Richter, 562 U.S. ___, ___, 2011 WL 148587 *18 (2011) (citing Strickland, at 693) (italics added).

A reviewing court need not address whether counsel's performance was deficient if it can first say there was no prejudice. See In re Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) (citing Strickland, at 697).

a. Failure To Object.

Tovar contends that counsel was ineffective for failing to object to a passing remark. Br. of Appellant at 37-38. During A.P.'s testimony, the deputy prosecutor focused A.P.'s attention on the time immediately after Tovar had raped her. A.P. said that Tovar knew he had “screwed up” and he asked her not to call the police. 8RP 84. The prosecutor asked A.P. to “[t]ell me about those conversations [with Tovar] about contacting the police.” 8RP 84. A.P. responded, “He told me he couldn't go back to prison and that, you know, I don't know like what it's like in there.” 8RP 84. There was no objection.

Defense counsel could have legitimately chosen not to object so as to avoid highlighting the testimony. “Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions,” and an appellate court presumes that a failure to object constituted a legitimate strategy or tactic. State v. Johnston, 143 Wn. App. 1, 19, 21, 177 P.3d 1127 (2007).

But even if counsel should have objected, the isolated remark had minimal, if any prejudice. Although certainly the admission of a

defendant's prior conviction is inherently prejudicial, that is less the case where, as here, the jury does not learn that the prior conviction is for a similar crime. See State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled in part on other grounds by State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991). Moreover, Detective Priebe-Olson said that during the tipped-receiver telephone call, Tovar said, "I can't go to prison." 4RP 73. The passing remark at issue here—"I can't go *back* to prison"—did not create a substantial likelihood of a different result. See Richter, 562 U.S. ___, ___, 2011 WL 148587 *18.

b. There Was No Evidence That Tovar Committed Only Rape In The Third Degree.

Tovar next claims that his counsels' failure to seek a jury instruction for the lesser degree crime of rape in the third degree constituted deficient performance. Tovar argues, for the first time on appeal, that there was evidence in the record from which the jury could have found that he engaged in sexual intercourse with A.P. where A.P. did not consent and such lack of consent was clearly expressed instead of sexual intercourse by forcible compulsion as charged. Br. of Appellant at 41-44.

This claim should be rejected for two reasons. First, trial counsel conceded that the trial evidence did not support a request for a lesser

offense instruction based on lack of consent. Thus, trial counsel waived appellate review of this issue. Second, this case presented the jury with only two possible verdicts: a conviction of rape in the second degree or acquittal. Accordingly, an instruction for rape in the third degree would have been improper.

As charged, the elements of rape in the second degree are “sexual intercourse” with another person by “forcible compulsion.” RCW 9A.44.050(1)(a); CP 1, 35, 37.

“Forcible compulsion” means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person. ...

RCW 9A.44.010(6); CP 36.

A person is guilty of rape in the third degree when,

[U]nder circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

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

RCW 9A.44.050(1). It specifically requires circumstances “*not* constituting rape in the . . . second degree[]. ...” RCW 9A.44.060(1).

The trial court properly instructs a jury on an inferior degree offense when “(1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe 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) (quoting State v. Peterson, 122 Wn.2d 885, 891, 948 P.2d 381 (1997)) (internal quotation marks omitted); see also RCW 10.61.003. Rape in the third degree is an inferior degree offense of rape in the second degree. State v. Jeremia, 78 Wn. App. 746, 754, 899 P.2d 16 (1995), review denied, 128 Wn.2d 1009 (1996). Therefore, the only issue in this case was whether the facts established that Tovar committed only the inferior offense.

The factual inquiry is satisfied “when substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense.” Fernandez-Medina, 141 Wn.2d at 461. The evidence must affirmatively establish the defendant's theory on the inferior degree offense—it is not enough that the jury might disbelieve the State's evidence. State v. Charles, 126 Wn.2d 353, 355, 894 P.2d 558 (1995). Put another way, “the evidence must support an inference that the

defendant committed the lesser offense *instead of* the greater one.”

Ieremia, 78 Wn. App. at 755. Although the evidence supporting a lesser offense need not be offered by the defendant, there still must be some evidence in the record to support a finding that only the lesser crime was committed. State v. McClam, 69 Wn. App. 885, 889-90, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993).

A trial court's refusal to give an instruction based on a ruling of law is reviewed de novo. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). A trial court may not submit a theory to the jury for which there is insufficient evidence. State v. Munden, 81 Wn. App. 192, 195, 913 P.2d 421 (1996).

i. Waiver.

As a preliminary matter, this Court should decline to review this issue because trial counsel conceded that the trial evidence did not support instructing the jury on rape in the third degree predicated on a lack of consent. Therefore, counsel waived appellate review of this issue. See State v. Carter, 4 Wn. App. 103, 113, 480 P.2d 794, review denied, 79 Wn.2d 1001 (1971); see also CrR 6.15.

Defense counsel proposed a jury instruction for rape in the third degree whereby A.P. engaged in sexual intercourse with Tovar when there

was a threat of substantial unlawful harm to her property rights. CP 19-20 (citing WPIC 42.01, 42.02); 9RP 65-66. Counsel said,

I would point out that there are two alternative means to meeting rape in the third degree. The first one deals with consent. And I would agree that if we were arguing or asking the Court to instruct the jury on rape in the third degree based on the first prong of rape in the third degree, being consent, we probably wouldn't be able to ask for it.

But I believe there is a possibility that the jury would be able to find rape in third degree under the second prong with regard to a threat to the alleged victim's property rights. And so, Your Honor, we would ask the Court to give the lesser included rape in the third degree, along with the accompanying instructions.

9RP 64-65. Moments later, counsel reiterated, "We are not asking for an instruction on the consent prong. We are asking for an instruction based on harm to property rights of the victim." 9RP 68-69.

The trial court refused the proposed instruction. The court said,

I am satisfied *Ieremia*, which is 78 Wn. App. 746, a 1995 case, is controlling. And I'm further convinced that there is no evidence to support your last argument because it is a threat of substantial unlawful harm to property rights of another. And I frankly don't see any evidence. Stabbing a pillow is not substantial property rights.

9RP 69.

Based on trial counsel's explicit waiver of a jury instruction based on lack of consent--a point never addressed by Tovar on appeal--this Court should decline to review this issue.²⁵

ii. Tovar failed to satisfy the factual prong.

Even if this Court reviews the issue, the trial court properly refused to instruct the jury on the inferior degree offense of rape in the third degree. The trial court may not instruct on rape in the third degree as an inferior degree offense to rape in the second degree when the defendant contends that the intercourse was consensual and the victim testifies that the intercourse was by force. See, e.g., Charles, 126 Wn.2d at 355-56; Ieremia, 78 Wn. App. at 756. The trial court here correctly found Ieremia controlling.

In Ieremia, a consolidated case, this Court held that a rape in the third degree instruction was improper because the jury had to either believe the defendants' consent defenses or find them guilty of rape in the second degree because the victims' testimony supported rape by forcible compulsion. Ieremia, at 755-56. One victim testified that one of the defendants grabbed her by the arms, carried her to a bedroom, covered her

²⁵ On appeal, Tovar claims, "Counsel however failed to request the instruction based on the lack of consent alternative." Br. of Appellant at 41-42. The "failure" to request such an instruction was not oversight; it was trial counsel's recognition that the trial evidence did not support the inferior degree offense.

mouth and removed her clothes before he raped her. Id. at 749-50. She cried out for him to stop and protested repeatedly that she wanted to go home. Id. at 749. She also resisted by slapping him. Id. at 749. There was evidence of physical trauma. Id. A second victim testified that the other defendant grabbed her wrists and told her they were going for a ride. Ieremia, at 749. She protested and tried to pull away, but despite her struggles, he raped her. Id. at 750. There was no physical evidence of physical or vaginal trauma to the second victim. Id. The defendants claimed that the intercourse was consensual. Id. This Court found that an instruction for rape in the third degree was improper: the jury could either convict under rape in the second degree if it believed the victims or it could acquit if it believed the defendants. Id. at 756.

Similarly, in Charles, the defendant was charged with rape in the second degree. The victim testified that Charles grabbed her, pushed her onto her back, partially removed her clothes and raped her, even though she pleaded with him to stop, struggled and scratched him. Charles, 126 Wn.2d at 354. There was evidence of physical trauma. Id. The defendant testified that the intercourse was consensual. Id. at 355. The Washington State Supreme Court concluded that the trial court properly refused to instruct the jury on rape in the third degree (reversing the Court of Appeals decision and reinstating Charles' conviction). Id. at 355-56.

If the jury believed the victim, Charles was guilty of rape in the second degree. Charles, at 355. But, if the jury believed Charles, he was not guilty of any degree of rape. Id. at 355-56. Because there was no evidence that the intercourse was unforced but still nonconsensual, there was no affirmative evidence to support an instruction for rape in the third degree. Id. at 356.

Ieremia and Charles are on point. A.P. testified that Tovar had armed himself with a samurai sword and a folding hunting knife. 8RP 60, 63. Every time that A.P. started to cry, Tovar's "dark guy" got angry, aggressive, and he came at her. 8RP 61-62. A.P. believed that she and Tovar might be dead in the morning. 8RP 61. Tovar stabbed a pillow that was two feet from A.P.'s head. 8RP 63. Tovar put the knife down on the bed next to him. Tovar put his hands around A.P.'s throat and held a pillow over her face; she could not breathe. 8RP 62, 65. Tovar shoved his hands in A.P.'s mouth and down her throat. 8RP 65, 71. A.P. kicked at Tovar and tried to get him off her. 8RP 65. A.P. was terrified. 8RP 62. A.P. did not fight or cry out because she was afraid that Tovar would hurt her. 8RP 75-76. Tovar disrobed; he then forced himself into A.P. 8RP 75. Afterward, Tovar snapped out of his "dark guy" mode and said, "Oh my God, did I just rape you." 8RP 76-77.

Tovar takes some of A.P.'s statements out of context to support his claim that the jury could have found that A.P. expressed her lack of consent (by trying to ignore Tovar and turning away from him) and that Tovar did not use any more force than that which is normally required to achieve penetration. Br. of Appellant at 41. Tovar does not cite to the verbatim report of proceedings for any of the "facts" used to support his argument. For instance, Tovar claims that "at some point" after he cut himself, "he laid the knife on the night stand." Br. of Appellant at 41. Yet, A.P. stated that the knife was in Tovar's hand "pretty much the whole time except when he was like on top of me. I mean, he had it like on the bed then, you know. *Like when he had both of his hands down my throat,* he didn't have it there. He had, you know, it next to me on the bed." 8RP 71.

Tovar also states that when he got on top of A.P. and penetrated her, A.P. "did not say 'no' and did not try to push [him] off her." Br. of Appellant at 41. Yet, A.P. testified that Tovar pulled her legs apart. 8RP 72. The knife was next to the bed. 8RP 73. Tovar's "dark guy" was present. 8RP 74. A.P. told Tovar, "[L]eave me alone." 8RP 74. She tried to turn her body away from Tovar. 8RP 74. A.P. cried and said, "I just really [did not] have the energy anymore to fight him." 8RP 74.

Tovar claims that the jury might have found his earlier threat to kill A.P. or himself “hyperbole or unrelated to forcing [A.P.] to have sex.”

Br. of Appellant at 41. But A.P. said,

What I found throughout the night is the least I resisted him, you know, the more likely I was to like get him out of that dark guy mode. So I just, you know, didn't really fight at him or cry or freak out like I wanted to because I didn't want to get hurt.

8RP 75. A.P. said that she had no intention of resisting him after the night she had experienced. She thought that she would “either be severely hurt or completely killed.” 8RP 76-77.

Similar to the victim in Charles and one of the victims in Ieremia, A.P. had evidence of physical trauma.²⁶

Here, as in both Charles and Ieremia, there was no affirmative evidence that the intercourse was unforced but still nonconsensual.²⁷ Thus defense counsel performance was not deficient, because the trial court may not instruct a jury on a theory for which there is insufficient evidence. Munden, 81 Wn. App. at 195.

²⁶ Officer Olmsted, Detective Priebe-Olson and Doctor Milne testified about the bruising in A.P.'s mouth. 4RP 21; 6RP 9-12; 7RP 24-27, 36.

²⁷ The State elected to proceed on only the first act of rape. 9RP 70-71.

c. Tovar Elected Not To Testify.

Finally, Tovar claims that trial counsel disregarded his desire to testify. Br. of Appellant at 45-49. This Court should reject Tovar's claim. After an evidentiary hearing, the trial court weighed Tovar's and counsels' credibility and determined that Tovar's version of the events was not credible. The court ruled that "Mr. Tovar was not impermissibly prevented from testifying."

i. Tovar's claims.

Tovar stated that, from the beginning, he told Todd and Dacanay he wanted to testify. 13RP 18-19. Tovar said that after A.P. had testified, Todd and Dacanay met with him at the jail and told him that they did not believe A.P. presented well to the jury. Based on their belief that the State had not proved its case, Todd and Dacanay advised Tovar not to testify. 13RP 18-19. Furthermore, Todd and Dacanay expressed their concerns that Tovar would open the door (or be tricked by the prosecutor into opening the door) to the evidence of his prior acts with Schmitke and Brazeau and his attempted suicide, which the defense had succeeded in having excluded. 13RP 20-21, 36.

Tovar said that when the meeting ended, the issue was unresolved. Tovar said that Todd and Dacanay told him, "We'll just figure it out tomorrow." 13RP 20. Tovar panicked. He called Wendy Latham, one of

his ex-wives, and instructed her to call Dacanay and to tell her that he would absolutely testify the next day—even if he had to create his own direct examination. 13RP 20-22.

Tovar said that later that same night, Todd returned to the jail and met with him again. 13RP 22. Tovar had written a rough draft of his direct examination and told Todd that he would have a final draft the next morning. 13RP 23-24. Although Todd tried to convince Tovar not to testify, Tovar stated that he was adamant; he wanted to testify. 13RP 22-23.

The next day Todd rested without calling Tovar as a witness. Tovar said that he did not voice his objection because Dacanay had repeatedly told him that if he wanted to address an issue with the court, it had to get communicated through counsel. 13RP 24.

ii. Counsel advised Tovar not to testify.

Counsel advised Tovar not to testify for several reasons. First, counsel had concerns that Tovar would open the door to very damning evidence—in particular, the prior acts with Schmitke and Brazeau and his attempted suicide. 13RP 49, 68-69, 73; CP 444-50. Second, counsel did not believe that the State had proved its case. 13RP 49, 52. Third, without Tovar's testimony, defense counsel could argue inferences from gaps in the State's case that might be foreclosed by Tovar's testimony

(Tovar had a “preposterous story that he wanted to tell the jury,” and Todd discussed with Tovar how the story might “come off to the jury”).

13RP 52, 64. Finally, counsel had stipulated to the admissibility of the text messages because they believed it allowed Tovar to get his theory of the case (the nature of his relationship with A.P. and messages in which he denied the rape) before the jury without being subjected to cross-examination. 13RP 51, 77-78; CP 445, 448.

Todd and Dacanay advised Tovar of the perils and potential consequences of testifying, but the final decision rested with Tovar. 13RP 48-50, 73. Although it would have been against counsel's advice, if Tovar had elected to testify, Todd would have called him as a witness. 13RP 53, 74. After the first meeting with both counsel and the later meeting with Todd, Tovar decided not to testify. Tovar was neither confused, nor ambivalent about his decision. 13RP 52, 63, 74-75; CP 444-50.

Todd does not recall his exact words, but before he rested on Tovar's behalf, Todd confirmed that Tovar did not want to testify. 13RP 54-55, 65; CP 447. Todd said something to the effect of, “Are you good” and “you are not going to testify?” 13RP 54; CP 449-50. Tovar nodded his head and said that, “we were good.” 13RP 54, 75-76. Todd and Dacanay were absolutely certain that Tovar did not want to testify. 13RP 54-55, 76-77. At no time on the final day of trial did Tovar communicate

that he wanted to testify. 13RP 54-55. Although after the jury returned its verdict, Tovar immediately regretted his decision not to testify. CP 448.

iii. Trial court's ruling.

The trial court acknowledged that there was conflicting testimony. 14RP 9. The court said that it could not stress enough that Tovar's longstanding emotional instability did not allow the court to put much credence in Tovar's version. 14RP 11-12. Rather, the court found that Todd and Dacanay—“who the court finds to have done a thorough job representing Tovar's interests”—testified more accurately. 14RP 11. The court said,

And in view of the fact that I have to weigh the credibility and what is clearly a long history of emotional insecurity emotional tribulations on the part of Mr. Tovar, and based on the documents that he's presented, I am satisfied that these attorneys are more accurate, that their advice, which was sound advice that he not testify, was in fact the accurate recitation of the facts in this case; and I am satisfied that Mr. Tovar was not impermissibly prevented from testifying

14RP 11.

Moreover, the trial court said that given the history of this case, it did not think any defense attorney would have advised Tovar to testify.

14RP 11. Counsels' advice to Tovar was a legitimate trial strategy.

14RP 9. The court stated that had Tovar testified, “it was extremely likely” that Tovar's “significantly similar” prior acts with Schmitke and

Brazeau would have been admitted. 14RP 10. The court also said that, although the defense had initially persuaded the court to suppress the circumstances surrounding Tovar's arrest, i.e., his attempted suicide, it was likely that information would have come out if Tovar had testified. 14RP 10-11.

Finally, the court said that,

Based on all the information I have in this case, seeing the testimony and the prior history, I am satisfied there was no protestation from Mr. Tovar at the time Mr. Todd rested his case.

14 RP 11.

- iv. The trial court properly denied Tovar's claim.

A defendant bears the burden of establishing by a preponderance of the evidence that trial counsel “actually prevented him from testifying.” State v. Robinson, 138 Wn.2d 753, 764-65, 982 P.2d 590 (1999). Courts must distinguish between cases in which the attorney actually prevents the defendant from taking the stand, and cases in which the attorney merely advises the defendant against testifying as a matter of trial tactics. Id. at 763. Additionally, when a defendant asserts that his counsel's error prevented the defendant from testifying on his own behalf, the prejudice prong of the Strickland test must still be met. Id.

At an evidentiary hearing, to determine whether a defendant was prejudiced under Strickland, the trial judge assesses witness credibility. State v. West, 139 Wn.2d 37, 43-44, 983 P.2d 617 (1999) (and cases cited therein). When a judge determines the credibility of a witness pursuant to a motion for a new trial, the judge looks to the “strength of the countervailing evidence, the plausibility of the witness's statements and the existence of evidence corroborating those statements.” West, 139 Wn.2d at 46. The decision to grant or deny a new trial based on a claim of ineffective assistance of counsel will not be disturbed absent a manifest abuse of discretion. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989).

Tovar failed to satisfy his burden of proving by a preponderance of the evidence that counsel actually prevented him from testifying rather than merely advised against it. See Robinson, 138 Wn.2d at 763. The court found that trial counsels' advice not to testify was a legitimate trial strategy and that it was unlikely any defense counsel would have advised Tovar to testify under the circumstances of this case. 14RP 9-11. Additionally, the trial court weighed the witness's credibility and determined that Tovar's version of events was not credible. 14RP 11-12.

Finally, there was no prejudice. The court found that had Tovar testified, the very damning evidence of Tovar's “significantly similar”

prior acts would have been admissible. 14RP 9-11. The trial court properly denied Tovar's motion for a new trial.

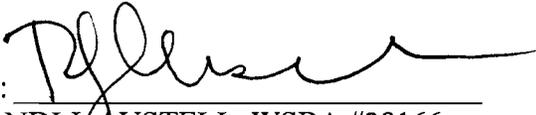
D. CONCLUSION

For the reasons stated above, the State asks this Court to affirm Tovar's conviction for rape in the second degree.

DATED this 23 day of February, 2011.

Respectfully submitted,

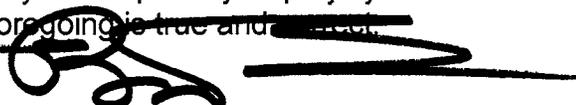
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. MICHAEL TOVAR, Cause No. 65324-5-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name Bora Ly
Done in Seattle, Washington



Date