S. Ct. No.
COA No. 38795-0-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARCOS A. GUTIERREZ,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Marcos A. Gutierrez asks this Court to accept review of the Court of Appeals opinion in Part B.

B. COURT OF APPEALS DECISION

The unpublished Court of Appeals opinion which Mr. Gutierrez wants reviewed was filed July 23, 2024. A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. By failing to subpoena phone records from Mr. Gutierrez's cell phone showing he received phone calls from the alleged victim the day of the incident, did defense counsel render ineffective assistance to his client's prejudice because the result of the trial would have been different?

2. Even though a toxicology screen of the alleged victim was done as shown by step one in the sexual assault evidence kit, did the State commit a *Brady*

violation by failing to produce lab results of the toxicology screen to the defense?

D. STATEMENT OF THE CASE

H.M. lived in one side of a duplex in Airway Heights, while her best friend, Michelle Thomas, lived in the other. (1/11/22 VRP 70-71). H.M. knew who Mr. Gutierrez was, as he lived across the street. (*Id*. at 71). In the January 2019 incident, she had been drinking a lot and hanging out at Ms. Thomas' side of the duplex. (*Id*. at 72-73). Shari Fields, Ms. Thomas' friend, was also there. (*Id*. at 73).

That night, Mr. Gutierrez's friend, Tristian Hewankorn, stopped by in his car where they smoked weed. (1/12/22 VRP 203). The three women walked across the street and up to the passenger side of Mr. Hewankorn's car, where Mr. Gutierrez was sitting. (*Id*. at 204). After chatting for about ten minutes, the women invited them to come over. (*Id*. at 205). Mr. Hewankorn

went with them into the duplex, but Mr. Gutierrez went home to Rhiannon Alton, his girlfriend of 18 years and Melania Acosta, his daughter. (*Id*. at 205).

After smoking a combination of weed and tobacco, Mr. Hewankorn got overheated and started vomiting. (*Id*.). Despite that, he took swigs as he and the women passed around a bottle of alcohol. Mr. Gutierrez was still at his house across the street. (*Id*. at 207). H.M. asked Mr. Hewankorn if he was ever going to come over. (*Id*. at 208). He called Mr. Gutierrez about three times and he came over after the fourth call. Mr. Gutierrez was not drinking; the other four were.

H.M. asked him if he could go to the store to get more alcohol. (*Id*.). Mr. Hewankorn and H.M. went to the store with Mr. Gutierrez, who went back home after the alcohol run. She kept asking about him and whether he was coming over. (*Id*. at 209).

H.M. called Mr. Gutierrez three or four times. Mr. Hewankorn called twice and said Mr. Gutierrez did come over "once his phone said [H.M.] because his phone always was read text message or, like, read who is calling, it would say the name." (1/12/22 at 210). By this time, Mr. Hewankorn was in the bathroom on the floor trying to throw up. (*Id.*). Mr. Gutierrez came in to get him up. H.M. followed and pushed Mr. Hewankorn down, telling him to throw it up. (*Id.* at 211). He came to and next thing he knew, H.M. and Mr. Gutierrez were kissing. (*Id.* at 212). Mr. Hewankorn closed the door and sat for about five minutes. He opened the door and saw them having sexual contact while she was unclothed. (*Id.*). He closed the door and a few minutes later, one of the other women started screaming rape. (*Id.* at 213).

Mr. Hewankorn and Mr. Gutierrez went back across the street to his house. (*Id.* at 214). By then, Mr. Gutierrez's girlfriend and daughter were outside where

there was yelling back and forth with the women from the duplex. (*Id.*). Mr. Hewankorn said Ms. Fields was the least drunk; Ms. Thomas was just barely drunk; and H.M. was buzzed about a five out of ten. (*Id.* at 216).

H.M. testified she drank a lot that night. (1/11/22 RP 73). She was on the toilet when Mr. Gutierrez came in and caught her off guard. (*Id.* at 75). Her level of intoxication was a ten. (*Id.* at 76). She remembered nothing else, except for Ms. Thomas "barging in" and the cops being called. (*Id.* at 77). She said she essentially had no memory of the January incident. (*Id.* at 83-85).

Karly Weir, an emergency department nurse at Sacred Heart Medical Center, was trained to care for sexual assault victims and collect evidence kits. (1/11/22 RP 92). She did the report on H.M. for a sexual assault situation. (*Id.* at 94). Ms. Weir testified H.M. was anxious, but calm, and was able to communicate. (*Id.*).

She said she had five drinks and was not that intoxicated. (*Id*. at 97, 104).

Ms. Weir used an evidence collection kit. (1/11/22 RP 103). The kit had around 12 envelopes with various items, including, among other things, a blood reference card , cervical and vaginal swabs, and oral swabs. (*Id*. at 104). Ms. Weir took H.M.'s blood and documented it. (*Id*.). The encounter with H.M. took 158 minutes. (*Id*. at 106-07). She did not say she was unable to resist. Ms. Weir also testified there was likely a tox screen done, but she had no lab results for H.M. (*Id*. at 111).

Melania Acosta. Mr. Gutierrez's daughter, was in her house. Mr. Hewankorn and her father were in a car. (1/12/22 RP 180). Three women approached the car about ten minutes later. (*Id*.). Ms. Acosta recognized H.M. and Ms. Thomas. Mr. Hewankorn went to the duplex and Mr. Gutierrez went inside his house. (*Id*. at 181). Mr. Hewankorn called him to ask if he would take

them to get alcohol. Mr. Gutierrez agreed and got into his car, whereupon H.M. tried to get in the passenger seat. Ms. Alton did not want her in the car, so they took Mr. Hewankorn's car instead. (*Id*. at 181-82). H.M. was in the passenger seat with Mr. Hewankorn sitting in the back and Mr. Gutierrez driving. (*Id*. at 182).

After returning, Mr. Gutierrez went back inside his house when H.M. called him three times. Ms. Acosta knew it was her because her father's phone had text to speech, so every time someone would call, it would say who it was from. His phone said "call from [H.M.], call from [H.M.], call from [H.M.]" (*Id*.). Mr. Gutierrez did not answer. Then Mr. Hewankorn called twice and he answered the second time. Mr. Gutierrez went across the street to the duplex. (*Id*. at 183). Ms. Acosta said she remembered the night well as it was a traumatic incident and she was paying attention. (*Id*.).

Ms. Alton testified Mr. Hewankorn came over to see Mr. Gutierrez and they were outside in a car when three women came over from across the street to talk to them. (*Id*. at 187). She recognized H.M. (*Id*.). After talking, Mr. Hewankorn went to the duplex with the women; Mr. Gutierrez stayed in the car and eventually went back into his house. (*Id*. at 188). He did not want to go across the street because it was a bunch of girls partying and he had no place being there. (*Id*. at 189-90). Ms. Alton did not want him going over. (*Id*. at 190).

Mr. Hewankorn called Mr. Gutierrez to ask for a ride to get alcohol. (1/12/22 RP 190). The two, along with H.M., went to the store. On their return, Mr. Gutierrez went back into his house. (*Id*. at 191). Ms. Alton knew he got at least three calls from H.M. because his phone had text to voice or voice to text, where it told him who was calling. (*Id*. at 191-92). She did not know whether Mr. Gutierrez actually answered the phone. (*Id*. at 192). Mr.

Hewankorn called next, asking him to come over. Mr. Gutierrez went across the street and returned in about five minutes. (*Id*. at 192-93).

Mr. Gutierrez told Ms. Alton he needed to go get Mr. Hewankorn and drive him home. (1/12/22 RP 193). He was gone for another five minutes, when she looked out the window and saw Ms. Thomas yelling and pushing Mr. Gutierrez. (*Id*. at 193-94). There was an altercation between Ms. Alton and Ms. Thomas. (*Id*. at 194). The parties split up; Mr. Gutierrez was going to drive Mr. Hewankorn home. (*Id*. at 194-95). They drove off and in a minute or so, she saw lights flashing. About five minutes later, the police showed up with both men. (*Id*. at 195).

Mr. Gutierrez testified in his own behalf. He admitted lying to the police when he said he did not have sex with H.M. (1/12/22 RP 234-35, 243). After going to the store with Mr. Hewankorn and H.M., he was at home

when he received a few calls from her and a couple from him. (*Id*. at 228-29). Ms. Alton got upset with the calls. He went to the duplex to take Mr. Hewankorn home. (*Id*. at 229).

Mr. Gutierrez saw him sitting by the toilet through the open bathroom door. (*Id*.). He went in with H.M. following right behind. Mr. Gutierrez tried to get Mr. Hewankorn up; H.M. pushed him down and said to throw it up. (*Id*. at 230). After about the third time of pulling and pushing, Mr. Gutierrez and H.M. began kissing. (*Id*. at 230-31). He had a thing for her and her for him as they exchanged phone numbers. (*Id*. at 225, 234). The kissing led to sex, which Mr. Gutierrez admitted having with H.M. (*Id*. at 233-34). He said she was not drunk at all and gave no indication she had no interest in having sex with him. (*Id*. at 235). Ms. Fields walked in on them and started screaming "rape." (*Id*. at 233).

There were no exceptions to the jury instructions given by the court. (1/12/22 RP 247). The jury sent two questions to the court. One asked: "Can we see the "urine toxicology report that was sent to SHMC lab? (as shown in the sexual assault evidence collection kit – Step 1)." (CP 248). The other asked: "Is there phone records from Marcos' phone indicating that calls were received from [H.M.'s] phone the date of the incident?" (CP 249). The court responded to both questions with the same response: "You are directed to review the evidence that was submitted during trial." (CP 248, 249; 1/13/22 RP 279-81).

The jury found Mr. Gutierrez guilty of second degree rape. (CP 247). He was sentenced to 78 months. (CP 287). His conviction was affirmed on appeal. (App. A).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is warranted under RAP 13.4(b)(1) and

(2) as the Court of Appeals' decision conflicts with Supreme Court decisions and other published decisions of the Court of Appeals.

The State must provide the defense with any exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). In order to show prejudice, Mr. Gutierrez must demonstrate a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 487, 276 P.3d 286 (2012).

Ms. Weir did the report on Ms. McKenzie and used an evidence collection kit for sexual assault victims. (1/11/22 RP 94, 103). Among other things, the kit had a blood reference card and Ms. Weir took Ms. McKenzie's blood and documented it. (*Id*. at 104). Defense counsel noted the kit indicated a tox screen was done. (*Id*. at 104). Indeed, the State did not dispute that fact. Ms.

Weir testified that most likely there would have been one as it was typical to do such a test, but she had no medical reports showing lab results of H.M's tox screen. (*Id.*). An element of the crime was that sexual intercourse occurred when she was incapable of consent by reason of being mentally incapacitated, *i.e.*, her intoxication. (CP 241, 244).

In the omnibus order, the State indicated it had provided the defense with all discovery required by CrR 4.7(a). (CP 45). The State was thus obligated to provide lab results of the tox screen . CrR 4.7(1)(a)(iv). It did not. Ms. Weir had no lab results in her medical record. But there were undoubtedly lab results from Ms. McKenzie's tox screen and they were in the hands of the State. Ms. Weir used a sexual assault evidence collection kit that was for the State's use. The prosecution's failure to produce the lab results implies they were not favorable to the State. Rather, they were exculpatory. The jury

realized the importance of the tox screen lab results to their deliberations by asking what they were. (CP 248). Thus, the lab results were material to guilt or innocence.

To establish a *Brady* violation, Mr. Gutierrez must show (1) the evidence was favorable to him, either because it was exculpatory or impeaching; (2) the evidence must have been suppressed, either willfully or inadvertently, by the State; and (3) prejudice ensued. *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011). The lab results of Ms. McKenzie's tox screen would have been both exculpatory and impeaching. She testified she was 10 out of 10 drunk. Yet, she told Ms. Weir that she was not that drunk. Either way, the lab results would have been impeaching at the very least or completely exculpatory at best. A tox screen was taken, but Ms. Weir did not have the lab results. It is inconceivable that the State did not have them. They

were not disclosed as required by *Brady* and the omnibus order.

The second requirement requires proof the State suppressed evidence favorable to the defense. *Mullen*, *supra*. The lab results were most likely in the State's possession as Sacred Heart did not have them. Even if the medical center did have the results, the State was nevertheless obligated to produce them as Ms. Weir, the emergency department nurse, was working on the State's behalf in collecting the items for the sexual assault evidence collection kit. *State v. Lord*, 161 Wn.2d 276, 292, 165 P.3d 1251 (2007). Moreover, the defense did not have the ability to get the lab results on its own due to HIPAA. The State had the duty to disclose under CrR 4.7(a)(1)(iv) and *Brady*.

The third element is whether there is a reasonable probability the evidence, if disclosed, would have produced a different outcome at trial. *Mullen*, 171 Wn.2d

at 897. Mr. Gutierrez has satisfied that element as well . The State committed a *Brady* violation by withholding likely exculpatory evidence of lab results of the toxicology screen done on H.M. because the undisclosed lab results would have resulted in a different outcome at trial. They undermine any confidence in the trial's result. *Id*. And the evidence was surely admissible. Mr. Gutierrez has established a *Brady* violation requiring reversal of his conviction.

The Court of Appeals addressed Mr. Gutierrez's claim that the State had withheld exculpatory evidence by avoiding the issue altogether:

> The record is silent as to whether a toxicology lab report actually exists, whether the report was suppressed by the State, and whether the report contained information that might have been exculpatory or impeaching. Given these circumstances, Mr. Gutierrez cannot satisfy the elements of a *Brady* claim. (Op. at 7).

The court clearly ignored the fact that a tox screen was done. (1/11/22 at 103, 104, 111). There is no reason for

doing a tox screen if no tox report Is done. Ms. Weir did not say no tox report was done, just that she did not have the results. (*Id*. at 111). The jury would not have asked about the results if no tox screen had been done. But it was. The omnibus order required the State to provide such results. It did not, so the logical conclusion is that they were suppressed by the State. There would be no reason for suppressing that information if it were not impeaching or exculpatory. The court cited *State v. Lazcano*, 188 Wn. App. 338, 357, 354 P.2d 233 (2015) in support of its determination. The record shows the facts necessary to adjudicate the claimed error is in the record on appeal. Those facts were simply ignored. The Court of Appeals' opinion conflicts with its own decision in *Lazcano*, thus warranting review under RAP 13.4(b)(2).

Review is also appropriate for the ineffective assistance of counsel claim. Mr. Gutierrez must show that counsel's representation fell below an objective

standard of reasonableness and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). When ineffective assistance of counsel is established, prejudice is presumed. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 565, 397 P.3d 90 (2017); *Mullen*, 171 Wn.2d at 897.

The words of defense counsel at sentencing were candid and compelling:

> I believe there's merits to appeal. . . I believe there are multiple issues here. I think the biggest one is, and this is one reason I told him I didn't want to do an appeal, is the jury wanted phone records. I failed to subpoena those phone records, and so I think they have a very strong case to argue that fact, and I believe there is strong merit there. (3/4/22 RP 306).

During deliberations, the jury inquired of the court if there were phone records from Mr. Gutierrez's phone indicating calls were received from H.M.'s phone the date of the incident. (CP 249). The defense was consensual

sex, not rape, occurred. The failure to subpoena Mr. Gutierrez's phone records fell below an objective standard of reasonableness, as such evidence would have corroborated his testimony and shown Ms. McKenzie was actively pursuing him while he had interest in her as well. The failure to subpoena the phone records was also of importance because the police kept Mr. Gutierrez's cell phone, which was apparently not returned to him. (1/12/22 RP 244).

As acknowledged by defense counsel, his client's phone records were particularly significant to the jury or else it would not have asked to review them. Having failed to request them, counsel performed below an objective standard of reasonableness. *Strickland*, *supra*. Reasonable counsel would have subpoenaed them as they were critical to the question of consent and mental capacity of Ms. McKenzie on the charge of second degree rape. (CP 240, 241, 243, 244). Moreover, the

failure to get the phone records was neither trial strategy nor tactics, but was deficient representation. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Although prejudice is presumed when ineffective assistance is established, there is a reasonable probability in any event that the outcome of the trial would have been different. *State v. Estes*, 188 Wn.2d 450, 466, 395 P.3d 1045 (2017). By the jury just asking the question, there is undoubtedly a reasonable probability in any event that the result of the trial would have been different. *Id*. By just asking the question, the jury signaled there was great weight in deciding guilt or innocence to have Mr. Gutierrez's phone records to review, but it never got the opportunity to see them. In these circumstances, counsel performed deficiently and rendered ineffective assistance. *Strickland*, *supra*.

The Court of Appeals, however, ignored the issue by stating "[t]his claim fails because Mr. Gutierrez cannot

show prejudice on the current record, which does not include any cell phone records." (Op. at 8). By saying the record does not contain any cell phone records, the court engaged in circular reasoning that simply states the obvious – there are no phone records, so it cannot say it was prejudicial even though counsel acknowledged he did not ask for them and was ineffective for failing to do so. The evidence is undisputed that Mr. Gutierrez received phone calls/texts from H.M. that night. (1/12/22 RP 182, 191-92, 210, 228-29). The record is sufficient to decide the ineffective assistance claim. By simply avoiding the issue, the Court of Appeals' opinion conflicts with the Supreme Court decisions in *Lui*, *Kyllo*, and *Estes*. Review is appropriate under RAP 13.4(b)(1).

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Gutierrez respectfully asks this Court to grant his petition for review.

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17, I certify that this document contains 3465 words.

DATED this 21st day of August, 2024.

Respectfully submitted,

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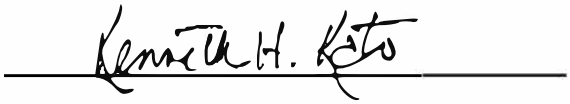
CERTIFICATE OF SERVICE

I certify that on August 21, 2024, I served a copy of the petition for review by USPS on Marcos Gutierrez, # 431091, PO Box 769, Connell, and through the eFiling portal on the Spokane County Prosecutor's Office.



APPENDIX A

FILED
JULY 23, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MARCOS A. GUTIERREZ, also known as MARCOS ACOSTA, Appellant.	))))))))))	No. 38795-0-III UNPUBLISHED OPINION

PENNELL, J. — Marcos Gutierrez appeals his conviction for second degree rape. We affirm.

FACTS[1]

The victim and her best friend were having a girls' night together at the victim's residence. Over the course of the evening, the victim drank considerable amounts of alcohol, to the point where she was "very intoxicated." Rep. of Proc. (RP) (Jan. 11, 2022) at 46. The victim estimated her level of intoxication was at "a ten." *Id.* at 76. In contrast, her best friend did not drink that much because alcohol makes her sick.

[1] Because Mr. Gutierrez raises an evidentiary sufficiency challenge, we construe the facts in the light most favorable to the State. *See State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

At some point in the evening, the friends invited an acquaintance named Tristian Hewankorn over to the residence. Mr. Hewankorn joined in the drinking and also became extremely intoxicated. He intermittently passed out and got sick. Mr. Gutierrez, a friend of Mr. Hewankorn, was eventually summoned to come pick up Mr. Hewankorn and take him home.

When Mr. Gutierrez arrived at the residence he went inside. Shortly thereafter, the victim's best friend started looking around for the victim and saw the bathroom door was shut. She went to the door and called out the victim's name. Hearing no response, she opened the door and saw Mr. Gutierrez and the victim inside. Mr. Gutierrez's pants were halfway down and he was holding the victim by the shoulders while forcibly engaging her in sexual intercourse. The best friend noticed the victim seemed nearly unconscious, and was unable to support her head or upper body, as Mr. Gutierrez was propping her torso up as he raped her.

The best friend screamed and pushed Mr. Gutierrez out of the bathroom. The best friend summoned police while the victim cried and asked what was happening. The victim later testified that she had partially blacked out. She remembered going to the bathroom and sitting on the toilet when Mr. Gutierrez walked in and made remarks about

a tattoo on her leg. The next thing she knew, her best friend barged into the bathroom and started screaming.

Police were dispatched to the vicinity and detained Mr. Gutierrez. Mr. Gutierrez denied having sex with the victim and agreed to provide a DNA sample.

Meanwhile, the victim and her best friend went to the hospital where the victim was treated by emergency room personnel. The victim received an examination and evidence was also collected for a rape kit. The emergency room nurse prepared a report noting an abnormal laceration to the victim's vulva. DNA collected from the victim was eventually linked to Mr. Gutierrez.

The State charged Mr. Gutierrez under RCW 9A.44.050(1)(b) with second degree rape, which requires proof that the victim was "incapable of consent by reason of being physically helpless or mentally incapacitated." Mr. Gutierrez exercised his right to a jury trial.

At trial, Mr. Gutierrez no longer denied having sexual intercourse with the victim. Instead, he raised a defense of consent and his strategy was to impeach the witnesses regarding the victim's level of intoxication. While cross-examining the emergency room nurse, defense counsel asked if there had been a toxicology screen. The nurse responded, "Most likely there would have been. I don't have results of labs for her. It would be

typical to collect that, but I don't have in these notes here medical records showing lab results." RP (Jan. 11, 2022) at 111.

Mr. Gutierrez presented testimony from several witnesses, including Tristian Hewankorn, who testified that the victim was not particularly intoxicated and that she had seemed romantically interested in Mr. Gutierrez. Mr. Gutierrez testified and claimed the victim was not intoxicated and that their encounter was consensual. In explaining the victim's interest in him, Mr. Gutierrez claimed the victim had called him several times that night.

During deliberations, the jury submitted two inquiries to the court. First, the jury asked, "Can we see the urine toxicology report that was sent to [the Sacred Heart Medical Center] lab?" Clerk's Papers (CP) at 248. Second, the jury asked, "[Are] there phone records from [Mr. Gutierrez's] phone indicating that calls were received from [the victim's] phone the date of the incident?" *Id.* at 249. With the agreement of the prosecutor and defense counsel, the trial court answered both inquiries by directing the jury to review the evidence that had been submitted during trial.

The jury returned a guilty verdict. The trial court imposed a standard range sentence. Mr. Gutierrez timely appealed his conviction.

ANALYSIS

Sufficiency of the evidence

In a criminal case, the State must prove every element of a charged offense beyond a reasonable doubt. *See State v. Chacon*, 192 Wn.2d 545, 549, 431 P.3d 477 (2018). When faced with a sufficiency challenge, we view the evidence and all reasonable inferences flowing therefrom in the light most favorable to the State, and then ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To convict Mr. Gutierrez of second degree rape, the State was required to prove that (1) he engaged in sexual intercourse with the victim and (2) the intercourse "occurred when [the victim] was incapable of consent by reason of being mentally incapacitated." CP at 241. Only the second of these elements was disputed at trial.

Contrary to Mr. Gutierrez's argument on appeal, the State's evidence was more than sufficient to prove incapacitation. The victim's best friend testified that the victim was "very intoxicated" on the night of the rape. RP (Jan. 11, 2022) at 46; *see also id.* at 54 (Best friend's testimony: "[The victim] was really drunk. She kept asking what's going on."). The best friend also testified that the victim was so inebriated that she was incapable of supporting her upper body, so Mr. Gutierrez was propping her up by her

shoulders as he raped her. The victim herself testified that her memory of the rape was a blur and she had no idea what was going on due to her level of intoxication.

The testimony amply supports a conclusion the victim was mentally incapacitated at the time of the rape. Mr. Gutierrez claims the victim and her best friend were not credible, but it is not the province of this court to assess the persuasiveness of trial testimony. *See State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) ("Credibility determinations are for the trier of fact and are not subject to review."). Mr. Gutierrez's challenge to the sufficiency of the evidence is without merit.

Withholding of exculpatory evidence

Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the State has an "affirmative duty to disclose evidence favorable to a defendant." *Kyles v. Whitley*, 514 U.S. 419, 432, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). We review *Brady* challenges de novo. *State v. Davila*, 184 Wn.2d 55, 74-75, 357 P.3d 636 (2015). To establish a *Brady* violation, a defendant must establish the evidence (1) is favorable to the accused because it is exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) is material. *Id.* at 69. Where a defendant fails to establish any one of those three components, the *Brady* claim necessarily fails. *State v. Sublett*,

156 Wn. App. 160, 200-01, 231 P.3d 231 (2010), *aff'd*, 176 Wn.2d 58, 292 P.3d 715 (2012) (plurality opinion).

Mr. Gutierrez claims the State violated its obligations under *Brady* because it did not produce the victim's toxicology report. This claim was not raised during trial. The record is therefore silent as to whether a toxicology report actually exists, whether the report was suppressed by the State, and whether the report contained information that might have been exculpatory or impeaching. Given these circumstances, Mr. Gutierrez cannot satisfy the elements of a *Brady* claim. *See State v. Lazcano*, 188 Wn. App. 338, 357, 354 P.3d 233 (2015) (holding a purported constitutional error is not "manifest," and thus reviewable for the first time on direct appeal, if "the facts necessary to adjudicate the claimed error" are not "in the record on appeal") (citing RAP 2.5(a)(3)). If Mr. Gutierrez has evidence outside the current record that could support a *Brady* claim, his remedy is to raise a challenge in a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

Assistance of counsel

Criminal defendants are guaranteed effective assistance of counsel by the state and federal constitutions. *See* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. To succeed on an ineffective assistance claim, a defendant must show (1) trial counsel's performance

was objectively deficient and (2) prejudice. *McFarland*, 127 Wn.2d at 334-35. Failure to meet either prong is dispositive. *State v. Berg*, 147 Wn. App. 923, 937, 198 P.3d 529 (2008).

Mr. Gutierrez argues his trial counsel performed deficiently by failing to subpoena cell phone records. This claim fails because Mr. Gutierrez cannot show prejudice on the current record, which does not include any cell phone records. Thus, we cannot say whether the records would have been helpful to Mr. Gutierrez. Again, if Mr. Gutierrez obtains evidence regarding the cell phone records outside the record on review that reveal them to be exculpatory, his remedy is to raise a challenge in a personal restraint petition. *See McFarland*, 127 Wn.2d at 338.

CONCLUSION

The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

August 21, 2024 - 7:59 AM

Filing Petition for Review

Transmittal Information

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- scpaappeals@spokanecounty.org

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