

REGINA V. WESTERLAND

ADVANCED MOCK TRIAL



Table of Contents

Preface	3
Indictment	4
Getting Started	5
Responsibilities of Participants	6
Crown Witness #1 – Constable Swain	7
Crown Witness #2 – Doctor Mack	8
Crown Witness #3 – Dana Morageau	9
Crown Witness #4 – Brent Bains	10
Crown Witness #5 – Tammy Warren	10
Crown Witness #6 – Jennifer Long	11
Defence Witness #1 – Jordan Westerland	12
Defence Submission – Notes for Counsel	13
Crown Submission – Notes for Counsel	14
Judge’s Role – Charge to the Jury	15
Actual Judgment	17
Appendix – Excerpts from the Transcript of D.A.E.	18

Acknowledgements

The Law Courts Education Society of BC is grateful to the developers of this mock trial, Judge Cunliffe Barnett and Sandra Hawkins, for their permission to adapt the script for publication in this form.

The Society has several first-class resource materials, including other mock trials and *Guide to Mock Trials: The Basics*, that can help you and your group learn more about the courts and justice system in British Columbia and Canada. For more information, contact us or visit our website:

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The Law Courts Education Society

We are a non-profit organization providing educational programs and services about the justice system in British Columbia and Canada. We help the public understand how our justice system works and we also help those people working within the justice system to better understand the justice-related issues that different people in our community face.

We work in partnership with the Ministry of Attorney General, the Ministry of Education, the Judiciary, the Canadian Bar Association (BC Branch), schools and communities.

With the support of our partners, funders and volunteers, we strive to maintain an accessible justice system for everyone.

Preface

This script was developed to be produced by Columneetza Senior Secondary School P.A.C.E. and Law 12 students in Williams Lake during Law Week 1992.

The script is based on the trial of D.A.E., who was charged with sexual assault as a result of events that occurred in Bella Coola on January 6, 1991. Besides encouraging students to focus on the difficult and controversial legal issues arising from this case, the script encourages thoughtful discussion on personal lifestyle choices and their effects. The topic, acquaintance rape, is both important and timely. Having students address this issue in a mock trial has met with the approval of communities in which this mock trial has been enacted, and there have been significant learning gains for the students.

The facts have been changed a bit to make the exercise more appropriate and interesting to high school students, but the actual legal issues remain. It is intended to be an honest dramatization of the evidence that was presented to the court during that trial. It is, therefore, important that role players do not stray from the outlines provided in the script. If evidence is added or omitted, the exercise will become something different than the authors of this script intended. The case of *R. v. D.A.E.* is reported: 10 C.R. (4th) 67. A summary of this judgment can be found in the back of this book.

There is, of course, a very great deal of latitude for creativity here. The roles have been purposely presented in outline form. Students are expected to develop these roles into believable characters. The role sheets are designed to be used in conjunction with the "Guide to Mock Trials: The Basics" produced by the Law Courts Education Society of BC. You can work with the students to modify this trial for their own use. You may want to make the dates current, change the names of the characters, and modify the location for local relevance.

This is an advanced mock trial. It is produced for senior students who have some mock trial experience and who are ready for a new challenge. The trial demands that participants familiarize themselves with the responsibilities of various court personnel, and with the deeper issues raised by the case. For example, the students who play Crown and defence counsel should meet with local lawyers to discuss the case. The authors suggest that a workshop would be particularly valuable in this production. For example, when this mock trial was being produced in Williams Lake, a law professor and other persons came to spend the day with the student participants to discuss sexual assault issues with them. This was an extremely valuable experience for Williams Lake students and the authors suggest that it should not be difficult for other groups to arrange similar workshops and that the learning which will happen during such workshops will more than repay the effort involved.

Judge C.C. Barnett
Sandra Hawkins

Indictment

CANADA
PROVINCE OF BRITISH COLUMBIA
SUPERIOR COURT OF BRITISH COLUMBIA

IN THE SUPERIOR COURT OF BRITISH COLUMBIA
HER MAJESTY THE QUEEN
AGAINST JORDAN WESTERLAND

Jordan Westerland stands charged:

THAT he, the said Jordan Westerland, on or about the 3rd of January, A.D. 1993, at or near the City of Williams Lake, in the Province of British Columbia, did commit a sexual assault on Dana Morgeau contrary to section 271 of the CRIMINAL CODE AND AGAINST THE PEACE OF OUR LADY THE QUEEN, HER CROWN AND DIGNITY.

DATED this 7th day of February, A.D. 1993, at the City of Williams Lake, in the Province of British Columbia.

*Agent of the Attorney General for
The Province of British Columbia*

This mock trial has the following witness roles:

Getting Started

FOR THE CROWN

Constable Swain
Doctor Mack
Dana Morageau
Brent Bains
Tammy Warren
Jennifer Long

FOR THE DEFENCE

Jordan Westerland

The judge's role as it relates to the specifics of this case is outlined in the Charge to the Jury.

These role sheets are designed to be used in conjunction with the material contained in the companion publication, "Guide to Mock Trials: The Basics."

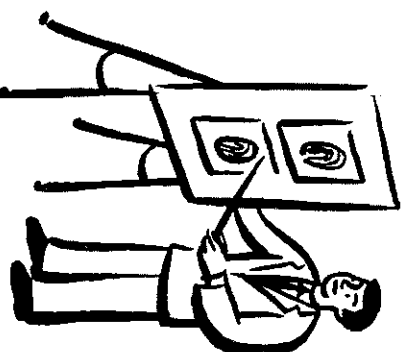
Students should be warned that counsel **must not** ask questions on direct or cross-examination that will get the witnesses into areas not outlined in the role sheets. Students are expected to develop the roles but to keep them within the framework outlined in the role sheets. To get started, students will need to become familiar with their roles, and carry out the tasks outlined in "Responsibilities of the Participants" on page 6.

Exhibits

1. Photograph of the mobile home
2. Plan drawing of mobile home
3. Photograph of bedroom (this must be taken with a wide angle lens-21 mm or thereabouts)
4. Box of men's clothing, all in individual plastic bags

Also required

- Box of women's clothing, all in individual plastic bags
- Mug shot of Jordan Westerland



Responsibilities of Participants

Cst. Swain

Meet with a member of your local R.C.M.P. Detachment, or member of your municipal police force. Obtain exhibits one through four. Learn the appropriate manner for a member of the police to give evidence in court.

Doctor Mack

Discuss with a local doctor how to give evidence in a sexual assault case. Organize the box of woman's clothing in plastic bags and obtain a very large notebook.

Dana Morgan

Talk with people in the community, such as R.C.M.P. officers, doctors, and workers at women's shelters to learn how a victim of sexual assault is likely to react in a court situation. Dress in the manner of a typical high school student.

Crown Counsel

Consult with the mock trial's legal advisor. Interview Crown witnesses. Prepare opening address for the jury. Prepare questions for your witnesses. Anticipate questions you will ask defence witnesses in cross-examination. Prepare a closing address to the jury, paying attention to the notes to counsel and to the Judge's Charge to the Jury (in this script) as you do so.

Defence Counsel

Consult with the mock trial's legal advisor. Prepare opening address for the jury and questions for your witnesses. Work with your witnesses and prepare to cross-examine Crown Witnesses. Prepare a closing address to the jury, paying attention to the Notes to Counsel and to the Judge's Charge to the Jury (in this script) as you do so.

Court Clerk

Meet with Court Services personnel to learn the duties of a court clerk. Perform duties during the trial.

Sheriffs

Meet with persons in the Sheriffs Office to learn their duties. Perform these duties during the trial.

Court Reporter

Meet with a court reporter to learn their duties and perform them during the trial.

Crown Witness #1 – Constable Swain

You are a member of the Williams Lake R.C.M.P. On January 3, 1993 at 3:19 am you were dispatched to respond to a complaint of sexual assault. You attended at a location 26 km from Williams Lake, along the Likely Road. The residence there is a mobile home located on a small acreage and is the home of the Dana Morageau family.

Exhibit 1 is a photograph of the home taken by you later in the morning of January 3, 1993.

Upon your arrival you saw and spoke to Dana Morageau, Brent Bains, Jennifer Long, Kara Myers and some other young persons.

You observed that Dana Morageau was very distraught. You were unable to talk to her because she was crying continuously and seemed quite hysterical. A very few minutes after your arrival she left with Cst. Klein who took her to Cariboo Memorial hospital.

You remained at the scene and took written statements from the persons present.

You will describe the home, referring to Exhibit 2, a plan drawing prepared by you. You will describe your observations of the living room and kitchen (junk food, playing cards, beer, a couple of mickys, etc.). You will describe the bedroom in some detail. Exhibit 3 is a photograph of the bedroom taken by you during your first attendance at the home.

You will say that all the persons at the house had quite obviously been drinking. Although nobody was intoxicated, you directed that none of them were to drive.

After your attendance at the Morageau home, you departed for Likely. Your purpose in going there was to find and arrest Jordan Westerland.

In Likely you went to the Warren residence. The time was 4:43 am. At first there was no response when you knocked on the door but you continued and knocked louder because you believed Westerland was there. The registration papers in the Ford pick-up parked in the driveway indicated that it belonged to him.

You awakened Westerland and handcuffed him. You then told him that he was under arrest for having sexually assaulted Dana Morageau. You gave him the official R.C.M.P. warning and advised him of his Charter rights to counsel.

Westerland's response, when you asked if he understood the things you had told him, was to say "this is a crock, man."

Crown Witness #1 – Constable Swain *(continued)*

You took Westerland to the local R.C.M.P. Detachment where he was booked in. His clothing was seized from him at that time: this will be entered into evidence as Exhibit 4. Westerland was later released upon signing an undertaking ordered by the J.P., Mrs. Barnes. (His father brought him some clothes to wear.)

You returned to the Morageau home later that morning to take some photographs and the measurements necessary to prepare the plan drawing.

On cross-examination you will agree that Tammy Warren looked to have been pretty badly roughed up when you first saw her. But nobody has admitted knowing anything about her having been assaulted.

On cross-examination you will refer to your notes and then recall that there was an obvious smell of marijuana in the Morageau home. But you found no marijuana and nobody would admit to knowing anything about it.

On cross-examination you will say that Westerland had obviously been drinking before you arrested him but you will not agree with suggestions of defence counsel to the effect that he was very drunk.

Crown Witness #2 – Doctor Mack

You will enter the courtroom carrying a large cardboard box full of clothing in plastic bags. You will also have a large notebook.

You will be sworn in and will say that you are a medical doctor. You will say that you examined Dana Morageau in the prescribed manner where sexual assault is suspected. At this point defence counsel will advise the court that the accused is now prepared to admit that he did have sexual intercourse with Dana Morageau on January 3, 1993, and that the Crown acknowledges that Dr. Mack found no sign of physical trauma when he examined Dana Morageau.

You will then be excused.

Crown Witness #3 – Dana Morageau

You are 17 and a grade 12 student at the local high school. You will identify Exhibit 1 as a photograph of the home where you live with your parents.

You will recall that your parents went to Hawaii for holidays in December, 1992. They left you home alone.

On January 2, 1993, you had a few friends over to snowmobile and party. Things got started in mid-afternoon. Around 6 some of the guys went to town to get some steaks and more beer. After dinner people's main activities were drinking beer and playing poker.

You will recall that an uninjured couple arrived just after midnight: Jordan and Tammy. You knew them both, but not really well. Jordan had been drinking but seemed okay; Tammy was really blitzed.

You will recall that about 1 a.m. you began to feel very tired. And your boyfriend, Brent was upset with you. He said you were drunk and acting silly. So you got kind of mad and decided to retire from the party.

You went into your parents' bedroom which you were using while they were away. You lay down on the queen size bed, pulled a quilt over yourself, and quickly went to sleep. You did not undress – you were wearing jogging pants and a sweatshirt.

You will identify Exhibits 2 and 3.

You will say that your next recollection is that of awakening to the realization that somebody was lying on you and having sex with you. At first you thought it was Brent, but when you realized it was another man, you screamed and managed to push him right off the bed.

You then ran out into the hallway, crying and screaming.

Brent and your friends came and somebody took you into the living room to comfort you until the police arrived.

When Crown counsel asks if you consented to having sex with Jordan Westerland (or would have consented had he asked), you will say "no!" in your most expressive and definite manner.

On cross-examination you will agree that you are not old enough to drink lawfully and that your parents do not permit you to drink.

On cross-examination you will say that you were not smoking marijuana that night and did not see anybody else smoking it.

On cross-examination you will agree that you did not lock the bedroom door.

On cross-examination you will agree that Jordan looked very surprised when you screamed.

Crown Witness #4 – Brent Bains

You are 18 and a grade 12 student at the local high school.

You will quickly recall the afternoon and evening of friendly partying at Dana's place. And you will recall telling her to go to bed to "sleep it off."

You will say that the party just continued in a pretty quiet way. You did not notice anything unusual until hearing Dana scream and seeing her in the hallway.

You will say that after seeing Dana and realizing what must have happened to her, you just grabbed Jordan Westerland off the bed, marched him down the hallway, and threw him out the door. He was fully dressed, except for his shoes. You called the police.

On cross-examination you will say that you only drank a couple of cans of beer that night because you were planning to go skiing the next day. And you will say that you were not smoking marijuana and did not see anybody else smoking it.

On cross-examination you will say that you have no knowledge of anybody roughing up Tammy. When pressed about this you will say that if anything like that did happen you were probably too busy comforting Dana to realize it was happening. You will say that you do not know how or when Tammy left the Morageau home.

Crown Witness #5 – Tammy Warren

You are 21. You live in Williams Lake and work as a waitress, but you spend most weekends and holidays at your parents' home in Likely.

On January 2 you were at a continuing New Years party. You were very drunk.

You hardly recall it, but you guess that Jordan Westerland offered to drive you to Likely.

You will say that you do not remember being at Dana's place at all. You were too drunk.

When Crown counsel asks if you remember going into the bedroom and having sex with Jordan Westerland, you will say you do not remember those events because you were too drunk. (You will not say any of this very convincingly and you will cry a lot.)

On cross-examination you will agree that somebody must have roughed you up that night because you had a black eye the next day. But you will say you do not know who did it or why.

Crown Witness #6 – Jennifer Long

You are 17 and a grade 11 student at your high school. Dana is your best friend. You will not be asked to describe the home or the party. You will simply confirm that you were there and Crown counsel will then ask if you recall anything unusual happening just before 3 a.m.

You will say that you heard Dana scream and ran to see what was wrong. You found her in the hallway. She was hysterical. Kara took Dana away. You went into the bedroom behind Brent. You saw Jordan and Tammy in the bedroom; both were lying on the bed. Jordan was fully dressed. Tammy's clothes were in a state of disarray.

You will say that after Brent pulled Jordan off the bed and took him away, you tried to awaken Tammy. But that was very difficult, and, when she did come around, she made no sense at all and she swore a lot.

You will say that you got Tammy up, pulled her clothes together, and escorted her along the hallway and out the door.

On cross-examination you will reluctantly agree that after you awakened Tammy she was telling you she had done nothing wrong. And you will even more reluctantly agree that it was you and Kara who roughed up Tammy. You will say that you do not know why you did that.

You will then be asked if you were smoking marijuana at the party, and you will admit that you were.

You will then be asked why you told the judge at the preliminary hearing that you were not smoking marijuana that night and that you did not hurt Tammy. You will concede that you were not entirely truthful when you testified at the preliminary hearing and will say that you realized it would be best if the jury heard the whole truth. You will insist that your testimony today is the truth.



Defence Witness #1 – Jordan Westerland

You have a very definite role to play. You are a 23-year-old grade 10 drop-out. You work occasionally as a skidder operator but are content to collect U.I.C. as much as possible. You are honest, but, nevertheless, people clearly identify you as a jerk with heavy chauvinist traits.

You picked up Tammy in town in the evening on January 2. She was drunk. You figured that if you give her a ride to Likely, you could probably get lucky.

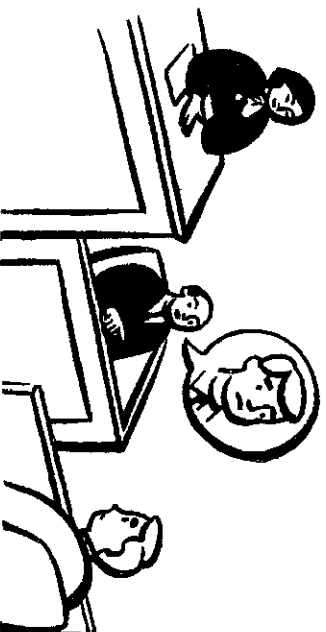
You stopped at Dana's place because a party was obviously happening. You wanted to check out the action and drink a few free beers. (You figured that would be safe enough since you were out of town and away from the cops.)

Tammy wandered away from the party about 2 a.m. When she did not return you went looking and found her in the bedroom. The room was very dark and you were unaware that anyone else was in the room. You decided this was a good time to make your move and Tammy was agreeable.

You both fell asleep after that.

When you woke up, you decided you might as well satisfy your desire again and you were unaware you were making love to the wrong girl until she screamed. Your testimony concerning this will be patterned after the testimony of D.A.E., which is reproduced in Appendix 1.

During cross-examination you will be asked what you meant when you told Cst. Swain, "This is a crock, man." You will reply by saying that you still cannot understand what all the fuss is about. After all, nobody got hurt. You think Dana must be some kind of feminist or something—trying to make you out to be some kind of criminal just because of a silly mistake.



Defence Submission – Notes for Counsel

Your submission must contain three elements.

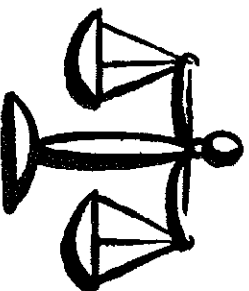
You **must** say, at least in a subtle but definite way, that Dana was the author of her own misfortune. She allowed her parents' home to be the scene of a party where persons used illegal drugs and she admittedly broke the law by drinking. If she had not done that she would not have remained oblivious to the activity of Jordan and Tammy. And it is not to be overlooked that Dana failed to lock the bedroom door.

You **must** place some emphasis on the fact that Crown witnesses were not entirely forthright. Your questioning forced their reluctant admissions about smoking marijuana and the roughing up of Tammy.

Your main submission is that Jordan is no rapist but rather, an innocent man, wrongly accused. You will stress the propositions that Jordan is a normal young man and that his actions were entirely reasonable in the circumstances. He did not leap out of the bushes, he did not attack Dana, he did not cause injuries to Dana, and Dana is his friend.

You will stress the fact that sexual assault is a very serious crime. If a man is convicted of this crime, he will bear the moral stigma of the conviction for the rest of his life. You will say that no man should be convicted unless the evidence makes it absolutely clear that he intended to violate that woman and the law. Jordan just made an honest mistake.

Finally, you will draw the attention of the jury to the fact that Jordan was under the influence of liquor. You will say that while he probably would have been more careful if he had not been drinking, he should not be convicted merely because he was a little drunk.



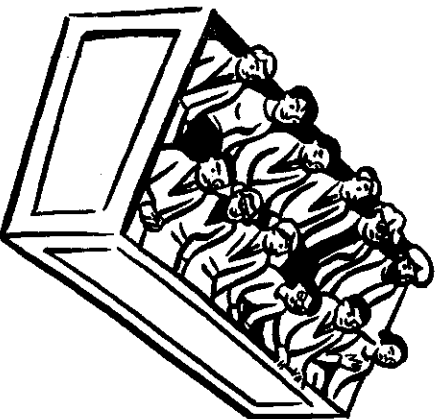
Crown Submission – Notes for Counsel

You will assert that sexual assault is not like any other crime.

You say that it is a myth that rapists are men who leap out of bushes to attack strange women. As this case demonstrates, an apparently normal man may be guilty of a very serious sexual assault.

You will stress the facts that Dana did nothing to entice Jordan and that she was asleep in the supposed safety of her own bed. You will say that it is entirely irrelevant that persons may have been smoking marijuana, that Dana was drinking, and should have locked her bedroom door, and that the Crown witnesses did not all always tell the whole and absolute truth.

You will say that Jordan's actions were not innocuous and innocent. He recklessly became drunk and thus deprived himself of the ability to control himself. You will assert that this failure to act in a socially acceptable fashion is quite sufficient to require a finding of guilt.



Judge's Role – Charge to the Jury

Mr./Madam Foreman, ladies and gentlemen of the jury, it is now my duty to give you certain instructions before you begin your deliberations.

We have separate responsibilities in this case. It is my responsibility to instruct you concerning the legal principles you must consider during your deliberations. You must accept my statements defining and explaining the law. It is your collective responsibility to assess the events that gave rise to the charges against Jordan Westerland and to decide what happened. You are not obliged to accept the submission of counsel or my own observations concerning the facts of this case.

There is a fundamental principle, which you must understand and always recall during your deliberations. In Canada, when a person is accused of criminal wrongdoing, he or she does not have to prove innocence. It is the task of the prosecution to prove guilt beyond all reasonable doubt. If the evidence before you does not go that far, Jordan Westerland is entitled to be acquitted.

The evidence of this case, like the evidence in almost every case, was, at times, surprising, conflicting and confusing. It is your task to sort through testimony of the various witnesses. You will use common sense and the wisdom that experience has taught you during your own lives. You may accept all or most of the testimony given by some witnesses. You may reject all or most of the evidence given by other witnesses. You may decide that some witnesses were honest, observed well, and recalled the events accurately. You may feel that other witnesses were untruthful or that their testimony cannot safely be relied upon for the any number of reasons. Honest persons can be mistaken in their observations and recollections of traumatic events.

I am required to review those areas of the evidence that may be particularly important to your deliberations.

We know that Jordan Westerland had sexual relations with Dana Morageau and that she did not give her consent. In most situations these facts would be sufficient to say that he sexually assaulted her.

Defence counsel has suggested that Dana Morageau was somehow herself blameworthy because she became drunk and then careless. I must tell you that these suggestions are wrong, and you cannot base your decisions upon them. I must also tell you that it is of no real importance that some of the Crown witnesses may have been less than absolutely truthful. You do not need to know who was smoking marijuana that night to decide this case.

The difficult issues in this case concern Jordan Westerland's thoughts. You know that he violated Dana Morageau: it cannot be suggested that some other man did the deed or that she gave her consent. But Jordan Westerland says he made an honest mistake and therefore thought he was having sex with another woman who had consented.

Judge's Role – Charge to the Jury (continued)

You may decide that Jordan Westerland's testimony cannot be believed and you are very sure that he really did know he was having sex with Dana and not Tammy. If you are very sure of this, you will find him guilty.

But I expect that you will not find your answer so easily. You will recall that Dana herself said that Jordan seemed very surprised when she screamed. It seems to me that the evidence suggests that Jordan Westerland did not actually know that Dana Morageau was not a willing partner.

Crown counsel says that makes no difference. He/she submits that if a man voluntarily becomes drunk and causes some hurt by assaulting another person, he has acted in a reckless and blame-worthy manner for which he should be condemned and punished. Crown counsel says that is the policy of the law as it has developed over the centuries and that it should not now be cast aside or changed.

Defence counsel says that you must find Jordan Westerland not guilty since he did not know he was having sex with Dana Morageau and violating her. Defence counsel says that Jordan was honestly mistaken in his belief that Dana was Tammy. He/she says that Jordan's thoughts were innocent and that you therefore cannot find him guilty and thus stigmatize him as a rapist.

The submissions of defence counsel find support in decisions by the Supreme Court of Canada. In 1980 that court decided that a man cannot be found guilty of criminally violating a woman if he held a mistaken but honest belief that her consent had been given.

You must decide if Jordan Westerland's mistake was honest and innocent or reckless and guilty. If you decide that his mistake was caused by his drunkenness and that he was recklessly wrong to dull his senses by drinking so excessively, you will find him guilty. If, however, you decide that Jordan Westerland did not know he was having sex with a woman who had consented and that no person in Canada should be found guilty of such a serious crime unless he really did know, you will find him not guilty.

Ladies and gentlemen, you may now retire and begin your deliberations. You may wish to take the exhibits with you into the jury room.

CAUTION: This "charge to the jury" was prepared for use during the mock trial only. It is necessarily abbreviated and simplified. It is not intended that any person should presume that the law is stated in a definitive manner here.

Actual Judgment

Regina v. Daniel Aaron Edgar 10 CR (4TH) 67

Facts

The accused had sexual intercourse with the victim who was sleeping fully clothed in the same bed as his girlfriend and himself. He looked surprised when the victim shoved him away. He had been drinking and did not care if the woman responded to him and had made no effort to find out who she was.

Issue

Did the accused have the requisite mens rea or intent to commit the offence?

Decision

The accused was found not guilty. Under section 7 of the Charter of Rights and Freedoms the Crown must prove that the accused has some subjective knowledge of the fact that consent was absent. The accused lacked the knowledge, which would constitute the recklessness required for the offence. The accused had no mens rea or intent to sexually assault the victim.

Appendix I – Excerpts from the transcript of D.A.E.

Q. After you had sex with R.B., what did you do?

A. Well, we both went to sleep.

Q. Okay. Then what happened?

A. Well, it was fairly dark. I just rolled over and tried to make love to the wrong girl.

(From the cross-examination)

Q. D.A.E., do you know whether or not there was another person in the bed besides you and R.B., the time you had the first encounter with her?

A. No, I didn't know.

Q. Okay. Did you check? Did you look around?

A. No.

Q. You were intent at that particular time at simply having sexual gratification with R.B., right?

A. Yes...

Q. Okay. Now, the woman you made love to the second time around, you had to take her pants down, didn't you?

A. Mm-mmm

Q. Okay. And you had to take her underwear down, right?

A. Yes.

Q. All right. And that involved some contact with her person, right? And she didn't respond when you took her underwear and pants down, is that right?

A. Yes.

Q. Okay. Did that strike you as, in any way, unusual?

A. Pardon?

Q. Did it strike you as, in any way, unusual that she didn't respond?

A. No.

Q. Is that because you really didn't care if she was asleep or awake or what, is that why you weren't particularly concerned about her responsiveness?

A. Can you say that again?

Q. All right. You didn't care whether she responded to you in any way or not, did you?

A. No, I didn't think about it, no.

Q. Because you were simply intent on having sexual gratification with this person, right?

A. Yes.

Q. And it didn't strike you as unusual that this woman now apparently had her pants on and her underwear on?

A. No.

Q. You didn't check to see who it was, did you?

A. No, I didn't.

Q. Because it really didn't matter to you who it was, right?

A. Well the room was dark....

Q. So it didn't really matter to you who it was, right?

A. Well, it's hard to tell anybody in the dark, you know.

Q. Okay, but you didn't make an effort to find out who it was, right?

A. No, I didn't.

Q. Okay. Because it didn't really matter to you, did it?

A. Not at the moment, no.

Q. No. And that was because you were still somewhat intoxicated, right?

A. Yes.

Q. And you wanted sexual gratification with this woman, right?

A. Yes.