NO. 45198-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDRE TAYLOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

OPENING BRIEF OF APPELLANT

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2. The to-convict instruction for assault in the second degree diluted the State's burden of proof by misstating the *mens rea.*

3. The trial court's response to the jury's question regarding the to-convict (Instruction 16) constituted a comment on the evidence contrary to Article IV, section 16 of the Washington Constitution.

4. The deputy prosecutor committed misconduct by improperly referring to attorney-client communications, by urging the jury to consider matters not in evidence, and by misstating the law in closing argument.

5. The trial court abused its discretion in admitting Andre Taylor's statement to police concerning his speculation regarding what the alleged victim might have been thinking.

6. Cumulative error denied Mr. Taylor his state and federal constitutional right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The court's instructions to the jury must completely and accurately explain the necessary legal requirements for a conviction, and a criminal defendant may only be convicted if the State proves every element of an offense beyond a reasonable doubt. A trial court errs where it gives an instruction that relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt. Where a jury question and special verdict form indicated the jury was confused and lacked unanimity as to the *mens rea* required to convict for assault in the second degree, did the instruction and to-convict deprive Mr. Taylor of his right to a fair trial?

2. Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." During a trial, a judge may not make "any remark that has the potential effect of suggesting that the jury need not consider an element of an offense." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Here, where the jury note indicated the jury misunderstood the *mens rea* required under the statute, was the trial court's response to the jury's question an improper comment on the evidence under Article IV, section 16?

3. The State's duty to ensure a fair trial precludes a deputy prosecutor from employing improper argument and tactics during trial. Where the deputy prosecutor encouraged the jury to consider opening statements, rather than evidence, did this constitute misconduct? Did the prosecutor's repeated questioning of the accused as to confidential communications with his counsel, also constitute misconduct? And did the deputy prosecutor's misstatement of the law during closing argument constitute misconduct, requiring reversal?

4. Under Evidence Rule 403, evidence may only be admitted if it is relevant to the charges and not unduly prejudicial. Did the admission of Mr. Taylor's statement to officers, as to what he imagined the alleged victim might be thinking, constitute an abuse of discretion, where this statement was irrelevant, speculative, highly prejudicial, and likely to produce an emotional response in the jury?

5. Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may find that the errors together created an enduring prejudice, denying the defendant a fair trial. Considering the many errors assigned above, was Mr. Taylor's right to due process violated, requiring reversal and a new trial?

C. STATEMENT OF THE CASE

After Andre Taylor finished work for the day as a landscaper on February 16, 2012, he drove his truck to a friend's house. 6/10/13 RP 27-29. Mr. Taylor left for home at approximately 4 a.m. Id.

Mr. Taylor's truck had faulty brakes; in fact, it was impossible to stop the truck unless the driver pulled the emergency (parking) brake. RP 38-40. Mr. Taylor had not received any citations for the condition of his vehicle, but he had collisions before when trying to stop. Id. Expert witnesses at trial testified that the truck had no brake fluid, and even when driving 15 miles per hour, the vehicle needed 25 feet of stopping-distance in order to come to a full stop. 6/6/13 RP 81.

While he was driving home at approximately 4:30 a.m., Mr. Taylor realized that his driving was impaired by drugs and alcohol he had consumed at his friend's home after work. 6/10/13 RP 27-29, 58-60. Mr. Taylor noticed H.H. walking down the side of 72nd Street in Tacoma. Id. at 41-42; 5/29/13 RP 13-15. At first, Mr. Taylor thought H.H. was a prostitute, but when she repeatedly ignored him and kept walking, he realized his error. 6/10/13 RP 46-47. Mr. Taylor still thought H.H. was pretty, and he followed her for some time, hoping to

get her phone number and to perhaps offer her a ride home, or to make a plan to see her another night. 6/10/13 RP 46-47, 56. He admitted he hoped the encounter would end in their "hooking up later," or in sex. Id. at 46-47, 56.

After following H.H. for several minutes in his truck, H.H. turned a corner and Mr. Taylor lost sight of her for a few moments. 6/10/13 RP 48-52. Suddenly, as Mr. Taylor's truck turned wide around the corner, she was immediately in front of his headlights and he hit his brakes – which do not function with only four to five feet stopping-distance. Id. at 49-51; 5/29/13 RP 21-23; 6/6/13 RP 81 (truck's brakes needed 25 feet stopping distance at 15 miles per hour).[1] Mr. Taylor immediately reversed. Id. at 51; 5/29/13 RP 29-31. However, H.H. had been struck by the truck, resulting in significant injuries, including several broken bones. 5/29/13 RP 21-23, 54.

Mr. Taylor approached H.H. as she lay on the ground and tried to help her to a sitting position, saying he was sorry, that it was an accident, and that he did not mean to hurt her. 5/29/13 RP 32; 6/10/13

[1] Mr. Taylor estimated he was driving 10 miles per hour, at most. 6/10/13 RP 51.

RP 53-54. She called him names and hit him, so he released her and she fell back on the ground. 5/29/13 RP 32; 6/10/13 RP 53-54.

Due to the early hour, there was no vehicular traffic, but when a pedestrian approached H.H., she asked him for help. 5/29/13 RP 35-38. Despite the fact that H.H. called Mr. Taylor a "stalker," Mr. Taylor, along with the pedestrian, located H.H.'s cell phone, watched as she put her battery back inside, and waited as the phone "booted up" and she called 911. 5/29/13 RP 40-41; 6/10/13 RP 58-60.[2] Mr. Taylor stayed at the scene while H.H. made the 911 call. He waited and listened while H.H. described him to the dispatcher, called him a stalker, and described his truck and his license plate number. 5/29/13 RP 46-50. He only left once help was on the way, due to his fear of being arrested for driving while under the influence. 6/10/13 RP 58-60.[3]

Several days later, Mr. Taylor was arrested and charged with assault in the first degree and attempted kidnapping in the second degree, both as committed with sexual motivation. CP 1-5. After his arrest, detectives interviewed Mr. Taylor and asked him what he thought H.H.

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[2] H.H.'s cell phone battery had fallen out with the impact of the collision. 5/29/13 RP 38.

[3] Mr. Taylor also testified that he left the scene because he knew he had an outstanding warrant for his arrest. 6/11/13 RP 45.

was likely thinking he was going to do to her that night. 6/3/13 RP 43-44. Mr. Taylor suggested, "kill, rape." Id.

Before trial, Mr. Taylor moved in limine to exclude reference to his statement to detectives, regarding what the alleged victim might have been thinking of his motives the night of the accident. CP 156-95; 9/20/12 RP 63-66. The trial court ruled the statement, "kill, rape" admissible. CP 239-43; 9/24/12 RP 3-8.

Following a jury trial, Mr. Taylor was convicted of the lesser included charge of assault in the second degree with sexual motivation, and attempted kidnapping in the second degree, also with sexual motivation. CP 473-82.

D. ARGUMENT

1. A TO-CONVICT MISSTATING THE *MENS REA* OF THE SECOND ALTERNATIVE MEANS OF ASSAULT IN THE SECOND DEGREE WAS EXACERBATED BY THE COURT'S FAILURE TO CLARIFY THE JURY'S CONFUSION, DENYING ANDRE TAYLOR A FAIR TRIAL AND CONSTITUTING A COMMENT ON THE EVIDENCE.

a. The court's instructions to the jury must completely and accurately explain the necessary legal requirements for a conviction. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime

beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77; U.S. Const. amends. 6 & 14.

The court's instructions to the jury are the critical vehicle for conveying the elements of a crime to the jury and they must be accurate. State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007). "[A] trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt." Id. Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

b. The to-convict instruction for the charge of assault in the second degree misstated the *mens rea* for the second alternative means. The "to convict" instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." Id. at 263.[4]

[4] Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009).

Here, Jury Instruction 16, which was proposed by the prosecution, stated:

> To convict the defendant of the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 17th day of February, 2012, the defendant:
>
> a. Intentionally assaulted H.H. and thereby recklessly inflicted substantial bodily harm; or
>
> b. Assaulted H.H. with a deadly weapon.

CP 450 (Instruction 16).

Although this instruction was taken from the Washington Pattern Jury Instructions (WPIC), the instructions incorrectly suggested that the first alternative mean – substantial bodily harm – requires the *mens rea* of intent, while the second alternative mean – assault with a deadly weapon – requires no *mens rea* whatsoever. See CP 449, 450; WPIC 35.10, WPIC 35.12.

The jury was evidently confused by the instructions, as indicated by the question they sent out during deliberations. CP 470; 6/13/13 RP 2-4. The jury's question read:

> In Instruction 16, does the fact that 1a states "intentionally assaulted" and 1b only states "assaulted" imply that satisfying 1b does not require "intent"?

CP 470 (Jury Question).

The question indicated that the jury did not understand that regardless of which alternative means the jury found, assault in the second degree requires the *mens rea* of intent.[5] Mr. Taylor thus argued that the trial court should answer the jury's question by referring the jury– not only to their instructions in general – but to Instruction 9, which defined assault to include intent. 6/13/13 RP 3. The court denied Mr. Taylor's request and only instructed the jury to "please refer to your jury instructions," over Mr. Taylor's objection. CP 471; 6/13/13 RP 3-4.

Because the assault in the second degree jury instruction failed to accurately instruct the jury as to the element of intent, it relieved the State of its burden of proving every essential element of the crime beyond a reasonable doubt. The court's clear implication to the jury that they should supply an element omitted from the to-convict instruction by referring to other jury instructions lowered the State's

[5] The Legislature sets forth the elements of an offense. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1994).

burden of proof and violated due process. See Smith, 131 Wn.2d at 262-63; Aumick, 126 Wn.2d at 429; see Winship, 397 U.S. at 358.

c. The court commented on the evidence by failing to properly instruct the jury, following the jury question. Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Since a comment on the evidence violates a fundamental constitutional prohibition, a criminal defendant may raise this issue on appeal even if not objected to below. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

An instruction improperly comments on the evidence if it resolves a disputed issue of fact that should have been left to the jury. State v. Becker, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). Article IV, section 16 prohibits a judge from "instructing a jury that matters of fact have been established as a matter of law." Levy, 156 Wn.2d at 721. "[A]ny remark that has the potential effect of suggesting that the

jury need not consider an element of an offense could qualify as judicial comment." Id.[6]

As both sides agreed, the central question in this case was whether Mr. Taylor intended to run down H.H. with his truck that night, or whether, while he was following her in a clumsy attempt to get her phone number, his faulty brakes gave out and he accidentally hit her. 6/12/13 RP 41-42, 93. Because the to-convict misstated the *mens rea* required for the two alternative means charged for assault in the second degree – substantial bodily harm or assault with a deadly weapon – the burden of proof was impermissibly lowered. Furthermore, the additional instruction from the trial court, directing the jury to simply refer to their instructions, had the "potential effect of suggesting," as the Supreme Court held in Levy, that the jury need not find the element of intent to convict of the second alternative means of assault in the second degree. 156 Wn.2d at 721.

d. These errors require reversal. Whenever a judge comments on the evidence, it is presumed prejudicial. Levy, 156 Wn.2d at 725. "A judicial comment is presumed prejudicial and is only

[6] The prosecutor compounded the error by confusing the degrees of assault and the mental states required, thereby diluting the State's burden of proof. 6/12/13 RP 93-

not prejudicial if the record affirmatively shows no prejudice could have resulted." Id. at 725 (emphasis added). Here, the prejudice to Mr. Taylor is shown by the jury question, which indicates the jury believed that to convict Mr. Taylor of the second alternative means (deadly weapon), intent need not be proved. CP 470. In addition, the jury completed a special verdict form, indicating they were unable to reach a unanimous verdict as to the alternative means. CP 476. Thus, the record here fails to affirmatively show that no prejudice could have resulted from the trial court's comment on the evidence, when the court's further instructions implied to the jury that assault with a deadly weapon required no *mens rea*. See Levy, 156 Wn.2d at 725.

2. MR. TAYLOR'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT.

a. Mr. Taylor has a right to due process. The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford,

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94; see infra, Section II.

130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The Fourteenth Amendment also "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial – has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

b. Prosecutors have special duties which limit their advocacy. A prosecutor's improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d

829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

> [The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a "substantial likelihood" exists that the comments affected the jury." Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

c. The prosecutor engaged in misconduct, diluting the burden of proof and denying Mr. Taylor his right to a fair trial. First, while conducting cross-examination of Mr. Taylor, the deputy prosecutor asked Mr. Taylor questions about his defense attorney's opening statement. 6/11/13 RP 22-23. After the trial court cleared the

courtroom, the defense objected, arguing that the jury has been instructed that opening statements are not, in fact, evidence, and should be disregarded. 6/11/13 RP 22-23.[7] After the court sustained the objection, the deputy prosecutor moved on with his cross-examination. The deputy prosecutor returned to his focus on Mr. Taylor's presence at trial, and where his attorney got her information. Id. at 24. "Mr. Taylor, you spoke to your attorney about whether or not you wanted to have sex --" Id. This objection, based upon attorney-client privilege, was sustained as well. Id.

Later during rebuttal argument, as discussed above, the deputy prosecutor misstated the law in closing argument. 6/12/13 RP 93-94.

The prosecutor's rebuttal argument compounded the confusing and misleading effect of the to-convict on assault in the second degree. On rebuttal, the prosecutor confused the degrees of assault and the mental states required, arguing as follows:

> [Defense counsel] suggested that I said Assault in the Second Degree did not require intent. That was her argument, that I, for some reason, said it didn't require intent. Well, I said in my opening statement and I said in my closing statement that that's the sole issue in this case. It applies to every assault. She said that her client

[7] This error is compounded by the fact that the jurors in this case had, atypically, received their trial notebooks prior to opening statements. 5/28/13 RP 32.

> clearly committed Assault 3. That's what she said because he negligently caused injury. Well, if he committed Assault 3, then he certainly committed Assault 2, because in order to commit Assault 2, the only difference is that he has to act recklessly instead of negligently ... if he intended to strike her with a vehicle, he is still guilty of Assault in the First Degree, and you don't reach the lesser included offenses.

6/12/13 RP 93-94 (emphasis added).

The prosecutor's rebuttal incorrectly argued that that there is no difference between the *mens rea* required for assault in the second degree and assault in the third degree. 6/12/13 RP 93-94 ("if he committed Assault 3, then he certainly committed Assault 2"). In addition, the prosecutor told the jury that if they believed Mr. Taylor intended to strike H.H. with his vehicle, they must to convict him of assault in the first degree. Id. ("if he intended to strike her with a vehicle, he is still guilty of Assault in the First Degree, and you don't reach the lesser included offenses").

The prosecutor's argument lowered its burden of proof, and the jury was obviously influenced by these arguments, as reflected by the jury question concerning intent. CP 470; 6/13/13 RP 2-4.

Due to the flagrant and ill-intentioned nature of the prosecutor's remarks in rebuttal, this particular issue may be raised for the first time

on appeal. RP 460-65; State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); RAP 2.5(a).

d. Reversal is required. The cumulative effect of various instances of prosecutorial misconduct may violate a defendant's right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). The deputy prosecutor's improper questions during cross-examination were objected to, and both objections were sustained. 6/11/13 RP 22-24. However, the deputy prosecutor attempted to malign the defense by implying that Mr. Taylor had changed his defense due to his presence during opening statements, or during the remainder of trial. By questioning Mr. Taylor about his confidential conversations with his lawyer, the prosecutor also tried to insinuate Mr. Taylor's intent ("[Y]ou spoke to your attorney about whether or not you wanted to have sex"). 6/11/13 RP 24.

Due to the remarks constituting misconduct in the closing argument and cross-examination, there is a substantial likelihood the cumulative effect affected the jury's verdict; therefore, this Court should reverse Mr. Taylor's convictions. Reed, 102 Wn.2d at 146-47; Fleming, 83 Wn. App. at 214.

3. THE TRIAL COURT ERRED BY ADMITTING MR. TAYLOR'S STATEMENTS TO DETECTIVES, WHICH WERE IRRELEVANT AND CREATED UNDUE PREJUDICE.

During Mr. Taylor's interrogation by detectives, he was asked what the alleged victim would have thought about his actions on the night of the incident. 6/3/13 RP 44. Detective Larsen specifically asked Mr. Taylor, "What do you think she thought you were going to do to her?" Id. at 44. Mr. Taylor responded, "Kill, rape."[8] Over defense objection, the court permitted the admission of this unduly prejudicial and irrelevant statement, despite the fact that it offered a speculative opinion on the alleged victim's opinion of the intent of the accused. CP 156-65; 9/20/12 RP 62-65; 9/24/12 RP 3-9.

a. Evidence at trial must be relevant to the crimes charged. Evidence is only relevant if it has "the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Here, the trial court admitted Mr. Taylor's statement concerning what he thought the alleged victim might have presumed he intended

that night – to "kill, rape." 6/3/13 RP 44. Although Mr. Taylor was never charged with either murder or rape, these words alone are emotionally charged, highly prejudicial, and likely to inflame the jury. Moreover, there was no relevance to the detective's question, nor to Mr. Taylor's answer. What is the importance of what Mr. Taylor believed the victim thought on the night of the incident, when it is the intent of the accused that is at issue? See, e.g., State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (areas inappropriate for opinion testimony include guilt of the defendant and the intent of the accused); ER 701.

b. The probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Even if the statement was slightly probative, the trial court abused its discretion in admitting it under ER 403. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. In a doubtful case, the scale should be tipped in favor of the defendant and toward exclusion. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

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[8] Mr. Taylor went on to say, "If I was in her shoes alone, I'd be scared." 6/3/13 RP 44.

Here, there was no relevance to the alleged victim's view of Mr. Taylor's intent, and even if there were, Mr. Taylor would not be qualified to offer it. See Montgomery, 163 Wn.2d at 591. Admission of the statement was also unduly prejudicial, because providing the jury with the words "rape" and "kill" – words not otherwise used in the context of the case -- undermined the presumption of innocence. Moreover, the jury was likely to interpret Mr. Taylor's statement as to H.H.'s perception as evidence of Mr. Taylor's actual intent—a connection not actually supported by the evidence.

c. The probative value of the of the statement was substantially outweighed by the danger of unfair prejudice, requiring reversal. For the reasons discussed above, the testimony regarding Mr. Taylor's "kill, rape" statement was irrelevant and unfairly prejudicial. Because the statement was more prejudicial than probative, it should have been excluded. ER 403; Smith, 106 Wn.2d at 776.[9] Because the trial court abused its discretion in failing to exclude Mr. Taylor's statement, reversal is required. See, e.g., State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) ("A discretionary decision 'is

based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard") (internal citations omitted).

4. CUMULATIVE ERROR CREATED AN ENDURING PREJUDICE, DENYING MR. TAYLOR THE FUNDMENTAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may find that the errors combined together denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel's errors in finding cumulative error); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) ("the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the

[9] As Mr. Taylor testified, he only "assumed" what H.H. might have been thinking he was intended that night. "If I was in her shoes, a woman late at night ... I would assume that you're not a good dude." 6/10/13 RP 64. The "not a good dude" prejudice is exactly that which ER 403 is meant to prevent.

outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

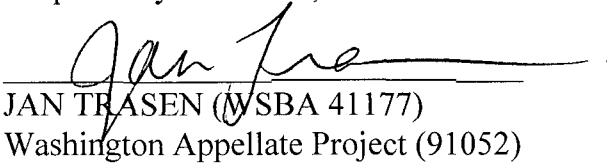
Each of the errors set forth above, standing alone, merits reversal. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Even if this Court does not find that any single error merits reversal, this Court should conclude that cumulative error rendered Mr. Taylor's trial fundamentally unfair.

E. CONCLUSION

For the foregoing reasons, Mr. Taylor respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 27th day of March, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. ANDRE TAYLOR, Appellant.	)))))))))	NO. 45198-1-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF MARCH, 2014.

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