72829-6

NO. 72829-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES DELONG,

Appellant.

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

The Honorable John Chun, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In a prosecution for rape and promoting prostitution based on a theory of inability to consent due to mental disability, the trial court erred in holding the rape shield statute warranted exclusion of evidence of the complainant's ongoing sexual relationship with her boyfriend.

2. For similar reasons, the court violated the appellant's right to present a defense by excluding such evidence.

3. The court erred in denying the appellant's motion for a new trial based on improper exclusion of the evidence.[1]

4. The prosecutor committed flagrant, prejudicial misconduct by appealing to the jury's passions and prejudices in closing argument.

5. Defense counsel provided constitutionally ineffective assistance by failing to object to the prosecutor's misconduct.

6. Cumulative error denied the appellant a fair trial.

Issues Pertaining to Assignment of Error

1. The State charged the appellant with one count of second degree rape based on a theory the mentally disabled complainant was

[1] DeLong filed a post-verdict, pre-sentencing motion for a new trial arguing the trial court improperly excluded the evidence. CP 71-76; Supp. CP ___ (sub no. 70, Motion for Arrest of Judgment and for New Trial). The trial court denied the motion on the same grounds it initially excluded the evidence. CP 77; 17RP 237. Argument as to this assignment of error is therefore subsumed within the substantive argument addressing the court's original ruling.

unable to consent to intercourse. The charge was based on conduct occurring between February 19, 2010 and February 19, 2014. The appellant sought to introduce evidence of the complaint's sexual relationship with her boyfriend, a relationship that was contemporaneous to the charging period. The appellant also sought to introduce evidence that a number of State's witnesses knew of and did not object to the relationship, despite opining at trial that the complainant suffered from a diminished mental capacity.

a. Where the evidence did not deal with "past sexual behavior" but rather contemporaneous sexual conduct, and where the evidence was not being used to attack the complainant's credibility, the use against which the rape shield statute was enacted, did the trial court err in excluding the evidence under that statute?

b. For similar reasons, did the court violate the appellant's state and federal constitutional rights to present a defense by excluding such evidence, which was relevant and indispensable to the appellant's defense?

3. In closing argument, the prosecutor repeatedly stated the complainant was no different from a child, told the jury he knew they wanted to protect her, argued the appellant took "gross and disgusting

advantage" of her, and repeatedly exhorted jurors "[w]hat are you going to do about it?" The defense did not object.

a. Did these and other comments constitute flagrant, prejudicial misconduct, improperly appealing to the jury's passions and prejudices rather than the evidence and the law?

b. Were the improper arguments so pervasive that no curative instruction could have remedied the resulting prejudice?

4. Did defense counsel violate the appellant's state and federal right to the effective assistance of counsel by failing to object to the prosecutor's misconduct?

5. Did the cumulative effects of the court's improper exclusion of evidence and flagrant, prejudicial prosecutorial misconduct deny appellant a fair trial?

B. STATEMENT OF THE CASE[2]

1. Charges, verdicts, and sentence

The State charged James DeLong with second degree rape based on a theory that complainant P.W., a 51-year-old woman with some form

[2] This brief refers to the verbatim reports as follows: 1RP – 10/22/14; 2RP – 10/23/14; 3RP – 10/27/14; 4RP – 10/28/14; 5RP – 10/29/14; 6RP – 10/30/14; 7RP – 11/3/14; 8RP – 11/4/14; 9RP – 11/5/14; 10RP – 11/6/14; 11RP – 11/10/14; 12RP – 11/12/14 (morning session); 13RP – 11/12/14 (afternoon session); 14RP – 11/13/14; 15RP – 11/17/14; 16RP – 11/18/14; and 17RP – 12/9/14.

of mental disability, was unable to consent to sex with him (Count 1). Based on a related theory, DeLong was charged with first degree promoting prostitution as to P.W. (Count 2).[3] The State also charged DeLong with second degree promoting prostitution as to another woman, P.B. (Count 3), and with second degree theft "by color or aid of deception" (Count 4) based on a rental agreement with P.W. CP 1-7, 9-10.

A jury convicted DeLong as charged. CP 67-70. The court sentenced DeLong to a high end indeterminate sentence of 136 months as to Count 1[4] and to concurrent high-end standard range sentences on the other counts. CP 82.

DeLong timely appeals. CP 90-102.

2. Trial testimony

Witness Christina Stark met DeLong when she worked for DeLong's friend. 11RP 109-10. Stark testified she contacted DeLong after she lost that job and moved to Federal Way. 11RP 110; 12RP 32.

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[3] A person commits first degree promoting prostitution "[b]y compelling a person with a mental incapacity or developmental disability that renders the person incapable of consent to engage in prostitution or profits from prostitution that results from such compulsion." RCW 9A.88.070(1)(b).

[4] RCW 9.94A.507(3) (providing for maximum and minimum terms for offenses including second degree rape, and setting maximum as statutory maximum for offense).

Stark moved into the home DeLong was renting and helped him maintain the grounds and deal with other tenants in exchange for room and board. 11RP 111; 12RP 14, 34.

Stark met P.W. through DeLong. 11RP 111. DeLong, P.W., and Stark lived together at the Federal Way home for four or five months in 2013 and early 2014. 11RP 111-12; 12RP 2-3. Stark observed that P.W. and DeLong spent a lot of time together. 12RP 3, 10. DeLong seemed to provide assistance to P.W., and Stark believed their relationship was similar to that of a father and a daughter. 12RP 10.

Stark soon began spending time with P.W. 12RP 4. P.W. enjoyed watching "Scooby Doo," an animated television program, and children's movies. 12RP 5. Stark did P.W.'s hair and nails. She attempted to teach P.W. to read and tell time, although she was for the most part unsuccessful. 12RP 4-5. Eventually P.W. began calling Stark "mom." 12RP 5. But P.W. did not always stay at the Federal Way house. 12RP 10-11. Occasionally, P.W. stayed with her boyfriend "Tim." 12RP 11.

Stark met P.B. when DeLong brought her to the Federal Way house at some point before Christmas of 2013. 12RP 12. According to Stark, P.B. was a heroin addict. 12RP 13. Stark soon grew frustrated with P.B.'s presence at the home. 12RP 13.

In early 2014, Stark noticed P.W. was spending less time at the Federal Way house. 12RP 16. After speaking with P.W., Stark confronted DeLong, accusing him of having sex with P.W. 12RP 16. DeLong said his relationship with P.W. was none of Stark's business. 12RP 167. The two fought on and off for a few days. DeLong eventually apologized to Stark for the altercation.[5] 12RP 18.

Meanwhile, Stark decided to take P.W. to the police. 11RP 85; 12RP 18, 21-22, 42. Stark and P.W. spoke to police together at first. 8RP 78-79. They were eventually separated to give statements. 12RP 22, 42.

Detectives Richard Kim and Adrienne Purcella interviewed Stark and P.W. 8RP 54; 9RP 27-28. They spoke with P.W. first. 8RP 54. She had a speech impediment and was difficult to understand. 8RP 55. Kim has some training in child forensic interviewing as well as experience working with adults with varying intellectual capabilities. 8RP 56. Based on P.W.'s mannerisms, behavior, and responses, Kim did not believe she was "functioning as a normal adult." 8RP 56, 58. Kim also testified he was "concerned" that P.W. had "diminished mental capacity." 8RP 74.

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[5] Stark acknowledged she had a history of disagreements with employers and roommates, which led her to frequently sever ties with them. 12RP 31-33. After DeLong moved out, however, the owner of the Federal Way property retained Stark in a similar capacity. She continued to work for him at the time of trial. 12RP 43; 11RP 82, 100-01, 103.

Kim acknowledged on cross-examination that he had no medical or psychological training. 8RP 69.

After interviewing the women, the two detectives and a number of other officers went to the Federal Way house to meet DeLong. 8RP 81. DeLong invited everyone in and agreed to speak with the detectives. 8RP 62-63. He told Detective Purcella that Stark worked as his assistant and helped around the house. He was, however, unhappy with her work performance, which led the two to argue. He told police P.W. was a friend and he helped care for her. 9RP 33-34.

DeLong agreed to give a recorded statement at the police station. 8R 62-63; 9RP 33. DeLong submitted to a lengthy interview, which was later admitted at trial. DeLong initially denied sexual contact with P.W., but ultimately admitted to engaging in sexual activity with her, including intercourse. Ex. 13 (redacted audio recording admitted at trial); Ex. 14 (redacted transcript used as listening aid but not admitted) at 34-37;[6] 9RP 87 (exhibit played with limiting instruction regarding editing).

DeLong told the detectives P.W. was an enthusiastic participant in their sexual activity. Ex. 14 at 34-38. Although P.W. had some childlike characteristics, she was mature about sex and able to express her preferences and say no. Ex. 14 at 17, 22. While P.W. could not tell time

[6] This brief cites to Exhibit 14 for the convenience of the court.

or lie convincingly, she spoke in complete sentences and could relate stories. Ex. 14 at 52, 61-62. DeLong believed the question of her sexuality was an even more complex question, and best addressed by an expert. Ex. 14 at 19, 50.

DeLong acknowledged he took P.W. and, on one occasion, P.B., to the home of "Marvin,"[7] an acquaintance DeLong met while driving his taxi. Marvin wanted female companionship and asked DeLong if he knew any "girls." Ex. 14 at 48. Marvin paid DeLong $100 for bringing the women to apartment. That amount was about the same as the taxi fare when DeLong used to drive Marvin from Gig Harbor to the Emerald Queen casino.[8] Ex. 14 at 41-46.

DeLong was aware P.B. had sex with Marvin during her visit to Marvin's. Ex. 14 at 42. As for P.W., he initially believed they just watched football together. DeLong later learned P.W. was having sex with Marvin after P.W. complained he had hurt her by lying on top of her.[9] Ex. 14 at 40-42, 46, 49. After that, DeLong never took P.W. to Marvin's again. Ex. 14 at 48. At the end of the interview, DeLong

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[7] Marvin Douglass, a disabled retiree, testified at trial. His testimony is set forth below.

[8] A defense investigator testified taxi fare from Federal Way to Gig Harbor ran $40 or $50 each way. 14RP 44.

[9] P.W. had injured her ribs in a go-cart accident. Ex. 14 at 49.

consented to a search of his home. 8RP 70. DeLong was arrested following the search. 8RP 65.

Like Detective Kim, Detective Purcella had difficulty communicating with P.W. 9RP 31. Purcella testified it was evident that P.W. had "diminished mental capacity." 9RP 82. Like Kim, however, Purcella acknowledged she had no medical training, nor was she qualified to make a mental health diagnosis. 9RP 75-76. Neither Kim nor Purcella knew whether P.W. had physical condition that made speech difficult. 8RP 68; 9RP 76.

Purcella interviewed P.W. a week after the initial stationhouse meeting and was more successful at communicating with her the second time. Nonetheless, P.W.'s speech was still relatively difficult to understand. 9RP 53-55. P.W. did not express herself in complex sentences. 9RP 54.

Purcella considered P.W. childlike. 9RP 84. In particular, Purcella noted that P.W. called Stark "mom" and showed extreme enthusiasm for Scooby Doo. 9RP 65-66. But P.W. also said she had a boyfriend, Tim Blakeny,[10] whom she lived with part-time. 9RP 77. Purcella drove past the residence where Blakeny was said to live and

[10] The spelling of the man's name various throughout the record.

performed a related records search. But Purcella never contacted Blakeny. 9RP 50-51.

Purcella arranged for P.W. to submit to an interview with child forensic interviewer Carolyn Webster. 9RP 59, 75. Webster had experience interviewing children, as well as developmentally delayed teens and adults, regarding abuse allegations. 12RP 65-67.

Webster also found P.W. difficult to understand. 12RP 79, 92. P.W. was also clearly embarrassed to discuss sexual matters. 12RP 79. After interviewing P.W., Webster "had concerns" regarding P.W.'s apparent developmental delays, which affected her "knowledge about some really basic things." 12RP 80, 91. Like other witnesses, Webster noted that P.W. appeared to have childlike interests and pursuits. 12RP 80.

Nonetheless, Webster did not have a medical or mental health background and was not qualified to diagnose a related condition. 12RP 81. Like the detectives, she was unaware whether P.W. suffered from any physical condition affecting her speech. 12RP 83.

Gig Harbor resident Marvin Douglass testified he had known DeLong about eight years. 11RP 10. He met DeLong when he flagged down DeLong's taxi outside a casino. 11RP 14. Douglass contacted DeLong as needed for rides and considered DeLong a friend. 11RP 17.

Douglass was partially blind, could not longer work, and lived alone. 11RP 7, 13-14.

Douglass first met P.W. when she was riding in the front seat of DeLong's taxi. 11RP 18-19. P.W. had a speech impediment that made her difficult to understand, although his ability to understand her speech improved over time. 11RP 20.

At one point, DeLong asked Douglass if he wanted "company." 11RP 21, 51, 68. DeLong knew Douglass had limited mobility and was largely confined to his apartment complex. 11RP 22. Douglass would, thereafter, give DeLong $100-120 dollars "to cover expenses," and DeLong would bring brought one of three different women, including P.W. and P.B., to Douglass's home. 11RP 24-25.

P.W. was the most frequent visitor. 11RP 34, 63. Douglass considered P.W. a friend and watched sports with her during the visits. 11RP 29, 61-62. They usually had sex. 11RP 32-33. Douglass believed P.W. wanted to have sex with him. 11RP 62.

P.W. testified she was born in Pine Ridge, South Dakota, in 1963. 13RP 148-49. Her mother drank alcohol when she was pregnant with P.W. 13RP 185. As a child, P.W. lived with her grandmother because her mother died when she was a baby. 13RP 149-50. She attended a special education school through the ninth grade. 13RP 149-50, 184.

P.W. moved to Arizona after her grandmother died. 13RP 185. P.W. married and had three children, but her husband assaulted her, breaking her jaw, which continued to make it difficult for P.W. to open her mouth. 13RP 187-88; 14RP 6. P.W.'s husband was incarcerated for assaulting her. 13RP 187.

P.W. had worked in the past at an airport and at a Laundromat. She began receiving disability benefits after injuring her ankle. 13RP 190. P.W. eventually rode to Washington with a truck driver and remained in the state. 13RP 189.

P.W. was homeless until she moved in with DeLong at his residence in Fife.[11] 13RP 200. DeLong helped her get glasses and dentures and assisted her when she got in trouble with the law. 14RP 8. P.W. had also resided with Tim Blakeny off and on for about five years. 13RP 151. She was living with Blakeny at the time of trial. 13RP 190.

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[11] DeLong was charged with second degree theft "by color or aid of deception" based on a theory that he unfairly charged P.W. $400 a month to live at the Fife residence, obtaining the rent money through P.W.'s Social Security "payee," despite the fact that (1) DeLong's lease with the property owner did not allow residential use or subletting of the property and (2) DeLong was behind on *his* rent payments to the owner. 9RP 93-94, 98, 100, 102; 10RP 55-56, 74-77. The State Department of Transportation eventually bought the Fife property for road construction and compensated both DeLong and P.W. for their relocation expenses. 10RP 8-9, 11, 15, 24-25.

P.W. had a "payee" for her disability benefits.[12] P.W. spent this money on "beer, booze, and gambling," as well as cigarettes and marijuana. 13RP 192-93. P.W. also rode her bicycle, fished, watched Scooby Doo, and visited with friends. 13RP 152-54, 194.

P.W. testified "Tim" was her boyfriend. But she also referred to Scooby Doo as her boyfriend. 14RP 25. When asked why she considered Scooby Doo to be her boyfriend, P.W. responded, "He's cuddly."[13] 14RP 25.

P.W. knew what "sex" was. When asked if there was ever a time she wanted to have sex, P.W. answered, "Not all the time." 13RP 169. P.W. said she had sex with DeLong "once in a while." 13RP 179.

DeLong also took her to Douglass's residence "to get money." 14RP 34. She did not enjoy sex with Douglass. 13RP 182. The last time she went to Douglass's apartment, she was sore from a go-cart injury, and he stopped when she asked. 14RP 18.

Asked if she liked sex with DeLong, P.W. answered, "not every day." 14RP 13. She was "tired of it." 14RP 14. Also, having sex in

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[12] The appointed payee, Tammy Roberts, handled payment of P.W.'s rent. 10RP 42-43, 45, 69. Otherwise, Roberts paid out P.W.'s benefits as needed. P.W.'s requests for money over the years were "fairly reasonable." 10RP 70-71.

[13] The State highlighted this testimony in its closing argument. 15RP 8.

DeLong's room at the Federal Way house was embarrassing because the room did not have a door that closed. 14RP 14-15.

P.W. knew a woman could get pregnant from having sex, and in particular, from "sperms." 13RP 168. P.W. testified she could no longer get pregnant. 14RP 12-13. She was able to provide an example of a sexually transmitted disease: One could get AIDS from sex and could die from the disease. 13RP 169.

P.W. testified it was Stark's idea to go to the police about her relationship with DeLong. P.W. knew Stark disliked DeLong; she also knew DeLong was trying to kick Stark out of the house. 14RP 20. Stark told P.W. she wanted P.W. to "throw [DeLong] in jail." 14RP 36. P.W. did not like how DeLong had treated Stark, whom she called "mom." 14RP 20.

The State asked P.W. what it meant to "freely make a choice." P.W. responded, "It's kind of hard." 14RP 26. Although other witnesses testified P.W. seemed eager to please others, P.W. denied that she would go along with what others said just to make them happy. 14RP 38-39.[14]

[14] The specific facts as to each of the issues raised are set forth in the argument section below.

C. ARGUMENT

1. THE COURT IMPROPERLY EXCLUDED EVIDENCE OF THE COMPLAINANT'S CONTEMPORANEOUS SEXUAL RELATIONSHIP WITH HER BOYFRIEND UNDER THE RAPE SHIELD STATUTE AND VIOLATED THE APPELLANT'S RIGHT TO PRESENT A DEFENSE.

DeLong sought to introduce evidence that P.W. had a sexual relationship with a boyfriend during the charging period and that, moreover, some of same individuals who testified about their observations of P.W.'s mental capacity took no steps to impede the relationship. Such evidence does not fall under plain language of the rape shield statute. The evidence was, moreover, critical to DeLong's defense and, and its exclusion violated his state and federal rights to present a defense. The State cannot demonstrate the exclusion of the evidence was harmless beyond a reasonable doubt. As a result, this Court should reverse the second degree rape and first degree promoting prostitution counts.

a. Introduction and related facts

"'Individuals [with disabilities] have the same needs for intimate relationships and sexual expression as everyone else.'" Michael L. Perlin & Alison J. Lynch, "All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex, 89 Wash. L. Rev. 257, 258 (2014) (quoting Shirli Werner, Individuals with Intellectual Disabilities: A

Review of the Literature on Decision-Making Since the Convention on the Rights of Persons with Disabilities (CRPD), 34 Pub. Health Rev. 1, 16 (2012)). The presence of a mental disorder, in itself, does not mean that the individual lacks this capacity. Perlin & Lynch, 89 Wash. L. Rev. at 263 (citing Mental Welfare Commission of Scotland, Consenting Adults? Guidance for Professionals and Careers When Considering Rights and Risks in Sexual Relationships Involving People with a Mental Disorder 4 (2007).

Washington statutes and case law address under which circumstances a disabled individual may, or may not, consent to sex. In particular, RCW 9A.44.050(1)(b) provides that an accused person is guilty of second degree rape when "under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person [when that person] is incapable of consent by reason of being physically helpless or mentally incapacitated." See also CP 49 (to-convict instruction for second degree rape, instructing jurors to convict if, among other elements, P.W. was "incapable of consent by reason of being mentally incapacitated"). Similarly, a person commits first degree promoting prostitution "[b]y compelling a person with a mental incapacity or developmental disability that renders the person incapable of consent to

engage in prostitution or profits from prostitution that results from such compulsion." RCW 9A.88.070(1)(b).

"Mental incapacity" is defined as: "[a] condition . . . which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4); see also CP 51 (Instruction 10). Unlike some other jurisdictions, Washington courts do not require expert testimony to establish incapacity. State v. Summers, 70 Wn. App. 424, 428, 853 P.2d 953 (1993) ("expert testimony as to . . . mental incapacity may be probative, and might be required in some factual situations, [but] there is no basis for requiring the State to establish mental incapacity by expert testimony in every case."); cf. Perlin & Lynch, 89 Wash. L. Rev. at 294 (discussing concerns raised where courts do not require expert testimony to show inability to consent).

Before trial, DeLong moved to introduce evidence that P.W. was involved in a sexual relationship with her longtime boyfriend, Tim Blakeny. DeLong argued P.W.'s sexual relationship with another, unprosecuted, individual was relevant to P.W.'s general ability to consent to intercourse because it suggested she was more capable of understanding the nature and consequences of the act of sexual intercourse than was the

State's theory. CP 16-17; 2RP 96-103; 3RP 34-43; 4RP 2-14. In particular, DeLong argued, it was fallacious to assume that P.W.'s childlike interests necessarily reflected a lack of understanding of sexual matters or a lack of interest in sex. 2RP 100. DeLong also pointed out that various State's witnesses, including police officers, appeared not to object to the relationship, which would undermine those witnesses' opinions as to P.W.'s mental capacity. 2RP 97; 3RP 37; 4RP 9. Counsel argued such evidence was also critical to DeLong's defense and therefore admissible under State v. Hudlow.[15]

Attempting to comply with the RCW 9A.44.020, the rape shield statute,[16] defense counsel filed an affidavit stating that "defense represents

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[15] State v. Hudlow 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

[16] Under Washington's "rape shield statute,"

> (2) *Evidence of the victim's past sexual behavior* including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards *is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section* . . . .
>
> (3) In any prosecution for the crime of rape . . . *evidence of the victim's past sexual behavior* including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards *is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent*, except where

that [P.W.] has had and continues to engage in sexual activities with her 'boyfriend' Tim Blakeny." CP 16-17. Consistent with 9A.44.020(3)(c), DeLong requested a hearing on the matter, including an opportunity to ask P.W. about their relationship. 2RP 99-100; 3RP 37-38, 43; 4RP 9. The

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> prohibited in the underlying criminal offense, only pursuant to the following procedure:
>
> (a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.
>
> (b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
>
> (c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.
>
> (d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

RCW 9A.44.020 (emphasis added).

State strenuously objected to a hearing, but never disputed the relationship or its nature. 2RP 101.

Without citing to authority, the court observed that counsel's affidavit was "technically" inadequate and refused to order a hearing. 3RP 41; 4RP 15. But the court considered the substance of the issue and excluded the evidence as irrelevant to the question of whether P.W. was capable of consent. 4RP 14-17. The court stated that under Summers, 70 Wn. App. at 428, such evidence was irrelevant because, if P.W. did not have the mental capacity to consent to sex, her sexual experience was irrelevant. 4RP 15. The court also ordered that DeLong's statement to police be redacted to omit information about the specifics of P.W.'s relationship with Tim. 2RP 102

DeLong now challenges the court's ruling on appeal on a variety of grounds.

b. The plain language of the rape shield statute does not bar introduction of the evidence, and the exclusion of such evidence denied DeLong his right to present a defense.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A defendant's right to an opportunity to be

heard, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. Id. "The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

These rights are, however, not absolute. Evidence "must be of at least minimal relevance." Darden, 145 Wn.2d at 622. "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id. at 622. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." Id. "[T]he integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. Hudlow, 99 Wn.2d at 14. Thus, for evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Id. at 16.

This Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion. Diaz v. State, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). Discretion is abused when it is exercised on untenable

grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Untenable reasons include errors of law. Noble v. Safe Harbor Family Preservation Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). This Court reviews claims of the denial of Sixth Amendment rights, including the right to present a defense, de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

In Hudlow, the Court drew a distinction between evidence of the general promiscuity of a rape victim and evidence that, if excluded, would deprive an accused of the ability to present his or her version of the incident. Id. at 17-18. In that case, the Court stated that evidence of past general promiscuity could be excluded, but evidence of high probative value could not be restricted regardless of how compelling the State's interest was. Id. at 16-18.

In Jones, the Supreme Court again addressed the intersection of the rape shield statute and the right to present a defense. 168 Wn.2d 713. The Court found the evidence offered was not precluded by the rape shield statute and, in any event, the right to present a defense prevailed.

Jones was prepared to testify that complainant K.D. consented to sex during a "sex party" at which drugs were consumed. The trial court refused to let Jones present this testimony or cross-examine K.D. about the defense theory. Id. at 721. The Supreme Court first noted that, "[t]his is

not marginally relevant evidence that a court should balance against the State's interest in excluding the evidence. Instead, it is evidence of extremely high probative value; it is Jones's entire defense." Id.

Because no State interest could be compelling enough to preclude the introduction of evidence of high probative value, the Sixth Amendment was violated when the court excluded such evidence. Id.

The Court also noted that, in any event, the language of RCW 9A.44.020 did not to the proffered testimony:

> The language of the [rape shield] statute states unequivocally that evidence of the victim's "past sexual behavior" is "inadmissible to prove the victim's consent." RCW 9A.44.020(2). Any reading of the statute that conflates "past" with "present" sexual conduct is tortured. The statute was not designed to prevent defendants from testifying as to their version of events but was instead created to erase the misogynistic and antiquated notion that a woman's past sexual behavior somehow affected her credibility. Hudlow, 99 Wn.2d at 8-9.

Jones, 168 Wn.2d at 723-24.

Putting aside for a moment the right to present a defense, the plain language of the rape shield statute does not bar introduction of the proffered evidence in this case. As in Jones, the proffered evidence dealt with P.W.'s current, not past, sexual behavior. DeLong sought to introduce evidence of sexual behavior occurring contemporaneous to the

four-year charging period. CP 9 (Count 1 charging period of February 19, 2010 through February 19, 2014).

Moreover, the evidence of sexual evidence was not offered to attack P.W.'s credibility via a showing of promiscuity, the primary "wrong" the rape shield statute was enacted to remedy. The purpose of the rape shield statute is to encourage rape complainants to prosecute their rapists and to eliminate prejudicial evidence of prior sexual conduct which has little, if any, relevance to a complainant's credibility. State v. Carver, 37 Wn. App. 122, 124, 678 P.2d 842 (1984) (citing Hudlow, 99 Wn.2d 1; State v. Cosden, 18 Wn. App. 213, 218, 568 P.2d 802 (1977)). The rape shield statute was not, however, intended to establish a blanket exclusion of sex-related evidence that is relevant to other issues at trial. Carver, 37 Wn. App. at 124 (citing State v. Simmons, 59 Wn.2d 381, 368 P.2d 378 (1962); Cosden, 18 Wn. App. at 218). As the Carver Court noted, "[m]erely because the evidence pertains to a sexual experience does not mean we must strain to fit it into the special confines of the rape shield statute. Rather, we must apply general evidentiary principles of relevance, probative value and prejudice." 37 Wn. App. at 124 (allowing introduction of evidence of prior sexual abuse of child victims to rebut the inference they would not know about such sexual acts unless they had experienced them with defendant).

Here, not only was the sexual activity contemporaneous to the charging period, it was not offered to attack P.W.'s credibility. Although the evidence was, theoretically, offered on the matter of consent, it was not offered to show consent in the traditional sense of the word. It was offered to prove *capacity* to consent, a different question from the fact of consent in a particular instance. See Anderson v. Morrow, 371 F.3d 1027, 1030 (9th Cir. 2004) (approving of evidence of disabled complainant's past sexual activity as relevant to *ability* to consent). "Consent" in this instance has nothing to do with whether a woman's purported checkered history indicates she is more likely to have consented to sex, and therefore, to be lying about the rape. Thus, the court erred in holding the rape shield statute applied and in excluding the proffered evidence under its lens.

In any event, the evidence was crucial to the defense and therefore admissible based on DeLong's right to present a defense under Jones, Hudlow, and other cases. The defense sought to introduce the evidence for a relevant purpose: To show P.W. had sufficient understanding of the nature and consequences of sexual intercourse to consent to the sexual activity with DeLong and, for the purposes of the promoting prostitution charge, with another. See CP 53 (Instruction 12, to-convict instruction for first degree promoting prostitution). Although, on the stand, P.W. demonstrated a fairly extensive knowledge of the mechanics of sex,

P.W.'s engagement in sex with another partner—an activity apparently condoned by the authorities and those who knew her—could have better demonstrated P.W. was capable of implementing her own sexual preferences and choices, and therefore capable of understanding the nature and consequences of sex. See State v. Ortega-Martinez, 124 Wn.2d 702, 705, 881 P.2d 231 (1994) (complainant may have "knowledge of the basic mechanics of sexual intercourse, but no real understanding of either the encompassing nature of sexual intercourse or the consequences which may follow"); see also State v. Frost, 141 N.H. 493, 502, 686 A.2d 1172 (1996) ("The issue the jury must decide is the complainant's mental capacity to choose whether to consent; the defendant is correct that evidence that she had exercised that mental capacity on prior occasions would be highly probative.").

The defense also sought to introduce the evidence to show that various individuals—some of the very same individuals who were permitted to testify about their observations of P.W. as childlike and otherwise simple—knew of and did not object to the relationship. 2RP 97.[17] P.W. was not evaluated by an expert, and no expert opined to the specifics of her disability. See Summers, 70 Wn. App. at 431 (State is not

[17] The evidence adduced at trial suggested that, for example, Purcella and Stark knew of the relationship but took no steps to stop it. 9RP 77-78; 12RP 39.

required in every case to establish mental incapacity by expert testimony in every case). Thus, the testimony of the lay witnesses, including police officers, who knew P.W. was critical to the State's case and the jury's evaluation of P.W.'s mental capacity. See 3RP 66-70; 4RP 22-25 (State's pretrial arguments that such witnesses should be permitted to offer their opinions as to P.W.'s mental capacity, comparing such lay opinions as similar to an opinion on intoxication). DeLong had a right to confront witnesses including Detective Purcella and Stark with the fact that they did not appear to take issue with P.W.'s relationship with, or ability to consent to sex with, another person who was not DeLong or Mr. Douglass.

Once an accused demonstrates evidence is relevant, a court may exclude such evidence only upon a strong showing of prejudice and confusion of issues. Darden, 145 Wn.2d at 622. "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id. Here, as in Carver, the proffered evidence did not fall into the category of evidence the rape shield statute sought to protect against; thus, "general evidentiary principles of relevance, probative value and prejudice" apply. Carver, 37 Wn. App. at 124. Under any standard, the evidence was more probative than prejudicial: Simply put, evidence of P.W.'s long-term sexual relationship was more likely to shed light on P.W.'s understanding of

intercourse, the central issue at trial, than to cause jurors to question P.W.'s credibility based on her promiscuity.

The State may argue, as it did below, that Summers provides for the blanket exclusion of such evidence. This Court should find any such argument unavailing.

In Summers, this Court *rejected* an argument that the plain language of the rape shield statute barred testimony of a developmentally disabled complainant's past sexual activity. 70 Wn. App. at 433.

> The State contends that, by its plain terms, RCW 9A.44.bars the admission of any such testimony on the facts here presented. While the language of the statute might arguably support such a construction, the court in [Cosden, 18 Wn. App. 213] refused to so hold under RCW 9.79.150, a predecessor to RCW 9A.44.020[. . . .]

Summers, 70 Wn. App. at 433-34. The Summers Court found, however, that the proffered evidence of past sexual activity was irrelevant because complainant L.L.'s testimony clearly demonstrated she had a very limited understanding of the consequences of sex. Id at 434. "Evidence of past sexual encounters does not necessarily show understanding of the nature and, even more clearly, the consequences of sexual intercourse, such as pregnancy or disease. The [trial] court's statement that the evidence was not probative is, of course, a different way of saying that the evidence was not relevant." Id.

This Court went on to balance the probative value of the evidence against its prejudicial effect based on the parameters set forth in the rape shield statute. Id. at 434-35 ("Even if the evidence had some minimal relevance, it would clearly not satisfy the other requirements of RCW 9A.44.020(3)."). This is somewhat puzzling, however, in light of this Court's earlier statement that the evidence did not fall under the plain language of rape shield statute.

In any event, this Court should find Summers distinguishable on its facts. The Summers complainant, who resided in a "congregate care facility" for the mentally ill,[18]

> had no knowledge of sexually transmitted diseases and her only knowledge of AIDS was that "[w]hen a man puts a wiener in you and you get it from them." She knew that "[w]hen a man puts a wiener in you and the sperm comes inside of you and you have the baby", and thought that a baby "[c]omes out of like your stomach or something like that." She defined intercourse as "[w]hen a man holds you down and puts a wiener in you, and if they force it in you, if you want it or don't want it" and defined sex as "[w]hen a man does something or something." She thought that intercourse occurred only between married persons[.]

Summers, 70 Wn. App. at 431. L.L. also referred to a penis as a "tail" and could not distinguish between a penis and a tail. Id. at 432.

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[18] 70 Wn. App. at 426.

Here, in contrast, although the State eventually argued P.W. was not capable of understanding the nuanced consequences of sex,[19] the evidence shows she was far more sophisticated than L.L. P.W. offered an example of a sexually transmitted disease and its consequences, testified she had been married and given birth to three children, knew she could no longer get pregnant, and provided an example of when she had said no to sex. 13RP 168-69, 187-88; 14RP 12-13. Although P.W. suffered from an intellectual disability, commentators and experts recognize the sexuality of the mentally disabled is a complex and, at times, thorny inquiry. Perlin & Lyncy, 89 Wash. L. Rev. at 299-300. DeLong should have been permitted to present the jury with more, not less, information, about P.W.'s sexuality and sexual choices.

In summary, the rape shield statute did not apply because the evidence dealt not with past sexual conduct but with sexual conduct contemporaneous to the charged act, Jones, 168 Wn.2d at 723-24, and because the evidence was not of the type the statute was enacted to prohibit. For nearly identical reasons reasons, even if the statute did apply, the State's showing of its interest in excluding the evidence was insufficient to outweigh DeLong's constitutional right to present a defense.

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[19] 15RP 20-21.

Evidence of the full extent of P.W.'s relationship with her boyfriend Blakeny was crucial to rebut the State's theory of the case, which sought to present P.W. as a child, one who was only interested in childlike pursuits and who described sex as "yuck." 13RP 168. The State's tactics were not surprising. As has been observed, "We want to close our eyes to the reality that persons with mental disabilities are sexual beings." Perlin & Lynch, 89 Wash. L. Rev. at 300. DeLong, in contrast, needed to demonstrate that P.W. was a human being with more complex needs than those of a prepubescent child. Because such evidence was crucial to his defense, the court violated DeLong's constitutional rights in excluding the evidence.

c. The State cannot show exclusion of the evidence was harmless beyond a reasonable doubt.

Error of constitutional magnitude can be harmless if the State proves it is harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). An error is harmless only if this Court cannot reasonably doubt that the jury would have arrived at the same verdict in its absence. Jones, 168 Wn.2d at 724 (quoting State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)).

The State cannot demonstrate this error was harmless beyond a reasonable doubt. Although jury heard P.W. had a "boyfriend," a boyfriend whom P.W. also referred to as a "playmate,"[20] the jury had no way of knowing that P.W. and the boyfriend had a sexual relationship. The information was therefore necessary for a full and fair assessment of P.W.'s ability to grasp the nature and consequences of sex, and the exclusion of the evidence prejudiced DeLong, affecting the jury's verdicts on the rape and first degree promoting prostitution counts.

2. THE STATE COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT IN CLOSING ARGUMENT.

The prosecutor repeatedly committed misconduct in closing argument, appealing to the sympathies and prejudices of jurors rather than focusing on the evidence. The misconduct affected the verdicts on all counts involving P.W., including theft. This Court should therefore reverse DeLong's convictions as to counts 1 through 3.

"A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899))). At the same time, a prosecutor

[20] 13RP 151.

"functions as the representative of the people in a quasijudicial capacity in a search for justice." Id. A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant's right to a fair trial. Rather, such convictions undermine the integrity of the criminal justice system as a whole. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). When a prosecutor commits misconduct, he may deny the accused a fair trial. Id. at 518; U.S. Const. amend. 14; Const. art. 1, § 3.

A prosecutor's exhortations to "send a message," or equivalent statements, are improper in part because they urge the jury to resolve the case on grounds other than the facts of the case and the applicable law. State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), aff'd, 120 Wn.2d 925 (1993); see State v. Powell, 62 Wn. App. 914, 918, 816 P.2d 86 (1991) (prosecutor's closing remarks improper because they, in effect, told the jury that a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby "declaring open season on children"), review denied, 118 Wn.2d 1013 (1992); State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (improper to argue that the jury send a message to society about the general problem of child sexual abuse: "[D]o not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe

them and [e]nforce the law on their behalf."), review denied, 114 Wn.2d 1011 (1990); see also State v. Neal, 361 N.J. Super. 522, 537-38, 826 A.2d 723 (2003) (prosecutor's repeated exhortations to the jury to hold the defendant accountable constituted improper "send a message to the community" and "call to arms" comments that diverted jurors' attention from the facts and promoted an improper sense of partnership between the jury and the prosecutor).

Misconduct also occurs when a prosecutor repeatedly urges jurors to convict a criminal in order to protect community values, preserve civil order, or deter future criminal activity. State v. Ramos, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011) (quoting United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991)).

Where defense counsel does not object, prosecutorial misconduct is reversible error when the misconduct is so flagrant and ill-intentioned as to be incurable by corrective instruction. State v. Walker, 164 Wn. App. 724, 730, 736, 265 P.3d 191, as amended (Nov. 18, 2011). Even if an instruction might have cured an isolated misstatement, the cumulative effect of repeated prejudicial misconduct may require reversal. Id. This Court's analysis of the prejudicial impact of misconduct does not rely on a review of sufficiency of the State's evidence. Walker, 182 Wn.2d at 479.

Here, the prosecutor repeatedly urged the jury to convict DeLong on grounds other than the facts and the law, seeking to ignite the jury's sympathies and prejudices. Although defense counsel did not object, the arguments were so prejudicial, and formed such a pervasive theme, that they could not be cured by instruction. Walker, 164 Wn. App. at 736. Reversal is therefore required.

First, the State argued, "children cannot and are not expected to understand the nature and consequences of sex. It is therefore illegal to have sex with them." 15RP 22. State law also prohibited sex with adults incapable of consenting. 15RP 22. P.W. was "like a sweet child" and was the "*epitome* of who[m] we want this law to protect." 15RP 23 (emphasis added).

In so arguing, the State held P.W. up as the gold standard victim. Similar to an impermissible "send a message" argument, this diverted the jury from its proper role of deciding the case based on the law and the facts of the individual case. Neal, 361 N.J. Super. at 537-38.

The State's argument also sought to compare P.W. to the universe of other possible victims. But no related evidence was before the jury. It is improper for a prosecutor to submit during closing argument facts not admitted as evidence during the trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704-05, 286 P.3d 673 (2012)

Next, emphasizing the false adult-child dichotomy that was the bedrock of the State's case, the prosecutor told jurors P.W. was a "child" and therefore she should never be tasked with saying "no." 15RP 24. The State continued, "DeLong took gross and disgusting advantage of that." 15RP 24. The prosecutor then ended his opening argument with this salvo, "[W]hat are you going to do about it?" 15RP 24. In summary, transitioning from colorful language demeaning to the accused, the prosecutor ended his argument with a call to arms.

Each of the cases cited above expresses its disapproval of such tactics. In Neal, which involved the perjury prosecution of a school board member, the prosecutor made the following comments:

> I'm asking you to [hold] him accountable for what he did. I'm asking you to [hold] him accountable for the lies that he told. I'm asking you to hold him accountable for the betrayal of his oath; not only the oath that he took in Grand Jury but his oath as a School Board member. *And I'm asking you to hold him accountable for the betrayal of the children* [*of*] *Asbury Park.*

Neal, 361 N.J. Super. at 537. Holding the remarks improper, the court reversed. As the court observed, such remarks improperly diverted jurors' attention from the facts of the case and were intended to promote a sense of partisanship with the jury that is incompatible with the jury's function.

Id. The prosecutor's remarks in this case likewise sought to invoke the jurors' passions and prejudices in the State's favor.

The third instance of misconduct occurred during the prosecutor's concise rebuttal argument. The prosecutor argued that everyone who dealt with P.W., including police officers who dealt with child victims, viewed P.W. as in urgent need of protection. The prosecutor continued, "[S]o did [P.W.'s] social security payee, *so did you.*" 15RP 53-54 (emphasis added). Like the previous argument, this argument improperly sought to align the jury with the State by appealing to the jury's sympathies. Neal, 361 N.J. Super. at 537 (remarks intended to impart sense of partisanship are improper). Moreover, the question for the jury was not whether P.W. required general protection from society's ills, as would a child. The question was whether P.W., a mentally disabled adult, was capable of consenting to sexual intercourse.

Concluding the State's argument as a whole, the prosecutor argued DeLong had taken advantage of P.W. The prosecutor again exhorted the jury, "What are you going to do about it?" 15RP 54. This argument, improper for the reasons explained above, was the last argument jurors heard from either party.

"[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions

can erase their combined prejudicial effect." State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (quoting Glasmann, 175 Wn.2d at 707) (internal quotations omitted).

Here, the prosecutor's comments constituted a pervasive theme: A call to arms to protect childlike adults against people who would take advantage of them. P.W. was the "epitome" of such victims. This call to arms had little to do with facts of the case and everything to do with inflaming the jury's passions and prejudices.

The prosecutor's repeated exhortations also took advantage of jurors' likely discomfort with the more "adult" characteristics of P.W. and mentally disabled people in general. But P.W. was not a child: She was an adult woman, who had been married and given birth to children.

Finally, the prosecutor's arguments came at the end of his opening and rebuttal arguments—two of the four instances cited were the last words spoken in each of his respective arguments. As the Lindsay Court observed, comments made at the end of a prosecutor's rebuttal argument are more likely to cause prejudice. 180 Wn.2d at 443 (citing United States v. Sanchez, 659 F.3d 1252, 1259 (9th Cir. 2011) (finding it significant that prosecutor made improper statement "at the end of his closing rebuttal argument, after which the jury commenced its deliberations"); United States v. Carter, 236 F.3d 777, 788 (6th Cir. 2001) (finding it significant

that "prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations"); cf. Ramos, 164 Wn. App. at 340 ("Rather than an isolated instance of misconduct, the prosecutor's improper comments were made at the beginning of closing argument as a prism through which the jury should view the evidence.").

The objectionable comments likely affected the jury's verdicts as to each of the counts involving P.W., including the theft count. The four related arguments formed the backbone of the State's closing argument as to the rape and first degree promoting prostitution counts, repeatedly seeking to stoke the jury's biases by painting P.W. as a child in need of protection from DeLong's sinister designs. The arguments also affected the theft verdict, creating a sense of partisanship that had less to do with the facts of the theft charge and more to do with the jury's sympathies. The arguments were so pervasive and so integral to the State's relatively brief closing arguments that a curative instruction could not have remedied them. This Court should reverse each of the counts relating to P.W. Glasmann, 175 Wn.2d at 707.

3. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE PROSECUTOR'S MISCONDUCT, THEREBY DENYING THE APPELLANT A FAIR TRIAL.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 of the state constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

An accused asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 686; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). This Court reviews claims of ineffective assistance of counsel de novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, "[t]here is a strong presumption that defense counsel's conduct is not deficient," but an accused rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To meet the prejudice prong, an accused person must show a reasonable probability "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." McFarland, 127 Wn.2d at 337.

DeLong satisfies both requirements. First, as argued at pages 33-35 above, Washington courts have long held that any "send a message" argument is improper. Counsel had a duty to be aware of the applicable law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). And no conceivable legitimate tactic explains counsel's failure to act: Even if counsel did not wish to highlight the State's improper closing argument, she could have moved for a mistrial and requested a curative instruction outside the presence of the jury.

The argument was prejudicial for the reasons explained in section 2 above. Again, the four related arguments formed the cornerstone of the State's closing argument as to the rape and first degree promoting prostitution counts as to P.W. The arguments also imparted a sense of partisanship affecting the theft verdict.

DeLong has established both deficient representation and prejudice. For this reason as well, this Court should reverse his convictions on counts 1-3 and remand for a new trial. Thomas, 109 Wn.2d at 232

4. THE CUMULATIVE EFFECT OF THE ERRORS IDENTIFIED ABOVE DENIED THE APPELLANT A FAIR TRIAL

Under Article 1, section 3 and the Fifth and Fourteenth Amendments, the accused has the due process right to a fair trial. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). This Court should reverse a conviction when the combined effect of trial errors effectively denies the defendant his right to a fair trial, even if each error standing alone may not itself warrant a new trial. State v. Venegas, 55 Wn. App. 507, 520, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010). Once the appellant establishes error, a reviewing court may then measure the errors' cumulative effect. State v. Clark, 143 Wn.2d 731, 771-72, 24 P.3d 1006 (2001).

Here, even if the trial errors asserted under headings 2 through 4 do not individually warrant reversal, their combined effect does. Taken in combination, there is a reasonable likelihood these trial errors affected the verdicts on counts 1 and 2 and denied DeLong a fair trial. This Court should order a new trial on the rape and first degree promoting prostitution counts based on cumulative error. Venegas, 155 Wn. App. at 527.

D. CONCLUSION

The trial court erred in excluding evidence of the complainant's long-term, contemporaneous sexual relationship with her boyfriend under the inapplicable rape shield statute. In doing so, the court also violated DeLong's right to present a defense. This Court should, accordingly, reverse DeLong's convictions for rape and first degree promoting prostitution, counts 1 and 2.

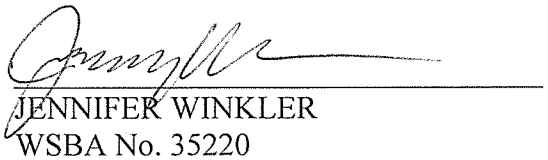
This Court should reverse Delong's convictions on counts 1-3 based on prosecutorial misconduct and a related ineffective assistance claim.

Finally, this Court should reverse DeLong's convictions on counts 1 and 2 because the cumulative effects of the errors described above likely affected the verdicts as to those counts.

DATED this 17TH day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72829-6-I
	)	
JAMES DELONG,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES DELONG
DOC NO. 291510
MONROE CORRECTIONS CENTER
P.O. BOX 888
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JUNE 2015.

X Patrick Mayovsky