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Court of Appeals
Division I
State of Washington
THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NO. 72405-3-I

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KENNON FASTRUP,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Kennon Fastrup was accused of killing his then-girlfriend by a former girlfriend, Michelle Backstrom, who also admitted that she participated in the acts causing the death and it occurred at her home. Ms. Backstrom pled guilty to reduced charges in exchange for testifying against Mr. Fastrup. At Mr. Fastrup's trial, Ms. Backstrom offered numerous allegations that Mr. Fastrup behaved meanly or violently on unrelated occasions. The State then bolstered her testimony by claiming it was consistent with what she told police, even though her motive to fabricate arose before her post-arrest statements to police. The court gave limiting instructions that commented on the evidence by including the judge's opinion about the probative value of this evidence. Finally, the bailiff eavesdropped on Mr. Fastrup's private communications with his lawyer during jury selection, which interfered with his right to counsel and prejudiced Mr. Fastrup's right to participate in jury selection. These errors, considered separately or cumulatively, require a new trial.

B. ASSIGNMENTS OF ERROR.

1. The court's interference in Mr. Fastrup's private communications with his attorney violated his right to counsel under the Sixth Amendment and article I, section 22.

2. The interference in Mr. Fastrup's private communications with counsel violated his right to meaningfully participate in jury selection under the Sixth Amendment and article I, sections 21 and 22.

3. The court erroneously denied Mr. Fastrup's motion for a new trial based on interference with the right to counsel.

4. The court denied Mr. Fastrup a fair trial by admitting allegations of uncharged misconduct that was more prejudicial than probative.

5. The court improperly commented on the evidence in violation of article IV, section 14.

6. The court erroneously admitted prior consistent statements of an accuser under ER 801(d)(1)(ii).

7. The cumulative prejudice resulting from the court's erroneous rulings, comments on the evidence, and interference with Mr. Fastrup's right to counsel denied him a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. An accused person's right to counsel includes the right to privately communicate with his attorney. His right to participate in jury selection also requires confidential consultation with counsel. The bailiff eavesdropped on Mr. Fastrup's private and quiet conversation with his lawyer during jury selection and reported this conversation to the court. As a result, the State peremptorily struck the prospective juror who was the subject of the private discussion and Mr. Fastrup was chilled in his ability to confidentially communicate with his lawyer throughout the trial. Was Mr. Fastrup prejudicially denied his right to counsel after the bailiff eavesdropped on and publicly reported his private communication to his attorney during jury selection?

2. Uncharged misconduct on other occasions is inadmissible unless the court first finds it is more probative than prejudicial and even if admitted, it may not be used to imply the accused person has a propensity for mean or dangerous conduct. The State's principle witness claimed Mr. Fastrup regularly engaged in bad behavior that was not part of the charged incident and had a propensity to be selfish and mean to women. The court did not weigh this evidence's admissibility under ER 404(b). Did the court improperly admit evidence that painted

Mr. Fastrup as a dangerous or unlikeable person for reasons unrelated to the charged offenses?

3. Article IV, section 16 strictly prohibits a judge from telling the jury her opinion of the probative value of disputed evidence. The court gave the jury two limiting instructions that informed the jury of the judge's opinion about the value it should give to evidence of uncharged misconduct by Mr. Fastrup. Did the court impermissibly comment on the evidence?

4. Prior consistent statements are inadmissible unless used to rebut a claim of recent fabrication. The prosecution elicited in detail the consistency of its principle witness's post-arrest statements to police and her trial testimony, over defense objection, even though her motive to fabricate arose before her custodial statements to police. Did the court improperly permit the State to bolster its case by offering inadmissible consistent statements?

5. The cumulative effect of errors may deprive a person of a fair trial. The evidence against Mr. Fastrup rested largely on the testimony of an alleged accomplice, whose testimony must be carefully weighed by the jury due to her self-interest in shifting blame to Mr. Fastrup. There was little evidence of premeditation even if the jury believed Ms.

Backstrom's testimony about Mr. Fastrup's involvement, yet Mr. Fastrup was convicted of the most serious charges against him. Did the multiple evidentiary errors, as well as the court's comment on the evidence and its invasion of the private communications between Mr. Fastrup and his attorney, affect how the jury viewed the evidence against Mr. Fastrup and deny him a fair trial?

D. STATEMENT OF THE CASE.

On May 5, 2012, a teenager noticed a car on fire as he drove home in the early morning. 6RP 15-16.¹ Firefighters extinguished the flames and found the remains of a body in the car's trunk. 6RP 32. The remains belonged to the registered owner of the car, Denise Grisby. 9RP 50; 10RP 11. The medical examiner concluded Ms. Grisby had skull fractures from two blows to the head and was dead before the fire started. 8RP 36-37.

Ms. Grisby's mother, Sandy Jones, had last seen Ms. Grisby several days earlier when she gave Ms. Grisby money to retrieve her car from an impound lot. 6RP 99-100. Ms. Grisby had been dating Kennon

¹ Sixteen volumes of the verbatim report of proceedings (RP) are referred to by the volume number designated on the cover page. The two dates of proceedings that do not have a volume designated on the cover page are referred to by the date of the proceeding.

Fastrup. 6RP 97. She and Mr. Fastrup used drugs frequently and struggled to make ends meet. 6RP 97; 6/23/14RP 10. Ms. Grisby left the impound lot on May 4, 2014, and went with Mr. Fastrup to Michelle Backstrom's home. 6RP 101-02.

Ms. Backstrom was Mr. Fastrup's former girlfriend. 6/23/14RP 6. Ms. Grisby and Mr. Fastrup came to her house because they were homeless, needed to do laundry, and had no money. 6/23/14RP 10. That day, Ms. Backstrom had a "hit" of heroin and smoked a bowl of methamphetamine, as she did regularly. *Id.* at 12. Later in the evening, Ms. Backstrom took a large hit of heroin as she did every night before bed. *Id.* at 20, 130. She heard Mr. Fastrup and Ms. Grisby arguing about money; Ms. Grisby wanted to "turn a trick" to get money to stay in a motel and get high, while Mr. Fastrup did not want Ms. Grisby to do that. *Id.* at 21-22.

Ms. Grisby and Mr. Fastrup started grappling in the kitchen, with Ms. Grisby scratching Mr. Fastrup. 6/23/14RP 22-23. Ms. Backstrom tried to separate them and told both to get out of her home due to the noise. *Id.* at 23. Ms. Grisby "grabbed a hold" of Ms. Backstrom's thumb "and she bit and she wouldn't release" it. *Id.* "She was just in a rage, so was Kenny," Ms. Backstrom said. *Id.* at 24. Ms.

Backstrom hit Ms. Grisby “in the hand with a meat cleaver” and Ms. Grisby released Ms. Backstrom’s thumb. *Id.*

The three adults continued arguing as they moved into the garage. 6/23/14RP 24-25, 27-28. Ms. Backstrom said Mr. Fastrup picked up a metal cable and put it around Ms. Grisby’s neck. *Id.* at 29. The two struggled for ten or twenty seconds as the cable slipped. *Id.* at 29-30. Ms. Backstrom picked up a lanyard after Mr. Fastrup dropped the cable, and she put the lanyard around Ms. Grisby’s neck “to hold her.” *Id.* at 30. Then, Ms. Backstrom said Mr. Fastrup picked up a part of a broken flashlight and hit Ms. Grisby in the head. *Id.* at 30, 32. Ms. Grisby slumped over and stopped struggling. *Id.* at 31. Ms. Backstrom was holding Ms. Grisby by the lanyard around her neck while this occurred. *Id.* at 32-33. Mr. Fastrup and Ms. Backstrom put Ms. Grisby’s body into the trunk of her car, which was parked in the garage. *Id.* at 33-34. Ms. Backstrom described the incident as spontaneous, with no communication between herself and Mr. Fastrup until it ended. *Id.* at 24-34.

After sleeping, cleaning up the home, and thinking about what to do, Ms. Backstrom went to a store and bought gasoline. 6/23/14RP 42, 54, 56. Mr. Fastrup and Ms. Backstrom drove Ms. Grisby’s car to a

forested area in Black Diamond and Mr. Fastrup set the car on fire. *Id.* at 57-58.

Police tracked Mr. Fastrup through his cell phone, spoke to him on the phone several times, then arrested him and Ms. Backstrom after they hid in the woods for several days and did not stop their car for police when signaled to do so. *Id.* at 67; 9RP 35-36; 11RP 78-82, 85-86. Detectives questioned them separately. 9RP 41, 57-58; 11RP 88. Ms. Backstrom initially minimized her involvement but during a lengthy post-arrest interview, provided an account of Mr. Fastrup killing Ms. Grisby at her home. 10RP 89-93, 99-102; 11RP 24-29. Mr. Fastrup also denied any involvement initially, but later admitted helping dispose of Ms. Grisby's body. 9RP 58, 83, 86.

Ms. Backstrom entered into a plea agreement with the prosecution, pleading guilty to second degree murder in exchange for no further charges being brought against her. 6/23/14RP 87, 90-91; 7RP 83-84. She agreed to testify against Mr. Fastrup as part of the plea agreement. *Id.* Despite extensive DNA testing, the police were not able to locate any clear forensic evidence from the garage to corroborate Ms. Backstrom's account of events. 7/1/14RP 22-23, 26-27, 30-31, 37-39.

Mr. Fastrup was charged with first degree premeditated murder; second degree murder in the alternative; arson in the second degree; attempting to elude the police; and a separate count of misdemeanor violation of a no contact order that involved a prior no contact order between Mr. Fastrup and Ms. Backstrom. CP 24-25. The jury convicted him as charged and he received a standard range sentence of 548 months. CP 130, 133; CP 142.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. The court impermissibly interfered with Mr. Fastrup's right to confidentially consult with his attorney during trial.

a. An accused person's right to counsel includes the right to confidentially confer with his lawyer.

The right to counsel is a bedrock procedural guarantee of a particular kind of relationship between an accused person and his attorney. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); U.S. Const. amend. 6; Const. art. I, § 22. Its foundation is “[t]he constitutional right to privately communicate with an attorney.” *State v. Pena Fuentes*, 179 Wn.2d 808,

820, 318 P.3d 257 (2014); *see also Patterson v. Illinois*, 487 U.S. 285, 290 n.3, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth Amendment involves a “distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship”).

It is “universally accepted” that effective representation cannot be had without private consultations between attorney and client. *State v. Cory*, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963). “A defendant's constitutional right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney.” *Pena Fuentes*, 179 Wn.2d at 818. The confidential attorney-client relationship is not only a “fundamental principle” in our justice system, it is “pivotal in the orderly administration of the legal system, which is the cornerstone of a just society.” *In re Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003).

The confidentiality of discussions is inextricably intertwined with the adversarial system of justice, which demands that the lawyer know all relevant facts to advocate effectively and understands clients will not provide lawyers with the necessary information unless assured this information will remain confidential. *Id.* at 160-61; *see RCW*

5.60.060(2)(a);² RPC 1.6 (lawyer “shall not reveal confidences or secrets” relating to client); RPC 4.4 (attorney may not intrude into attorney-client relationship of another party). Eavesdropping by the government on a private conversation between attorney and client violates the right to counsel and is presumed prejudicial. *Pena Fuentes*, 179 Wn.2d at 819-20.

b. Jury selection is a critical stage in a trial where confidential communications between attorney and client are essential to a meaningful right to counsel.

An accused person has a right to personally participate in selecting an empaneled jury. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Irby*, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Const. art. I, § 22. The stronger jury trial protections guaranteed in article I, section 22 expressly mandate the defendant’s personal participation in all stages of jury selection. *Irby*, 170 Wn.2d at 884.

During jury selection, the accused person is constitutionally entitled “to give advice or suggestion or even to supersede his lawyers

² RCW 5.60.060(2)(a) provides, “An attorney or counselor *shall not*, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” (Emphasis added.)

altogether.” *Irby*, 170 Wn.2d at 883 (internal citations omitted). The defense may decide to challenge or not challenge a prospective juror for any unstated reason as long as it is not premised on invidious discrimination. *See Batson*, 476 U.S. at 91. Peremptory challenges have “deep historical roots” and the Supreme Court has found that the “peremptory challenge is a necessary part of trial by jury.” *Id.*; *Swain v. Alabama*, 380 U.S. 202, 212, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

The mechanism by which an accused person participates in jury selection is through consulting with his attorney in person. *Irby*, 170 Wn.2d at 884. A defendant must be given the opportunity to tender advice or make suggestions to his or her lawyer when assessing potential jurors. *Id.* The defendant’s “life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors.” *Lewis v. United States*, 146 U.S. 370, 373, 13 S.Ct. 136, 36 L.Ed. 1011 (1892).

c. The court interfered in Mr. Fastrup's right to counsel by eavesdropping on private communications and requiring Mr. Fastrup to explain his confidential conferences with counsel.

During the substantive portion of jury selection where the parties explored the qualifications of jurors to serve impartially for case-specific reasons, Juror 35 was individually examined because he may have heard something about the allegations before being called for jury service. 4RP 13. The court and parties questioned him and determined he did not have knowledge about this case that might disqualify him. 4RP 29-31.

But after this exchange with Juror 35 in court, the judge announced that her bailiff overheard Mr. Fastrup communicating about this juror to his lawyer. 4RP 53; CP 119-21. The bailiff believed Mr. Fastrup had indicated his personal recognition of Juror 35. 4RP 53-55. Speaking directly to Mr. Fastrup, the judge requested that the defense explain what he knew about Juror 35. 4RP 53-54. Mr. Fastrup said Juror 35 looked like someone he knew from Renton High School. *Id.*

It turned out that Mr. Fastrup did not know Juror 35. 4RP 123; CP 127. However, the prosecution struck this juror in its peremptory challenges. 5RP 149. Mr. Fastrup filed a motion for a new trial based

on the intrusion into private attorney-client communications. CP 105-06, 111-16; CP 119-21. Defense counsel complained that Mr. Fastrup had spoken to him confidentially, in a hushed tone, and the bailiff should not have overheard or reported his conversation to the court and prosecution. CP 120. This intrusion affected jury selection and chilled the in-court attorney-client communications throughout trial. CP 120-21. The court denied the motion without an evidentiary hearing or an explanation of its ruling. CP 117-18, 163.

d. The court's interference in the confidential attorney-client relationship undermines the privacy essential to the right to counsel and requires a new trial.

Eavesdropping to acquire confidential information intended for an attorney violates the right to counsel. *Pena Fuentes*, 179 Wn.2d at 819. Because the constitutional right to privately communicate with an attorney is an essential foundational right, “[w]e must hold the State to its highest burden to ensure it is protected.” *Pena Fuentes*, 179 Wn.2d at 820. Prejudice is presumed and the State has the burden beyond a reasonable doubt to show the defense was not prejudiced. *Id.* at 819-20.

Qualified jurors may look at the same evidence and reach different results. *Irby*, 170 Wn.2d at 886-87. Private communication with counsel is essential to the accused person's participation in jury

selection. *See Irby*, 170 Wn.2d at 884. A court's impairment of an accused person's ability to meaningfully participate in jury selection is not harmless. *Id.*

A bailiff is the judge's agent and is subject to the same restrictions as a judge. *State v. Johnson*, 125 Wn.App. 443, 461, 105 P.3d 85 (2005). The bailiff eavesdropped on the private conversation between Mr. Fastrup and his attorney. CP 120. The conversation was conducted in the same "hushed tone" used throughout trial. CP 120. Mr. Fastrup's remarks were not directed at the bailiff. *Id.* But the bailiff listened and relayed this private conversation to the judge, who announced part of the conversation in court and required Mr. Fastrup to state his thoughts about Juror 35 on the record. 4RP 53-54. Defense counsel explained the detrimental effect of the bailiff's eavesdropping and reporting on private communications. It chilled attorney-client communications throughout trial, giving Mr. Fastrup a reason to fear expressing himself to his lawyer and risk that his communications would be reported to the judge. CP 120. It also gave the State a reason to strike this qualified juror that would not have arisen absent the court's interference into Mr. Fastrup's right to counsel. 5RP 149.

Even though Juror 35 and Mr. Fastrup did not know each other, he was the type of juror Mr. Fastrup would have wanted on the jury. Juror 35 was not a drug user but had a friend who used methamphetamine, which might make the juror more sympathetic to a person like Mr. Fastrup whose behavior was influenced by drugs. 5RP 83-84, 140-41. He was a younger man who might be able to put himself in Mr. Fastrup's shoes. 4RP 54. However, he also had markings of a juror favorable to the prosecution. His girlfriend and mother had been victims of domestic violence, thus making him potentially sympathetic with the prosecution. 5RP 79, 81. He described himself as introverted at a party but able to engage with a group. 5RP 20-21, 24. Juror 35 appeared able to relate to both sides in the case, and therefore would be a qualified and appropriate juror who the State would be interested in having serve. But the State struck him after the bailiff relayed Mr. Fastrup's confidential communications in court. 5RP 149.

The bailiff's close attention to Mr. Fastrup's private communications with his lawyer when participating in jury selection and publicly reporting those private communications to the court on the record interfered with his right to counsel. It prejudiced the selection of jurors, affected the attorney-client relationship during the critical phases

of the jury trial, and requires a new trial. *See Pena Fuentes*, 179 Wn.2d at 819-20; *Irby*, 170 Wn.2d at 886-87.

2. By admitting unduly prejudicial evidence painting Mr. Fastrup as a violent person based on uncharged conduct, Mr. Fastrup was denied a fair trial.

a. The right to a fair trial includes the right to be tried for only the charged offense.

An accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The right to a fair trial includes the right to be tried for only the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L.Ed. 2d 708 (1990) (the introduction of improper evidence deprives a defendant of due process where "the evidence is so extremely unfair that its admission violates fundamental conceptions of justice").

“ER 404(b) is a categorical bar to admission of evidence [of a prior bad act] for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Allegations that an accused person committed uncharged misconduct, or is a mean person, are presumed inadmissible. *State v. Everybodytalksabout*, 145 Wn.2d 456, 465–68, 39 P.3d 294 (2002).

Uncharged misconduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused’s propensity to commit certain acts, and (3) substantial probative value outweighs its prejudicial effect. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing *Saltarelli*, 98 Wn.2d at 362); ER 404(b).³ Doubtful cases should be resolved in favor of the defendant. *Smith*, 106 Wn.2d at 776.

³ Under ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

“This analysis must be conducted on the record.” *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) (quoting *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)). In addition, the “trial court must also give a limiting instruction to the jury if the evidence is admitted,” when requested. *Id.*

In *Gunderson*, the Supreme Court reversed an assault conviction because the trial court admitted evidence of prior domestic violence between the defendant and his former wife that was more prejudicial than probative. *Id.* at 924-25. The evidence was insufficiently probative because the complainant had not given conflicting statements about the incident, even if other evidence contradicted her testimony. *Id.* The prosecution was not free to make a blanket claim the allegations were credible because the accused had engaged in domestic violence in the past. “[T]he mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness’s testimony is unreliable” before offering accounts of uncharged misconduct. *Id.* at 924-25.

The *Gunderson* Court also explained the essential analysis in which the trial court must engage before admitting uncharged allegations of misconduct. “[C]ourts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high.” *Id.* at 925. There is a “heightened prejudicial effect” from the jury hearing about uncharged domestic violence.” *Id.* Therefore, prior acts of domestic violence are admissible only if the prosecution “has established their overriding probative value, such as to explain a witness’s otherwise inexplicable recantation or conflicting account of events.” *Id.* If the State does not prove the overriding need for such testimony, “the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.” *Id.*

b. The State’s witness told the jury that Mr. Fastrup committed many uncharged criminal acts and claimed he has a propensity to be violent, mean, and controlling.

i. Unrelated allegation of “pistol whipping” by Mr. Fastrup.

Without the required preliminary analysis or proffer, the State elicited at the outset of its direct examination of Ms. Backstrom that in an unrelated incident some time before the charged offense, she had

been “pistol-whipped” by Mr. Fastrup and retaliated by smashing Ms. Grisby’s car windshield with a hatchet. 6/23/14RP 9. Ms. Backstrom blamed Mr. Fastrup for inciting her. *Id.* She claimed that the reason she struck Ms. Grisby’s windshield was because Mr. Fastrup “pistol-whipped me,” then drove her to a 7-Eleven where “he continued to beat me some more,” and later “he drove me down the road from my house, and then he beat me some more and he stole my phone and wallet.” *Id.*

In its rebuttal case, over defense objection, the prosecution introduced a photograph of Ms. Backstrom showing her injuries after the alleged pistol-whipping incident. 7RP 122; Ex. 58. The prosecution claimed it needed to corroborate Ms. Backstrom’s story that Mr. Fastrup had severely beaten her on an unrelated occasion because the defense had made it appear that Ms. Backstrom was jealous of Ms. Grisby and was going after Ms. Grisby when she hit her car with a hatchet, when she was actually mad at Mr. Fastrup. 7RP 89-90.

The State’s pretrial motions in limine did not mention this incident. Supp. CP __, sub. no. 99. It did not seek the mandatory court permission to offer allegations of a pistol-whipping of Ms. Backstrom, the alleged co-participant, by Mr. Fastrup on some other occasion. *Gunderson*, 181 Wn.2d at 923.

The court let the State introduce a photograph of Ms. Backstrom “to corroborate” that she was beaten by Mr. Fastrup. Ex. 58; 7RP 122-23. This incident occurred some unspecified time before the charged offense and had no connection to Mr. Fastrup’s intent to harm Ms. Grisby beyond making him appear to be a person who routinely assaults women.

ii. Myriad allegations of propensity to act unkindly on other occasions.

Ms. Backstrom cast numerous other allegations of Mr. Fastrup’s propensity to engage in wrongful acts to show his bad character. When defense counsel objected or tried to stop the witness, the court did not intervene. This testimony was markedly prejudicial and painted Mr. Fastrup as an irredeemably bad person for reasons unrelated to his alleged involvement in the offense.

For example, Ms. Backstrom alleged that being selfish was “the norm” for Mr. Fastrup; Mr. Fastrup “likes to hit women” and gives “women black eyes all the time”; he hung a noose in the garage “so I could commit suicide one day when he left”; and he “is a control freak. That’s how he is.” 7RP 47, 53, 62. Ms. Backstrom said Mr. Fastrup “abused me for three years straight. He stole everything I had. I lived in

fear of him.” 7RP 62. “He would hold knives to me everyday, almost.” *Id.* “He robbed my house repeatedly” and “[h]e threw gasoline at my house.” 7RP 62-63.

Defense counsel tried to stop Ms. Backstrom from making these comments that were not in direct response to a question but was unable to quiet her. Even when the court directed her to stop, she continued accusing Mr. Fastrup of uncharged violent acts. 7RP 62-63. She called Mr. Fastrup a “hateful little person.” 7RP 65. She gave her opinion, “he obviously did this,” despite defense counsel’s efforts to stop her gratuitous comments after answering questions. 7RP 85. The court only intervened by asking Ms. Backstrom to wait for another question, but did not sustain Mr. Fastrup’s objections. 7RP 85-86; 7RP 87-88.

Ms. Backstrom complained that Mr. Fastrup had gotten both her and Ms. Grisby addicted to drugs and said he felt guilty about it. 7RP 87. She said, “I had got addicted to heroin” while with Mr. Fastrup, “[j]ust like he got Denise strung out.” 7RP 87. Defense counsel objected but the court did not rule on the objection, instead telling Ms. Backstrom to wait for another question. *Id.*

iii. Allegation of Mr. Fastrup's interest in not coming to court during trial.

The State also introduced the uncharged allegation that Mr. Fastrup threatened to attack Ms. Backstrom during the trial. The court initially ruled this purported threat was “unfairly prejudicial” and insufficiently probative but reversed its ruling after the prosecution alleged it was essential rebuttal to Mr. Fastrup’s statement to police that indicated he was afraid of Ms. Backstrom. 10RP 74-75. Mr. Fastrup objected. 10RP 70-71.

Over defense objection, jail guard Jeffrey Gaw testified that one morning when preparing to bring Mr. Fastrup to court, Mr. Fastrup said he did not want to come to court and if he was made to come to court, “as soon as I took off the handcuffs he was going to jump over the table and run up here and beat the witness.” 11RP 70. Mr. Gaw said Mr. Fastrup told him that “my partner and I, would have to, uh, fuck him up, after that, to stop him.” *Id.* This exchange occurred on June 24, 2014, when Ms. Backstrom was resuming her testimony. 11RP 69-70. The court instructed the jury that the limited purpose for Mr. Gaw’s testimony about Mr. Fastrup’s remarks was “allowing the state to refute

the defendant's prior statements regarding his fear of Ms. Backstrom and his inability to defend himself." 11RP 68-69.

These numerous allegations of Mr. Fastrup engaging in violent, selfish or threatening behavior toward women were not related to his actions during the incident and were targeted toward painting Mr. Fastrup's bad character. They were not material to an essential element but showed Mr. Fastrup as a person with a propensity for mistreating others. The court should not have admitted this inflammatory evidence and should have stricken it when it was gratuitously offered.

c. The court's comments on the evidence further undermined the fairness of the trial.

A court "must give a limiting instruction where evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted asks for a limiting instruction." *State v. Hartzell*, 156 Wn.App. 918, 937, 237 P.3d 928 (2010) (emphasis in original). The court "is not obliged to give the instruction in the exact language proposed by the defendant." *Id.* Instead, it must exercise its discretion to fashion an appropriate limitation on the use of the evidence. *Id.*

When giving an instruction, a judge may not convey her personal opinion about the merits of a case or instruct the jury that a fact at issue has been established. *Id.* (citing *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)). The constitution prohibits judicial comments on the evidence “to prevent the trial judge’s opinion from influencing the jury.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Const. art IV, § 16.⁴ “[T]he purpose of Art. 4, § 16 of the Washington constitution, ‘is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.’” *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (quoting *Heitfeld v. Benevolent Protective Order of Keglers*, 36 Wn.2d 685, 699, 220 P.2d 655 (1950)).

A judge is forbidden from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of the constitutional prohibition arises where the judge’s opinion is merely implied. *Levy*, 156 Wn.2d at 721.

⁴ Article IV, section 16 reads, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

Alleged violations of this rule are rigorously reviewed and presumed prejudicial. *Lane*, 125 Wn.2d at 838. The presumption of prejudice may be overcome only if the record affirmatively shows no prejudice could have resulted. *Levy*, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission “conveys the idea that the fact has been accepted by the court as true.” *Id.* at 726.

Here, the judge’s limiting instructions conveyed her personal opinion about the value of evidence as if it was a settled matter. CP 47; 7RP 123; 11RP 68-69. Rather than telling the jury its role was to decide the relevance and weight to give this evidence for a limited purpose, the court gave instructions, repeated in the final jury instruction packet. *Id.* The court told the jury: “Exhibit 58 was admitted for the limited purpose of corroborating Ms. Backstrom’s description of the incident involving Ms. Backstrom breaking Denise Grisby’s windshield with a hatchet; and also that, “Officer Gaw’s statement was admitted for the limited purpose of allowing the State to refute the defendant’s prior statements regarding his fear of Ms. Backstrom and his inability to defend himself.” CP 47; *see also* 7RP 123; 11RP 68-69.

These instructions let the jury know that Exhibit 58 *corroborated* Ms. Backstrom's testimony and Mr. Fastrup's threatening comment about Ms. Backstrom *refuted* a portion of his statement to police. *Id.* Mr. Fastrup complained the court's explanation of the reasons why it was admitting Mr. Fastrup's alleged threat to Ms. Backstrom as "too much commenting on the evidence" and noted his objection. 11RP 4-5.

Ms. Backstrom's credibility was the central contested issue in the case. There would be no way for the prosecution to prove how Ms. Grisby's death occurred, as necessary for first degree premeditated murder, without crediting Ms. Backstrom's account of events. Ms. Backstrom had an undeniable motive to blame Mr. Fastrup and minimize her own role. The court's instructions expressly conveyed the judge's opinion that the corroborative value of the exhibit was a settled matter. CP 47; 7RP 123. It told the jury that this exhibit bolstered Ms. Backstrom's credibility. *Id.* Similarly, by instructing the jury that Mr. Fastrup's out-of-court threat to beat up Ms. Backstrom refuted his statement to police that he feared Ms. Backstrom, it directed the jury the value of this threat was a settled matter and gave to the jury the

court's opinion that the threat undercut Mr. Fastrup's credibility. CP 47; 11RP 68-69.

Defense counsel requested limiting instructions after the court overruled his objections to this evidence and proposed these instructions to describe the court's ruling, although objecting to the specific language inserted by the court. 7RP 90-92, 94-95; 10RP 70-71; 11RP 4-5, 68-70. If the court disagreed with the instructions proposed, the court was required to fashion the appropriate limiting instruction. *Hartzell*, 156 Wn.App. at 937. "[T]he trial court has a duty to correctly instruct the jury" even if defense counsel proposes a legally incorrect limiting instruction. *State v. Gresham*, 173 Wn.2d 405, 424-25, 269 P.3d 207 (2012). Instead, the court instructed the jury about its opinion of the specific importance of the contested evidence.

Issues of credibility are solely for the fact-finder. It is impermissible even to ask one witness to comment on the credibility of another witness. *State v. Boehning*, 127 Wn.App. 511, 525, 111 P.3d 899 (2005) ("Asking one witness whether another witness is lying is flagrant misconduct."). Giving instructions to the jury that convey the judge's opinion of the established value of this evidence, as evidence that "corroborated" the State's witness Ms. Backstrom, or "refuted" Mr.

Fastrup's statement to police, were comments on the evidence that prejudiced Mr. Fastrup on central contested issues. The instructions also exacerbated the harmful effect of improperly admitted evidence of uncharged wrongful acts by Mr. Fastrup.

d. The prosecution improperly bolstered the complainant's allegations with prior consistent statements.

A witness's prior consistent statements are inadmissible hearsay unless offered to rebut an accusation that the witness's testimony is a recent fabrication. ER 801(d)(1)(ii). The requirement of recent fabrication means that the witness is challenged based on the claim that she had a reason to fabricate her story later. *State v. Bargas*, 52 Wn.App. 700, 702, 273 P.2d 470 (1988). "The alleged fabrication must be recent because if the statement was made after the events giving rise to the inference of fabrication, it would have no probative value in counteracting the charge of fabrication." *State v. Makela*, 66 Wn. App. 164, 168, 831 P.2d 1109 (1992). A claim of recent fabrication "can be rebutted by the use of prior consistent statements only if those statements were made under circumstances indicating that the witness was unlikely to have foreseen the legal consequences of his or her statements." *Id.* at 168-69.

Here, Mr. Fastrup challenged Ms. Backstrom's veracity by pointing out some inconsistencies and reasons to doubt her story. 2RP 100-01, 104, 109. His theory was that she exaggerated and fabricated Mr. Fastrup's role from the time of her arrest. The prosecution responded by eliciting her "consistency" in her post-arrest statements to the police. On direct examination, it asked Ms. Backstrom about the consistency between her statement to police and her testimony. 6/23/14RP 84-85, 88, 90-91. On redirect, it had Ms. Backstrom read portions of her first statement to the police to show its consistency and asked repeatedly for her to confirm the consistency of many details of her testimony and her statement to police. 7RP 117-18, 119-21, 124-27, 129-32. Detective Mark Mellis also recounted Ms. Backstrom's statement to police in great detail. *See* 10RP 92-102; 11RP 20-29, 37-42; 12RP 14-15. The court permitted the prosecution to elicit these statements to rebut an implication of recent fabrication, over repeated defense objections and a continuing objection. 7RP 117, 126, 127, 129, 132; 10RP 93, 98, 101, 103-04; 11RP 20, 22-23, 37; 12RP 14.⁵ As a

⁵ Although the defense initially objected to Ms. Backstrom's testimony as leading and improper re-direct, it later complained about the improper elicitation of prior consistent statements from Ms. Backstrom and made this basis of its objection abundantly clear during Detective Mellis's testimony. *See*,

result, Ms. Backstrom and the lead detective gave extensive testimony about the consistency of Ms. Backstrom's allegations.

By the time Ms. Backstrom was arrested, her motive to fabricate and shift blame had already arisen. It was not relevant that her initial custodial statement to police was consistent with her later statements to police or in court. *See Makela*, 66 Wn.App. at 168-69. She already foresaw the legal consequences of her actions when she knew Ms. Grisby had been killed and she spoke to police after an extended period of hiding from them in the woods. At that point, she knew there were legal consequences from participating in the killing. Her prior consistent statements were inadmissible under ER 801(d)(1)(ii). The prosecution impermissibly bolstered the complainant's credibility by asserting that she must be truthful due to her consistent custodial statement to police and in-court testimony after her guilty plea.

e. The cumulative effect of the multiple errors requires reversal.

The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Under the cumulative error doctrine, even where one error

e.g., CP 99, 108-110; 10RP 93, 98, 101, 102, 103-04; 11RP 21-23, 37, 41.

viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

The prosecution bears the burden of establishing beyond reasonable doubt that any error of constitutional dimension is harmless. *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Matter of Hagler*, 97 Wn.2d 818, 825, 650 P.2d 1103 (1982). The court's instructions that conveyed the judge's opinions to the jury are presumed prejudicial. The additional evidentiary errors require a new trial because "there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

There is no dispute someone killed Ms. Grisby, and Mr. Fastrup's statement showed his connection to the disposal of the body, but he was convicted of the most serious offense of premeditated murder based on Ms. Backstrom's testimony alone. The jury was instructed that Ms. Backstrom's self-interest as a participant in the event made her testimony suspect. CP 45. Even under Ms. Backstrom's

account of events, the incident arose spontaneously as a verbal argument turned physical, without foreplanning, yet Mr. Fastrup was convicted of premeditated murder.

Ms. Backstrom's accusations that Mr. Fastrup committed myriad bad acts and demeaning behavior over many years affected the jury. The State bolstered these uncharged allegations by showing the jury a picture of Ms. Backstrom's injuries after Mr. Fastrup allegedly pistol-whipped and beat her on an unrelated occasion, designed to inflame the jury for conduct that was not material to the charged offenses. The State included this photograph in its power point presentation in closing argument. Ex. 173, at 7. No reasonable juror would have been unaffected by the litany of unrelated allegations Ms. Backstrom cast against Mr. Fastrup, combined with the court's comments that the evidence corroborated the State's case and refuted Mr. Fastrup's statement to police. Furthermore, considering alongside the violation of Mr. Fastrup's right to confidential communications with counsel, these errors denied Mr. Fastrup a fair trial. The erroneously admission of this evidence and the violation of the right to counsel, considered cumulatively, affected the jury and entitle Mr. Fastrup to a new trial.

F. CONCLUSION.

Mr. Fastrup's conviction should be reversed and a new trial ordered as well as any further relief this Court deems appropriate.

DATED this 5th day of May 2015.

Respectfully submitted,

s/ Nancy P. Collins

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 72405-3**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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