

**NO. 42149-6-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHRISTOPHER JOHN DUNNE,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to grant a continuance to allow the defense time to obtain an expert to rebut an expert witness the state endorsed the day of trial.

2. The trial court denied the defendant the right to confront witnesses under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it refused to allow him to examine a state's expert witness on other possible causes for the injuries the complaining witness sustained.

3. The state denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it presented closing argument that shifted the burden of proof to the defense to explain how the complaining witness sustained her injuries.

4. The trial court violated Washington Constitution, Article 4, § 16, when it commented on the evidence by repeatedly referring to the complaining witness as the "victim" or the "named victim" of the defendant's crimes.

*Issues Pertaining to Assignment of Error*

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to grant a continuance to allow the defense time to obtain an expert to rebut an expert witness the state endorses on the day of trial?

2. Does a trial court deny a defendant the right to confront witnesses under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it refuses to allow the defense to examine a state's expert witness on other possible causes for the injuries the complaining witness sustained?

3. Does the state deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it presents closing argument that shifts the burden of proof to the defense to explain how the complaining witness sustained her injuries?

4. Does a trial court comment on the evidence and thereby violate Washington Constitution, Article 4, § 16, if it repeatedly refers to the complaining witness as the "victim" or the "named victim" of the defendant's crimes?

## STATEMENT OF THE CASE

### *Factual History*

In March of 2009, the defendant Christopher Dunne began a romantic relationship with Crystal Engle, a childhood friend of his sister Victoria. RP 159-163.<sup>1</sup> At the time, the defendant was living with his parents in Meadow Glen in Clark County, along with his sister Victoria and her husband. *Id.* By September of 2009, Crystal moved in with the defendant in his parent's home. *Id.* Their bedroom was next to the bedroom that Victoria and her husband used. RP 433-440. Crystal worked the entire time she lived with the defendant and was never financially dependent upon him. RP 278-281. By the middle of October 2010, Crystal became convinced that the defendant had become romantically involved with their neighbor Kari Kuchta. RP 229-239. As a result, she packed up her belongings and moved in with her parents. *Id.* A few weeks after Crystal moved back in with her parents, she went to the police and claimed that on a number of prior occasions, the defendant had physically and sexually assaulted her. RP 238-239.

In her statement to the police, Crystal claimed four specific instances of abuse. RP 238-239. She stated that the first occurred after a birthday celebration for the defendant at his parent's home on November, 20, 2009.

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<sup>1</sup>The record in this case includes six volumes of continuously numbered verbatim reports, referred to herein as "RP [page #]."

RP 161-163, After dinner and cake, she and the defendant, along with Victoria and her husband and some other friends went to a bar called the Main Street Station in Battleground. *Id.* They returned home from the bar about 1:30 in the morning. *Id.* The defendant was quite intoxicated. *Id.* Once in their bedroom, they engaged in consensual sex. *Id.* The defendant then asked Crystal where she had put their marijuana. RP 164-168. She replied that it was in his back pants pocket. RP 163-165, 261. According to Crystal, when the defendant could not find it he became very upset. *Id.* He then jumped on top of her as she lay on the bed and began strangling her with his hands around her throat cutting off her ability to breathe. *Id.* During this incident, Crystal urinated on herself, but was able to wiggle out from under him. *Id.* She then cleaned up the mess and went out to sit on the couch in the living room. *Id.* She later returned to the bedroom, where she and the defendant smoked the marijuana that actually had been in his back pants pocket all along. *Id.* Crystal claimed that the attack put marks on her neck and left her feeling scared and isolated. RP 166-169. However, Victoria stated that she saw Crystal the next day, that she had no signs of bruising on her, and that she seemed quite happy. RP 433-438.

In her statement to the police, Crystal claimed a second instance of abuse occurred following a New Years Eve party on December 31, 2009. RP 168-173. According to Crystal, she spent the evening at her parent's house

for their traditional family party at New Years. *Id.* A friend then took her over to a party where the defendant was playing pool and drinking heavily. *Id.* After a few hours at the party, she told the defendant that she wanted to go home, so the two of them left with Crystal's friend driving. *Id.* However, on the drive home, she and her friend got into an argument with the defendant because he wanted to go back to the party and drink some more and Crystal wanted to go home. *Id.*

Once Crystal and the defendant got back to the defendant's parent's house, they found that his parents were gone, but Victoria and her husband were home. RP 169-173. When the defendant went into their bedroom, he turned the radio on very loud and refused to turn it down. *Id.* Crystal then texted Victoria to come in the bedroom to tell the defendant to turn the radio down. RP 174-178. Victoria did this, and the defendant did turn the radio down for a little while. *Id.* However, he then turned it up again. *Id.* At this point, Victoria came back into the bedroom and told him that their mother was on the phone and wanted to talk to him. *Id.* The defendant then spoke with his mother on the phone, after which he turned down the radio. *Id.*

According to Crystal, after the defendant turned down the radio, he sat on top of her while she was in bed and began licking her on the face. RP 178-182. Even though she told him that she did not like what he was doing, he persisted in the conduct, so she bit his tongue and held on to it. *Id.* The

defendant then got mad, hit her a number of times about the face and arms, and strangled her by putting both hands on her neck and squeezing until she couldn't breathe. RP 178-182. The defendant then stopped, went into another room, and passed out. *Id.* Crystal claimed that she suffered bruising on her neck and arms as a result of the attack, as well as swelling and broken blood vessels in her eyes and forehead. *Id.*

The day following this incident, Crystal met with her mother to go shopping. RP 188-193. However, when Crystal's mother saw Crystal's injuries, she took Crystal to the police department to file a report. *Id.* Once at the police department, an officer took pictures of Crystal's injuries. *Id.* However, Crystal told the officer and her mother that she had suffered the injuries in a fall getting out of the shower. *Id.* An expert employed by the state later examined the photographs of Crystal and rendered the opinion that they were caused by manual strangulation. RP 378-382. However, an expert employed by the defense refuted this opinion, stating that the lack of consistent petichiae in both eyes belied manual strangulation as the cause of the injuries shown. RP 543-546.

In her statements to the police after ending her relationship with the defendant, Crystal Engle made a third claim of abuse by the defendant, allegedly occurring on May 20, 2010. RP 193-198. Crystal told the police during the late evening on that date, she and the defendant were having

consensual sex in their bedroom when the defendant asked her if she wanted “to do it the hard way” or the “easy way.” *Id.* According to Crystal, the “hard way” was for him to do what he wanted after he strangled her. *Id.* The easy way was for her to just do what he wanted. *Id.* She responded by going into the bathroom and locking the door. *Id.* When she did not come out, he knocked on the door and she unlocked it so he could enter. *Id.* Once inside, he told her that he wanted to have anal sex. *Id.* When she replied that she did not want to do this, they began having vaginal intercourse. *Id.*

While having sex in the bathroom, the defendant repeated that he wanted to have anal intercourse with her. RP 195-198. When she again responded that she did not want to do this, he put his forearm to her throat and strangled her to the point that she involuntarily urinated and then passed out. *Id.* According to Crystal, she regained consciousness after 15 to 20 seconds. *Id.* When she did, she cleaned up and changed her clothes. *Id.* She then got back into the bed with the defendant, who was apologetic by this point. *Id.* He then passed out. *Id.* Although Crystal stated that the defendant’s parents were in the house when this incident happened, she did not attempt to call them to help her. *Id.* In addition, she stated that she did not know why she stayed with him although she felt more and more isolated. RP 198-199.

Finally, in her statement to the police after leaving the defendant,

Crystal made a fourth claim of abuse occurring on July 11, 2010. RP 200-205. According to Crystal, during that evening the defendant was very intoxicated, and while having consensual sex, he told her that he wanted to try something new. *Id.* Specifically, he stated that he wanted to try “fisting” her, by putting his hand into her vagina. *Id.* Although she initially consented, she began to feel intense pain and she told him to stop. *Id.* However, he did not stop. *Id.* Eventually, the pain became so intense that she grabbed his hand and pulled it out of her vagina. *Id.* She then noticed that she was bleeding so she went into the bathroom and took a shower. *Id.* When she continued bleeding, she got dressed and drove herself to the emergency room. *Id.* Once at the hospital, the emergency room doctor diagnosed a five inch tear in Crystal’s vagina, which the doctor sutured during surgery. *Id.* Prior to surgery, the emergency room doctor asked if she had been raped. *Id.* Crystal responded by stating that she had not, that her injuries had happened when she was having consensual sex that got “too rambunctious.” *Id.*

### ***Procedural History***

By information filed November 10, 2010, and amended March 17, 2011, the state charged the defendant with the following six felonies arising from Crystal Engel’s four separate claims of abuse:

- I. Second Degree Assault occurring between 11/20/09 and

11/21/09;

II. Second Degree Assault occurring between 12/31/09 and 1/1/10;

III. Second Degree Assault with Sexual motivation occurring between 5/1/10 and 5/31/10;

IV. Second Degree Assault with Sexual Motivation occurring between 7/11/10 and 7/12/10;

V. Third Degree Rape between 7/11/10 and 7/12/10; and

VI. Third Degree Assault with Sexual Motivation occurring between 7/11/10 and 7/12/10.

CP 1-2, 162-165.

During trial preparation, the defense gave the state notice that it intended to call a number of transactional witnesses to refute Crystal Engle's claim that she was the victim of domestic abuse and only stayed in her relationship with the defendant because she felt trapped as a domestic abuse victim. CP 166-169. The defense arranged for the state to interview these witnesses. *Id.* On March 8, 2011, just 12 days before trial, the state sent an e-mail to the defendant's attorney indicating that it intended to call an "expert to testify on the dynamics of domestic violence relationships to explain the actions of Ms. Engle during her relationship with Mr. Dunne." *Id.* However, even at this late date, the state did not endorse such a witness because it did not have one. *Id.* It was not until six days before trial on March 15, 2011, when the state first endorsed an expert witness by the name of Dr. Marilyn

Howell. *Id.* Dr. Howell is a professor at Clark College with a doctorate in sociology from Washington State University. RP 400-403. Her entire career has been spent studying domestic abuse relationships. CP 166-169. Two days later, on the day before trial, the defense was provided an opportunity to interview Dr. Howell over the telephone. *Id.*

Based upon the state's late endorsement of Dr. Howell as a witness, the defense was unable to consult with an expert in this field to even review the accuracy of Dr. Howell's assertions, much less secure such a witness to testify on behalf of the defense. CP 166-169. As a result, on the morning of trial, the defense filed a motion to either continue the trial date or exclude Dr. Howell as a witness along with supporting affirmation. CP 166-169; RP 88-96. The trial court denied the motion. *Id.* As a result, the case proceeded to trial with the state calling eight witnesses. RP 158, 209, 320, 329, 336, 339, 368, 399.

One of the state's witnesses was Dr. William Herzig, the obstetrician/gynecologist called in on July 12, 2010, to repair the injury to Crystal Engle's vagina. RP 209-226. In his testimony, he first explained the extent of Crystal's injuries, and then explained the surgical procedure he employed to repair that injury. RP 209-218. He then rendered the opinion that such injuries were usually the result of either a quick childbirth or from the use of forceps during childbirth, and that they were unusual as the result

of regular sex. RP 218-219. On cross-examination, the defense asked Dr. Herzig whether or not the injuries could have resulted from non-typical, consensual sexual conduct. RP 222-226. Although Dr. Herzig did not claim that he was unqualified or could not answer the question, the state objected that the question was speculative and the court sustained the objection. *Id.*

The state's last witness was Dr. Howell. RP 399. During her testimony, she first explained her training in the field of domestic abuse, along with her research and publications in this area. RP 400-403. She then explained what she called the "four major questions" involving domestic abuse, those being: (1) Why does he do it, (2) Why does she stay, (3) What is abuse, and (4) What are we doing about it. RP 403-405. She then explained the statistically high prevalence of women who do not report domestic abuse, along with the following list of reasons why abused women don't report abuse or leave the relationship: (1) cultural valuation of privacy, (2) victim belief that the police cannot and will not do anything, (3) fear of revenge, (4) the victim's belief that the abuse is her fault, (5) the belief that reporting will cause less prestige or respect in the community, and (6) the prevalence of financial dependency, fear that the abuser will go to jail, and resultant financial problems. RP 407-408.

Dr. Howell also explained the "cycle of violence" to the jury, which involved the building of tension within a relationship, and resultant violent

event, a honeymoon phase in which the abuser is repentant and attentive, and finally, the repeated building of tension until a new event of violence. RP 408-414. Dr. Howell then explained the phenomenon called “learned helplessness” in which the victim feels isolated, powerless, and unable to escape. RP 414-418. On cross-examination, Dr. Howell disavowed that her testimony dealt directly with the case at bar and claimed she was only dealing in generalities. RP 418-419. However, Crystal Engle did provide testimony that felt powerless, isolated, and trapped in her relationship with the defendant and that in spite of her claims of abuse, she did not leave the relationship for these reasons. RP 158-208, 227-319.

After the state rested its case, the defense called nine witnesses, including the defendant. RP 424, 473, 517, 522, 526, 529, 532, 554, 569. A number of the defendant’s witnesses testified that they had continued contact with Crystal Engle during the time periods in which she claimed abuse and isolation, and that she showed no physical signs of abuse or any indications that she was powerless or isolated in her relationship with the defendant. RP 424, 473, 517, 522, 526, 529. These witness included the following: (1) Victoria Skube, the defendant’s sister; (2) Jackie Dunne, defendant’s mother; (3) Ward Perkins, a long time friend of both the defendant and Crystal Engle; (4) Stephen Foster, an acquaintance of Crystal Engle; (5) Michelle Walton, the defendant’s sister-in-law; and (6) Debbie Kirkman, a

co-worker with the defendant and acquaintance with Crystal Engle. *Id.*

The defense also called Dr. Brady, who rendered the opinion that the injuries shown in the police photos of Crystal Engle were not consistent with strangulation. RP 532-553. As its second to last witness, the defense also called Kari Kuchta. RP 554. Ms. Kuchta explained that she was acquainted with both the defendant and Crystal Engle, that she had never had a romantic relationship with the defendant, that Crystal Engle believed that such a relationship existed, and that Crystal Engle had repeatedly expressed intense jealousy over this perceived relationship. RP 554-568. During her testimony, Crystal Engle repeatedly denied that she had been jealous, or that jealousy had been a motive for her to fabricate false claims against the defendant. RP 274-309.

As its last witness, the defendant took the stand on his own behalf. RP 589-618. During his testimony, he denied ever physically or sexually assaulting Crystal. *Id.* In addition, he explained that the injuries that Crystal had sustained to her vagina were the result of consensual sexual contact. *Id.* Finally, he testified to Crystal's false belief that he was romantically involved with Kari Kuchta and to Crystal's repeated threats to make false claims of abuse against him. *Id.*

Following the close of the state's case, the court instructed the jury on each count charged, along with each of the enhancements alleged,

including sexual motivation, domestic violence, deliberate cruelty, and an ongoing pattern of abuse. CP 274-308. In three of these instructions and ten of these special verdicts, the court repeatedly referred to Crystal Engle as either the “victim” of the defendant’s crimes or the “named victim” of the defendant’s crimes. *Id.* The three instructions, numbers 24, 26, and 28, stated the following:

#### **INSTRUCTION NO. 24**

You will also be given a special verdict form for all crimes charged to determine whether the defendant and the *named victim* were family or household members. If you find the defendant not guilty of all charged crimes, do not use the this special verdict form. If you find the defendant guilty of any of these crimes, you will then use the family or household special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach.

You will also be given a special verdict form for all crimes charged to determine whether the defendant’s actions manifested deliberate cruelty or intimidation of the *named victim*. If you find the defendant not guilty of all charged crimes, do not use this special verdict form. If you find the defendant guilty of any of these crimes, you will then use the deliberate cruelty or intimidation special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach.

You will also be given a special verdict form for the crimes of Assault in the Second Degree as charged in Counts 3 and 4, Rape in the Third Degree as charged in Count 5, and Assault in the Third Degree as charged in Count 6 to determine whether the defendant’s actions amounted to an ongoing pattern of physical abuse of the *named victim*. If you find the defendant not guilty of all of these charged crimes, do not use this special verdict form. If you find the defendant guilty of any of these charged crimes, you will then use the ongoing pattern of physical abuse special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach.

You will also be given a special verdict form for the crimes of Assault in the Second Degree as charged in Counts 3 and 4 and Assault in the Third Degree as charged in Count 6 to determine whether the defendant's actions were sexually motivated. If you find the defendant not guilty of all of these charged crimes, do not use this special verdict form. If you find the defendant guilty of any of these charged crimes, you will then use the sexual motivation special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach.

Because this is a criminal case, in order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, or if after careful deliberation you cannot agree as to the answer, you must answer "no".

#### **INSTRUCTION NO. 26**

To find that Counts 1, 2, 3, 4, 5 or 6 manifested deliberate cruelty or intimidation of a *victim* in a domestic violence relationship, each of the following elements must be proved beyond a reasonable doubt:

(1) That the *victim* and the defendant were family or household members; and

(2) That the defendant's conduct during the commission of the offense manifested deliberate cruelty or intimidation of the *victim*.

If you find from the evidence that element (1) and (2) have been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer "no" on the special verdict form.

## INSTRUCTION NO. 28

To find that Counts 3, 4, 5, or 6 were an ongoing pattern of abuse in a domestic violence relationship, each of the following elements must be proved beyond a reasonable doubt.

(1) That the *victim* and the defendant were family or household members; and

(2) That the offense was part of an ongoing pattern of physical abuse of the *victim* manifested by multiple incidents over a prolonged period of time. An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

If you find from the evidence that elements (1) and (2) have been proved beyond a reasonable doubt, then it will be your duty to answer “yes” on the special verdict form.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to elements (1) and (2), then it will be your duty to answer “no” on the special verdict form.

CP 300-301, 303, 305 (emphasis added).

The ten special verdict instructions referring to Crystal Engle as the “victim” or the “named victim” stated as follows:

### **SPECIAL VERDICT FORM - DELIBERATE CRUELTY OR INTIMIDATION - COUNT 1**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant’s conduct during the commission of Assault in the Second Degree as charged in Count 1 manifest deliberate cruelty or intimidation of the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 2**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 2 manifest deliberate cruelty or intimidation of the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 3**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 3 manifest deliberate cruelty or intimidation of the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - ONGOING PATTERN  
OF PHYSICAL ABUSE - COUNT 3**

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 3 part of an ongoing pattern of physical abuse against the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 4**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 4 manifest deliberate cruelty or intimidation of the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - ONGOING PATTERN  
OF PHYSICAL ABUSE - COUNT 4**

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 4 part of an ongoing pattern of physical abuse against the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 5**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Rape in the Third Degree as charged in Count 5 manifest deliberate cruelty or intimidation of the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - ONGOING PATTERN  
OF PHYSICAL ABUSE - COUNT 5**

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the Defendant's conduct during the commission of Rape in the Third Degree as charged in Count 5 part of an ongoing pattern of physical abuse against the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 6**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Third Degree as charged in Count 6 manifest deliberate cruelty or intimidation of the *named victim*, who was also a family household member?

**SPECIAL VERDICT FORM - ONGOING PATTERN  
OF PHYSICAL ABUSE - COUNT 6**

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the Defendant's conduct during the commission of Assault in the Third Degree as charged in Count 6 part of an ongoing pattern of physical abuse against the *named victim*, who was also a family household member?

CP 316-319, 321-322, 324-327 (emphasis added).

During closing, the prosecutor argued on five separate occasions (three in initial closing, twice in rebuttal) that Dr. Howell's testimony explaining the attributes of a domestic abuse victim supported Crystal Engle's claim that she was the victim of domestic abuse and supported the state's arguments that the defendant had committed the crimes charged. RP 695-697, 698, 720-721, 743-744, 747. In addition, during closing, the prosecutor argued that the jury should convict because the defense had failed to present evidence to explain Crystal Engle's injuries. RP 722. The prosecutor's exact words were as follows:

And keep in mind that the Defense really has provided no explanation in this case for the injuries.

CP 722.

After closing argument, the jury retired for deliberation. RP 752. On the second day of deliberation, the jury sent out the following question:

Regarding Inst. 18 - please confirm if consent can be withdrawn after sexual intercourse has been withdrawn.

CP 273.

Over both the defendant and the state's objections, the court responded to this question with the following supplemental instruction:

A person's consent to engage in sexual intercourse may be revoked after intercourse has begun, so long as the revocation of consent is clearly expressed to the other party by words or conduct.

In order to be effective, the revocation of consent must be communicated to the other party in a timely manner, affording the other party an opportunity to desist from the conduct complained of. If the intercourse continues thereafter, it may be considered to be without consent, if the Jury determines beyond a reasonable doubt that such alleged revocation of consent has occurred.

CP 308.

The jury later returned a verdict of "not guilty" on the first count of second degree assault, and guilty on all other counts. CP 309. In spite of the verdict of acquittal on Count I, and in spite of the fact that the court had instructed the jury that it should not use the special verdict form relating to Count I unless it found the defendant guilty on Count I, the jury none the less did answer the special verdict form relating to Count I in the negative. CP 316. The jury also found that the state had proven all of the enhancements alleged in Counts II through VI. CP 315-328.

Prior to sentencing, the defendant brought a motion for a new trial, arguing that the trial court had denied the defendant a fair trial when it

refused to grant a continuance to allow the defense to prepare to meet the testimony of the state's last minute expert. CP 348-365. The defense supported this motion by affirmation in which the defendant's attorney explained how, following trial, he had been able to consult with Dr. Kirk Johnson, an expert on domestic violence. CP 388-389. During this interview, Dr. Johnson pointed out a number of deficiencies in the police investigation in this case that led to erroneous conclusions by Dr. Howell and the police concerning whether or not Crystal Engle really did display the symptoms and indicators of a victim of domestic abuse. *Id.* The trial court denied the motion for a new trial. RP 782-811. The defense also moved for a new trial on a claim that one of the jurors was sleeping during part of closing argument. CP 348-365. Noting that neither of the attorneys nor the court witnessed a sleeping juror, the trial court denied the motion for a new trial on this basis also, as well as upon a claim of prosecutorial misconduct. RP 782-811.

At a subsequent sentencing hearing, the court merged Count V (third degree rape on 7/11/10), and Count VI (third degree assault with sexual motivation on 7/11/10) into Count IV (second degree assault with sexual motivation on 7/11/10). RP 823-824. The court also ruled that the "deliberate cruelty" aggravator could not be used to enhance the defendant's sentence because it merged into the element of "substantial bodily injury" in

the assault charges. RP 841-848. However, the court ruled that it could use the “ongoing pattern of abuse” and “sexual motivation” findings to support imposition of an exceptional sentence. *Id.*

Although Counts II, III, and IV were all charges of second degree assault, the standard range on Count II was from 13 to 17 months, and the standard range on Counts III and IV was from 22 to 29 months. CP 452. The reason was that Counts III and IV had findings of sexual motivation, which changed them from Class B felonies to Class A sex offenses. *Id.* Thus, the offender score for Count II was 4 points (2 points each from Counts III and IV), while the offender score for Counts III and IV was 5 points (2 points from Count II added to 3 points from the other count with sexual motivation). CP 452. In addition, since Counts III and IV were Class A sex offenses, they were subject to indeterminate sentencing under RCW 9.94A.507. *Id.*

Based upon the “ongoing pattern of abuse” and “sexual motivation” aggravators, the court sentenced the defendant on Counts III and IV to a base sentence of 72 months (43 months over the 29 months top end of the standard range), plus the two 24 month sexual motivation enhancements for a minimum sentence of 120 months each on Counts III and IV. CP 453. This resulted in sentences of 17 months on Count II, and sentences of 120 months to life each on Counts III and IV. *Id.* Following imposition of these

sentences, the defendant filed timely notice of appeal. CP 467.

## ARGUMENT

### I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT REFUSED TO GRANT A CONTINUANCE TO ALLOW THE DEFENSE TIME TO OBTAIN AN EXPERT TO REBUT AN EXPERT WITNESS THE STATE ENDORSED THE DAY OF TRIAL.

Under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, every criminal defendant has the right to a fair trial, although not a perfect trial. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This constitutional provision includes the right to be appraised of the state's evidence with sufficient time to adequately investigate and prepare to answer it, and is embodied in CrR 4.7. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). As the Washington Supreme Court held in *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993),

The prosecutor has a duty to disclose and to preserve evidence that is material and favorable to the defendant. CrR 4.7(a)(3). Failure to do so will generally be held to violate the accused's constitutional right to a fair trial.

*State v. Blackwell*, 120 Wn.2d at 826.

For example, in *State v. Dunivin*, 65 Wn.App. 728, 829 P.2d 799 (1992), the defendant was charged with manufacturing marijuana after the police flew over his property, saw marijuana, obtained a search warrant, and

then arrested him while executing the warrant. In fact, the defendant's son-in-law had given the police the initial tip about the grow operation in return for a payment of \$50.00, for which he gave the police a receipt. The defense was unaware of this fact because no informant was mentioned in the police reports or in the affidavit given in support of the warrant.

At trial, the defense called the son-in-law as a witness, and he testified that he was familiar with the defendant's property, and there had been no marijuana on it. The state then impeached the son-in-law with his statements to the police and the receipt he had signed. Upon hearing this information, the defense moved for a mistrial based upon the state's failure to provide discovery of the son-in-law's role and the receipt. The trial court initially denied the motion. However, after the jury returned a guilty verdict, the court granted a defense motion for a new trial on this basis. The state appealed.

In addressing the issues presented, the court first noted the following concerning the state's duty of discovery:

It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process ..." *State v. Yates*, 111 Wash.2d 793, 797, 765 P.2d 291 (1988) (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub. Co. ed. 1971)). To accomplish these goals, it is necessary that the prosecutor resolve

doubts regarding disclosure in favor of sharing the evidence with the defense.

*State v. Dunivin*, 65 Wn.App. at 733.

The court then affirmed the trial court's decision to grant a new trial, noting that the state's failure to disclose the information concerning the son-in-law along with the receipt violated both the defendant's right to discovery under CrR 4.7, as well as his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

In the case at bar, the state called Dr. Howell as a key witness for the state. The fact that the prosecutor felt compelled to employ this witness at the last minute and to call her as the state's last witness evinces her importance to the state's case. This conclusion also follows from the state's extensive use of her testimony and opinions during closing argument. The state used her testimony (1) to directly support its claim that Crystal Engle was a victim of domestic abuse, who didn't leave the defendant after repeated instances of abuse because she felt "isolated" and "trapped," and (2) to directly refute the defendant's claim that Crystal Engle's decision to remain in the relationship demonstrated that no such abuse had occurred.

In spite of the obvious importance of this witness, the trial court refused to grant the defense a continuance in order to consult with its own

expert so that it could (1) effectively challenge Dr. Howell's claims and (2) present its own expert on what factors one would expect to see in a nonviolent domestic relationship. By denying the defendant's motion to continue, the trial court denied the defendant his constitutional right to review the state's evidence in a timely manner and to allow the defendant time to evaluate and confront that evidence.

In this case, the defense was eventually able to consult with its own domestic violence expert, who had specific criticisms of the conclusions the state and the state's experts drew. This evidence, presented after trial through an affirmation of counsel given in support of the motion for a new trial, illustrates the prejudice that the defense suffered when the court allowed the state to endorse a critical expert witness on the eve of trial. Given the equivocal nature of the state's evidence, the witnesses that the defense called directly refuting many of Crystal Engle's claims, as well as the fact that the jury acquitted on Count I, this error in denying the motion to continue was far from harmless. Thus, in denying the motion to continue, the trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, the defendant is entitled to a new trial.

**II. THE TRIAL COURT DENIED THE DEFENDANT THE RIGHT TO CONFRONT WITNESSES WHEN IT REFUSED TO ALLOW HIM TO EXAMINE A STATE'S EXPERT WITNESS ON OTHER POSSIBLE CAUSES FOR THE INJURIES THE COMPLAINING WITNESS SUSTAINED.**

The confrontation clause of the Sixth Amendment and under Washington Constitution, Article 1, § 22, guarantees a defendant the opportunity to confront the witnesses against him through cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). This includes the right to impeach a witness with prior inconsistent statements. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974); *State v. Dickenson*, 48 Wn.App. 457, 469, 740 P.2d 312 (1987). Thus, any error in excluding evidence is presumed prejudicial and requires reversal unless no rational person could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *Davis*, 415 U.S. at 318; *State v. Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893, 18 A.L.R.4th 690 (1980); *Dickenson*, 48 Wn.App. at 470.

Although the right to confront witnesses is constitutional, it is subject to two limitations: (1) the offered evidence must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *State v. McDaniel*, 83 Wn.App. 179, 184-85,

920 P.2d 1218 (1996). However, any attempt to limit meaningful cross-examination, however, must be justified by a compelling state interest. *State v. Hudlow*, 99 Wn.2d at 15-16.

For example, in *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002), the defendant was charged with possession of a controlled substance with intent to deliver. During trial, the state called a police officer who testified that he had stationed himself in a specific surveillance location and that from this position he saw the defendant participate in a number of suspected drug transactions on the street. He then identified the defendant to other officers who made the arrest. After the arrest, the police strip searched the defendant and uncovered a bundle of cocaine on the defendant's person. At trial the surveillance officer testified that he had observed the defendant for over an hour and had seen him give people bundles similar to the one uncovered during his arrest.

On cross-examination the defense asked the officer to identify his exact position in order to show that the officer could not have seen what he said he did. However, the state objected that this information was "secret." Based upon this claim, the trial court refused to order the officer to answer the defendant's questions concerning the officer's exact position. Following conviction the defendant appealed, arguing that the trial court's ruling had violated his right to confrontation under Washington Constitution, Article 1,

§ 22 and United States Constitution, Sixth Amendment. In addressing these arguments the court first noted the threshold for what is or is not relevant is very low. The court observed:

The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible. However, relevant evidence may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence.

*State v. Darden*, 145 Wn.2d at 621 (footnotes and citations omitted).

In addressing the issue of relevance, the court noted that the defendant's mere possession of a small amount of cocaine was not sufficient to support a conviction for possession with intent. Thus, the officer's claimed observations were critical in either sustaining or refuting a charge of possession with intent. As such, what the officer could or could not see from his particular vantage point was relevant in determining the credibility of the officer's claimed observations. The court held:

Here the fact of consequence was Sgt. Vandergiessen's ability to observe and identify Darden as the person who allegedly conducted three transactions. Since he was the only one of the three prosecution witnesses who saw the alleged transactions, he was a crucial witness. It was Sgt. Vandergiessen's observations that gave law enforcement probable cause to arrest Darden. It was his description of Darden that enabled the arrest team to separate Darden from the other person wearing the identical jacket at the bus shelter. Lastly, it was his testimony that enabled the prosecution to convict Darden of possession with the intent to deliver rather than the lesser offense of possession.

*State v. Darden*, 145 Wn.2d at 624.

Finding the evidence relevant, the court then addressed the issue of prejudice. Based upon the fact that the one officer's observation was the only evidence of intent to deliver, the court found that the confrontation violation was not harmless. The court stated:

Nor was this error harmless or otherwise within the trial court's discretion. The State's entire case for possession with intent to deliver hinged on Sgt. Vandergiesse's testimony.

*State v. Darden*, 145 Wn.2d at 626.

In the case at bar, the state called Dr. William Herzig as its second witness. He was the surgeon who repaired the tear to Crystal Engle's vagina. During his testimony, he rendered the opinion that the most typical mechanism causing the injuries he observed was either a very quick childbirth or the use of forceps during birth. There is little question that he was qualified to render this opinion, as he was an ob/gyn with extensive training and experience. In addition, he had repeatedly seen and repaired similar injuries. The relevance of this opinion is immediately apparent and the state's purpose in eliciting it was to argue to the jury that Crystal Engle did not sustain this injury as the result of consensual sexual contact.

In order to respond to this argument, the defense asked Dr. Herzig whether or not this injury could occur as the result of consensual sexual activity. Once again, this was a question that the doctor was well qualified to answer. Indeed, his testimony that he would "normally" see this injury as

a result of a quick childbirth or a childbirth with the use of forceps is itself an admission that this was not the only causality and that he was well aware of other possible causes for this injury. Indeed, his question to Crystal Engle during the examination whether or not she had been raped was itself implied that rape could also have been the cause of the injury.

In spite of Dr. Herzig's qualifications to answer the defendant's questions, and in spite of its relevance and importance to the defendant's case, the court refused to allow the defense to question Dr. Herzig about other, non-criminal causes for the injury that Crystal Engle sustained. In so ruling, the trial court prevented the defense from confronting this important witness on an issue that had great importance to the defense. In so ruling, the court denied the defendant his right to confront the witnesses called against him and denied him a fair trial.

**III. THE STATE DENIED THE DEFENDANT A FAIR TRIAL WHEN IT PRESENTED CLOSING ARGUMENT THAT SHIFTED THE BURDEN OF PROOF TO THE DEFENSE TO EXPLAIN HOW THE COMPLAINING WITNESS SUSTAINED HER INJURIES.**

As was stated previously, while due process does not guarantee every person a perfect trial, due process under both the state and federal constitutions does guarantee a defendant a fair trial. *State v. Swenson, supra*; *Bruton v. United States, supra*. This due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton, 90*

Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice, the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order *in limine* precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this argument by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence. The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching

television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

*State v. Gregory*, 158 Wn.2d at 866-867.

In the case at bar, the defense argues that the state committed misconduct when, in closing, it argued that the defendant was guilty because he failed to present evidence or argument rebutting the state's claims. The following addresses this argument.

Since the burden rests upon the state to prove every element of the crime charged beyond a reasonable doubt, it is prosecutorial misconduct for the state to comment upon the defendant's failure to testify, to call witnesses, or to present any defense at all. *State v. Cleveland*, 58 Wn.App. 634, 794 P.2d 546 (1990). In spite of this clear constitutional requirement, in the case at bar the state did comment on the defendant's failure to present evidence when it made the following comment during closing argument.

And keep in mind that the Defense really has provided no explanation in this case for the injuries.

CP 722.

By making this argument, the state directly invited the jury to find the

defendant guilty because he failed to present any evidence or argument rebutting the existence of the injuries that Crystal Engle had as a result fo the four claimed attacks by the defendant. This argument constituted misconduct.

In the case at bar, the issue before the jury was not the substance of Crystal Engle’s injuries. Rather, the issue before the jury was whether or not the defendant had inflicted the injuries on Ms Engle as the result of assaultive, non-consensual conduct. On this real issue, the jury had to rely solely upon Crystal Engle’s testimony. The fact that the jury acquitted the defendant on the first assault charge illustrates the difficulty the jury had with the credibility of this testimony. Thus, there is a substantial likelihood that the prosecutor’s improper arguments in closing affected the jury’s decision to convict. As a result, the defendant is entitled to a new trial.

**IV. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO BE FREE OF JUDICIAL COMMENTS ON THE EVIDENCE WHEN IT REPEATEDLY REFERRED TO THE COMPLAINING WITNESS AS THE “NAMED VICTIM”.**

Under Washington Constitution, Article 4, § 16, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement made by the court in front of the jury constitutes an impermissible “comment on the evidence” if a reasonable juror hearing the statement in the context of the case would infer the court’s

attitude toward the merits of the case, or would infer the court's evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crofts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

*State v. Crofts*, 22 Wash. at 250-51.

The courts of this state "rigorously" apply the prohibition found in Article 4, § 16, and presume prejudice from any violation of this provision. *State v. Bogner*, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, "[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment". *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

*State v. Lane*, at 838-839.

In the case at bar, the trial court commented on the evidence (the substance and veracity of Crystal Engle's testimony), when it repeatedly referred to Crystal Engle as the "victim" or "named victim" in three jury instructions and ten special verdict forms. In our society today, in which the question of "victim's rights" is one of the continuing issues before the public, the court's decision to refer to the complaining witness as the "victim" or "named victim," clearly and unmistakably informed the jury that the court considered Crystal Engle's claims against the defendant as truthful. Were this not the case, then Crystal Engle would not have been the "victim."

The error in referring to Crystal Engle as the "victim" of the defendant's crimes is illustrated by the constitutional principle that no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the

defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

*State v. Carlin*, 40 Wn.App. 701; *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police

officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

In this case, the court referred to Crystal Engle as the “victim” in three separate jury instructions and ten special verdict forms. The state may argue, at least in regards to the court’s use of this term in the special verdict forms, that the term is not error because the jury is only supposed to use these forms if it first finds the defendant guilty of the related offense. Thus, the term would be appropriate. However, any such claim is erroneous for two reasons. First, this argument runs afoul of the rule that jury instructions should be viewed as a whole, which is the natural way that a jury would consider them. This is particularly true because the court read all of the instructions to the jury prior to deliberation, and the jury presumably read the instructions prior to deciding on verdicts.

Second, in the case at bar, the jury did not understand the limited applicability of the special instructions. This conclusion follows from the fact that although the jury acquitted the defendant on the first count, it none the less considered and answered the special verdicts relating to that count. Had the jury understood the limitation on the applicability of the special verdicts, it would not have answered the special verdict relating to Count 1. As a result, the court’s use of the term “victim” or “named victim” constituted a comment on the evidence both in the verdict forms as well as

in the special verdict forms. As a judicial comment on the evidence in violation of Washington Constitution, Article 4, § 16, this error is presumed prejudicial and the burden rests upon the state to prove it harmless beyond a reasonable doubt. Under the facts of this case, this error was far from harmless. This conclusion follows from the fact that (1) the majority of the state's case turned upon the credibility of Crystal Engle, and (2) the defense was able to attack her credibility through a number of witnesses and inconsistent statements. Indeed, the jury acquitted on one of the counts and needed further instructions on another count before it could reach its verdict. Thus, the defendant is entitled to a new trial.

## CONCLUSION

The defendant is entitled to a new trial based upon (1) the trial court's abuse of discretion in denying the defendant's motion to continue, (2) the trial court's erroneous refusal to allow the defense to fully confront the state's witnesses, (3) prosecutorial misconduct shifting the burden of proof, and (4) the trial court's violation of Washington Constitution, Article 4, § 16.

DATED this \_\_28<sup>th</sup>\_\_ day of December, 2011.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**WASHINGTON CONSTITUTION  
ARTICLE 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

## **INSTRUCTION NO. 24**

You will also be given a special verdict form for all crimes charged to determine whether the defendant and the named victim were family or household members. If you find that the defendant not guilty of all charged crimes, do not use the this special verdict form. If you find the defendant guilty of any of these crimes, you will then use the family or household special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach.

You will also be given a special verdict form for all crimes charged to determine whether the defendant’s actions manifested deliberate cruelty or intimidation of the named victim. If you find the defendant not guilty of all charged crimes, do not use this special verdict form. If you find the defendant guilty of any of these crimes, you will then use the deliberate cruelty or intimidation special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach.

You will also be given a special verdict form for the crimes of Assault in the Second Degree as charged in Counts 3 and 4, Rape in the Third Degree a charged in Count 5, and Assault in the Third Degree as charged in Count 6 to determine whether the defendant’s actions amounted to an ongoing pattern of physical abuse of the named victim. If you find the defendant not guilty of all of these charged crimes, do not use this special verdict form. If you find the defendant guilty of any of these charged crimes, you will then use the ongoing pattern of physical abuse special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach.

You will also be given a special verdict form for the crimes of Assault in the Second Degree as charged in Counts 3 and 4 and Assault in the Third Degree as charged in Count 6 to determine whether the defendant’s actions were sexually motivated. If you find the defendant not guilty of all of these charged crimes, do not use this special verdict form. If you find the defendant guilty of any of these charged crimes, you will then use the sexual motivation special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach.

Because this is a criminal case, in order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, or if after careful deliberation you cannot agree as to the answer, you must answer “no”.

### **INSTRUCTION NO. 26**

To find that Counts 1, 2, 3, 4, 5 or 6 manifested deliberate cruelty or intimidation of a victim in a domestic violence relationship, each of the following elements must be proved beyond a reasonable doubt:

(1) That the victim and the defendant were family or household members; and

(2) That the defendant's conduct during the commission of the offense manifested deliberate cruelty or intimidation of the victim.

If you find from the evidence that element (1) and (2) have been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer "no" on the special verdict form.

### **INSTRUCTION NO. 28**

To find that Counts 3, 4, 5, or 6 were an ongoing pattern of abuse in a domestic violence relationship, each of the following elements must be proved beyond a reasonable doubt.

(1) That the victim and the defendant were family or household members; and

(2) That the offense was part of an ongoing pattern of physical abuse of the victim manifested by multiple incidents over a prolonged period of time. An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

If you find from the evidence that element (1) and (2) have been proved beyond a reasonable doubt, then it will be your duty to answer “yes” on the special verdict form.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) and (2), then it will be your duty to answer “no” on the special verdict form.

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 1**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 1 manifest deliberate cruelty or intimidation of the name victim, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 2**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 2 manifest deliberate cruelty or intimidation of the name victim, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 3**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 3 manifest deliberate cruelty or intimidation of the name victim, who was also a family household member?

**SPECIAL VERDICT FORM - ONGOING PATTERN  
OF PHYSICAL ABUSE - COUNT 3**

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 3 part of an ongoing pattern of physical abuse against the named victim, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 4**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 4 manifest deliberate cruelty or intimidation of the name victim, who was also a family household member?

**SPECIAL VERDICT FORM - ONGOING PATTERN  
OF PHYSICAL ABUSE - COUNT 4**

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the Defendant's conduct during the commission of Assault in the Second Degree as charged in Count 4 part of an ongoing pattern of physical abuse against the named victim, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 5**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Rape in the Third Degree as charged in Count 5 manifest deliberate cruelty or intimidation of the name victim, who was also a family household member?

**SPECIAL VERDICT FORM - ONGOING PATTERN  
OF PHYSICAL ABUSE - COUNT 5**

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the Defendant's conduct during the commission of Rape in the Third Degree as charged in Count 5 part of an ongoing pattern of physical abuse against the named victim, who was also a family household member?

**SPECIAL VERDICT FORM - DELIBERATE  
CRUELTY OR INTIMIDATION - COUNT 6**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the Defendant's conduct during the commission of Assault in the Third Degree as charged in Count 6 manifest deliberate cruelty or intimidation of the name victim, who was also a family household member?

**SPECIAL VERDICT FORM - ONGOING PATTERN  
OF PHYSICAL ABUSE - COUNT 6**

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the Defendant's conduct during the commission of Assault in the Third Degree as charged in Count 6 part of an ongoing pattern of physical abuse against the named victim, who was also a family household member?

