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NO. 50328-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE BUTLER,
Appellant.

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

Clark County Cause No. 16-1-01936-6

The Honorable Scott A. Collier, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Butler's conviction for witness tampering was entered in violation of his Fourteenth Amendment right to due process.
2. The state presented insufficient evidence to convict Mr. Butler of witness tampering as charged.

ISSUE 1: Evidence is insufficient to support a conviction if no rational jury could have found each element proved beyond a reasonable doubt. Did the state present insufficient evidence to support Mr. Butler's conviction for witness tampering when the state charged him with attempting to induce his wife to provide false testimony but provided evidence to show, at most, that he tried to convince her to drop the charges against him or to refuse to testify at trial?

3. Prosecutorial misconduct deprived Mr. Butler of his Sixth and Fourteenth Amendment right to a fair trial.
4. The prosecutor committed misconduct at Mr. Butler's trial by encouraging the jury to make an improper evidentiary inference.
5. The trial court erred by failing to rule on Mr. Butler's objection to the prosecutor's improper argument.

ISSUE 2: A prosecutor commits misconduct by encouraging the jury to make an improper evidentiary inference. Did the prosecutor commit misconduct at Mr. Butler's trial by arguing to the jury that the lack of substantive testimony from Mr. Butler's seven-year-old son was actually evidence of guilt?

6. The prosecutor committed misconduct at Mr. Butler's trial by making arguments designed to appeal to the jury's passion and prejudice.
7. The prosecutor's misconduct was flagrant and ill-intentioned.

ISSUE 3: A prosecutor commits misconduct by making arguments designed to appeal to the jury's passion and prejudice rather than to the evidence in the case. Did the prosecutor at Mr. Butler's trial commit misconduct by arguing to the jury that, to Mr. Butler "...sex comes first. Sex comes before love. Sex comes before respect. Sex comes before his own family;" telling the jury that Mr. Butler's sexual practices

were “not normal;” and asking the jury to focus on the alleged victim’s love for her children?

8. The prosecutor committed misconduct at Mr. Butler’s trial by “testifying” to “facts” that had not been admitted into evidence.

ISSUE 4: A prosecutor commits misconduct by “testifying” to “facts” that have not been admitted into evidence. Did the prosecutor commit misconduct at Mr. Butler’s trial by arguing that the discrepancies in the alleged victim’s testimony could be explained by the effects of trauma on memory and cognition when no witness had testified to any effects of that nature at trial?

9. The prosecutor committed misconduct at Mr. Butler’s trial by admonishing the jury to hold Mr. Butler accountable, rather than to hold the state to its evidentiary burden.

ISSUE 5: A prosecutor commits misconduct by admonishing the jury to “send a message” or to hold the accused “accountable.” Did the prosecutor commit misconduct by encouraging the jury to hold Mr. Butler “accountable,” rather than to hold the state to its evidentiary burden?

10. The cumulative effect of the prosecutorial misconduct at Mr. Butler’s trial deprived him of his Sixth and Fourteenth Amendment right to a fair trial.

ISSUE 6: The cumulative effect of repeated instances of prosecutorial misconduct can require reversal even when any individual instance would not. Does the cumulative effect of the prosecutor’s improper arguments at Mr. Butler’s trial require reversal of his convictions?

11. The court’s ruling prohibiting Mr. Butler from eliciting the balance of his statements to the officers on the day of his initial arrest violated his Sixth Amendment right to confront the state’s witnesses.
12. The court’s ruling prohibiting Mr. Butler from eliciting the balance of his statements to the officers on the day of his initial arrest violated his Sixth and Fourteenth Amendment right to present a defense

13. The court's ruling prohibiting Mr. Butler from eliciting the balance of his statements to the officers on the day of his initial arrest violated the common law rule of completeness.

ISSUE 7: When the state offers only portions of a statement by the accused at trial, the remainder of that statement is admissible under the rule of completeness, when necessary to prevent misleading the jury or when the offered portion excludes information that is substantially exculpatory. Did the trial court violate Mr. Butler's rights to present a defense and to confront adverse witnesses when it prohibited from eliciting the exculpatory portions of his statement to the police after the state elicited portions that appeared to be inculpatory out of context?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jesse Butler and his wife, Sybil Butler, were going through a difficult period of their 10-year marriage. RP 554, 912. Mr. Butler had recently found out that Ms. Butler had had an affair about two years before. RP 912.

One day, the couple had a big argument in front of their three children. RP 554. They fought about Ms. Butler's affair and their intimacy issues. RP 554, 912. Mr. Butler lost his temper and poked Ms. Butler hard in the chest. RP 555. He also grabbed her arm at one point and she twisted away. RP 556. Eventually, they both calmed down. RP 556.

Once the fight had ended, Mr. Butler asked Ms. Butler if she would like to have sex and she nodded her head yes. RP 556. The couple went into their bedroom, locked the door, and had sex while their children played in the living room. RP 557-58.

Ms. Butler was not very active during the intercourse. RP 559. She took off her own shorts but just lay on the bed, while Mr. Butler took the lead. RP 557, 559. This had become the norm in their relationship and was one of the reasons for their fighting about intimacy. RP 120.

Afterwards, the argument started anew. RP 560. Ms. Butler said that she wanted to leave Mr. Butler, so he opened the front door and invited her to do so.¹ RP 561.

Ms. Butler went to a neighbor's house and called the police. RP 924. The officers arrived and called Mr. Butler on his cellphone, asking him to come outside to talk. RP 562.

Mr. Butler went outside and cooperated fully with the officers. RP 1038. When the police asked Mr. Butler whether he had had sex with his wife that day and whether it had been consensual, Mr. Butler realized for the first time that Ms. Butler was accusing him of rape. RP 562.

The state charged Mr. Butler with fourth-degree assault, second-degree rape, and third-degree rape of his wife. CP 54-55.

Subsequently, Mr. Butler asked his sister to send messages to Ms. Butler and then Ms. Butler agreed to try to reconcile with her husband, leading to several contacts in violation of the pre-trial no-contact order. RP 937, 973-74. Ms. Butler also invited Mr. Butler to move back into the family home at one point and he slept there for two nights. RP 566.

The state added four counts of violation of a no-contact order against Mr. Butler. CP 55-57.

¹ Mr. Butler locked the front door but did not lock the back door. RP 561-62. The front door had a keypad on the outside, which would have permitted Ms. Butler to unlock the door and come back in if she had wanted to do so. RP 561-62.

Ms. Butler went to the prosecutor's office and asked to have the charges against her husband dropped. RP 944. She also went to court in order to get a civil no-contact order rescinded so Mr. Butler could have contact with his children. RP 1003.

Upon learning that Ms. Butler wanted the charges dropped, one of the detectives on the case told her that she should hear the things that her husband was saying about her to his family. RP 977-78. The next time Ms. Butler went to the prosecutor's office, the detectives played several recordings of Mr. Butler's phone calls from jail for her to listen to. RP 284, 337-38. After that, Ms. Butler stopped advocating to have the charges dropped. RP 979.

The state added a charge of witness tampering against Mr. Butler. CP 55.

The charging language for the witness tampering charge alleged only that Mr. Butler had attempted to induce Ms. Butler to testify falsely in an official proceeding. CP 55.

The state called Mr. and Ms. Butler's seven-year-old son to testify at Mr. Butler's trial. RP 875-886, 908. The child denied seeing his parents fight on the day of the alleged assault. RP 885. Once the prosecutor started asking questions about the fight, the child essentially refused to answer any questions. RP 883-86, 908.

The court admitted Mr. Butler's statement to the police that his wife "didn't say yes and didn't say no" to sex on the day of the alleged assault and that she had "just lied there," rather than actively participating in the encounter. RP 1025-26.

On cross-examination, Mr. Butler sought to elicit that he had also told the officer that it was common for his wife to be a passive participant in their sex life. RP 1033. Defense counsel argued that the additional statement was admissible under the rule of completeness and was necessary in order for him to effectively confront the state's police witness. RP 346, 1032. The court denied Mr. Butler's motion to offer those additional portions of his statement to the officer. RP 1036-37.

Ms. Butler testified that Mr. Butler had punched her and thrown her to the floor. RP 914. She said that he pushed her into the bedroom, took her clothes off, and pushed her onto the bed. RP 916-17. She said that she was crying and asked him to stop. RP 917. She said that she resisted and said no during both the brief anal penetration and the subsequent vaginal penetration. RP 919-20. She said that he held her down. RP 919.

The state played portions of several of Mr. Butler's phone calls from jail to his mother and siblings for the jury. RP 524-44. On the recordings, Mr. Butler repeatedly asks his family to tell Ms. Butler that he

loves her. RP 524-25. He asks them to tell her how she can have the no-contact order rescinded. RP 531. He did not believe that Ms. Butler would testify against him in court. RP 541, 585.

Mr. Butler also told one of the state's police witnesses that his wife would never testify against him. RP 324.

The state did not present any evidence regarding the effects of trauma on the memory of an alleged victim. *See RP generally.*

Mr. Butler testified at trial. RP 533-588. He admitted to poking Ms. Butler in the chest, to grabbing her arm roughly, and to violating the no-contact orders. RP 555, 566-67.

He said that his wife nodded her head when he asked if she wanted to have sex, walked into the bedroom, and took off her own clothes. RP 557-58. He said that he attempted to penetrate her anally first, but she asked him to stop, which he immediately did. RP 558. After that, he penetrated her vaginally. RP 558. He admitted that she was not very active during the vaginal sex, but that she never asked him to stop. RP 557, 559.

During cross-examination, the prosecutor asked Mr. Butler whether he had cleaned himself off between attempting to penetrate his wife anally and penetrating her vaginally. RP 573. Mr. Butler said that he was not aware that doing so was unhygienic. RP 573. He said that he had

done it before. RP 573. When pressed by the prosecutor, he agreed that he could see how it could possibly cause health problems for the woman. RP 574.

The prosecutor began her closing argument by telling the jury that: “To [Mr. Butler], sex comes first. Sex comes before love. Sex comes before respect. Sex comes before his own family.” RP 690.

The prosecutor told the jury that the fact that Mr. and Ms. Butler’s son had not provided any substantive testimony was actually evidence of Mr. Butler’s guilt:

When it came time to talk about the incident itself, the argument, the violence, [J.B.] Jr. shut down. That tells you something... if his Dad hadn’t done something wrong, if his Dad hadn’t done something bad, [J.B.] Jr. would not have had that demeanor. [J.B.] Jr. would have been fine to proceed. RP 706-07.

Defense counsel objected to this argument. RP 707. The court did not make a ruling on the objection. RP 707.

The prosecutor asked the jury to focus on Ms. Butler’s love for her children:

There was one point when [Ms. Butler] started crying, and that was after I asked her about her children and where they were. And she described that they huddled together after the assault (inaudible). That moment, that fact of the kids being there, takes her back to reality about this incident. That pulls her back to this incident. It is clear that she cares about her kids, probably more than herself, and that might be the piece of this case, the piece of this incident that was the most troubling to her, the most disturbing for her.

RP 711-12.

The prosecutor explained the inconsistencies between Ms. Butler's story as recounted to a nurse on the day of the alleged incident and her testimony at trial by claiming that she had "blocked things out" in the intervening months: "This is what trauma looks like. It looks like confusion, like loss of memory, like not knowing the order of things." RP 713.

The prosecutor also argued that Mr. Butler was more likely guilty of rape because he had not "cleaned himself off" between attempting to penetrate his wife anally and penetrating her vaginally:

He never cleaned himself off. He had no concern for his wife's health. He kind of conceded that it's gross to put your penis in someone's anus and then immediately into her vagina. If you're having anal sex and vaginal sex, there is typically an order to that, and it's usually the opposite. When it's not, there is typically cleaning involved. This was not consensual. This was not normal sex
RP 714.

Finally, the prosecutor ended her closing by admonishing the jury to hold Mr. Butler accountable:

I am asking that you hold the defendant accountable, accountable for rape, accountable for assault, accountable for witness tampering, accountable for violating the no-contact order, and most of all, accountable for refusing to respect the meaning of 'No.' I ask that you return verdicts of guilty on all eight counts.
RP 715.

The jury convicted Mr. Butler as charged. RP 783-84. The trial court dismissed the assault and third-degree rape charges, which the state conceded merged with the second-degree rape charge. CP 162; RP 819.

This timely appeal follows. Supp DCP, Notice of Appeal.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. BUTLER OF TAMPERING WITH A WITNESS AS IT WAS CHARGED IN HIS CASE.

Ms. Butler testified that it was her own idea to ask the court to rescind the civil no-contact order. RP 1003-04. Nonetheless, the recordings of Mr. Butler's phone calls to his family could be interpreted to demonstrate that he tried to convince her to do so. RP 524-44.

Ms. Butler also testified that Mr. Butler told her to go to the prosecutor's office to try to get the charges dropped. RP 943. Additionally, Mr. Butler's adamant belief that his wife would never testify against him could have been interpreted to indicate that he had done something to persuade her not to testify at trial. RP 324, 585.

However, Mr. Butler was not charged with any of that conduct. CP 54-57. Rather, the state charged him only with attempting to induce his wife to "testify falsely" in an official proceeding. CP 55. But the state did not present any evidence that Mr. Butler did anything to attempt to induce Ms. Butler to testify falsely at any proceeding. *See RP generally.*

Accordingly, no rational jury could have found Mr. Butler guilty of witness tampering as it was charged in his case.

Evidence is insufficient to support a conviction if, taking the evidence in the light most favorable to the state, no rational jury could have found each element of an offense proved beyond a reasonable doubt. *State v. Larson*, 184 Wn.2d 843, 855, 365 P.3d 740 (2015).²

The offense of Tampering with a Witness criminalizes any attempt to induce a witness or potential witness to:

- (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
- (b) Absent himself or herself from such proceedings; or
- (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120.

But Mr. Butler was only charged under the prong of the offense for attempting to induce a witness to provide false testimony at an official proceeding. CP 55. Likewise, that was the only means of committing the offense upon which the jury was instructed. CP 101-02, 104.

But no rational jury could have found beyond a reasonable doubt that Mr. Butler attempted to induce Ms. Butler to give false testimony.

² The Court of Appeals reviews the evidence *de novo*. *Larson*, 184 Wn.2d at 855.

Even taken in the light most favorable to the state, the evidence showed, at most, that Mr. Butler may have attempted to convince Ms. Butler to ask the prosecutor's office to drop the charges against him and to rescind the civil no-contact order. RP 943, 524-44. A rational jury could even have inferred that Mr. Butler may have attempted to induce Ms. Butler to refuse to testify at trial. *See* RP 324, 585.

But the state did not present any evidence whatsoever indicating that Mr. Butler took any steps to try to induce his wife to give false testimony at an official proceeding. *See* RP *generally*. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Butler committed witness tampering as it was charged in this case. *Larson*, 184 Wn.2d at 855. Mr. Butler's conviction for witness tampering must be reversed. *Id.*

II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. BUTLER OF A FAIR TRIAL

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements

prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is “so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

At Mr. Butler’s trial, the prosecutor committed extensive misconduct during closing argument by encouraging the jury to make an improper evidentiary presumption, appealing to the jury’s passion and prejudice, “testifying” to “facts” not in evidence, and admonishing the jury to hold Mr. Butler accountable rather than to hold the state to its evidentiary burden. Whether considered individually or cumulatively, these repeated instances of misconduct deprived Mr. Butler of a fair trial.

- A. The prosecutor committed misconduct by encouraging the jury to infer that the lack of substantive testimony from Mr. Butler's seven-year-old son was actually evidence of guilt.

The state called Mr. Butler's seven-year-old son, J.B., Jr. at trial. RP 875-86, 908. The boy acknowledged that his parents had a fight and that the police came to his house. RP 879. But he said that he did not remember any details of the events and did not provide any further substantive testimony. RP 879-86, 908.

Even so, in closing, the prosecutor argued that J.B., Jr's testimony was evidence that Mr. Butler had assaulted and raped his wife:

When it came time to talk about the incident itself, the argument, the violence, [J.B.] Jr. shut down. That tells you something... if his Dad hadn't done something wrong, if his Dad hadn't done something bad, [J.B.] Jr. would not have had that demeanor. [J.B.] Jr. would have been fine to proceed.
RP 706-707.

Mr. Butler objected to this argument and moved to strike but the court simply said, "noted" and permitted the argument to stand. RP 707.

A prosecutor commits misconduct by encouraging the jury to make an improper inference from the evidence or lack thereof. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009).

Mr. Butler's son did not provide any testimony implicating Mr. Butler in any of the charged offenses. He merely corroborated that his parents had a fight and that the police came to the house, none of which

was in dispute. RP 879. He did not claim that his father was ever violent toward his mother in any way. RP 875-86, 908.

The prosecutor committed misconduct by encouraging the jury to infer that J.B., Jr.'s lack of testimony about any violence by Mr. Butler was actually evidence that Mr. Butler *had* engaged in violence. In short, the prosecutor encouraged the jury to find evidence of Mr. Butler's guilt in J.B., Jr.'s testimony where none actually existed. The prosecutor's argument was improper. *Dixon*, 150 Wn. App. at 54.

The prosecutor's argument was also improperly designed to inflame the jury's passion and prejudice. *Glasmann*, 175 Wn.2d at 704.

Mr. Butler was prejudiced by the prosecutor's improper argument. The only witnesses to the alleged events were Mr. Butler, Ms. Butler, and their children. Mr. Butler and Ms. Butler's testimony was directly contradictory in regards to the extent of the violence in the living room and whether Mr. Butler had forced Ms. Butler into the bedroom – all of which was, presumably, witnessed by J.B., Jr. RP 554-56, 912, 915-16. But J.B. Jr.'s testimony did not help the prosecution because he was unable to corroborate either of his parents' versions of events. RP 883-86, 908. The prosecutor's improper argument, however, encouraged the jury to infer that J.B., Jr.'s testimony actually was evidence of Mr. Butler's guilt, thereby shifting the quantum of proof in the minds of the jurors from

Mr. Butler's word against Ms. Butler's word to Mr. Butler's word against the word of Ms. Butler *and* their seven-year-old son. There is a substantial likelihood that the argument affected the jury's verdict.

Glasmann, 175 Wn.2d at 704

The prosecutor committed prejudicial misconduct by encouraging the jury to make an improper inference from the lack of substantive testimony from J.B., Jr. *Id.*; *Dixon*, 150 Wn. App. at 54. Mr. Butler's convictions must be reversed. *Id.*

B. The prosecutor committed misconduct by making extensive arguments designed to appeal to the jury's passion and prejudice, rather than focusing on the evidence in the case.

The prosecutor at Mr. Butler's trial opened her closing argument by claiming that, to Mr. Butler, "...sex comes first. Sex comes before love. Sex comes before respect. Sex comes before his own family." RP 690.

Later, the prosecutor told the jury that Mr. Butler's practice of attempting anal penetration and then vaginal penetration was "not normal sex." RP 714. She argued that what Mr. Butler had done was "gross" and told the jury that this was evidence that the intercourse was not consensual. RP 714.

The prosecutor also attempted to inflame the jurors' emotions by encouraging them to focus on Ms. Butler's love for her children:

It is clear that she cares about her kids, probably more than herself, and that might be the piece of this case, the piece of this incident that was the most troubling to her, the most disturbing for her.” RP 711-12.

These arguments constituted prosecutorial misconduct because they were improperly designed to inflame the jury’s passion and prejudice. *Glasmann*, 175 Wn.2d at 704. Rather than limiting her arguments to those based on the evidence against Mr. Butler, the prosecutor chose to claim that, to him, “sex comes before his own family;” and that his sexual practices are “gross.” RP 690, 714. She also chose to draw the jury’s attention to the emotional elements of Ms. Butler’s love for her children. RP 711-12. The prosecutor’s arguments were improper. *Id.*

Mr. Butler was prejudiced by the prosecutor’s emotion-laden arguments. Though the state called many witnesses at trial, the question of guilt (particularly on the rape, assault, and witness tampering charges) boiled down to Mr. Butler’s word against Ms. Butler’s. The prosecutor’s improper appeal to the jury’s passion and prejudice encouraged the jury to *want* to find Mr. Butler guilty because he was an allegedly bad person. There is a substantial likelihood that the improper arguments affected the jury’s verdict. *Glasmann*, 175 Wn.2d at 704.

Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor

at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to longstanding case law prohibiting appeals to the jury's emotion, passion, and prejudice. *Id.*

Arguments with an "inflammatory effect on the jury" are also generally not curable by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

The prosecutor's misconduct in Mr. Butler's case requires reversal even though his attorney failed to object to the arguments appealing to the jury's emotions. *Id.*; *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed extensive, flagrant, ill-intentioned misconduct by appealing to the jury's passion and prejudice. *Glasmann*, 175 Wn.2d at 704. Mr. Butler's convictions must be reversed. *Id.*

C. The prosecutor committed misconduct by "testifying" to "facts," which had not been admitted into evidence.

No witness at Mr. Butler's trial testified to the effects of alleged trauma on human memory or cognition. *See RP generally.*

Nonetheless, the prosecutor attempted to explain discrepancies between Ms. Butler's testimony and her story as recounted to a nurse on the day of the alleged assault by claiming that they were the normal result of a traumatic experience: "this is what trauma looks like. It looks like

confusion, like loss of memory, like not knowing the order of things.” RP 713.

The prosecutor committed misconduct by arguing “facts” that had not been admitted into evidence. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (Jones I). The prosecutor’s claim that the inconsistencies in Ms. Butler’s story were a result of her having experienced trauma – made absent any evidence to that effect in the record – was improper. *Id.*

There is a substantial likelihood that the prosecutor’s improper argument affected the outcome of Mr. Butler’s trial. *Glasmann*, 175 Wn.2d at 704. The evidence against Mr. Butler was not overwhelming. Indeed, the inconsistencies in Ms. Butler’s versions of the story could have sown a reasonable doubt as to her veracity in the minds of the jury. Rather than arguing that the evidence supported Ms. Butler’s account, however, the prosecutor chose to claim – without any supporting evidence – that the inconsistency was the result of the very conduct with which Mr. Butler was charged. Mr. Butler was prejudiced by the prosecutor’s improper imposition of “facts,” which had not been admitted into evidence into her closing argument.

The prosecutor’s improper argument was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707. Again, the prosecutor had

access to longstanding case law prohibiting the introduction of “facts” outside the evidence into closing argument. *See e.g. Jones*, 144 Wn. App. at 293. The argument was also designed to have an “inflammatory effect on the jury,” such that the prejudice could not be cured by an instruction. *Pierce*, 169 Wn. App. at 552. The prosecutor’s improper argument requires reversal of Mr. Butler’s conviction even absent an objection below. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by arguing “facts” that had not been admitted into evidence during closing. *Jones*, 144 Wn. App. at 293. Mr. Butler’s convictions must be reversed. *Id.*

D. The prosecutor committed misconduct by encouraging the jury to hold Mr. Butler “accountable,” rather than to hold the state to its evidentiary burden.

At the end of her closing at Mr. Butler’s trial, the prosecutor admonished the jury to hold Mr. Butler accountable:

I am asking that you hold the defendant accountable, accountable for rape, accountable for assault, accountable for witness tampering, accountable for violating the no-contact order, and most of all, accountable for refusing to respect the meaning of "No." I ask that you return verdicts of guilty on all eight counts.

RP 715.

A prosecutor also commits misconduct by arguing that the jury should “hold [the accused] accountable” for his alleged misdeeds. *State v.*

Neal, 361 N.J. Super. 522, 537, 836 A.2d 723 (App. Div. 2003).³ Such arguments are akin to asking the jury to send a message, and thus “improperly divert jurors’ attention from the facts of the case.” *Id.*

The prosecutor’s argument at Mr. Butler’s trial was improper. The jury’s role is to hold the state to its burden of proof, not to hold individuals accountable for alleged wrongdoing. The prosecutor committed misconduct and improperly “diverted the jurors’ attention from the facts of the case” by encouraging the jury to “hold” Mr. Butler “accountable,” rather than to hold the state to its evidentiary burden. *Id.*

There is a substantial likelihood that the prosecutor affected the outcome of Mr. Butler’s trial by encouraging the jury to hold him accountable. As outlined above, the evidence against Mr. Butler was not overwhelming. The case boiled down to his word against Ms. Butler’s. Accordingly, a jury could have taken that evidence and, applying the state’s burden of proof, determined that there was a reasonable doubt as to whether Mr. Butler had committed the assault and rape charges. Rather than arguing that the state had met its burden, however, the prosecutor closed her argument by encouraging the jury to hold Mr. Butler

³ Prosecutorial admonitions for the jury to convict the defendant in order to “send a message” have long been held to constitute misconduct in Washington. *See e.g. State v. Perez-Mejia*, 134 Wn. App. 907, 917, 143 P.3d 838 (2006).

accountable. Mr. Butler was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704.

Again, the emotional nature of this improper argument renders its prejudicial effect so inflammatory that it could not have been cured by an additional instruction. The prosecutor's misconduct was flagrant and ill-intentioned. *Pierce*, 169 Wn. App. at 552.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by admonishing the jury to hold Mr. Butler accountable. *Neal*, 361 N.J. Super. at 537. Mr. Butler's conviction must be reversed. *Id.*

E. The cumulative effect of the prosecutor's improper arguments requires reversal of Mr. Butler's convictions.

The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012).

The prosecutor's closing argument at Mr. Butler's trial was littered with improper arguments throughout. The prosecutor encouraged the jury to improperly infer that J.B., Jr.'s lack of substantive testimony was actually evidence of Mr. Butler's guilt, appealed repeatedly to the jury's

passion and prejudice, “testified” to “facts” not in evidence in an attempt to explain discrepancies in Ms. Butler’s version of events, and admonished the jury to hold Mr. Butler accountable rather than to hold the state to its burden of proof.

Whether considered individually or in the aggregate, the prosecutor’s extensive improper arguments to the jury require reversal of Mr. Butler’s convictions. *Walker*, 164 Wn. App. at 737.

III. THE COURT VIOLATED MR. BUTLER’S CONSTITUTIONAL RIGHTS TO CONFRONT THE STATE’S WITNESSES AND TO PRESENT A DEFENSE BY PROHIBITING HIM FROM ELICITING CRITICAL CONTEXT NECESSARY TO SHOW THAT HIS STATEMENTS TO THE POLICE ON THE DAY OF THE ALLEGED RAPE WERE NOT ACTUALLY AN ADMISSION TO NONCONSENSUAL SEX WITH HIS WIFE.

On the day of his initial arrest, Mr. Butler told the police that he had had sex with his wife. RP 117. He told the officers that Ms. Butler “didn’t say yes but... didn’t say no” when he asked her if she wanted to have sex. RP 118. He also said that Ms. Butler “just lied there” during the intercourse. RP 118. All of those statements were admitted to the jury. RP 1025-26.

But the jury did not hear that Mr. Butler had also told the officer that these actions on the part of his wife were normal in their marriage. RP 118, 1025-26. This is because the court prohibited Mr. Butler from eliciting that critical context for his other statements. RP 1036-37.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amends. VI, XIV; art. I, § 22. The primary and most crucial aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence “must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.” *Darden*, 145 Wn.2d at 621.

The due process clause (along with the Sixth Amendment right to compulsory process) also guarantees criminal defendants a meaningful opportunity to present a complete defense. U.S. Const. Amends. VI; XIV; art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The accused must be able to present his version of the facts, so the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has called this right “a fundamental element of due process of law.” *Washington v. Texas*, 410 U.S. at 19. The

right to present a defense includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007).

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Unless otherwise limited, all relevant evidence is admissible. ER 402. Evidence tending to establish the defendant’s theory of the case or to disprove the state’s theory is highly probative. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010) (Jones II).

There is no “self-serving hearsay” bar to otherwise admissible evidence. *State v. Pavlik*, 165 Wn. App. 645, 650, 268 P.3d 986 (2011).

The common law rule of completeness provides that “when a confession is introduced, the defendant has the right to require that the whole statement be placed before the jury.” *State v. Stallworth*, 19 Wn. App. 728, 734-735, 577 P.2d 617 (1978). This is so even where the evidence would have not have been admissible in the first place. *State v. West*, 70 Wn.2d 751, 754-755, 424 P.2d 1014 (1967).

The rule applies to the entire confession (including when the defendant’s statement is given piecemeal during a series of interrogations) so long as the proponent specifies testimony which is relevant to the issue

and which qualifies or explains portions of the statement(s) already admitted. *U.S. v. King*, 351 F.3d 859, 866 (8th Cir. 2003); *U.S. v. Webber*, 255 F.3d 523, 526 (8th Cir. 2001).

The common law rule has been partially codified by ER 106:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106.⁴

Although ER 106 codifies the common law in part, the common law doctrine of completeness survives the partial codification and continues to have force and effect. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988); *See also State v. Simms*, 151 Wn. App. 677, 692, 214 P.3d 919 (2009), *aff'd on other grounds*, 171 Wn.2d 244, 250 P.3d 107 (2011) (applying the rule of completeness to an oral statement even though oral statements are not encompassed by ER 106).

The purpose of ER 106 “is ‘to prevent a party from misleading the jury.’” *U.S. v. Moussaoui*, 382 F.3d 453, 481 (4th Cir. 2004) (quoting *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996)). The rule applies to oral, written, and recorded statements. *State v. Larry*, 108 Wn.

⁴ The Washington rule is substantially the same as the federal rule. Comment to ER 106.

App. 894, 909-910, 34 P.3d 241 (2001), *review denied*, 146 Wn.2d 1022 (2002) *disapproved on other grounds by State v. Fisher*, 185 Wn.2d 836, 847, 374 P.3d 1185 (2016).

A statement is admissible under ER 106 if it passes either of two tests. Under the first test (the “*Alsup*” test), a partial statement must be completed where the partial statement distorts the meaning of the whole or excludes information that is substantially exculpatory. *Larry*, 108 Wn. App. at 909 (citing *State v. Alsup*, 75 Wn. App. 128, 133-134, 876 P.2d 935 (1994)). Under the second test (the “*Velasco*” test), a statement should also be admitted if it (1) explains other statements already admitted, (2) places the previously admitted portions in context, (3) helps avoid misleading the trier of fact, and (4) helps ensure fair and impartial understanding of the evidence. *Larry*, 108 Wn. App. at 910 (citing *United States v. Velasco*, 953 F.2d 1467 (7th Cir. 1992)).

Here, Mr. Butler told the police that his wife had not said yes but also had not said no when he asked if she wanted to have sex. RP 118. He said that his wife had “just lied there” during the encounter. RP 118. He also told the officer that this had become commonplace in their marriage and that it was normal for his Ms. Butler not to be an active participant in intercourse. RP 118.

But the jury only heard his statements that Ms. Butler had not said either yes or no when Mr. Butler proposed that they have sex and that she had “just lied there. RP 1025-26. The prosecutor used that statement in closing to argue that Mr. Butler had actually admitted to having nonconsensual sex with his wife. RP 696.

The explanatory portions of Mr. Butler’s statements to the police – which were necessary to provide critical context -- were admissible under ER 106 and the common law rule of completeness. ER 106; *Alsup*, 75 Wn. App. at 133-134; *Velasco*, 953 F.2d at 1475. The balance of his statement “ought in fairness to [have been] considered contemporaneously with” the portion introduced by the state. ER 106.

The excluded portion should also have been admitted under both the *Alsup* and *Velasco* tests. The partial statement distorted the meaning of the whole by permitting the jury to infer that Mr. Butler’s statement that his wife had not said either yes or no and had “just lied there” during the intercourse were admissions to rape. RP 1025-26; *Alsup*, 75 Wn. App. at 133-134. In actuality, however Mr. Butler qualified his statement by explaining that this was normal in his sex life with his wife. In the context of his entire statement, Mr. Butler’s comments about the lack of affirmative consent and Ms. Butler’s less than active participation were not incriminating.

The court's ruling also excluded information that was substantially exculpatory. *Alsup*, 75 Wn. App. at 133-134. The excluded portions of Mr. Butler's statements placed the admitted portions in important context. *Velasco*, 953 F.2d at 1475. Admission of Mr. Butler's entire statement would have helped avoid misleading the jury, and helped to ensure a fair and impartial understanding of the evidence. *Id.*

The excluded portion of Mr. Butler's statement was at least minimally relevant under ER 401. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). It was also highly probative to Mr. Butler's theory of the case – that the intercourse between himself and Ms. Butler had been consensual and that its nature was commonplace within their marriage. *Jones II*, 168 Wn.2d at 721. Because the exculpatory portion of Mr. Butler's statement was otherwise admissible, its exclusion violated his rights to confront adverse witnesses and to present a defense. *Darden*, 145 Wn.2d at 620; *Holmes* 547 U.S. at 324.

The trial court violated Mr. Butler's constitutional rights to present a defense and to confront adverse witnesses by prohibiting him from eliciting additional portions of his statements to police, which were necessary to provide context and clarify that the portions admitted by the state were not actually admissions of guilt. *Darden*, 145 Wn.2d at 620; *Holmes* 547 U.S. at 324. Mr. Butler's convictions must be reversed. *Id.*

CONCLUSION

The state presented insufficient evidence for a rational jury to find Mr. Butler guilty of witness tampering as it was charged in this case. The prosecutor committed extensive and varied misconduct during closing argument. That misconduct, whether considered on a case-by-case basis or cumulatively, denied Mr. Butler of a fair trial. The trial court violated Mr. Butler's constitutional rights to confront the state's witnesses and to present a defense by prohibiting him from eliciting critical context for his seemingly inculpatory statement to a police officer. Mr. Butler's convictions must all be reversed.

Respectfully submitted on December 12, 2017,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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Coyote Ridge Corrections Center
PO Box 769
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on December 12, 2017.



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