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

STATE OF WASHINGTON, Respondent

v.

JESSE ETHAN BUTLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-01936-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The State presented sufficient evidence to convict Butler of Tampering with a Witness**
- II. The prosecutor did not commit misconduct**
- III. The trial court properly precluded Butler from admitting his own out-of-court statement into evidence**

STATEMENT OF THE CASE

The State charged Jesse Butler (hereafter 'Butler') with numerous counts arising out of a domestic violence incident involving his wife of ten years, Sybil Butler. CP 1-4. The case proceeded to trial on the following charges: Rape in the Second Degree Domestic Violence, Rape in the Third Degree Domestic Violence, Assault in the Fourth Degree Domestic Violence, Tampering with a Witness Domestic Violence, and four counts of violation of a Domestic Violence No Contact Order. CP 54-57.

J.B., Butler's and Ms. Butler's 7-year-old son testified at trial. RP 874. J.B. was able to testify before the jury, telling them he was 7-years-old, has two brothers, is in the second grade, and finds school boring. RP 875-77. He further testified that he was nervous. RP 879. J.B. remembered a time the police came to his house when his mom and dad were fighting, though he stated that he did not want to talk about it. RP 879. The prosecutor was able to elicit that J.B. and his two brothers were at their old

house, and so were both Butler and his mother when this event occurred. RP 880. He was in the living room playing a game with one of his brothers; everyone in his family was in the living room at the time. RP 881. J.B. continued to not answer the prosecutor's questions, saying "uh-uh" or "uh-huh" over and over again whenever the prosecutor asked questions about his mom and dad having a fight. RP 882. J.B. indicated he knew the answers to the questions, but did not want to talk about the incident. RP 879, 908.

5'6" tall, 107lb Sybil Butler testified that she and Butler started dating in December 2006 and got married in August 2009. RP 910, 1013. In August 2016, Butler was 5'9" tall and weighed about 245 pounds. RP 568. The couple had three children together, who were ages seven, five, and one at the time of trial. RP 911.

Ms. Butler described sex as a source of conflict in her marriage. RP 911. Butler wanted sex more frequently than she did and they fought over that a lot. RP 912. Ms. Butler also explained that she and her husband had engaged in anal sex on one prior occasion, but that she did not enjoy it and she told him she did not enjoy it. RP 912. Butler still asked to have anal sex about once a month. RP 913. Ms. Butler also had an affair two and a half years prior to the time of trial. RP 912.

On August 27, 2016, Ms. Butler and Butler had an argument about sex. RP 914. Butler asked her why she didn't like having sex with him and why she didn't love him, and asked her why she wouldn't just have sex with him every day like he wanted her to. RP 914. Butler became angry because she wouldn't answer him. RP 914. Butler then began hitting his wife in the chest, poking her really hard; he then starting punching her in the arms and smacking her on her head. RP 914. Butler grabbed Ms. Butler by her leg and pulled her off the chair, throwing her across the floor into the kitchen. RP 914. The couple's three children were all in the room when this assault occurred; they were huddled together behind the couch. RP 915. Ms. Butler was on the floor in the kitchen, where she had landed after Butler had grabbed her by the leg and threw her across the floor, when Butler started yelling at her. RP 916. About 10 minutes passed with Ms. Butler remaining seated on the floor and Butler standing over her, yelling. RP 916.

Butler then told Ms. Butler to stand up and go into the bedroom. RP 916. Ms. Butler stood up and walked towards the bedroom; Butler pushed her from behind to keep her going. RP 916. Ms. Butler only went into the bedroom because she did not want Butler to get more upset with her. RP 916. In the bedroom, Butler closed the door and locked it. RP 917. Butler took off his wife's clothes and pushed her onto the bed on her

stomach. RP 916-17. Ms. Butler was crying and asked him to stop and said no. RP 917-18. Butler used his penis to penetrate Ms. Butler's anus; she said no and told him to stop, and tried to push him away. RP 918-19. In response, Butler pushed harder and forced himself inside. RP 919. Butler had one hand on Ms. Butler's back, holding her down; she told him to stop and that it hurt and said no multiple times. RP 919. Ms. Butler continued to cry and scream; Butler punched his hand down beside her and told her to shut up and stop crying. RP 919.

The anal rape did not last very long; Butler gave up and then penetrated Ms. Butler vaginally. RP 920. At this point Ms. Butler was still crying, but just laid there because she had given up trying to push him off. RP 920. Butler had his hand at the back of her neck, squeezing her hard. RP 920, 971. Butler ejaculated inside Ms. Butler's vagina and then stood up; Ms. Butler laid still on the bed. RP 921. Butler was angry at Ms. Butler and punched her on her leg as she was still crying. RP 922. At one point during the rape, Butler told Ms. Butler that if she was going to be like this then this is what she would get. RP 918.

After he raped her, Butler wanted Ms. Butler to come out to the living room to sit with him, but she refused. RP 922. This angered Butler and he eventually had Ms. Butler pinned up against the wall as she sat on the floor, and asked her repeatedly if she wanted to leave him. RP 922-23.

Ms. Butler remained silent, but Butler then said if she wanted to leave then she should leave, and he then told her to leave. RP 923. At that point, Ms. Butler got up and left the bedroom and Butler followed her and pushed her out the front door, locking it behind her. RP 923. Ms. Butler did not have shoes or a bra on, and did not have her purse or phone with her. RP 923. After standing outside for a few minutes, Ms. Butler went to the neighbor's house and called 911. RP 924.

Police arrived and Ms. Butler spoke with the responding officer. RP 931. Edward Prentice has been a police officer with the City of Vancouver for 26 years. RP 1007. Officer Prentice responded to Ms. Butler's 911 call on August 27, 2016. RP 1008. Officer Prentice made contact with Ms. Butler outside her residence; she seemed upset and began crying while they spoke, and appeared scared and shaky. RP 1009, 191. Ms. Butler told Officer Prentice that she was afraid, and that she had pain to her right shoulder and other body pain, as well as a bruise. RP 1010. Officer Prentice observed the bruise to Ms. Butler's left bicep and took photographs to document the injury; the photographs were admitted into evidence. RP 1010-12; EXs 7, 8, 9.

Patrick Moore is a patrol sergeant with the Vancouver Police Department. RP 1019-20. Sgt. Moore responded to the Butler residence after Officer Prentice called him and advised him of the situation. RP

1023. Sgt. Moore called Butler, while Butler was still inside the residence, identified himself, and asked Butler to step outside. RP 1023. Butler complied and exited the residence; police took him into custody and informed him of his constitutional rights. RP 1024. Sgt. Moore then asked Butler about what had happened that day. RP 1024. Butler told him that he and his wife were arguing over intimacy problems, that his wife had had an affair about two and a half years ago. RP 1024-25. Butler told Sgt. Moore that he had poked his wife in the chest, but denied punching her, throwing her down, or holding her on the ground. RP 1028. Butler told Sgt. Moore that his wife did not like to have sex. RP 1025. Sgt. Moore asked Butler if he and his wife had had sex prior to the police arriving that day. RP 1025. Butler slumped down and paused and finally responded “yes.” RP 1025. Sgt. Moore asked if the sex was consensual and Butler responded “Well, she didn’t say ‘yes,’ and she didn’t say ‘no.’ She just laid there.” RP 1025. Butler indicated he didn’t consider it sex and that it was the most unsatisfying sex he had ever had and that his wife had just laid there. RP 1026. In giving more detail about the incident, Butler told Sgt. Moore that he had asked his wife to go into the back bedroom and she complied and that he said he wanted to have sex with her. RP 2028. Butler indicated Ms. Butler gave no verbal response and that he pulled her shorts down, bent her over the bed and attempted to penetrate her anally. RP

1028. Butler told Sgt. Moore that his wife complained of a burning sensation and possible tearing, so he stopped and proceeded to penetrate her vaginally. RP 1029. Butler told Sgt. Moore that his wife just laid there while he did this, did not say a word and did not actively participate. RP 1029. Sgt. Moore asked Butler a second time if this was consensual and Butler again said that “she did not say ‘yes,’ and she did not say ‘no.’” RP 1029.

During cross-examination of Sgt. Moore, defense attempted to elicit additional statements that Butler made to Sgt. Moore. RP 1031-32. Defense counsel argued the rule of completeness, ER 106, provided for admission of Butler’s additional statements to police. RP 1032. Defense sought to admit Butler’s statement to Sgt. Moore that it was common for his wife to just lay there as he had sex with her and that he did not understand why his wife did not like sex. RP 1033-34. The State objected to the admission of this statement, arguing the rule of completeness did not compel its admission, that it was hearsay, and that the State had limited its line of questioning to the sex act that had occurred on the day the police were called as opposed to attempting to introduce evidence of their prior sex life which would likely raise the issue of Ms. Butler’s indication that Butler had raped her on prior occasions. RP 1034. The trial court sustained the State’s objection, finding that it was not a clarifying

statement of the statement the State had introduced and it went to past behavior and did not clarify, explain, modify, or rebut the defendant's statement about what she had done on that occasion. RP 1034, 1040.

That same day, Ms. Butler went to the hospital and was examined by a nurse. RP 931, 358. Ms. Butler described having a bad headache that lasted a couple days after the incident, and a bruise on her arm and one on her leg. RP 932. The nurse documented injuries to Ms. Butler's body and documented that Ms. Butler indicated her husband had made verbal threats to her and had hit her in her chest and arms, poking, hitting and slapping her and holding her down by the sides of her neck. RP 368-70. The nurse also took swabs for possible DNA testing from Ms. Butler. RP 371-74. The crime lab analyst found sperm on the perineal, vaginal, and anal swabs. RP 428. The analyst then tested the vaginal swab for DNA and found a mixed profile of two people, which matched Ms. Butler and Butler. RP 430. The estimated probability of selecting an unrelated individual at random from the United States population with a matching profile to Butler's and the one from the vaginal swab was 1 in 130 quintillion. RP 431.

After Butler was arrested the Court issued a no-contact order on August 29, 2016 prohibiting Butler from having any contact with Ms. Butler. RP 933, 317-19; EX 17. That order had not been rescinded or

modified as of September 14, 2016. RP 320. After Butler was released from jail, he came back to the house where Ms. Butler was on August 30, 2016. RP 936. Ms. Butler's parents were there and her father called 911. RP 936. Butler knocked on the door of the house, telling them to let him in, and after they wouldn't, he went to every window of the residence, knocking on the windows, trying to get in. RP 936. As he was doing that, Butler was saying he loved Ms. Butler and that what he did was not that bad and that he needed to come inside. RP 936-37. Officer Ocegüera responded to the 911 call and arrived at the residence to find Butler, outside about 30 feet from the residence. RP 206. Butler approached Officer Ocegüera and handed him a document and said, "please don't arrest me." RP 206. The document Butler handed Officer Ocegüera was a copy of the no-contact order that had been entered by the Court prohibiting him from having contact with Ms. Butler or coming within 250 feet of her residence. RP 207; EX. 17. Ms. Butler spoke to Officer Ocegüera that night, telling him she was in fear for her life and could hear Butler calling her name, yelling for her to let him in as he banged on first the door and then the windows of her residence. RP 209-10.

Later in September 2016, Butler came back to the residence and stayed for a one or two days. RP 937. He told Ms. Butler that he was sorry and that he would never do it again. RP 937. Around that time, Butler told

Ms. Butler to drop the charges and to delete any text messages or phone calls from him that she had on her cell phone. RP 939. Ms. Butler did delete the messages and calls because Butler asked her to. RP 939. Butler also told Ms. Butler to go tell the prosecutor and everyone that what she had said wasn't true and that she said what she did because she was simply mad at him. RP 940. Butler encouraged her to have the charges dropped. RP 940. Butler would make Ms. Butler feel guilty about the pending charges, as did others in his family. RP 941.

After the incident, Ms. Butler had a lot of contact with Butler's sister, Heather White. RP 934-37. Ms. White also goes by the nickname "Micki." RP 934-35, 288. Ms. White would give Ms. Butler messages from Butler, telling her that he loved her. RP 938. Ms. White also asked Ms. Butler to have the charges against Butler dropped. RP 940. Ms. White brought Ms. Butler to the prosecutor's office and asked Ms. Butler to get the charges dropped, telling her that if she didn't Butler wouldn't be able to see his kids anymore and that he wouldn't be able to work. RP 942. Butler knew Ms. White was taking Ms. Butler to the prosecutor's office and told her to get the sexual assault charge dropped and the no-contact order dropped. RP 943. Ms. Butler did try to get the charges dropped because she felt guilty. RP 944. Ms. White also stayed with Ms. Butler for

a week or longer, never leaving her side, going with Ms. Butler everywhere she went. RP 944.

Members of Butler's family told Ms. Butler that she could not take her five-year-old son after he had been at Butler's mother's house. RP 941. His family kept her 5-year-old son, refusing to let Ms. Butler have all three of her children at once. RP 941-42. Butler's mother called it Butler's "insurance." RP 942. Ms. Butler had to call police to get her 5-year-old son back. RP 942.

Butler was arrested again on September 14, 2016. RP 945, 333-34. At that time, Ms. Butler spoke to Det. Anderson who told her she should not feel guilty and like everything was her fault. RP 945-46. Det. Anderson transported Butler to the Clark County jail and as they waited in the booking area, Butler told Det. Anderson that this whole thing had been blown out of proportion and that his wife would not testify against him. RP 336. About a week later Det. Anderson played some of Butler's jail phone calls for Ms. Butler upon her request. RP 946, 336-37. Ms. Butler stopped feeling guilty as she knew what Butler did was wrong. RP 946.

Detective Sandra Aldridge with the Vancouver Police Department monitored phone calls Butler made from jail while he was in custody. RP 513. Det. Aldridge listened to several calls Butler made and recognized his voice from having heard him speak in court and from when he took his

DNA reference sample. RP 520. Det. Aldridge recognized Heather White as “Micki,” and as a participant in the phone calls she listened to; she also identified a number of phone calls in which Butler refers to “mom” when speaking with Debra Butler. RP 520-21. Det. Aldridge also listened to phone calls between Butler and his brother, Jameson Butler. RP 522-23.

EX 42 was admitted and played for the jury; it is an audio recording of a phone call between Butler and his sister, Heather White, that occurred on August 28, 2016 at 4:07p.m. RP 523-25. In that call Butler tells Ms. White to call Ms. Butler and tell her that he loves her and that he’s sorry and for her not to go anywhere. RP 524. He also tells Ms. White that the incident wasn’t “that serious.” RP 525.

EX 40 was admitted and played for the jury; it is an audio recording of a phone call between Butler and Ms. White that occurred on August 29, 2016 at 5:07p.m. RP 526. In that call Butler asks Ms. White if she called Ms. Butler like he told her to and if she told her what he wanted her to. RP 527. Butler tells Ms. White that he “need[s] [Ms. White] to talk to [Ms. Butler].” RP 528. He again tells Ms. White that what he did wasn’t that bad and that Ms. Butler needs to be on his side. RP 528. Ms. White tells Butler that she had already tried to call Ms. Butler 10 times that day, but that she wouldn’t answer the phone or return her text messages. RP

528. Butler implores Ms. White to do whatever she has to do to talk to Ms. Butler, and to write her messages. RP 529.

EX 41 was admitted and played for the jury; it is an audio recording of a phone call between Butler and his mother, Debra Butler that occurred on September 15, 2016 at 1:57p.m. RP 529. In that call, Butler tells his mother to tell Ms. White to tell Ms. Butler that she would need to file a new request to rescind the no-contact order since a new no-contact order was put in place. RP 531.

EX 47 was admitted and played for the jury; it is an audio recording of a phone call between Butler and Ms. White that occurred on September 15, 2016 at 2:30p.m. RP 531-32. Ms. White explains to Butler that Ms. Butler won't speak to her; Butler tells Ms. White to keep trying to talk to Ms. Butler. RP 533.

EX 43A was admitted into evidence and played for the jury; it is an audio recording of a phone call between Butler and his mother from September 16, 2016 at 6:49p.m. RP 537. In that call Butler tells his mother that they just have to be patient and wait for Ms. Butler to come around, that she will eventually calm down and talk to Ms. White again and they just have to wait for them to build a relationship again and they will be able to "move from there." RP 538.

EX 44 was admitted and played for the jury; it is an audio recording of a phone call between Butler and Ms. White from September 19, 2016 at 6:43p.m. RP 539. In that call Butler discusses Ms. Butler with Ms. White, mentions something about “when the time comes for testimony...” in reference to Ms. Butler, and implores Ms. White to “work that angle.” RP 541. He again tells Ms. White to “tell [Ms. Butler] all about me and the things that I’m saying....” RP 541.

EX 46 was admitted and played for the jury; it is an audio recording of a telephone call between Butler and his brother, Jamie Butler on February 14, 2017 at 9:40a.m. RP 543. The snippet of this conversation shows Butler telling his brother that there are recordings of his phone calls to their mom and sister asking them to talk to Ms. Butler on his behalf. RP 543.

Butler testified at trial. RP 553. Butler testified that he and Ms. Butler argued emotionally that day, and admitted that he poked her in the chest and also roughly grabbed her by the arm. RP 555. Butler claimed the argument cooled down after about 30 minutes, and that he asked her to have sex with him. RP 556. Butler testified Ms. Butler nodded yes and they went into the bedroom. RP 556. Butler admitted Ms. Butler was not enthusiastic about sex, but that she pulled down her shorts and bent over the bed. RP 557. Butler testified that he first attempted to have anal sex,

but Ms. Butler said to stop so he stopped immediately; Butler then moved to her vaginal area and had vaginal intercourse with her. RP 558. There was no foreplay or any attempt to arouse Ms. Butler. RP 572. Butler estimated the vaginal intercourse lasted 8 to 10 minutes; Ms. Butler did not say anything during that time and just laid there. RP 558. Butler claims Ms. Butler never said stop. RP 559. After the sexual intercourse ended, Butler testified he asked Ms. Butler to join him in the living room, but that was when she did she started the argument up again. RP 560. Butler said he was tired of the arguments so he tried to end the argument, but Ms. Butler kept screaming and yelling at him. RP 560. Butler claims Ms. Butler yelled that she did not want to be with him anymore and did not want to be there, so Butler went to the front door and opened it and told her to get the hell out. RP 561. Butler testified Ms. Butler then walked out of the front door and he closed the door behind her and locked it. RP 561.

Butler testified that a bit later he received a phone call from Sgt. Moore; he assumed it was about the physical contact prior to the sexual contact. RP 562. Butler discussed the phone calls he made to his mother and sister while testifying, explaining that he was not trying to get them to convince Ms. Butler to testify *falsely*, but to get them to convince her to testify *truthfully*. RP 564. Butler said he told them to have Ms. Butler say things that are convincing. RP 654.

Butler identified EX 17 as the no-contact order filed in Clark County District Court on August 29, 2016 and identified his signature on that order. RP 578. Butler admitted he was ordered not to have any contact with Ms. Butler and not to go to her residence or be within 250 feet of it. RP 579.

Butler agreed he had talked to Ms. Butler about her testifying and was confident that she would not testify against him and would work to get the charges dropped. RP 585. Butler encouraged Ms. Butler to get the charges dropped, and tried to facilitate that through his sister. RP 586.

During closing arguments, the prosecutor made the following statements:

The defendant is someone who will not accept the meaning of “no.” Whether it’s the Court saying no to contact or his wife saying no to sex, he is someone that does what he wants, when he wants, no matter what. To him, sex comes first. Sex comes before love. Sex comes before respect. Sex comes before his own family.

On August 27, 2016, he violated his wife in the most invasive way. He raped her by force. He then proceeded to do everything he could to guilt her into dropping the charges, to guilt her in getting the no-contact order lifted. He did everything he could to manipulate her to get what he wanted. He kept her in the throes of an unhealthy relationship, and somehow she managed to come out on the other side.

I have eight charges that I have to prove to you. And I have to prove them to you beyond a reasonable

doubt. That is my burden. And I ask that each and every one of you hold me to that burden.

RP 690-91. She then discussed the jury instruction on reasonable doubt and then each count charged and the elements of them and what she had proved to support those elements. The prosecutor also said the following:

I'm not going to walk through every single witness's testimony because you're all capable of memory, but I do want to point out a couple of things about a couple people. This case started out with the testimony of 7-year-old J[B.]. He was present for this incident. He places everyone there in the living room.

...

Now J[B.] was comfortable – well, not comfortable, but fine talking about benign things, talking about his family, talking about school, talking about recess.

...

When it came time to talk about the incident itself, the argument, the violence, J[B.] shut down. That tells you something. We got from him that he talked to a defense investigator. We got from him that he previously talked to me about it, but he couldn't talk in court about this. And no one was going to force him to; but if his Dad hadn't done something wrong, if his Dad hadn't done something bad, J[B.] would not have had that demeanor. J[B.] would have been fine to proceed.

...

I, of course, want to talk about Sybil Butler and her testimony. Why should you believe her?

RP 706-07. The prosecutor discussed more of Ms. Butler's testimony and that of other witnesses; she then turned to Butler's testimony.

The last person that I want to talk about is the defendant. As soon as he took the stand, his credibility came into question just like any other witness. He gave a story, and he is asking you to believe that.

He asked you to believe that on this date, on August 27th, him and his wife are arguing because he went to breakfast at Denny's without her. He was mad at her that she had had an affair two and a half years previous that he learned about several months prior. He was mad at her because she didn't want to have sex with him. They were having intimacy issues. Their three kids are in the room. They're arguing, and he pokes her in the chest. He grabs her by the arms, hard enough to leave bruises. This is his story. The kids are still there.

He wants you to believe he then asked [Ms. Butler] "do you want to have sex?" She nodded yes and they walked down the hallway together and leave their three kids in the living room, including a baby, an infant, who is wide awake and crawling around. He wants you to believe that they go into the room, she takes off her own clothes and immediately he puts his penis in her rectum. He concedes that there is no foreplay. He does nothing to try to arouse her. He said she said to stop, though later when I crossed him he said she never said stop. But in his direct, he said she said to stop, so he moved on and put his penis in her vagina –

...

-- he never cleaned himself off. He had no concern for his wife's health. He kind of conceded 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.

He wants you to believe that after that, he ejaculated. She was just laying there the whole time, not acting, not participating, not saying anything. He ejaculates. He was feeling pretty satisfied, although he told Sergeant Moore that it was the most unsatisfying sex he ever had, but he claimed on the stand that he felt satisfied. He wanted to go sit in the living room and he wanted her to come sit with him, and she did....

RP 713-15.

The jury returned guilty verdicts on all eight counts, and further found the offenses were domestic violence offenses and that the Rapes were aggravated domestic violence offenses. CP 130-40. The trial court found the Rape in the Third Degree merged with the Rape in the Second Degree convictions, and sentenced Butler pursuant to RCW 9.94A.507 for a range of 151 months to Life on the Rape in the Second Degree conviction. CP 163. The court imposed standard range sentences on all other remaining counts. *Id.* This appeal timely followed.

ARGUMENT

I. The State presented sufficient evidence to support Butler's conviction for Tampering with a Witness

Butler argues the State failed to present sufficient evidence at trial that he committed tampering with a witness. However, in viewing the evidence in its entirety, it is clear the evidence supports the elements of

tampering with a witness and that any rational trier of fact could have found these elements were proven beyond a reasonable doubt. Butler's claim fails.

When a defendant claims evidence is insufficient to sustain his conviction, this Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Evidence that is direct or circumstantial may be equally presented to the jury. Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975). The reviewing Court does not disturb the jury's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict Butler of Tampering with a Witness the State had to prove that between August 28 and September 23, 2016, Butler attempted to induce his wife, a witness or someone Butler believed was to be called as a witness in an official proceeding, to testify falsely. CP 104; RCW 9A.72.120. The evidence showed that Butler directed his wife to tell everyone, including the Court, that he did not rape her and that she made up the allegations because she was angry with him. He asked his wife to have the charges dropped; he had others ask his wife to have the charges dropped. Butler also directed his wife to go to Court to ask to have the no contact order rescinded, thereby asking her to lie in Court to a judge. Based on the evidence as a whole and considering it in the light most favorable to the State, this Court should reject Butler's claim.

The crux of a witness tampering charge is a definitive attempt to affect the testimony of a witness. *State v. Thompson*, 153 Wn.App. 325, 335, 223 P.3d 1165 (2009) (discussing *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990)). No express threat or promise of reward is required to sustain a witness tampering charge. *Id.* Neither is direct evidence of an attempt to induce a change in testimony or absent a witness from trial. Circumstantial evidence, including reasonable inferences, is sufficient so long as the jury (or trier of fact) is convinced of a defendant's

guilty beyond a reasonable doubt. *Thompson*, 153 Wn.App. at 335 (citing *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999)).

In *State v. Scherck*, 9 Wn.App. 792, 514 P.2d 1393 (1973)

Division I of this Court upheld a witness tampering conviction where the defendant told the victim “[i]f you refuse to appear as a witness in a trial against [Scherck’s friend], the State will have no course but to drop the case.” *Scherck*, 9 Wn.App. at 794. The defendant also noticed that the victim had a nice neighborhood and that it would “be a shame if anything happened to it,” and that the trial would be “very embarrassing” for the victim. *Id.* In that case, the Court indicated that the jurors were required to consider the inferential meaning of the defendant’s conversation with the victim. *Id.* Scherck’s argument was that all he did was ask the victim to drop the charges, and that this was not tantamount to an attempt to prevent the victim from appearing as a witness. *Id.* The Court on appeal rejected this argument and stated it was simply “semantics.” *Id.* The current version of the witness tampering statute is different than the one considered in *Scherck*, *supra*, however the reasoning of *Scherck* still applies.

In *State v. Williamson*, 131 Wn.App. 1, 86 P.3d 1221 (2004), the Court found that to sustain a conviction for witness tampering, the witness did not actually have to be successfully tampered with, but if a defendant

attempted to alter a witness's testimony, the elements of the crime are met. *Williamson*, 131 Wn.App. at 6. A person is guilty of attempting to commit a crime if he intends to commit the crime and takes a substantial step towards the commission of that crime. *Id.* (quoting RCW 9A.28.020(1)). Proof of actual communication with the victim is not required. *Id.* (stating that a person violates the witness intimidation statute even if a threat is not communicated to the victim).

Even if a defendant's literal words do not constitute an unequivocal request to testify falsely, he can still be convicted of witness tampering. "The State is entitled to rely on the inferential meaning of the words and the context in which they were used." *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). Direct statements are not necessary to convict for witness tampering, and the trier of fact must consider the inferential meaning as well as the literal meaning of the defendant's words and conduct. *See Scherck*, 9 Wn.App. at 794. It is clear that in order to sustain a conviction for tampering with a witness by inducing the witness to testify falsely, there need not have been evidence of the defendant explicitly telling the witness to "testify falsely" or to "lie." *See State v. Hurley*, 192 Wn.App. 1050 (Div. 1, 2016).¹ The State is

¹ GR 14.1 allows for the citation to unpublished opinions of the Court of Appeals. This opinion is not binding authority on this Court and this Court may afford such persuasive value from this opinion as it sees fit.

permitted to rely on the “inferential meaning of the words [used] and the context in which they were used.” *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990) (citing *State v. Scherck*, 9 Wn.App. 792, 514 P.2d 1393 (1973)).

The evidence presented at trial as a whole shows a grim picture, one in which an abusive husband systematically used those around him to put significant pressure on the victim to testify falsely. He had his sister call the victim over and over again, pressuring her to do the right thing, to drop the charges, even accompanying her to the prosecutor’s office and trying to go back into the conference room with the victim to ensure she followed through on getting the charges dropped. The defendant’s mother refused to let the victim have her own child back after a visit, calling the child the defendant’s “insurance.” The defendant intentionally used guilt and manipulation to make the victim feel as though the situation were all her fault. On the jail calls, the defendant is heard repeatedly begging his sister to call his wife, text his wife, go see his wife, to get her to say what she needs to say, to drop the order and to drop the charges. With all reasonable inferences taken in the light most favorable to the State, any rational trier of fact could have found the defendant attempted to induce the victim to testify falsely. The jury in fact did find all the elements met beyond a reasonable doubt. They were entitled to make all reasonable

inferences from the evidence and it is clear that the evidence supports the jury's conviction for witness tampering. Butler's claim fails.

II. The prosecutor did not commit misconduct

Butler argues the prosecutor committed misconduct in her closing argument by asking the jury to make an improper inference from the evidence, by testifying to facts not in evidence, by asking the jury to hold the defendant accountable, and by appealing to the jury's passion and prejudice. The prosecutor did not commit misconduct and Butler was not prejudiced by any of the actions he deems improper. This claim fails.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained-of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error

unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court’s instruction on the law, to tell a jury to

acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *Davenport*, 100 Wn.2d at 762. The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Id. at 762-63.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct

caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

Butler's claim the prosecutor improperly argued inferences from the testimony of the 7-year-old child of the defendant and victim is without merit. A prosecutor has wide latitude to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 447, 258 P.3d 43 (2011) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) and *Fisher*, 165 Wn2d at 747). The prosecutor did not misstate the evidence regarding what J.B. testified to and the argument was based on reasonable inferences drawn from the evidence presented at trial. In *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), the State argued in closing that a paramedic was struck by the defendant's lack of grief, and being that the witness was an experienced EMT, he would have knowledge of the variety of ways in which people act during a crisis. *Stenson*, 132 Wn.2d at 727. Similarly, in this case, the prosecutor argued facts from J.B.'s testimony that were properly in evidence and she remained within proper bounds in drawing inferences from those facts during her argument to the jury. Furthermore, the jury was instructed that

they were the sole judges of the credibility of each witness and that they could consider the “manner” of the witness while testifying as well as “any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.” CP 80. The jury was properly allowed to consider J.B.’s manner while testifying; they were properly allowed to consider that he was present when the event occurred, that he had a memory of the event, but that he specifically said he did not want to talk about it, yet was willing and able to talk about benign things. This evidence showed that something unusual occurred, something J.B. had a reason not to want to talk about. The prosecutor properly argued a reasonable inference from this testimony that his behavior, demeanor and manner on the stand corroborated Ms. Butler’s version of events. Furthermore, the defendant himself testified to a loud argument with his wife, in J.B.’s presence, that spanned over 30 minutes, during which he assaulted his wife to the point of leaving bruises. This alone would have been a difficult event to witness for a young child and one which could have been the cause of J.B.’s desire not to talk about it at trial. The prosecutor’s argument that J.B.’s testimony showed that he witnessed something wrong that his father did actually corroborates Butler’s version of events as much as it does Ms. Butler’s. Butler cannot show that this argument prejudiced him.

Next Butler argues that the prosecutor inflamed the passion and prejudice of the jury by engaging in emotion-laden arguments. None of the statements which Butler now claims were improper in this regard were objected to at trial. This failure to object waived his challenge to any potential misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 761. The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762. A prosecutor's discussion of the heinous nature of a crime and its effect on the victim is proper if it does not appeal to the passion and prejudice of the jury. *State v. Claflin*, 38 Wn.App. 847, 849-50, 690 P.2d 1186 (1984). In Butler's case, the prosecutor did not read a poem that used vivid and highly inflammatory imagery about rape's emotional effect on victims as the prosecutor improperly did in *Claflin, supra*. A prosecutor commits misconduct if she asks a jury to convict based on their emotions rather than the evidence. *State v. Bautista-Caldera*, 56 Wn.App. 186, 194-95, 783 P.2d 116 (1989). Here, however, the prosecutor's argument, while emotional, did not urge the jury to convict based on emotion rather than the evidence. In the context of her entire closing argument, the prosecutor

the jury and something that was properly argued as an inference from the evidence. But even if it was improper, Butler cannot show that the jury would not have disregarded the statement had they been instructed to do so.

Butler argues the prosecutor committed misconduct by asking the jury to hold the defendant accountable for his crimes and to convict him. Butler cites no Washington authority holding that statements by a prosecutor urging the jury to “hold the defendant accountable” are per se improper, flagrant, or ill-intentioned. The Minnesota Supreme Court has addressed this issue before. *See State v. Montjoy*, 366 N.W.2d 103 (Minn. 1985); *State v. Ford*, 539 N.W.2d 214 (Minn. 1995). In *Montjoy*, the prosecutor argued in closing that the “whole trial boils down to one word ... accountability.” *Montjoy*, 366 N.W.2d at 108-09. The prosecutor then went on about the importance of accountability in the criminal justice system and the importance of holding this defendant accountable. *Id.* Despite making accountability a central theme of the argument, the Minnesota Supreme Court found the prosecutor did not commit misconduct. The Court also noted the defendant did not object to the complained-of argument and the trial court fully instructed the jury on the state’s burden of proof and the presumption of innocence. *Id.* at 109. The same is true in Butler’s case. He did not object to the argument about

holding the defendant accountable. The absence of an objection or a motion for a mistrial at the time of a prosecutor's argument "strongly suggests to a court that the argument... did not appear critically prejudicial to an appellant in the context of the trial." *Swan*, 114 Wn.2d at 661 (citing *State v. Miller*, 66 Wn.2d 535, 537, 403 P.2d 884 (1965); *State v. Walton*, 5 Wn.App. 150, 152, 486 P.2d 1118 (1971)). In Butler's case, the evidence showed the defendant repeatedly stated that what he did was not that serious, that it was not that bad, and he repeatedly ignored the Court's order prohibiting contact with his wife, thus providing the victim with no protection from him, and he brazenly tampered with her, and encouraged his family to pressure and cajole the victim into dropping the charges, even using her children to force pressure on her. It was appropriate for the State to implore the jury to hold the defendant accountable, after, it should be noted, she had asked the jury to hold her to her burden of proving every element of each crime beyond a reasonable doubt. In light of the record as a whole, the references by the prosecutor to universal truths and accountability were not so flagrant and ill-intentioned that enduring prejudice resulted.

As Butler failed to prove any instance of prosecutorial misconduct he has not shown that the cumulative impact of multiple instances of misconduct violated her right to a fair trial. The defendant is entitled to a

trial free from prejudicial error, not one that is totally error free. *See State v. White*, 72 Wash.2d 524, 531, 433 P.2d 682 (1967). In reviewing the record, it is clear that the alleged instances of misconduct, taken individually or as a whole, did not affect the jury's verdict.

III. The trial court properly precluded Butler from admitting his own out-of-court statement into evidence

Butler claims the trial court erred in refusing to allow him to admit a statement he made to Sgt. Moore about the prior times he and his wife had sex and how she reacted on those occasions. Butler claimed this evidence was admissible pursuant to ER 106. The trial court properly excluded this evidence. Butler's claim fails.

This Court reviews a trial court's decision regarding admission of evidence for an abuse of discretion. *State v. Larry*, 108 Wn.App. 894, 910, 34 P.3d 241 (2001). ER 106 states that "[w]hen 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. This rule only requires that the trial court admit the remaining portions of a statement "which are needed to clarify or explain the portion already received." *Larry*, 108 Wn.App. at 910. In addition to ER 106 we have a common law "rule of completeness"

and the two are often interchanged and presumed to be one and the same, though the common law rule is broader than the statutory rule under ER 106.

In Butler's case, the trial court ruled the defense could not ask Sgt. Moore about additional statements Butler made to him during his investigation as they were hearsay and were not admissible under ER 106 as Butler argued they were. Butler attempted to elicit information that he had told Sgt. Moore about his and his wife's past sexual behaviors. The statements the prosecutor had elicited had only to do with the sexual contact Butler had with his wife the day of the rape. The trial court excluded the additional statement offered by Butler through Sgt. Moore because it was not a "clarifying" statement as it talked about past behavior, how the victim has behaved in the past as opposed to on this occasion. RP 1034. The trial court ruled it was not admissible under ER 106 as it did not complete or clarify the statement the State had already introduced. *Id.*

Butler's claim of reversible error for failure to allow him to introduce his own statement through Sgt. Moore fails for three main reasons: 1) the statement did not clarify, amend, retract, or otherwise explain the statements the State had already elicited from Sgt. Moore and thus was not admissible under the common law rule of completeness; 2)

ER 106 is limited to a writing or recorded statement and does not apply to oral statements; and 3) Butler testified in his own defense and did not seek to introduce the same content into evidence via his own direct testimony.

This statement was not admissible under the common law rule of completeness. This rule provides that when one party has introduced part of a conversation, the opposing party may introduce the balance of the conversation if it explains, modifies, or rebuts the evidence already introduced. *State v. West*, 70 Wn.2d 751, 754, 424 P.2d 1014 (1967). Our Courts consider four factors in determining whether the offered statements should have been admitted under this rule: whether the statements 1) explained the already admitted evidence, 2) placed the admitted portions of the statement into context, 3) avoided misleading the trier of fact, and 4) insured fair and impartial understanding of the evidence. *Larry*, 108 Wn.App. at 910 (citing to *U.S. v. Velasco*, 953 F.2d 1467 (7th Cir. 1992)). The statement Butler sought to admit did not satisfy these factors. Butler sought to admit his out-of-court statement to Sgt. Moore that the incident between he and his wife had become common and he did not understand why his wife did not like sex. The State had introduced the defendant's statements to Sgt. Moore about the facts of the rape that had occurred that day and the defendant's recounting of the events. The statement Butler sought to admit was his commentary on his failure to understand why his

wife didn't like sex that way and how that had become their norm, discussing prior incidents. This did not explain the already admitted evidence, it did not place any of the already admitted evidence into context, its admission was not necessary to avoid misleading the jury or to insure a fair and impartial understanding of the evidence. The trial court properly declined to admit this statement as it was not necessary to admit under the rule of completeness and it was otherwise inadmissible hearsay.

Furthermore, the statutory rule of completeness, ER 106, does not provide for admission of oral statements. In *State v. Perez*, 139 Wn.App. 522, 161 P.3d 461 (2007), this Court held that the rule of completeness under ER 106 applies only to written or recorded statements and does not apply to oral statements. There, this Court determined whether a defendant's statement to police should be admitted at retrial pursuant to the rule of completeness. *Perez*, 139 Wn.App. at 530. At trial, the officer testified that the defendant admitted to giving the victim "the old one-two-three punch." *Id.* at 525. At a pre-trial hearing, the same officer testified that the defendant said "after [the victim] swung at me, I gave him the old one-two-three punch." *Id.* at 530. On appeal, *Perez* argued the entirety of the statement should be admitted pursuant to ER 106. However, this Court held that

ER 106 is limited to a writing or recorded statement and does not apply to Perez. The rule of completeness did not require that Perez's statement to Officer Brand be admitted to the jury. Instead, ER 801 provides the proper framework.

Id.

Finally, the rule of completeness, either under ER 106 or the common law, is a method of admission of evidence, typically acting as an exception to the hearsay rule. The trial court's ruling that the evidence Butler sought to admit was inadmissible under the rule of completeness was not a ruling that the subject of the statement was not admissible. Evidence rules prohibit hearsay from being admitted unless there is an exception that applies. ER 801 allows admission of statements by a party opponent, but does not allow a party to admit his own hearsay statements. This is so, in part, so that a defendant cannot put forth his own version of events without facing the rigor of cross-examination. Thus, the trial court properly ruled that the statement that Ms. Butler did not like sex and often just laid there during sex was not admissible in its form as an out-of-court statement made by the defendant to Sgt. Moore. The trial court did not rule that this statement would not be admissible from the defendant on the witness stand. And the defendant took the stand and chose not to address this issue. He did not testify as to the content of the statements he made to Sgt. Moore, though there was no ruling at the trial court saying he could

not have done so. Had he done so, there would have been absolutely no prejudice to the defendant as it would have come in either as his statement to the police officer or his statement to the jury. The trial court's ruling only went to the form of the admission of this information, and not the substance of the information itself. Had Butler wanted this information admitted he could have sought its admission via his own testimony.

For the reasons discussed above, the trial court properly ruled that the defendant could not elicit his own hearsay through Sgt. Moore as no exception to the hearsay rule applied, and its admission was not required by ER 106 or the common law rule of completeness. The trial court did not abuse its discretion and Butler's claim should be denied.

CONCLUSION

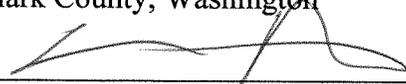
Butler has not shown any error that denied him a fair trial. His convictions should be affirmed.

DATED this 12 day of Feb, 2018.

Respectfully submitted:

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