

FILED  
Court of Appeals  
Division II  
State of Washington  
7/20/2018 11:29 AM

NO. 50934-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RONALD WITTHAUER,

Appellant.

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

The Honorable Robert A. Lewis, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied the appellant his constitutional right to confront witnesses when it improperly limited the appellant's cross-examination of the complainant.

2. The prosecutor's cross-examination of the appellant, suggesting that the appellant committed uncharged crimes against other family members, was so inflammatory as to deny the appellant fair trial.

3. The prosecutor committed additional misconduct by minimizing the State's burden of proof in closing argument.

4. The prosecutor committed misconduct in closing argument by disparaging the defense for calling to the stand a witness who was physically infirm but necessary for the defense.

5. The cumulative effects of the prosecutor's misconduct during trial and in closing argument denied the appellant his right to a fair trial.

6. Cumulative error based on the prejudice resulting from the above errors denied the appellant a fair trial.

7. The trial court erred when it ordered the appellant to obtain a chemical dependency assessment and comply with recommendations.

Issues Pertaining to Assignments of Error

1. The appellant, accused of drugging and raping his adult niece, testified that the sex was consensual. The niece's pharmacy

technician license was revoked based on diversion of prescription medication. The court found the underlying conduct probative of untruthfulness and allowed the appellant to ask the complainant if she diverted prescription medication for personal use, which she denied. But the court precluded the appellant from even inquiring into the license revocation itself. In so limiting cross-examination, did the trial court deny the appellant his constitutional right to confront the witnesses against him?

2. During cross-examination, the prosecutor asked the appellant, who had regular contact with several family members, how many nieces he had. When the appellant responded that he had four nieces, the prosecutor suggested the only reason the appellant had not confessed to having sex with them was a lack of DNA evidence implicating him. Although the appellant objected, and the court struck the line of questioning, did the prosecutor's indelible misconduct—presenting the specter of past and even future crimes—deny the appellant a fair trial?

3. In closing argument, the State argued that the concept of reasonable doubt requires that jurors articulate a reason for their doubt. Did such misconduct, nearly identical to the forbidden “fill-in-the-blank” arguments routinely condemned by Washington courts, constitute incurably prejudicial misconduct, denying the appellant a fair trial?

4. In closing, the State also argued that defense counsel behaved shamefully by calling the complainant's physically infirm mother to the stand. In fact, the mother was a necessary witness helpful in impeaching the complainant's claims she did not willingly go to her uncle's residence the night in question. Did these comments also constitute incurably prejudicial misconduct, denying the appellant a fair trial?

5. Did the cumulative effects of these three forms of prosecutorial misconduct deny the appellant a fair trial?

6. Does the combined prejudice resulting from the improper limitation on cross-examination and the several instances of prosecutorial misconduct require reversal in this case?

7. Where the trial court made no finding that the appellant had a chemical dependency that contributed to his offenses, should the community condition that he obtain a chemical dependency assessment be stricken?

B. STATEMENT OF THE CASE

1. Charges, verdicts, and sentence.

The State charged appellant Ronald Witthauer with second degree rape based on forcible compulsion and incapable-of-consent alternatives

(count 1),<sup>1</sup> as well as indecent liberties by forcible compulsion (count 2).<sup>2</sup> CP 8-9. The State also alleged that the aggravating circumstance of abuse of “trust, confidence, or fiduciary responsibility”<sup>3</sup> applied. CP 8-9.

The complainant as to each count was Witthauer’s adult niece, C.Z. CP 8-9. Witthauer testified that the contact, while embarrassing and inappropriate, was consensual. RP 758-59.

The jury convicted Witthauer as charged and found the aggravating circumstance applied to both charges. RP 889-92; CP 43-46.

The parties agreed the convictions constituted the same criminal conduct under the Sentencing Reform Act (SRA)<sup>4</sup> and each count would not score against the other for purposes of offender score calculation. RP 908-09. Witthauer’s standard range was therefore 86-114 months of incarceration on count 1, the crime with the longer standard range.<sup>5</sup> But

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<sup>1</sup> RCW 9A.44.050(1)(a), (b).

<sup>2</sup> RCW 9A.44.100(1)(a).

<sup>3</sup> RCW 9.94A.535(3)(n).

<sup>4</sup> See RCW 9.94A.589(1)(b) (“if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime [for purposes of offender score calculation]. Sentences imposed under this subsection shall be served concurrently.”).

<sup>5</sup> See RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (crimes included within each seriousness level); RCW 9.94A.525 (offender score). Witthauer’s offender score was one following his guilty plea to bail jumping; the charge related to the proceedings in this case but was filed under a separate case number.

the State recommended an exceptional sentence of 168 months on that charge. RP 903. Witthauer, on the other hand, argued for a low-end standard range sentence based in part on his age, productive life, and minimal criminal history. RP 905.

The court sentenced Witthauer to an exceptional minimum sentence of 144 months of imprisonment, with a maximum sentence of life in prison.<sup>6</sup> CP 64. The court found orally that the offenses “merged.” RP 908-09. But the written judgment and sentence also notes that the offenses constitute same criminal conduct. CP 62 (judgment and sentence). The court made no finding that chemical dependency contributed to the offense. CP 61 (leaving corresponding box unchecked). The trial court nonetheless ordered Witthauer to complete a chemical dependency evaluation and comply with provider recommendations. CP 76.

Witthauer appeals. CP 80.

2. Trial testimony and ruling limiting cross-examination of complainant

On July 18, 2015, C.Z. and her friend Tricia Smith went to the Woodland Bottoms, accompanied by C.Z.’s son and Smith’s two children.

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See RP 894-900 (entry of guilty plea to bail jumping charge, occurring immediately before sentencing in this case).

<sup>6</sup> RCW 9.94A.507(1).

RP 146-49, 199. The Woodland Bottoms is locals' name for a sandbar on the Columbia River where people hang out and swim. RP 200. At trial, Tricia and C.Z. disagreed about the time they arrived. Tricia thought they arrived before noon, whereas C.Z. thought they arrived in the late afternoon. RP 167, 260.

At the Woodland Bottoms, C.Z. used her cell phone to communicate with her uncle, Witthauer, via Facebook messaging. RP 202, 571-72. Witthauer, who was upset about a recent breakup, asked C.Z. to call him. RP 202. C.Z. did not recall if she called Witthauer, or if he called her. RP 202-03, 254-55. Witthauer sounded upset and he asked to meet up with C.Z. They arranged meet at the nearby Wal-Mart in Woodland.<sup>7</sup> RP 204, 257.

Witthauer arrived in a truck driven by his friend Dan Hainley. RP 207. Witthauer appeared intoxicated, but he sounded less depressed than on the phone. RP 209. C.Z. had not consumed alcohol or used drugs earlier that day, but she drank out of a vodka bottle that she had been carrying in her purse. RP 209-11, 219, 239, 247-49.

While waiting for Witthauer to arrive, C.Z. made several calls to family members. RP 590-97. C.Z.'s mother, called as a witness by the

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<sup>7</sup> C.Z. testified she made plans for her son to spend the night at Smith's residence. RP 211-12, 269. Smith testified there was no sleepover plan but agreed the plan was for C.Z.'s son to hang out with Smith's children that evening. RP 155-57.

defense, testified C.Z. told the mother she planned to go to Witthauer's house. RP 802-03. On cross-examination, the prosecutor highlighted that C.Z.'s mother suffered from several health problems and stroke-related memory problems. RP 803-04. However, the lead detective later testified that the mother provided similar information to him. RP 808

Hainley testified that when he and Witthauer arrived, C.Z. was upset and didn't want to be taken to her home. RP 708-09, 713. C.Z. was drinking vodka out of a bottle she kept in her purse. RP 713. The three arrived at Witthauer's residence, where Witthauer was residing in a motor home on his mother's—C.Z.'s grandmother's—property. C.Z. was outside briefly but soon retired to the motor home with Witthauer. RP 714. Before leaving, Hainley went into the motor home to say goodbye, and C.Z. hugged him. RP 716.

Unlike the other witnesses, C.Z. testified that the plan was for Witthauer to take her directly home. At some point, however, C.Z. realized Hainley was driving toward C.Z.'s grandmother's house. RP 212-13. C.Z. claimed she planned to stay there only a short time and have Hainley take her home. RP 213, 310-11.

C.Z. testified that she sat outside Witthauer's motor home with Witthauer and Hainley and watched her school-aged cousins—Witthauer's

nephews—play basketball. RP 215, 282, 300, 640. Witthauer brought C.Z. a beer. RP 218.

After a few sips from the beer, C.Z. started to feel dizzy. She fell while attempting to stand. RP 219. Witthauer picked her up. He told her she was drunk and needed to sleep it off. RP 220-21. Witthauer deposited C.Z. on the bed inside his motor home and went back outside with Hainley. RP 222. Meanwhile, C.Z. asked Witthauer to call her husband. Although Witthauer claimed he did, she did not believe him. RP 222.

C.Z. fell asleep but woke to the sound of Hainley's truck leaving. RP 223. Witthauer entered the motor home and asked C.Z. if she wanted to have sex with him. RP 225. C.Z., who still felt dizzy and weak, told Witthauer he wasn't funny. RP 225. Witthauer said he wasn't joking. He then straddled C.Z., who lay on her stomach. RP 226. He pulled down C.Z.'s pants and had penile-vaginal intercourse over her objections. RP 227-29. While this was occurring, Witthauer also inserted a finger into C.Z.'s anus.<sup>8</sup> RP 231. C.Z. lost consciousness during the intercourse; Witthauer had placed his hand on the back of her neck, forcing her face into the pillow. RP 232, 303, 325, 372. After Witthauer finished, he put a blanket over C.Z., told her he loved her, and went to sleep. RP 232.

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<sup>8</sup> The State alter argued that this act formed the basis for the indecent liberties charge. RP 847, 855 (closing argument).

C.Z. testified she spent the night in the motor home with Witthauer only because the main door would not open and she could not figure out how to leave. RP 232-33, 289, 305, 308. The morning of July 19, Witthauer behaved as if nothing happened. Witthauer even stopped to pick up a terminally ill friend<sup>9</sup> before dropping C.Z. off at her residence. RP 235, 312-16. C.Z. acknowledged she did not raise any alarm to the friend. RP 316.

Once at home, however, C.Z. called a friend, who urged C.Z. to call the police and go to the hospital for a sexual assault exam. RP 237, 468, 476. C.Z., who had worked at local hospitals in the past, drove to Portland due to privacy concerns. RP 238, 295-96. The nurse examiner, who saw C.Z. the afternoon of July 19, testified C.Z.'s vagina showed signs of swelling and redness. RP 380-83. The nurse could not say whether the redness resulted from the July 19 incident or from C.Z.'s intercourse with her husband two days earlier. RP 319, 400-01.

The Portland hospital collected blood and urine samples from C.Z. that afternoon. RP 366, 372. C.Z.'s urine, but not her blood, tested positive for metabolites of alcohol and clonazepam, a benzodiazepine. RP 623-24. Both substances are central nervous system depressants, and the

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<sup>9</sup> Witthauer wished to call the friend to testify on his behalf, but he died before trial. RP 79-87.

presence of one may exacerbate the effects of the other. RP 624-26, 628-29. A forensic scientist from the state crime laboratory testified that the presence of the metabolites in urine, but not blood, indicated the primary substances were ingested a significant period of time before sample collection. RP 627, 631-32. He testified C.Z. may have ingested the substances approximately 12 hours earlier, or more,<sup>10</sup> or less. RP 627-28, 631, 34.

Before trial, the State moved to limit inquiry into evidence that C.Z.'s Oregon pharmacy technician license had been revoked based on conduct occurring in December of 2014. RP 39, 243; Supp. CP \_\_\_ (sub no. 91, State's Initial Motions in Limine).

The State moved to limit inquiry by the defense as follows

Specifically, the State expects the defense will attempt to impeach C.Z. with the fact that her pharmacy technician license was revoked by the Oregon State Board of Pharmacy. Assuming the [trial court] deems this material probative under ER 608(b), the State asks that any examination on this issue be limited to asking C.Z. whether her pharmacy technician license was revoked in 2015 due to allegations she engaged in prescription fraud to obtain oxycodone for personal use. Any further questioning or attempt to present extrinsic evidence would be improper.

Id. at 2; RP 31-33.

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<sup>10</sup> The crime laboratory scientist testified that if the sample donor was a regular user of the substance, it might be present, and detectable, for longer. RP 628.

The record indicates, moreover, that C.Z. was notified of the disciplinary proceedings in May of 2015. RP 37. But C.Z. failed to respond to the allegations. RP 32-33. The resulting order revoked C.Z.'s license and imposed \$2,000 in civil penalties. RP 36-37.

Witthauer, in contrast, initially argued the underlying documents related to license revocation should be admitted. RP 34-36.

The court ruled that, because the matter was probative of untruthfulness, defense counsel would be permitted under ER 608(b)<sup>11</sup> to ask C.Z. if she had engaged in the underlying conduct, that is, whether she diverted drugs for her own use. RP 38-40. However, if C.Z. denied the allegation, defense counsel could not inquire further. RP 39.

Defense counsel later asked for clarification of the court's ruling, and whether counsel would be permitted, consistent with the State's initial motion, to inquire into the license revocation itself. RP 52-56. The State, having changed course from its original position, argued Witthauer should

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<sup>11</sup> ER 608(b) provides in relevant part that

Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness[.]

not be permitted to inquire into the revocation, claiming that such inquiry would constitute “extrinsic evidence.” RP 55.

The court eventually reiterated that the defense could not ask C.Z. if her license had been revoked. Rather, counsel was only permitted to ask directly about the underlying conduct. RP 241-43; see also RP 56-57 (stating inquiry would be limited consistent with court’s original ruling, although court could not recall parameters of original ruling at that time). Inquiry was so limited even considering the assertion by C.Z.—who, as stated, had tested positive for a benzodiazepine metabolite the day after the incident—that she was drugged without her knowledge. RP 68.

During cross-examination of C.Z., defense counsel attempted to inquire if C.Z. had ever been “accused” of diverting oxycodone. Cutting defense counsel off mid-question, the State objected, and the court sustained the objection. RP 295. Defense counsel then asked C.Z. if she had ever diverted oxycodone for her own use. C.Z. said no. The court barred any further inquiry. RP 295.

The State presented evidence that DNA collected during the sexual assault exam matched a reference sample Witthauer voluntarily provided to police. RP 387, 672-73. Witthauer initially denied he had had sex with C.Z. RP 337-38, 766-67, 779-80. Witthauer had initially asserted, moreover, that the DNA evidence was the result of a conspiracy against

him. RP 785-86. But, at trial, Witthauer admitted that the two had had sex. RP 757-58. Witthauer thought it happened because both were upset and had been drinking. RP 758, 791-92. Witthauer's girlfriend had just broken up with him, and C.Z. had just learned that her husband had had an affair and fathered twins with another woman. RP 757-58, 777. What happened was wrong, and he felt ashamed and embarrassed. RP 759, 769-70, 791. Witthauer admitted he had even lied to his mother, who had died while Witthauer was awaiting trial. RP 759.

Witthauer adamantly denied drugging C.Z. He testified he "wouldn't even know what kind of drugs and where to get them." RP 752. Witthauer explained the only prescription medication to which he had access was his blood pressure medication. RP 752.

3. Prosecutorial misconduct in cross-examination and closing argument.

On cross-examination, the prosecutor questioned Witthauer about the fact that he changed his story and was only then admitting he had sex with C.Z. RP 779-80.

The prosecutor's inquiry continued as follows:

Q. And when a man doesn't tell us the truth, should we take him at his word? Would you? I'll withdraw that.

A. If you --

Q. You don't have to answer that.

Now, is it normal for you to have sex with your niece?

A. No.

Q. How many nieces do you have?

A. Four.

Q. I'm sorry?

A. Four, I believe.

Q. How many have you had sex with?

A. One.

Q. Okay. Would that answer change if there was DNA evidence about other people?

A. What do you mean?

[Defense counsel]: I'm going to object to this line of questions.

THE COURT: Sustain the objection. Disregard any questions or answering concerning allegations of misconduct with anyone else. They don't have anything to do with this case.

Proceed to something else, Counsel.

RP 781-82. Earlier, the prosecutor had asked Witthauer a series of questions designed to elicit that Witthauer, who was 18 years older than C.Z., had known C.Z. since she was a little girl and had observed the passage of various milestones in her life. RP 775.

In closing argument, near the end of its initial argument, the State misstated the burden of proof as follows:

We've talked about the evidence but then -- and we talked about the law. Finally, we come to the burden of proof where the facts meet the law. What must the State prove to you? To what level? Is it beyond all doubt? Is it a hundred percent? Is it to a scientific certainty? Well, we got a lot of scientific certainty in this case. *But, no, the answer is the State must prove the case to you beyond a reasonable doubt, and you don't have to take my word for it. We don't have to guess what that is because Judge Lewis defined it for us. And he tells us that a reasonable doubt is a doubt for which a reason can be given.*

RP 856 (italics and bold type supplied). There was no objection.

In its own closing argument, the defense attempted to challenge C.Z.'s credibility by pointing out inconsistencies in C.Z.'s account of the day leading up to the incident. RP 857-69.

In rebuttal argument, the prosecutor disparaged the defense case (and defense counsel) for calling C.Z.'s mother as a witness to point out some of these inconsistencies. The State argued that the point of fact for which she was called was trivial. The State went further, suggesting that it was inappropriate to solicit the mother's testimony given her ailing health.

And -- and we get the claim that, you know, well, gee. [C.Z.] is lying because of the testimony of her mother[.]. *And you know, that -- that's just really kind of a shame. I mean, [the mother], she's called to the stand as a surprise witness. I really don't why. She's got some serious medical problems. Some serious memory problems. She's got trouble even making it back off the*

*stand. She didn't say that [C.Z.] told her one way or the other. She basically -- she can't remember. She said she can't remember what she did the day before. I don't say that to be, you know, rude to her. But, I mean, what is that? Who hangs their hat on that in a case? Why would you even present that evidence if not as a distraction? It's just -- it's a shame.*

RP 876-77 (emphasis added).

C. ARGUMENT

1. THE TRIAL COURT DENIED WITTHAUER HIS RIGHT TO CONFRONT HIS ACCUSER BY INAPPROPRIATELY LIMITING CROSS-EXAMINATION REGARDING THE DISCIPLINARY PROCEEDING AGAINST HER.

C.Z., the complainant, was the primary witness for the prosecution.

C.Z.'s credibility was, therefore, the central issue at trial. But the court prevented Witthauer from bringing out her most salient negative characteristic, specifically, that shortly before the allegations arose, C.Z.'s pharmacy technician license had been revoked for diverting prescription drugs. Instead, Witthauer was only permitted to ask a toothless question, whether C.Z. had ever diverted oxycodone for her own use. His question was easily waved away when C.Z. answered in the negative. Moreover, when the court's ruling unfairly limited this line of inquiry, Witthauer was left to point out relatively insignificant inconsistencies in C.Z.'s testimony regarding the day leading up to the illicit sexual conduct. C.Z.'s assertion that she was drugged without her knowledge also went untested. The trial

court's ruling deprived Witthauer of his fundamental right to confront and to cross-examine the most important witness against him.

- a. Cross-examination, guaranteed by the constitution, is the principle means for discovery of truth in our court system.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the state constitution guarantee accused persons the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996).<sup>12</sup> The primary and most important component of the right to confront witnesses has long been held to be the right to conduct meaningful cross-examination. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). “Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” Davis, 415 U.S. at 315.

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<sup>12</sup> The Sixth Amendment provides that a person accused of a crime has the right “to be confronted with the witnesses against him.” This Sixth Amendment right is applicable to state court proceedings through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965).

Article 1, section 22 provides in part that “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.”

This Court reviews a trial court's limitation of the scope of cross-examination for abuse of discretion. Yet, the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Moreover, if the trial court excluded relevant defense evidence, the reviewing court determines as a matter of law whether the exclusion violated the constitutional right to present a defense. State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017).

This Court applies a three-part test to determine whether a trial court violated confrontation rights as follows:

First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

Darden, 145 Wn.2d at 621; accord State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010).

Thus, before a trial court may preclude a relevant area of inquiry, it must demonstrate a compelling state interest. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Quoting the Michigan Court of Appeals,

the Washington Supreme Court made the following seminal pronouncement:

[I]t is clear that any attempt to limit meaningful cross-examination, whether it be by legislative act, judicial pronouncement or court ruling upon the admissibility of evidence, court rule, or the common law, must be justified by a compelling state interest. Where a statute or court ruling is challenged on grounds that it unduly restricts the Sixth Amendment right to confrontation, the state's interest in the rule must be balanced against the fundamental requirements of the constitution. We believe the "compelling state interest" requirement is the proper method of balancing the defendant's right to produce relevant evidence versus the state's interest in limiting the prejudicial effects of that evidence. We now adopt that standard as our own.

Hudlow, 99 Wn.2d at 15-16 (quoting People v Kahn, 80 Mich. App. 605, 612, 264 N.W.2d 360 (1978)).

A defendant's constitutional right to present evidence or cross-examine witnesses does not necessarily exempt him from the basic rules of evidence. But he may be given more latitude under those rules in order to ensure compliance with those important rights. See Darden, 145 Wn.2d at 619 (noting that an accused person may have more latitude to explore motive, bias, credibility, and foundational matters in cross-examination).

Under ER 608(b), specific instances of a witness's prior conduct may be inquired into on cross-examination for purposes of impeaching the witness if the conduct is probative of the witness's truthfulness or

untruthfulness and the cross-examiner has a good faith basis for the inquiry. Conduct involving fraud or deception is indicative of the witness's general disposition with regard to truthfulness. State v. Johnson, 90 Wn. App. 54, 71, 950 P.2d 981 (1998) (holding trial court erred by excluding evidence that the assault complainant had recently admitted to lying under oath) (citing 5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE: EVIDENCE, § 258, at 207 (3d ed. 1989)).

An accused should be given extra latitude in cross-examination to show motive or credibility, especially when the witness is essential to the State's case. Any fact that goes to trustworthiness of the witness may be elicited if it is germane to that topic. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). The York decision is itself instructive.

York was convicted of two counts of delivery of a controlled substance. He was convicted primarily upon the testimony of Gary Smith, an undercover investigator for the Okanogan County Sheriff's Department, who testified he bought two bags of marijuana from York. On direct examination, Smith testified about his background, military service, and work experience after leaving the military. Smith had held jobs doing undercover work, initially in the military, and then for the Wenatchee Police Department. Id. at 34.

The defense sought to elicit, on cross-examination, that Smith had also been employed by the Mineral County, Montana sheriff's department but had been fired because of irregularities in the paperwork he produced and his general unsuitability for the job. However, the State successfully moved to exclude cross-examination on this issue. The trial court, in granting the State's motion, held any related inquiry would deal with a collateral matter. Id.

The defense, attempting to salvage its case, presented several alibi witnesses indicating York had not been present at the location where the alleged buy occurred. The defense also attempted to show Smith had a motive to fabricate the sale. Id. at 35.

On appeal, the Division Three of this Court reversed York's conviction. The Court observed that Smith's credibility was the central issue in the case. Smith was the only witness to the sale. His credibility, based on his apparently spotless background, was stressed heavily by the prosecution. Credibility was not, therefore, collateral; it was the very essence of the defense. Id. at 35-37.

The Court concluded that

as a matter of fundamental fairness, the defense should have been allowed to bring out the only negative characteristics of the one most important witness against York. If the elicited testimony had no substantial bearing upon the witness's credibility, we would not be offended by

the trial court's action. However, we find this area of impeachment to be of considerable importance to the defense and cannot in good conscience condone the trial court's action.

Id. at 37. Correspondingly, the Court found that the error was not harmless beyond a reasonable doubt and reversed York's conviction. Id. As will be explained, based on the parallels between this case and Mr. York's—as well as additional authority—this Court should also reverse Mr. Witthauer's convictions.

- b. The trial court abused its discretion by limiting the defense to toothless cross-examination of the State's primary witness regarding her record of drug-related dishonesty.

As the foregoing case indicates, the trial court abused its discretion in prohibiting inquiry into C.Z.'s license revocation on cross-examination. Moreover, a careful balancing of the factors set forth in Hudlow and Darden establishes that the trial court violated Witthauer's right to cross-examine the State's primary witness.

The trial court's basis for limiting inquiry appears to have been that the allegations were never adjudicated because C.Z. did not respond to the allegations. Moreover, C.Z. never explicitly admitted to the conduct. RP 36-37. The trial court surmised, therefore, that permitting such an inquiry into the revocation would necessitate a mini-trial on the subject. This would implicate extrinsic evidence and, moreover, confuse

the jury. RP 37-38. The court's ruling touches on both relevance and its countervailing consideration under Hudlow / Darden, that is, prejudice so severe as to be inherently disruptive to the truth-finding process.

Contrary to the court's ruling, Witthauer was not seeking a mini-trial. Rather, he simply sought to engage in targeted cross-examination regarding relevant subject matter. See California v. Green, 399 U.S. 149, 125, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (characterizing cross examination as "the greatest legal engine ever invented for the discovery of truth") (internal quotations omitted). By its very nature, the disciplinary proceeding and resulting license revocation was "probative of untruthfulness" and therefore relevant to the matter of C.Z.'s credibility. Contrary to the court's ruling, the disciplinary action was itself relevant. C.Z.'s failure to respond to the allegation of drug diversion—essentially theft—arguably constituted an admission to such conduct. See State v. Lounsbury, 74 Wn.2d 659, 662, 445 P.2d 1017 (1968) (to constitute an implied admission, a statement must be incriminating or accusatory, made in the presence and hearing of the party, and not denied by the party).

Relatedly, and contrary to the court's oral ruling,<sup>13</sup> inquiry into the result of a disciplinary proceeding in addition to (or instead of) the

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<sup>13</sup> RP 38 (court's oral ruling); see also RP 55 (addressing defense counsel's argument that Witthauer should be permitted to inquire into license revocation,

underlying conduct would not constitute presentation of “extrinsic” under ER 608(b). See United States v. Dawson, 434 F.3d 956, 958-59 (7th Cir. 2006) (“[t]here would have been a problem in this case had the defendants’ lawyer asked ‘has any federal judge ever found that you lied on the stand?’ and when the witness answered ‘no’ the lawyer sought to have the judge’s finding placed in evidence;” but cross-examination regarding the findings themselves would not violate the rule).

The inquiry was relevant. Like informant Smith’s credibility in York, complainant C.Z.’s credibility was the linchpin of the State’s case, and her history of dishonest conduct his most cogent line of defense. The desired area of inquiry was even more critical given that C.Z. had claimed she did not know how prescription drugs entered her system. Crucially, the desired cross-examination did not seek to suggest that C.Z. was dishonest *because* she was a drug user. Cf. State v. Hardy, 133 Wn.2d 701, 709-10, 946 P.2d 1175 (1997) (in general, “prior drug convictions . . . are not probative of a witness’s veracity”). Rather, the defense sought to inquire into conduct probative of untruthfulness, as permitted by ER 608(b). By implication, C.Z.’s claim that she didn’t know how the clonazepam got into her system was an accusation that Withauer had

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the prosecutor stated “I think that’s the exact type of extrinsic evidence the court excluded”).

drugged her to facilitate rape. Access to prescription drugs, and the revocation of her access to such based on dishonest conduct, was relevant to C.Z.'s credibility in general, and relevant to this specific topic.

As in York, the court's ruling precluding Witthauer from targeted cross-examination left C.Z.'s credibility deceptively intact. On cross-examination, C.Z. could (and did) simply deny that she had diverted prescription drugs for her own use. And, although Witthauer attempted to impeach C.Z. with relatively insignificant details about events leading up to the incident—such as who called whom and at what time—his inability to confront C.Z. with the fact that her license had been revoked for such conduct hamstrung his defense. As in York, where the defense also did its best to impeach Smith with limited tools, the trial court's ruling unfairly limited cross-examination in this case.

Finally, under the Hudlow / Darden test, because the area of inquiry was relevant, only a compelling state interest could preclude such cross-examination. There was, however, no compelling state interest. The State cannot establish that cross-examination on license revocation was “so prejudicial as to disrupt the fairness of the fact-finding process.” Hudlow, 99 Wn.2d at 5, 15-16 (excluding rape complainants' prior sexual history as “loose” women as irrelevant to issue of their consent).

Evidence is not “prejudicial” under Hudlow simply because it is impeaching. See Wilson v. Olivetti N. Am., Inc., 85 Wn. App. 804, 814, 934 P.2d 1231 (1997) (“[e]vidence is not inadmissible under ER 403 simply because it is detrimental or harmful to the interest of the party opposing its admission; it is prejudicial only if it has the capacity to skew the truth-finding process”) (citing Hudlow, 99 Wn.2d at 12-13).

Inquiry into the revocation would not have been unduly confusing. Initially, the State did not even ask to preclude this line of questioning. Rather, it asked that the jury not be permitted to peruse documentary evidence establishing the license revocation. Supp. CP \_\_\_\_ (sub no. 91, supra); RP 33. The State only changed its position after an initial favorable ruling from the trial court. *Questioning* regarding the license revocation itself, while potentially harmful to the State’s case, was not so prejudicial as to disrupt the fairness of proceedings. Nor, as discussed above, did it implicate “extrinsic” evidence” necessitating a mini-trial. Dawson, 434 F.3d at 958-59.

In summary, as shown by careful balancing of the Hudlow / Darden factors, the trial court abused its discretion in limiting cross-examination, resulting in a constitutional violation. McDaniel, 83 Wn. App. at 187-88.

- c. The error was constitutional in magnitude and was not harmless beyond a reasonable doubt.

A violation of the Hudlow standard, as occurred in this case, is a constitutional error. Hudlow, 99 Wn.2d at 14-16; see also McDaniel, 83 Wn. App. at 186-88 (finding trial court abused its discretion by limiting cross-examination and that error was not harmless under constitutional harmless error review). The denial of the right to confront and cross-examine adverse witnesses is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. Johnson, 90 Wn. App. at 69 (citing Davis, 415 U.S. at 318; State v. Fitzsimmons, 93 Wn.2d 436, 452, 610 P.2d 893 (1980)). Where C.Z.'s credibility was central to the State's case, the State cannot establish that it was harmless to limit inquiry into her history of dishonest conduct, particularly where this conduct involved the illicit procurement of prescription drugs.

The violation of Witthauer's constitutional rights, as well as the unfair abridgement of his ability to impeach C.Z. under the evidence rules, require reversal of his convictions. This Court should reverse and remand for a new trial.

2. PROSECUTORIAL MISCONDUCT DURING TRIAL AND IN CLOSING ARGUMENT DENIED WITTHAUER A FAIR TRIAL.

The State committed misconduct in cross-examination and in closing argument. First, the State's cross-examination implied that Witthauer had or would sexually abuse or rape other relatives. Although defense counsel objected, and the trial court told the jury to disregard the questions and related comments, the line of questioning was so inflammatory that no instruction could have erased its indelible mark. Then, in closing, the State misstated its burden of proof and disparaged the defense in a manner that was both inflammatory and prejudicial. Such pervasive misconduct denied Witthauer a fair trial.

- a. Prosecutorial misconduct may be so pervasive as to deny an accused person due process of law.

A claim of prosecutorial misconduct requires an accused person to show both that the prosecutor made improper statements and that those statements caused prejudice. To show prejudice, the accused must show a substantial likelihood that the prosecutor's statements affected the jury's verdict. State v. Lindsay, 180 Wn.2d 423, 440, 326 P.3d 125 (2014). If the accused did not object at trial, he is deemed to have waived any error, unless the prosecutor's misconduct is "so flagrant that no instruction could cure it." State v. Case, 49 Wn.2d 66, 72, 298 P.2d 500 (1956). Under this

heightened standard, the accused person must show that (1) no curative instruction would have fixed the prejudice and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments, as well as article 1, section 3<sup>14</sup> and article 1, section 22 of the Washington Constitution. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive an accused of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). “In presenting a criminal case to the jury, it is incumbent upon a public prosecutor, as a quasi-judicial officer, to seek a verdict free of prejudice and based upon reason.” State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). “[T]he prosecutor, in the interest of justice, must act impartially, and his trial behavior must be worthy of the position he holds.” Id.

An accused person cannot demonstrate misconduct where a curative instruction could have cured any error and alleviated any prejudice. State v. Aquarius Walker, 164 Wn. App. 724, 737, 265 P.3d

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<sup>14</sup> Article 1, section 3 provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.”

191, 198 (2011), as amended (Nov. 18, 2011), adhered to on remand, noted at 173 Wn. App. 1027, review denied, 177 Wn.2d 1026 (2013). But an objection is unnecessary in cases of incurable prejudice because “there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” Emery, 174 Wn.2d at 762 (quoting Case, 49 Wn.2d at 74). Thus, “[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.” Emery, 174 Wn.2d at 762 (citing State v. Navone, 186 Wash. 532, 538, 58 P.2d 1208 (1936)).

Reviewing courts, therefore, focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. Emery, 174 Wn.2d at 762. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Id. (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

In addition, reviewing courts recognize that the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase the combined prejudicial effect. Walker, 164 Wn. App. at 737 (citing Case, 49 Wn.2d at 73).

- b. The prosecutor committed flagrant, incurable misconduct by suggesting during cross-examination that Witthauer had victimized or would victimized other family members.

The prosecutor committed flagrant, incurable misconduct by suggesting on cross-examination that Witthauer victimized other nieces. RP 780. Although the trial court struck the questions and told the jury to disregard the line of inquiry, the misconduct was so inflammatory as to be incurable. Reversal, based on this misconduct alone, is required.

As detailed above in the Statement of the Case, in cross-examination, the prosecutor asked Witthauer—who had regular contact with several family members who were minors<sup>15</sup>—how many nieces he had. When Witthauer responded that he had four nieces, the prosecutor suggested the only reason Witthauer had not confessed to having sex with his other nieces was a lack of DNA evidence implicating him. RP 780-81.

Although the trial court struck the questions and related answers, the prosecutor's suggestion of uncharged offenses was improper and so inflammatory as to be incurable. The line of questioning implicated Witthauer in other uncharged acts, despite no support in the record for such.<sup>16</sup> Courts have repeatedly held such questioning to be improper. See

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<sup>15</sup> E.g. RP 640.

<sup>16</sup> The record contains no hint of uncharged acts. Of course, the jury would not have been aware of this.

State v. Miles, 139 Wn. App. 879, 887, 162 P.3d 1169 (2007) (prosecutor's repeated questions referencing boxing matches occurring during period Miles claimed to be incapacitated, and therefore incapable of committing the charged crime, were improper references to extrinsic evidence; although Miles did not object, reversal was required); State v. Babich, 68 Wn. App. 438, 444-46, 842 P.2d 1053 (1993) (prosecutor repeatedly referred to transcript of a conversation that was not admitted in evidence to impeach defense witness); State v. Beard, 74 Wn.2d 335, 338-39, 444 P.2d 651 (1968) (prosecutor questioned defendant about prior convictions without offering proof thereof); State v. Yoakum, 37 Wn.2d 137, 143-44, 222 P.2d 181 (1950) (prosecutor quoted from transcript of interview, but offered no extrinsic evidence of interview).

Juries are presumed to follow a court's instructions. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). But no instruction can "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (alteration in original) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

Thus, analogously, courts of this state recognize that the admission of evidence concerning commission of a crime similar to the

charged offense is inherently difficult for jurors to disregard. See Escalona, 49 Wn. App. at 255-56 (where witness revealed forbidden evidence that accused had committed a similar crime in the past, reversal was required despite curative instruction); Miles, 73 Wn.2d at 71 (analyzing effect of stricken testimony asserting that defendant had committed robbery similar to charged crime).

This case, admittedly, does not involve the introduction of *evidence* of prior crimes. But the jury was exposed to cross-examination suggesting Witthauer had committed, or would commit, other acts similar to the charged crime. Worse than the irregularities occurring in Escalona and Miles, 73 Wn.2d 67, the prosecutor's misconduct in this case raised the specter of easy access to victims and of future crimes if the jury did not convict Witthauer as charged. Moreover, given that several of Witthauer's relatives were minors, and given that the State had emphasized that Witthauer had had a relationship with C.Z. when *she* was a minor, it also raised the specter of *minor* victims.

As in those cases, therefore, the prosecutor's line of questioning was so prejudicial as to be incapable of cure. For this reason alone, reversal is required. Escalona, 49 Wn. App. at 255. However, as will be shown, the prosecutor's misconduct did not stop with cross-examination. It extended into closing argument.

- c. The prosecutor also committed misconduct by subtly, yet incurably, diminishing the State's burden of proof in closing argument.

The prosecutor also committed misconduct in closing argument. The prosecutor acknowledged the law was contained in the jury instructions. And those instructions, according to the prosecutor, informed jurors that a reasonable doubt is a doubt for which a reason *can be given*. RP 856. This is, of course, incorrect, and it is inconsistent with the pattern instruction defining the burden of proof. This subtle yet profound abridgment of the State's burden of proof, explicitly portrayed as an instruction from the trial court itself, was incurably prejudicial.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). Arguments by the prosecution that shift or misstate the State's burden constitute misconduct. Lindsay, 180 Wn.2d at 434. A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. Davenport, 100 Wn.2d at 764.

Due process requires that the State bear the burden of proving every element of a criminal offense beyond a reasonable doubt. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (citing In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)). In contrast, the defense has no obligation to produce or explain evidence.

Emery, 174 Wn.2d at 760 (“[T]he State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.”). “The law does not require that a reason be given for a juror’s doubt.” State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015).

Here, the prosecutor’s remarks misstated the reasonable doubt standard and shifted the burden of proof to Witthauer to provide a basis for doubt. The argument parallels the “fill-in-the-blank” arguments that Washington courts have repeatedly held misstate the law and constitute misconduct.

For example, in State v. Anderson, the prosecutor recited the standard reasonable doubt instruction before making a prohibited fill-in-the-blank argument: “A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009).

The same occurred in State v. Johnson, where the prosecutor told jurors: “What [the pattern instruction<sup>17</sup>] says is ‘a doubt for which a reason exists.’ In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is . . . .’ To be able to find a reason

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<sup>17</sup> 11 WASH. PRAC., PATTERN JURY INSTR. CRIM. (WPIC) 4.01 (4th Ed).

to doubt, you have to fill in the blank; that's your job." State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

Courts have consistently condemned these arguments because they tell jurors they must be able to articulate their reasons for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760. Such arguments "misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759. But, in contrast, "a jury need do nothing to find a defendant not guilty." Id.

One Iowa court long ago illustrated the problems caused by an instruction requiring jurors to find an articulable doubt:

One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899).

The prosecutor's argument here suffers from the same affliction as the arguments in those cases. It suggested jurors must articulate their

reasoning before they could acquit Witthauer. This shifted the burden of proof and undermined the presumption of innocence.

There was, however, no objection. And the jury was instructed, consistent with the pattern instruction, that a reasonable doubt is “a doubt for which a reason *exists*.” CP 23 (instruction 4).

But, given the subtle distinction between the wording of the instruction and the prosecutor’s argument, it is unlikely the standard curative instruction (instructing jurors to rely on the court’s instructions rather than the parties’ arguments) would have sufficed to cure the error.

“[A] misstatement about the law and the presumption of innocence due a defendant, the ‘bedrock upon which [our] criminal justice system stands,’ constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights.” Johnson, 158 Wn. App. at 685-86 (quoting State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)). Shifting the burden of proof is flagrant and ill-intentioned misconduct. Glasmann, 175 Wn.2d at 713. By misstating the basis upon which a jury can acquit, the State “insidiously shifts the requirement that [it] prove the defendant’s guilt beyond a reasonable doubt.” Id.

The prosecutor’s misconduct—a subtle yet profound misstatement of the bedrock principle of American jurisprudence—was incurably

prejudicial. And, given the relative strength of the parties' cases (discussed in detail below in section "e"), it denied Witthauer a fair trial.

d. The prosecutor again committed misconduct by disparaging defense counsel in rebuttal argument.

Finally, the prosecutor committed misconduct by disparaging defense counsel in rebuttal. As indicated above, defense counsel attempted to demonstrate that C.Z. had misrepresented her unwillingness to be at Witthauer's residence night by calling witnesses who testified C.Z. always planned to go there. In rebuttal, instead of focusing on the evidence itself, the prosecutor suggested that it was improper, even shameful, for defense counsel to call C.Z.'s mother to the stand due to her physical infirmity. RP 876-77. The profound impropriety of the prosecutor's argument overwhelmed any hint of proper rebuttal. The prosecutor's comments were, moreover, incurably prejudicial.

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). In Thorgerson, a prosecutor's argument referring to defense arguments as "bogus" or involving "sleight of hand" were held to impugn defense counsel because such language implied deception. Id. at 451-52. Similarly, in State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), the Court held the

prosecutor improperly disparaged the role of defense counsel by calling the defense argument a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing[.]” Cf. State v. Reed, 102 Wn.2d 140, 143, 684 P.2d 699 (1984) (improper to urge jury not to be swayed by defendant’s “city lawyers”); State v. Gonzales, 111 Wn. App. 276, 284, 45 P.3d 205 (2002) (improper to argue that, unlike defense lawyers, prosecutors take an oath “to see that justice is served”); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (improper to argue that defense counsel was paid to twist the words of a witness).

Here, the prosecutor suggested the mother’s testimony was ambiguous and, in any event, not germane. RP 877. If the prosecutor had made this point and moved on, the argument may have been within the bounds of proper rebuttal. Thorgerson, 172 Wn.2d at 451-52. But the prosecutor went much further, crossing the line from appropriate advocacy to impermissible disparagement by arguing that it was shameful to ask a physically infirm individual to testify. RP 876-77. In fact, C.Z.’s mother was a percipient witness necessary for the defense. And, clearly, Witthauer had a right to present witnesses for his defense. See Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983) (prosecutor’s improper comments, including to emphasize that accused had hired counsel, were

designed to “strike at the very fundamental due process protections the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system”).

However repugnant to the fundamentals of American jurisprudence, disparagement of defense counsel is often deemed to be capable of cure by trial court instruction. But here, as with the misconduct occurring during cross-examination, the prosecutor’s comments preyed on jurors’ emotions and sympathies. This misconduct was, like the prior occurrence, so provocative as to be incurable by instruction. Reversal is required.

e. The cumulative effect of the State’s misconduct denied Witthauer a fair trial.

“There comes a time . . . when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error.” Case, 49 Wn.2d at 73. The cumulative effect of the State’s misconduct denied the Witthauer a fair trial.

This Court’s decision in State v. Boehning, 127 Wn. App. 511, 525, 111 P.3d 899 (2005) is instructive because involves, as in this case, misconduct during cross-examination of an accused, as well as misconduct in closing argument.

There, this Court reversed, despite lack of objection, based in part on “flagrant” misconduct in closing argument. The prosecutor had argued that a child complainant’s inadmissible abuse disclosures were “consistent” with her trial testimony and that the jury could infer the child had disclosed even more serious allegations. The prosecutor also drew attention to charges that had been dismissed. *Id.* at 521. As in this case, the misconduct was not limited to closing argument: On cross-examination, the prosecutor improperly asked Boehning whether the child “made [it all] up,” which was essentially a request that he comment on the complainant’s veracity. As with the misconduct in closing, there was no objection. *Id.* at 524-25.

This Court reversed Boehning’s convictions notwithstanding the lack of objections. “The prosecutor’s repeated misconduct during closing arguments, coupled with his improper questioning of Boehning, was so flagrant and prejudicial as to deny Boehning a fair trial.” *Id.* at 525.

In *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010), this Court found a prosecutor committed “flagrant” misconduct by using a “fill-in-the-blank” argument, thereby undermining the presumption of innocence. *Id.* at 525. This Court reversed based on the cumulative effect of this and other errors. *Id.* at 526-27 (reversal based on two instances of

prosecutorial misconduct, only one of which was objected to, as well as improper admission of ER 404(b) evidence at trial).

And in State v. Evans, 163 Wn. App. 635, 643, 648, 260 P.3d 934 (2011), this Court reversed based on the effects of three instances of prosecutorial misconduct in closing argument, even though defense counsel had not objected. This Court was “unwilling to speculate that a curative instruction could have overcome the prosecutor’s multi-pronged and persistent attack on the presumption of innocence, the State’s burden of proof, and the jury’s role.” Id. at 648. Under those circumstances, this Court concluded that the prosecutor’s comments could not have been cured by instruction, and it reversed despite counsel’s failure to object. Id. (citing Warren, 165 Wn.2d at 28 (court would not hesitate to reverse based on prosecutor’s misstatements of reasonable doubt standard if the trial court had not intervened to correct the mischaracterizations); Venegas, 155 Wn. App. at 527).

Here, as in those cases, the cumulative effects of the State’s misconduct deprived Witthauer of a fair trial. Even with the improper limitation on cross-examination, Witthauer was able to cobble together a viable defense case. Witthauer’s defense was consent. Witthauer was able to marshal evidence that C.Z. was not taken to Witthauer’s residence against her will. Rather, she wanted to come home with him. The was

ample evidence that C.Z. was drinking that night, but also evidence—via Witthauer’s own testimony—that she was not so intoxicated as to be incapable of consent. However, like Witthauer, C.Z. was upset, which led them both to commit an irrational act. Witthauer testified he knew nothing about the drugs found in C.Z.’s system. Witthauer’s version of events was corroborated by other witnesses and the fact that C.Z. stayed the night and did not raise any alarm until the next morning. And, while Witthauer had changed his story, his denials were explainable given the stigma involved.

Meanwhile, pervasive misconduct by the State seriously undermined the defense. The prosecutor suggested that Witthauer had preyed on other female family members or would in the future. The prosecutor asserted that, in order to acquit, jurors must be capable of articulating their reasoning for doing so, reassigning the State’s burden and undermining the presumption of innocence. Finally, the prosecutor cast shame and derision upon defense counsel for calling a witness who happened to be physically infirm. The witness was, nonetheless, important to support Witthauer’s defense that C.Z. was a willing visitor at his residence.

The cumulative effects of the prosecutor’s misconduct deprived Witthauer of his right to a fair trial. For this reason, reversal is required.

3. CUMULATIVE ERROR, BASED ON THE EFFECTS OF THE ERRORS UNDER SECTIONS 1 AND 2, DENIED WITTHAUER A FAIR TRIAL.

The cumulative effect of the foregoing errors—the improper limitation on cross-examination, as well as the several instances of prosecutorial misconduct—also denied Witthauer a fair trial. See Venegas, 155 Wn. App. at 526-27 (where errors occurred in admission of evidence and in closing argument, finding that “[e]ach of these errors was significant, and we believe that their cumulative impact on Venegas’s trial was severe enough to warrant reversal of her convictions under the cumulative error doctrine.”). For this reason, as well, this Court should reverse his convictions.

4. THE COMMUNITY CUSTODY CONDITION REQUIRING WITTHAUER TO OBTAIN A CHEMICAL DEPENDENCY ASSESSMENT WAS NOT AUTHORIZED BY STATUTE.

The community condition requiring that Witthauer obtain a chemical dependency assessment was not authorized by statute. CP 76. As a result, it must be stricken.

A trial court lacks authority to impose a community custody condition unless authorized by the legislature. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008).

RCW 9.94A.505(9) provides, “As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” Under the SRA, as a condition of community custody, the court is authorized to require an offender to “[p]articipate in crime-related treatment or counseling services,” RCW 9.94A.703(3)(c), and in “rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d).

The SRA specifically authorizes the trial court to order an offender to obtain a chemical dependency evaluation and to comply with recommended treatment only if it finds that the offender has a chemical dependency that contributed to his or her offense:

*Where the court finds that the offender has any chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.*

RCW 9.94A.607(1) (emphasis added).

If the court fails to make the required finding, however, it lacks statutory authority to impose this condition. State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

Here, the trial court did not make the required finding. CP 61. This Court should, therefore, strike the condition. CP 76.

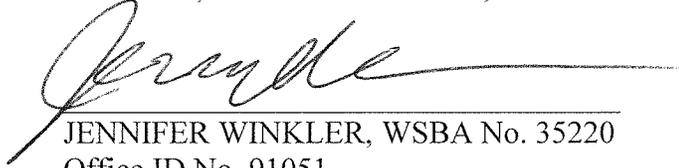
D. CONCLUSION

The trial court denied Witthauer his constitutional right to confront witnesses when it improperly limited cross-examination of the complainant. The prosecutor's cross-examination suggesting that Witthauer committed uncharged crimes against other victims denied him a fair trial. The prosecutor also committed misconduct by minimizing the State's burden of proof in closing argument and by disparaging the defense for calling a witness who was physically infirm, but necessary for the defense. Individually and cumulatively, the effects of the prosecutor's misconduct in cross-examination and in closing argument denied Witthauer a fair trial. Moreover, the improper limitation on cross-examination, taken in combination with several instances of prosecutorial misconduct, also denied Witthauer a fair trial. Finally, the trial court erred when it ordered Witthauer to obtain a chemical dependency assessment without making the statutorily required finding.

DATED this 20<sup>th</sup> day of July, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Jennifer Winkler", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

JENNIFER WINKLER, WSBA No. 35220  
Office ID No. 91051

Attorney for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**July 20, 2018 - 11:29 AM**

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**Appellate Court Case Number:** 50934-2  
**Appellate Court Case Title:** State of Washington, Respondent/Cross Appellant v. Ronald Witthauer, Appellant/Cross Respondent  
**Superior Court Case Number:** 15-1-02355-1

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