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State of Washington  
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NO. 51098-7-II

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

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STATE OF WASHINGTON, Respondent

v.

JEREMIAH ALLEN TEAS, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02097-6

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

- I. The prosecutor did not commit misconduct..... 1
- II. The trial court properly denied Teas’ request for a consent instruction..... 1
- III. Cumulative Error did not deprive Teas of a fair trial..... 1
- IV. The trial court properly sentenced Teas as a persistent offender..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT ..... 16

- I. The prosecutor did not commit misconduct..... 16
- II. The trial court properly denied Teas’ request for a consent instruction..... 33
- III. Cumulative Error did not deprive Teas of a fair trial ..... 42
- IV. The trial court properly sentenced Teas as a persistent offender..... 43

CONCLUSION..... 50

## TABLE OF AUTHORITIES

### Cases

<i>Chapman v. Cal.</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	40
<i>Helman v. Sacred Heart Hosp.</i> , 62 Wn.2d 136, 381 P.2d 605 (1963).....	34
<i>In re Crabtree</i> , 141 Wn.2d 577, 9 P.3d 814 (2000).....	45, 46
<i>In re Marriage of Vander Veen</i> , 62 Wn.App. 861, 815 P.2d 843 (1991) .	34
<i>In re Pers. Restraint of Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994) .....	42
<i>Neder v. U.S.</i> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1996) .....	40
<i>State v. Anderson</i> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	18, 22, 24
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988) .....	31
<i>State v. Berube</i> , 171 Wn.App. 103, 286 P.3d 402 (2012), <i>review denied</i> , 178 Wn.2d 1002 (2013) .....	25, 26, 27, 28
<i>State v. Bowerman</i> , 115 Wn.2d 794, 802 P.2d 116 (1990).....	47
<i>State v. Burton</i> , 165 Wn. App. 866, 269 P.3d 337 (2012) .....	17
<i>State v. Buzzell</i> , 148 Wn.App. 592, 200 P.3d 287 (2009).....	41, 42
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984) .....	18
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	19, 25, 29
<i>State v. Estill</i> , 80 Wn.2d 196, 492 P.2d 1037 (1972).....	17
<i>State v. Fain</i> , 94 Wn.2d 387, 617 P.2d 720 (1980).....	47
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	21
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	18
<i>State v. Ginn</i> , 128 Wn.App. 872, 117 P.3d 1155 (2005) .....	34
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006) .....	21
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	42
<i>State v. Griffith</i> , 91 Wn.2d 572, 589 P.2d 799 (1979) .....	34, 37
<i>State v. Hughes</i> , 118 Wn. App. 713, 77 P.3d 681 (2003).....	17
<i>State v. Jefferson</i> , 11 Wn.App. 566, 524 P.2d 248 (1974).....	24
<i>State v. Knippling</i> , 141 Wn.App. 50, 168 P.3d 426, <i>affirmed</i> , 166 Wn.2d 93, 206 P.3d 332 (2007).....	45
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014) .....	23
<i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	17
<i>State v. Martin</i> , 171 Wn.2d 521, 252 P.3d 872 (2011).....	26, 27, 28
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006) .....	30
<i>State v. Mills</i> , 116 Wn.App. 106, 64 P.3d 1253 (2003), <i>reversed on other grounds</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	37
<i>State v. Morin</i> , 100 Wn.App. 25, 995 P.2d 113 (2000) .....	49
<i>State v. Otis</i> , 151 Wn.App. 572, 213 P.3d 613 (2009).....	34
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	17
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984) .....	22

<i>State v. Rivers</i> , 129 Wn.2d 697, 921 P.2d 495 (1996).....	48, 49
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	17
<i>State v. Smith</i> , 31 Wn.App. 226, 640 P.2d 25 (1982).....	34
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	17
<i>State v. Stevens</i> , 58 Wn. App. 478, 794 P.2d 38 (1990).....	42
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	16
<i>State v. W.R.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014).....	35, 36, 37, 40
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	34, 37
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	18
<i>State v. Willis</i> , 153 Wn.2d 366, 103 P.3d 1213 (2005).....	34
<i>State v. Witherspoon</i> , 180 Wn.2d 875, 329 P.3d 888 (2014).....	47, 48
<i>Wilson v. Stone</i> , 71 Wn.2d 799, 431 P.2d 209 (1967).....	34

**Statutes**

ORS 137.725.....	48
RCW 9.94A.030(38).....	47, 48
RCW 9.94A.570.....	47, 48
RCW 9A.44.010(6).....	41
RCW 9A.44.010(7).....	38

**Other Authorities**

WPIC 0.10.....	36
WPIC 18.25.....	36, 37
WPIC 40.05.....	35, 36

**Rules**

GR 14.1.....	24, 27, 35
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**Constitutional Provisions**

U.S. Const. amend. XIV; Const. art. I, § 22.....	33
Washington State Constitution, article I, sec. 14.....	47, 49

**Unpublished Opinions**

<i>In re Matter of the Personal Restraint of Trevino</i> , 199 Wn.App. 1037 (Div. 3 2017).....	24
<i>State v. Quinata</i> , 180 Wn.App. 1048 (Div. 2 2014).....	27, 28, 29
<i>State v. Stanley</i> , 200 Wn.App. 1058 (Div. I, 2017).....	35, 37, 38

## **RESPONSE TO ASSIGNMENTS OF ERROR**

- I. The prosecutor did not commit misconduct**
- II. The trial court properly denied Teas' request for a consent instruction**
- III. Cumulative Error did not deprive Teas of a fair trial.**
- IV. The trial court properly sentenced Teas as a persistent offender.**

### **STATEMENT OF THE CASE**

The State charged Jeremiah Teas (hereafter 'Teas') with Rape in the First Degree by forcible compulsion and alleged he used a deadly weapon during the commission of the crime. CP 5. The charge arose from an incident that occurred on October 5, 2016 involving a female victim, R.C. Teas proceeded to a jury trial on the original charge. At trial the testimony and evidence presented as follows:

At the time of trial, R.C. was 29 years old and living in Vancouver, Washington. RP 280. In October 2016 R.C. lived at the Steeple Chase Apartment Complex located at 4617 NE St. Johns Road. RP 281. R.C. is a single mom of three children, and she also had a roommate, Savannah Crawford, in October 2016. Ms. Crawford and R.C. were close friends. RP 343-44. R.C. also goes by the name Miley. RP 279-80.

R.C. had an advertisement posted on Backpage, a website similar to craigslist. RP 286. She posted her advertisement for massages in the escorts category on Backpage. RP 286, 326. On October 5, 2016, at about 3pm, R.C. got a phone call in response to her advertisement asking if she was available; she told the man she was, and texted him her address. RP 284-85. On the phone they discussed how long of a massage the man wanted and the price. RP 287-88. He said he was taking the bus to her, and then texted her as he arrived at the apartment complex asking for the apartment number. RP 284. He arrived at about 3:30pm. RP 291. The only other person in the apartment at the time was her roommate, Ms. Crawford. RP 295.

The man knocked on R.C.'s apartment door, and when R.C. opened the door she saw the defendant standing there. RP 293. He was wearing a hoody and jeans and was carrying a backpack. RP 293. R.C. tells him to come in and she takes him to her bedroom. RP 294. R.C. closed the door and bent over to put her phone down on a bedside table. RP 294, 296. Suddenly, before she had a chance to stand up straight, the defendant was on R.C.'s back, almost piggy-back ride style. RP 296. R.C. then looked back at him and saw he was holding a knife to her throat so close it was touching her skin. RP 294, 297. The knife was in the defendant's hand and the blade was exposed. RP 296. R.C. described the

blade as the “box cutter part” of the knife. RP 296. The defendant told her he was going to rape her. RP 297. R.C.’s thoughts were about getting out of the situation alive, so she told the defendant she would do whatever he wanted if he put the knife away. RP 297. At first the defendant started to put the knife in his pocket, but she told him he had to put it in his backpack before she would do anything. RP 298. R.C. was afraid that the defendant was going to kill her and worried her kids would come home and find her. RP 324.

R.C. took her pants down, but does not think they were fully off; the defendant remained clothed except for his shoes, which he removed, and he pulled his pants partway down. RP 299-300. The defendant then asked R.C. to give him oral sex; she told him no. RP 298. The defendant asked R.C. to kiss him; she said no. RP 298. She told him to use a condom, and he put a condom on. RP 298. R.C. was positioned in a leaned-back sitting position facing the defendant, and the defendant was standing between her legs. RP 300. The defendant put the condom on his penis and then put his penis inside R.C.’s vagina, penetrating her vagina. RP 301. That lasted a couple minutes. RP 301. At some point during the rape the defendant put his mouth on her breasts. RP 320. The defendant was not maintaining an erection; R.C. told him they needed lubrication and told him to let her up to get some. RP 301. R.C. told him that a few

times, hoping that if he let her up she could get away. RP 301-02. The defendant finally agreed to use some lubrication and he let R.C. get up. RP 302. R.C. immediately went to the bedroom door, but the defendant met her at the door and said, “don’t leave the room.” RP 302. At that moment, R.C. knew she had to get out of there and so she physically struggled with the defendant, who was trying to keep her inside the room, and “gave it all she had,” managing to push past him and open the door. RP 302. The second R.C. was out of the room she was screaming out for her roommate, yelling, “Savannah, where’s the gun?” and ran to Ms. Crawford’s room. RP 303. Ms. Crawford was in her room and R.C. burst in and told her that the guy had a knife. RP 303. R.C. was naked from the waist down. RP 305. Ms. Crawford ran past R.C. and pushed against the door; the defendant jiggled the handle. RP 303. R.C. knew her roommate had a gun and she was hoping it was with her in her bedroom, but Ms. Crawford did not have it there. RP 304.

Ms. Crawford testified that sometime in the afternoon while she was lying in bed, she suddenly heard R.C. yell out for her. RP 347. R.C. was yelling her name, running towards her and said that “he had a knife.” RP 348. R.C. was asking Ms. Crawford where her gun was. RP 349. Ms. Crawford was confused; she didn’t know what was going on or even that anyone else was in the house. RP 349. She saw that R.C. was hysterical

and knew something was wrong. RP 349. As R.C. came into her room, Ms. Crawford got up and pushed the door shut, leaning against it. RP 349. Her gun was in her car, so she grabbed a pair of scissors and stood against the door. RP 349. While Ms. Crawford was holding the door shut, someone jiggled the door handle from the outside for a few seconds. RP 350. R.C. told Ms. Crawford that “he put a knife to my throat and raped me.” RP 351.

R.C. and Ms. Crawford soon heard the front door open and close, and R.C. looked out the bedroom window and saw the defendant putting his shoes on the sidewalk below. RP 305, 351. R.C. yelled out the window, calling him a name and saying the cops would find him. RP 305. R.C. was emotional and angry at this point, and still hysterical. RP 305, 352. She and Ms. Crawford decided to follow him. RP 305, 352. They went down to the parking lot and got in Ms. Crawford’s car. RP 306, 353. They saw the defendant near the rental office towards the front of the complex and were about 20 feet away from him. RP 308, 357. R.C. was hysterical and yelling at the defendant that he wasn’t going to get away with it. RP 357. When the defendant reached the street, he headed south. RP 309, 359. The street was a one way street travelling in the opposite direction, so R.C. and Ms. Crawford had to first head north before they could go back around to try to find the defendant again. RP 309-10. They

were unable to find the defendant after a few minutes, so R.C. and Ms. Crawford returned to their apartment. RP 310.

When they returned, R.C. and Ms. Crawford talked for a bit and then R.C. called her mom, trying to decide what to do. RP 310. R.C. decided to call 911 and police responded to her apartment. RP 311. She told them what had happened and then she went to the hospital for a rape examination. RP 311. Ms. Crawford went to the hospital with R.C. for support. RP 362. R.C. found the rape examination to be very invasive and it was really emotional for her, not something that was easy to go through. RP 311-12. The nurse had R.C. describe exactly what happened, they collected her clothes, and took swabs from her nipples, her private areas, and every body cavity. RP 312. After the rape exam, some detectives talked to R.C. and had her again explain what had happened. RP 313. R.C. let the detectives download her cell phone for potential evidence so the police could find the defendant. RP 314. The police also searched R.C.'s apartment. RP 314. The defendant had left a hat on R.C.'s bed and the knife he used had fallen to the floor, but R.C. had picked it up and put it on the bed. RP 315-16. R.C. had noticed the defendant had a small injury to the back of his hand and a little blood got on her sheet and on her bra strap. RP 315-16.

R.C. admitted she had twice shoplifted from Walmart 7 years prior to the trial because she was a struggling single mother and she was trying to give her kids something for Easter. RP 322. R.C. also admitted she was convicted of theft of rental property after she leased a computer from Rent-A-Center and then stopped making payments on it after the computer was stolen. RP 322.

Ms. Crawford indicated that after the incident, R.C. wasn't the same. RP 364. R.C. slept in Ms. Crawford's room with her, and for weeks she pushed a chair up against the door. RP 364. R.C. was constantly scared that someone was going to come into the apartment and do something to her, and she was really worried that the defendant hadn't been caught. RP 364.

Megan Challinor is a sexual assault nurse examiner who works for the Oregon Clinic and also for Rapid Safe Investigations (RSI). RP 409. Ms. Challinor performed a rape examination on R.C. at Legacy Salmon Creek Hospital in Vancouver, Washington. RP 413. During the exam, R.C. was intermittently crying, seemingly upset. RP 416. R.C. told Ms. Challinor the following:

I had a posting on Backpage for a massage/rubdowns. This guy called and asked how far I was from downtown, that he had just got off work. He showed up at 3:33pm. And said he was in my apartment complex. I gave him my apartment number and he came in. I led him to the back room. I had my

phone in my hand and was bent over to put it down and he was on my back. He was pushing against me, and when I asked what he was doing, that's when I saw the knife. It was a folding pocket knife about three inches long. I told him I'd do whatever he wanted just please put the knife away. He said, 'I'm going to rape you.' He put the knife in his backpack. I asked him if he'd use a condom because I'm not on birth control. He agreed to use a condom. I laid back on the bed and asked him why he was doing this. He said he wanted to fuck me. He put the condom on. He started raping me. He was having a hard time staying hard, he asked for lube. I went to go to the door of the bedroom and he caught me. Told me to stay in the room. We struggled at the door, and I pushed as hard as I could and got the door open. I just ran out and Savannah was in the apartment, too, so I yelled for her. I went to her bedroom and we closed the door. I looked for anything to defend ourselves. About a minute later, I heard him run out of my apartment. Also, I remember he licked my nipple. I didn't remember which one. I saw there was blood on his hand and some of that got on my bra strap.

RP 416-17. Ms. Challinor did a head-to-toe exam, took swabs from each nipple, an oral swab, perineum swabs, vaginal cervical swabs, and collected R.C.'s clothing. RP 418. Ms. Challinor indicated that only about 10% to 20% of rape victims she sees have injuries from the rape; she did not note any injuries to R.C. RP 419-20. Ms. Challinor collected all the swabs and evidence for the rape kit and handed the kit over to law enforcement. RP 426.

Deputy Adam Beck of the Clark County Sheriff's Office collected the rape kit containing the evidence from R.C.'s exam from the hospital and took it to the police station and entered it into evidence. RP 440.

Deputy Chris Luque obtained a search warrant to obtain a sample of Teas' DNA. RP 576-77. Brad Dixon from the Washington State Patrol Crime Lab used that sample as a reference sample to compare to the DNA profiles he obtained from items of evidence collected by police and by the sexual assault nurse examiner. RP 620-35. The hat that Teas left on the victim's bed matched Teas' profile, with a random match probability as 1 in 130 quintillion (130,000,000,000,000,000,000). RP 629. There was a stain on the bed sheet that appeared to possibly be blood, but did not test presumptively positive for blood. RP 627. Nevertheless, the major contributor of the DNA from that stain on the bedsheet was Teas, again with a random match probability of 1 in 130 quintillion. RP 629-30. The handle of the knife tested positive for both Teas' and R.C.'s DNA with a random match probability of 1 in 27 quadrillion (27,000,000,000,000,000). RP 630. The swab of R.C.'s left breast tested positive for Teas' DNA with a random match probability of 130 quintillion. RP 631.

The defendant had an AT&T cell phone registered to him under the name Jeremiah Teas. RP 448. The phone number for that phone is 360-609-4191. RP 448. That number and account was active starting in June, 2016 through October 7, 2016. RP 450.

The night of the rape, Detective Jared Stevens of the Clark County Sheriff's Office took R.C.'s cell phone to his office, downloaded the contents, saved a copy, and then took the phone back to R.C. RP 513. Of import, Det. Stevens reviewed 16 text messages sent between the defendant and R.C. on October 5, 2016. R.C.'s phone number was 360-449-2622. RP 519. In an interview, Teas verified his phone number to police. RP 520.

The first text message between R.C. and Teas was sent by R.C. at 3:05 pm with her address. RP 520-21. At 3:09pm Teas sent R.C. a message that said, "So do you take requests for what I would like you to wear for our visit?" RP 521. R.C. responded at 3:15pm that she was already dressed and ready. RP 521. Teas responded at 3:16pm, "What are you wearing then, beautiful?" RP 521. R.C. responded that he would see when he got there. RP 521. Teas then told her he was coming by bus so he would be a few more minutes. RP 521. A few minutes later Teas asked if it was just going to be them and if it was a house or an apartment. RP 522. R.C. told him that it would just be them and it was an apartment. RP 522. At 3:31pm Teas texted R.C. saying he was there and asking what number her apartment was. RP 522. R.C. told him it was E213. RP 522. The next text message was at 3:46pm from R.C. to Teas saying "I have your hat and your phone number. You're F, bunch of asterisks. They will find out who

you are.” RP 522. At 3:53pm R.C. again texted Teas and said, “And have your knife. Now I have fingerprints for the cops.” RP 523.

The State also presented surveillance video from the public bus that Teas took on October 5, 2016, the number 25 C-TRAN bus that goes from downtown Vancouver, through St. Johns and up to 99<sup>th</sup> street. RP 474-76. The video ran about 14 minutes, ending at 3:31pm on October 5, 2016. RP 481-82. Just before the Steeple Chase apartment complex, the bus surveillance video shows a man with a hat and a backpack get off the bus. RP 499.

Deputy Luque also responded to Legacy Salmon Creek Hospital to meet with R.C. RP 541-52. Deputy Luque had R.C. tell him what had happened, asking her about the assailant, how they met, what she knew about him, etc. RP 543-44. R.C. appeared to be afraid, and cried sometimes, rocking as she spoke. RP 546. Deputy Luque got the phone number of the suspect off of R.C.’s phone and later wrote a search warrant for the telephone records and identifying information associated with that phone number. RP 546. The warrant returned with the phone number registered to Jeremiah Teas. RP 547.

Deputy Luque also determined that the bus route that travelled from downtown Vancouver to Steeple Chase Apartments was route number 25. RP 548. Two days after the rape, Deputy Luque obtained

surveillance video from that bus route near the time the defendant would have been taking the bus to the victim's apartment. RP 548. In reviewing the surveillance video, the deputy identified Teas enter the bus wearing a Seattle Seahawks hat and wearing a backpack. RP 565. The video shows Teas sit down and pull out a phone. RP 566. The time he pulled out the phone was listed at 3:18pm, which corresponded with the cell phone records of text messages he sent to R.C. RP 566. The video shows Teas writing and receiving text messages. RP 566-73. The surveillance video shows Teas exit the bus near the Steeple Chase Apartments. RP 573.

Deputy Luque also created a photo montage for a photo laydown to see if R.C. and Ms. Crawford could identify a suspect. RP 549. They both selected the photo of Teas as the assailant. RP 549.

Deputy Luque made contact with Teas in person during his investigation. RP 574-75. Teas had a white cell phone in his possession that appeared similar to the one seen on the bus surveillance video. RP 575. Teas was arrested and submitted to a recorded interview. RP 576. During the interview Teas told police that he was in the area on October 5, 2016 seeing a friend named Chris. RP 586-87. Teas initially indicated that he had communicated with Chris by phone, but that the day before they severed ties so he no longer had Chris' phone number. RP 587. Teas indicated he got off work at 3pm on October 5, 2016 and took the number

25 bus up to St. Johnson to see Chris. RP 588. Teas said he only stayed with Chris for a few minutes because he had to leave to go to a birthday party. RP 588. Deputy Luque told Teas that he didn't think Teas was there to see a guy, but rather that he was with a female. RP 588. In response, Teas said, "I'm sticking to the story." RP 589. Teas told Deputy Luque that he was not familiar with anyone named "Miley," that he didn't leave his knife at a friend's house and doesn't know why police would be asking him about a knife. RP 590. Additionally, when police told Teas that two women identified him as the person who tried to rape one of them and what would Teas say if they found his DNA on the victim, Teas said he thought the deputy was lying to him. RP 591.

Teas decided to testify in his defense. RP 645. Teas testified that he was looking on Backpage, looking at the adult services portion of the site, specifically under escort services, and that he found an ad for massages by Miley. RP 647-48. On October 5, 2016, Teas got off work at 3pm and arranged to come to Miley's apartment. RP 649-50. Teas took the number 25 bus to Miley's apartment. RP 650-51. The bus ride took about 15 minutes. RP 651. Teas had his backpack with him, a pocket knife, and wore a Seahawks hat. RP 653. A woman opened the door and had Teas come inside and took him to the master bedroom. RP 654. They did not discuss services or fees. RP 656. Teas claimed the woman he knew as

Miley sat down on the bed and told him to take off his pants. RP 656. Teas pulled his pants down and Miley took off her pants. RP 657. Teas asked her if they could kiss and if she could perform oral sex, and Miley said no. RP 657. Miley told Teas he had to wear a condom because she was not on birth control. RP 658. Teas testified that Miley provided him the condom. RP 658. Teas was having issues obtaining an erection, so Miley asked if she could get some lubricant or a penis pump; she asked this multiple times as Teas continued to have issues. RP 658-59. Teas testified that as he was trying to get himself erect, Miley suddenly got up and ran away screaming. RP 659. Teas then amended that testimony to say that he was reaching into his pocket to try to get the money out to pay Miley when his knife came out because it was in the same pocket. RP 659.

Teas testified that he did not follow Miley, he simply grabbed his belongings and went to the front door and left the apartment. RP 660. As he walked out of the complex, Miley and another woman were in a car and Miley yelled at him that she was going to get him, that she had his stuff and used foul language towards him. RP 661. Teas walked away and walked towards the mall and later went to a birthday party. RP 664.

On October 7, two days later, Teas had contact with police. RP 664. Teas told police that he was visiting a friend named Chris on October 5 in or near the same apartment complex that the woman he knew as

Miley lived at. RP 665. Teas testified he told police that because he was ashamed about going to an escort service and did not want his family to know. RP 665-66. Teas agreed the story he told police was something he made up. RP 667.

Teas denied having sexual intercourse with the woman he knew as Miley. RP 672. He testified that his penis was never inserted in her vagina because he could not maintain an erection. RP 672.

Teas asked the trial court to give an instruction on consent. RP 685. The trial court declined to give the instruction, noting that Teas was still able to argue his theory of the case. RP 687. The court gave a lesser offense instruction on Rape in the Second Degree by forcible compulsion. CP 37. No other lesser included offenses were offered for the jury's consideration.

Teas did not object to any statements the prosecutor made during closing argument. RP 720-50. Relevant portions of the State's closing argument are quoted in the pertinent argument section below. The jury returned a verdict of guilty on the charge of rape in the first degree and returned a special verdict finding that Teas used a deadly weapon during the commission of the crime. RP 42-43.

Teas' prior conviction for Child Molestation in the First Degree was agreed by Teas to count as his first of two strikes under the persistent

offender law. RP 787-93. Teas did not argue that his prior Child Molestation conviction did not constitute a most serious offense which did not require he be sentenced as a persistent offender. *Id.* The court sentenced Teas as a persistent offender to life without parole. CP 46-64. Teas then timely filed this appeal. CP 65.

## ARGUMENT

### I. The prosecutor did not commit misconduct

Teas argues the prosecutor committed misconduct during closing argument by improperly commenting on the fact that Teas testified, in explaining why the jury should find the knife used was a deadly weapon, and by arguing facts not in evidence to improperly vouch for the victim's credibility. The prosecutor did not commit misconduct, and even if the prosecutor's statements were ill-advised or inappropriate, they were not so flagrant and prejudicial that a curative instruction would not have cured the issue had Teas raised an objection to the trial court at the time of the now-complained-of argument. Teas' claim of prosecutorial conduct fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). 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, including the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *Id.* at 85-86.

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. *Id.*

Improper argument does not require reversal unless the error was prejudicial to the defendant. *See Davenport*, 100 Wn.2d at 762-63. 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.

*Davenport*, 100 Wn.2d 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. Teas did not object to any of the prosecutor's statements during closing argument, including those he now complains of. Therefore, he has waived his challenge to any misconduct unless no curative instruction would have prevented any prejudicial effect from ensuing. Teas cannot show that the prosecutor committed misconduct, or that such misconduct caused prejudice and could not have been prevented by a curative instruction had Teas timely objected.

Given that a prosecutor has wide latitude to argue reasonable inferences from the evidence, Teas cannot show that the prosecutor's statements during closing argument constituted misconduct which denied him a fair trial. Teas claims the prosecutor created an inference of guilty because Teas testified, and argues that the prosecutor used the fact of Teas exercising his right to testify to infer that Teas was lying. The prosecutor did no such thing. The prosecutor never argued or inferred that *because* Teas was testifying that he was lying. While a defendant may be presumed innocent, he is not presumed credible, and a prosecutor may properly

discuss issues of credibility in closing argument regarding all witnesses, including the defendant. The prosecutor appropriately discussed the substance of Teas' statements and the motivation he had to testify in such a way given the strength of the State's evidence. During closing the prosecutor stated,

When questioned about why he made up that story about Chris and his statements to the police from October 7<sup>th</sup>, what did the defendant say? What – what was his explanation? He says he – he says he was quote ashamed. He was ashamed that his family would find out that he had visited an escort. Well, if he was ashamed that and – and was afraid his family would find out about visiting an escort and he talked to by the police and he lied – correction – and he made up a story to cover that versus now, when he's looking at rape in the first degree and his statements yesterday make no logical sense. Defies logic. Makes no sense. You draw the conclusion about the veracity and the credibility of his statements yesterday.

Let's go over what he said that makes no sense. He said that after he went into the – Ms. [R.C.]'s bedroom, that she told him – well, let's back up a little bit.

RP 732-33. The prosecutor then continued, detailing the defendant's testimony and what parts of his testimony did not make sense, were illogical, and then urged the jury to use common sense in determining whether what the defendant testified to was true. RP 732-35. The prosecutor also argued,

So that's another reason why, ladies and gentlemen, the defendant decided to testify. He saw the overwhelming evidence against him. Couldn't deny the DNA. Could not

deny the DNA. You saw the astronomical number of probability that Mr. Dixon told you yesterday in regards to the likelihood of selecting an – it is unrelated person in this country?....

...

So bottom line for you, ladies and gentlemen, is to weigh the credibility of the – the defendant and his words and his established proven history of telling falsehoods. He was untruthful to the – to the police at the – at the time of his arrest, compared to what he said. Okay? Weight that versus everything else, the credibility of everybody else, including the physical and forensic evidence that we have in this case. After you do all that, look at the – the evidence, too, obviously. Use your common sense and judgment, apply the law, the elements of the crime that he's charged with. Those are the four elements.

I submit to you that the State has proved that Jeremiah Allen Teas is guilty of the crime of rape in the first degree. And I ask that you return that verdict.

RP 747-48.

As discussed above, Teas did not object to this argument, so he has waived the claim unless the prosecutor's statements were "so and ill-intentioned that it evinces an enduring and resulting prejudice" that cannot be cured by an instruction from the court. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). There was nothing improper about the prosecutor's argument regarding witness credibility, including the defendant's, but even if there was a statement that could have been misinterpreted, a timely

objection and an instruction to the jury would have cured any prejudice to the defendant.

Teas claims this argument from the prosecutor created an inference of guilt based on his exercise of his right to testify. However, what the prosecutor really argued here, and what Teas' complaints truly argue is that the prosecutor improperly commented on and argued about the defendant's credibility. Teas takes exception to the prosecutor's statements that Teas had to have something to rebut the DNA evidence given at trial since Teas told police he had never been in the victim's apartment, yet his DNA was found there. *See* Br. of App. pp. 16-17; RP 747-48. A prosecutor may not express a personal opinion as to the credibility of any witness. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (citation omitted). However, a prosecutor is allowed to draw inferences from the evidence and express those inferences during closing argument. *Anderson*, 153 Wn.App. at 430. For example, using the words "ridiculous" or "preposterous" in relation to a witness's testimony is not, by itself, an improper expression of personal opinion if the prosecutor is drawing an inference from the evidence. *Id.* In his closing argument, the prosecutor in Teas' case was drawing proper inferences from the evidence to discuss and argue the credibility of the witnesses, including the defendant's credibility. Teas told police he had never been at the victim's

apartment and that he did not know the victim. The DNA evidence presented by the State strongly rebutted this claim, along with the victim's testimony, her roommate's observations of the victim's emotional state immediately after the rape, and the officers' testimony and the nurse's testimony. That the defendant's testimony changed so drastically from his initial statement to police is permissible fodder for argument about the defendant's credibility. The prosecutor may draw inferences from the change in story only after presented with irrefutable evidence, like DNA, and the prosecutor may argue which witnesses are more credible based on the evidence, common sense, and their demeanor, amongst other things. The prosecutor in this case made appropriate argument regarding the credibility of the witnesses and appropriately argued that the defendant's testimony was not credible.

In *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014), our Supreme Court found a prosecutor committed misconduct when he argued to the jury that the defendant's testimony was "funny," "disgusting," and "the most ridiculous thing I've ever heard." *Lindsay*, 180 Wn.2d at 438. The prosecutor also told the jury that the defendant's theory of the case was a "crook." *Id.* The Supreme Court found these statements together were an impermissible expression of the prosecutor's personal opinion and therefore constituted misconduct. *Id.* However, the prosecutor in *Teas*'

case did not make any such inflammatory statements and never injected his personal opinion into his argument. The prosecutor argued that the defendant's testimony about why he lied to police "defie[d] logic," and "makes no sense." RP 732. Those statements were *immediately* followed by the prosecutor telling the jury that *they* are the ones who draw the conclusions about the defendant's credibility and veracity." *Id.*

It is not improper for a prosecutor to comment upon evidence and inferences from the evidence that bear upon a defendant's credibility. *See State v. Jefferson*, 11 Wn.App. 566, 569, 524 P.2d 248 (1974). In *Anderson, supra*, this Court found a prosecutor's arguments that the defendant's testimony was "made up on the fly," "ridiculous," and "utterly and completely preposterous," were appropriate and proper arguments on inferences from the evidence. *Anderson*, 153 Wn.App. at 430-31. Additionally, in the unpublished case of *In re Matter of the Personal Restraint of Trevino*, 199 Wn.App. 1037 (Div. 3 2017),<sup>1</sup> Division Three of the Court of Appeals held that the prosecutor's use of the words "silly," "ridiculous," and "ludicrous" to describe the defendant's theory of the case did not constitute misconduct as the statements were limited to the substance of the defense case. *Trevino*, slip op. at 5. The statements that

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the prosecutor in Teas' case made, indicating that the defendant's reasons for why he lied to police defied logic and made no sense are on par with the types of statements this Court has previously upheld. When such statements are made in reference to the evidence presented, and reasonable inferences therefrom, the prosecutor does not commit misconduct by arguing that the defendant's new version of events is simply not credible. The prosecutor did not commit misconduct as Teas claims. Additionally, Teas has not shown that the use of these statements in the prosecutor's argument had a substantial likelihood of affecting the verdict, the heightened prejudice standard Teas must meet because he did not object at trial. *See Emery*, 174 Wn.2d at 761. Teas' claim fails.

Teas also argues the prosecutor committed misconduct by inferring that Teas tailored his testimony. To support that argument, Teas claims that our Supreme Court has held that it is improper for a prosecutor to suggest a defendant tailored his testimony during closing argument. Br. of Appellant, p. 16. This is not correct. Division I of this Court directly addressed this very argument in *State v. Berube*, 171 Wn.App. 103, 286 P.3d 402 (2012), *review denied*, 178 Wn.2d 1002 (2013). There, the defendant had told police that he had not seen two specific individuals the night of the shooting, but his mother testified that the defendant had told her he had had drinks with the two individuals that night. *Berube*, 171

Wn.App. at 114. The defendant testified consistently with his mother's account at trial, thus testifying to a different account than what he had previously told police. *Id.* The prosecutor then argued,

And what does he do then when he takes the stand about that conversation, he who has sat here throughout the entire trial and listened to everything that everyone testifies about? He has to make his version of events conform with what he has heard his mother testify about. So he tells you that Kyla and Tanisha had a drink and that he stood there and sipped his vodka drink with them. If that had happened, Tanisha would have told you that that happened because that would only strengthen her identification of him as the shooter.

*Id.* at 114-15. On appeal, the defendant argued that *State v. Martin*, 171 Wn.2d 521, 534-36, 252 P.3d 872 (2011) categorically prohibits a prosecutor from arguing a defendant tailored his testimony unless that argued was preceded by cross-examination of the defendant on the subject. *Berube*, 171 Wn.App. at 116. Division I disagreed with the defendant's claim.

Instead, Division I, in reviewing *Martin*, noted that the Supreme Court expressly declined to address general tailoring arguments. *Berube*, 171 Wn.App. at 116 (citing *Martin*, 171 Wn.2d at 536 n. 8). Division I noted that the evil addressed by *Martin* was "a closing argument that burdens the exercise of constitutional rights without an evidentiary basis and in a fashion preventing the defendant from meaningful response." *Id.*

at 116-17. However, “[w]hen tailoring is alleged based on the defendant’s testimony on direct examination, the argument is a logical attack on the defendant’s credibility and does not burden the right to attend or testify.” *Id.* at 117. There is no requirement that a prosecutor raise the issue on cross-examination in order to make a credibility argument in closing. *Id.* Thus the prosecutor in *Berube* did not commit misconduct when he argued that the defendant testified to “make his version of events conform with” what he had heard another witness testify to. *Id.*

Similarly, in the unpublished case of *State v. Quinata*, 180 Wn.App. 1048 (Div. 2 2014),<sup>2</sup> the Court addressed whether a prosecutor committed misconduct in closing argument by arguing the defendant tailored her testimony. *Quinata*, slip op. at 8-9. The defendant in *Quinata* also argued that *Martin, supra* prohibited all tailoring arguments by prosecutors during closing arguments. *Id.*, slip op. at 8. This Court agreed with Division I’s opinion in *Berube, supra*, and noted that the *Martin* Court had expressly declined to address general tailoring arguments, and that it had held it was not prosecutorial misconduct for a prosecutor to argue tailoring “[w]hen tailoring is alleged based on the defendant’s testimony on direct examination, the argument is a logical attack on the

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defendant's credibility and does not burden the right to testify.'" *Quinata*, slip op. at 9 (quoting *Berube*, 171 Wn.App. at 116-17). In *Quinata*'s case, the statements she made at the time of the incident were substantially different from the testimony she gave at trial. *Id.*, slip op. at 9. This Court held, "[t]he prosecutor's tailoring argument was based on *Quinata*'s testimony, which was the type of argument that the *Berube* court approved." *Id.* (citing *Berube*, 171 Wn.App. at 106).

Like the prosecutors in *Berube, supra* and *Quinata, supra*, the prosecutor in *Teas*' case argued based off of the defendant's own testimony, and because the defendant's testimony differed so substantially at trial from the statements he made to police, argument that he tailored his testimony to fit into the State's evidence was a reasonable inference from the evidence. The prosecutor's arguments did not offend *Martin, supra*, and did not unduly burden the defendant's exercise of his constitutional right to testify. There was no misconduct for the argument that the defendant's story was not credible and that it was tailored to fit with the evidence that he could not explain away.

Additionally, no prejudice could have ensued from the prosecutor's tailoring arguments. The defendant's theory at trial was substantially different from the defense he originally raised to police; the jury was aware that *Teas* was present during trial for all the testimony; and

because of the change in Teas' story now fit in with the State's evidence, whereas his original story conflicted with the State's evidence, the jury could have easily concluded on their own that Teas tailored his testimony to fit into the evidence the State presented at trial. *See Quinata, supra*. Thus, even if there had been some misconduct, Teas cannot show that the prosecutor's tailoring argued had a substantial likelihood of affecting the verdict, and therefore his claim of prosecutorial misconduct fails. *See Emery, 174 Wn.2d at 761*.

Teas also argues the prosecutor committed misconduct when he argued about the knife being a deadly weapon. In his closing, the prosecutor stated,

Ladies and gentlemen, what I submit to you happened in that bedroom was that the defendant had, in fact, placed this knife, with the razor exposed or the blade, doesn't matter. According to [the victim], it was the razor blade, but regardless, even with the other blade, the pointed blade, if either of these blades were placed against a person's neck and threatened and said, "I'm going to rape you," and then, in fact, did do that, this, ladies and gentlemen, the way that it was used, the manner in which it was used, the crime in which it was used in, constitutes a deadly weapon.

Now, it is not a gun. It's not a firearm. It's not a pistol, a revolver, because those are, per se, deadly weapons. Okay? But the manner in which this instrument, this implement was used, with either blade, and the proximity to a person's neck, constitutes a deadly weapon.

And we know that something like this has been used in the past. Okay? I'm not saying – what I'm about to say, and I

will preface this by saying this is not a terrorist act. This is not even close to 9/11. Okay? But we all know what was reported about the people who meant to harm on – on those planes that crashed into the twin towers. What did they have? Box cutters.

This, ladies and gentlemen, with this blade exposed, the manner in which it was used, is a deadly weapon.

RP 735-36. Teas argues this portion of the prosecutor's argument inflamed the passion of the jury when he equated the pocket knife to the weapon the 9/11 hijackers used. *See* Br. of Appellant, p. 26. Teas claims this argument painted him in a bad light and villainized him to the jury. *Id.* at p. 27. Teas also claims that the reference to a box cutter being used as a deadly weapon in 9/11 is an improper comparison to the weapon used by Teas. In all, the argument made by the prosecutor, while potentially ill-advised, did not constitute misconduct.

This Court must examine the alleged improper argument in context of the full trial, the total argument, the evidence and the issues in the case. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). From that perspective it is clear the prosecutor did not use 9/11 as a theme for the entire case; the prosecutor did not villainize the defendant, did not compare him to a terrorist, and in fact said this was *not* terrorism. The prosecutor used a famous historical example of when an instrument, once thought to be nothing dangerous, could, in the circumstances in which it is

used, be a deadly weapon. A jury is allowed to use their experiences and their common sense when deciding a case and in evaluating the evidence. Reference to a historical moment when a similar weapon was used in a similar way to achieve an end goal, without likening the defendant to those wrongdoers, was an appropriate argument for the prosecutor to make.

The prosecutor's statements here are a far cry from those made in *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988) where the prosecutor told the jury the defendant belonged to "a deadly group of madmen" who were "butchers that kill indiscriminately," and compared them to well-known terrorist groups. *Belgarde*, 110 Wn.2d at 508. The prosecutor never compared Teas to the 9/11 terrorists; he compared the blade used, the blade described by the victim and shown to the jury, to that of a well-known deadly weapon. This does not rise to the level of misconduct, nor does it rise to the level of flagrant and ill-intentioned misconduct that deprived Teas of a fair trial. The prosecutor did not attempt to create a sense of revulsion in the jury by comparing Teas to a terrorist. The prosecutor only attempted to give the jury a real-life example of how a small blade could be a deadly weapon, and when held to the victim's throat, as Teas held it, it did constitute a deadly weapon. This

statement and reference did not affect the jury's verdict. Teas' claim of prosecutorial misconduct fails.

Teas also claims the prosecutor committed misconduct by arguing to the jury that the victim's version of events was consistent throughout her re-tellings of it to police, the nurse, defense counsel, and the jury. Teas' argument that this was "patently false" is untrue. The degree of consistency with witnesses is always an issue in person crimes, and the jury heard the statements that the victim made to the nurse, and to the jury. While true, the victim's statements on the stand were not verbatim with the statements she made to the nurse, they were consistent. Teas makes much of the lubricant and that the victim indicated she suggested it and another time said he asked for it – while the details may differ, the story is consistent that lubricant was discussed. Just as if two people agree they spoke on the phone on a certain date, but disagree as to which person initiated the call, if the pertinent fact is that they had a phone conversation, then the two persons are consistent with each other. Thus, the previous statements and fact that they were largely consistent was in evidence at trial, and was not used by the prosecutor to improperly bolster the victim's credibility. Additionally, as Teas did not object to this argument, he has waived this claim as the prosecutor's statements here were not so flagrant and ill-intentioned as to deny him a fair trial. In addition, defense counsel

argued the inconsistencies in the victim's testimony in detail in his closing argument, and the jury had been instructed that the attorneys' statements were not evidence and that they were to rely on their memories. CP 22. No prosecutorial misconduct occurred, and even when considered cumulatively, the prosecutor's closing argument did not deprive Teas of a fair trial.

**II. The trial court properly denied Teas' request for a consent instruction.**

Teas argues the trial court committed reversible error in denying his request to instruct the jury on consent. The trial court properly considered that Teas' defense was that penetration did not occur, and therefore a consent instruction was not warranted. Teas did not claim the victim consented to sexual intercourse – sexual intercourse being a required element of Rape in the First Degree as charged, and Rape in the Second Degree as a lesser included – but rather Teas claimed no sexual intercourse occurred. Accordingly, the trial court properly denied Teas' request for instruction on consent.

Due process under the state and federal constitutions guarantees a defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22. This requires the court to provide instructions that allow a defendant to argue his theory of the case, when the proposed instructions are appropriate.

*State v. Otis*, 151 Wn.App. 572, 578, 213 P.3d 613 (2009). A defendant is entitled to have the jury instructed on issues that are supported by substantial evidence in the record. *State v. Griffith*, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). Substantial evidence is evidence of a sufficient amount to persuade a fair-minded, rational person of the truth of the declared premise. *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963); *In re Marriage of Vander Veen*, 62 Wn.App. 861, 865, 815 P.2d 843 (1991). When determining if evidence is sufficient to support a jury instruction on an affirmative defense, the court views the evidence in the light most favorable to the defendant. *Wilson v. Stone*, 71 Wn.2d 799, 802, 431 P.2d 209 (1967); *State v. Ginn*, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005). In determining if the evidence was sufficient, this Court cannot weigh the evidence; judgment as to the credibility of the witnesses and the weight of the evidence is the exclusive function of the jury. *State v. Smith*, 31 Wn.App. 226, 228, 640 P.2d 25 (1982).

This Court reviews alleged legal errors in jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). However, a trial court's refusal to give an instruction based on sufficiency of the evidence is reviewed for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Consent is an affirmative defense to rape as it negates the element of forcible compulsion. *State v. W.R.*, 181 Wn.2d 757, 763, 336 P.3d 1134 (2014). The State has the burden of proving forcible compulsion beyond a reasonable doubt in a charge of rape by forcible compulsion. *See id.* If the State proves forcible compulsion, it has necessarily disproved consent. The “State’s burden to prove forcible compulsion encompasses the concept of nonconsent.” *Id.* at 767. No additional jury instructions are necessary to adequately instruct the jury on the State’s burden of proving forcible compulsion and thus disproving consent. “Because the focus is on forcible compulsion, jury instructions need only require the State to prove the elements of the crime. It is not necessary to add a new instruction on consent simply because evidence of consent is produced.” *Id.* at 767 n. 3. As Division I of this Court noted in the unpublished case of *State v. Stanley*, 200 Wn.App. 1058 (Div. I, 2017) (unpublished),<sup>3</sup> even if the defendant produces enough evidence to put consent in issue, “the supreme court cautioned ... ‘[i]t is not necessary to add a new instruction on consent.’” *Stanley*, slip. op. at 2 (quoting *W.R.*, 181 Wn.2d at 767 n.3). In addition, the comment to WPIC 40.05, the definition of consent, the Washington Pattern Instruction Committee indicated that,

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<sup>3</sup> GR 14.1 allows for citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. These opinions are not binding on this Court and may be given as much persuasive value as this Court chooses.

An instruction on consent is generally not appropriate in prosecutions for first or second degree rape. To prove first degree rape, or second degree rape under RCW 9A.44.050(1)(a), the State must prove that sexual intercourse occurred by forcible compulsion. In the overwhelming majority of cases, the focus should be on forcible compulsion rather than consent. Except in unusual cases, an instruction on consent may confuse the jurors about the burden of proof, without providing them meaningful guidance. In *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), the Supreme Court held that although the victim's alleged consent to sexual intercourse negated the 'forcible compulsion' element of second-degree rape, a separate instruction on consent is not needed 'simply because evidence of consent is produced.'

WPIC 40.05, cmt (quoting *W.R.*, 181 Wn.2d at 767 n. 3). Therefore, no consent instruction is needed even if the defendant has sufficiently put evidence of consent into the record at trial.

Despite the Supreme Court's statement that no additional jury instruction is necessary on consent in rape cases involving forcible compulsion, the Washington Pattern Instruction Committee created a consent instruction, amending WPIC 18.25.<sup>4</sup> This instruction is not binding on a trial court, and has not been approved by any appellate court, nor has it been found to be required in rape cases involving forcible compulsion. In addition, WPICs "do not receive advance approval from any court...." WPIC 0.10, cmt. (citing *State v. Mills*, 116 Wn.App. 106, 64

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<sup>4</sup> Pattern instructions are not required in criminal cases. WPICs are not meant to be "an exact blueprint" of the instructions to be given to a jury, but rather, the pattern instructions are intended to assist the trial judge "in preparing clear, accurate and balanced jury instructions for individual cases." WPIC 0.10, cmt.

P.3d 1253 (2003), *reversed on other grounds*, 154 Wn.2d 1, 109 P.3d 415 (2005). Thus, despite the existence of WPIC 18.25, our Supreme Court's statement that no additional instruction on consent is necessary remains the controlling law. *See W.R.*, 181 Wn.2d 767 n. 3.

However, even if this instruction were required if the defendant presented sufficient evidence of consent, the decision on whether giving this instruction rests with the quantum of evidence presented to support the defense of consent. *See Griffith*, 91 Wn.2d at 574; *Stanley*, slip op. at 2 (unpublished). The issue is whether there was sufficient evidence to support giving the instruction on consent; this decision is reviewed for an abuse of discretion. *Walker*, 136 Wn.2d at 771-72. In Teas' case, the trial court did consider whether there was sufficient evidence to warrant giving WPIC 18.25. RP 685-88. The trial court noted that the defendant made a "general denial" of sexual intercourse, saying "it didn't happen." RP 687. Importantly, there is no evidence submitted by the State that would have supported a theory that sexual intercourse did occur, yet it was consensual. The victim testified it was forced; the defendant testified no sexual intercourse occurred. RP 672. Teas' defense was not an affirmative defense of consent. The term "affirmative defense" requires that the defendant agree the crime occurred or that the touching, or alleged wrongful act occurred, but that the wrongful or unlawful element of the

crime is negated by the defense. When Teas testified that no sexual intercourse occurred, then if the jury believed him, it would be impossible for the jury to have found the victim consented to sexual intercourse, as the jury would have found no sexual intercourse occurred (and therefore no rape occurred).

Consent is “actual words or conduct indicating freely given agreement to have sexual intercourse....” at the time of the sexual intercourse. RCW 9A.44.010(7). The victim’s testimony gave no evidence to support a finding of words or conduct indicating a freely given agreement to have sexual intercourse, and per the defendant’s testimony, no sexual intercourse occurred so there was no reason to discuss consent of that act. In *Stanley, supra*, the defendant argued that the trial court improperly refused to instruct the jury on consent when the evidence showed a downstairs neighbor did not hear any screams from the victim, an absence of forced entry, an absence of evidence of a struggle inside the house, the absence of DNA to support the charge, and that the victim’s statements were inconsistent. *Stanley, supra*, slip. op. at 3 (unpublished). The Court of Appeals found that none of this evidence suggested consent as defined by the statute. *Id.* The neighbor failing to hear the victim’s screams only suggests the neighbor did not hear the screams, not that the victim consented; the absence of forced entry only tends to show consent

to enter the house, not consent to sexual intercourse; the lack of struggle inside the house is distinct from “actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact,” and thus the Court found it was irrelevant; and lack of DNA is also irrelevant to whether the victim consented. *Id.* Additionally, the victim’s inconsistent statements go to credibility, not consent. *Id.* Thus the Court found the defendant “failed to show any evidence sufficient to support the giving of the proposed instruction.” *Id.* The Court found the trial court did not abuse its discretion in refusing to give the consent instruction. *Id.*

Likewise, Teas did not produce sufficient evidence to support giving the consent instruction. To the trial court, Teas argued that while his client denied that any penetration occurred, “this is a case where you could still be, you know, attempted sexual intercourse, and attempted sexual intercourse in this case, and this kind of case could still send my client to prison.” RP 686. However, the crime of attempted rape was not given to the jury as an option to consider, and neither was any other crime that did not require penetration, such as indecent liberties. In addition, Teas does not indicate what other evidence supports a finding of consent to sexual intercourse. What Teas testified to was consent to sexual activity wherein no sexual intercourse occurred. RP 656-59, 672. The only other version involved forced sexual intercourse. Thus there was not sufficient

evidence to justify giving the consent instruction as requested by Teas. The trial court did not abuse its discretion in refusing to give the consent instruction.

Even if this Court finds the trial court should have given the instruction proffered by Teas on consent, any error was harmless; even if the jury had been given the instruction Teas requested, the same result would have been reached. A constitutional error is harmless if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder v. U.S.*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1996) (quoting *Chapman v. Cal.*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). At trial, the State was required to prove beyond a reasonable doubt that the sexual intercourse was achieved by forcible compulsion. As discussed above, proving forcible compulsion necessarily disproves consent. *W.R.*, 181 Wn.2d at 767. “There can be no forcible compulsion when the victim consents, as there is no resistance to overcome. Nor is there actual fear of death, physical injury, or kidnapping when the victim consents.” *W.R.*, 181 Wn.2d at 765. The jury found Teas used forcible compulsion to accomplish sexual intercourse with the victim; therefore the jury necessarily found the victim did not consent to the sexual intercourse. The instruction, as confirmed by our Supreme Court, was unnecessary, and the

instructions given to the jury in this case accurately identified the elements of the crime of rape in the first degree, and properly put the entire burden of proving the elements on the State. CP 25, 35. The instructions did not shift any burden to the defendant. And despite Teas' argument, the jury would not have been able to find the defendant used "physical force which overcame[] resistance," or "a threat, express or implied, that place[d] [the victim] in fear of death or physical injury to herself [] or another person, or in fear that she [] would be kidnapped," if they had a reasonable doubt as to whether the victim consented to the act. *See* RCW 9A.44.010(6). Instead, the jury clearly weighed the evidence and determined the credibility of the witnesses, and did not believe the defendant's version of events.

In *State v. Buzzell*, 148 Wn.App. 592, 200 P.3d 287 (2009)

Division I of this Court found that while the trial court's refusal to give a consent instruction at the defendant's request, that error was harmless.

*Buzzell*, 148 Wn.App. at 601. The Court noted that even without the consent instruction, the defendant was able to argue consent as his theory of the case. *Id.* The case turned on which testimony the jury believed: the victim's or the defendant's. *Id.* The court found that since the defendant testified that the sexual contact was consensual, the jury could not have

accepted his testimony and still returned a guilty verdict. *Id.* Thus the error was harmless. *Id.*

As in *Buzzell*, the jury necessarily rejected the Teas' version of events by finding him guilty of rape. By finding the State proved every element of the crime of rape in the first degree, the jury necessarily found the victim did not consent. Any potential error the trial court committed in not giving an instruction on consent was harmless.

### **III. Cumulative Error did not deprive Teas of a fair trial**

Teas claims that cumulative error denied him a fair trial. As argued above, there was no error at his trial, let alone multiple errors. As no error occurred, multiple errors did not accumulate to deny him a fair trial. The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The cumulative error doctrine does not provide relief where the errors are few and had little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As discussed above, Teas failed to show error, or how each alleged error affected the outcome of his trial. Further, Teas has not shown how the

combined error affected the outcome of his trial. Accordingly, Teas' cumulative error claim fails.

**IV. The trial court properly sentenced Teas as a persistent offender**

Teas claims the trial court erred when it sentenced him to life without parole as a persistent offender. Teas claims that he committed his prior most serious offense as a juvenile and thus the trial court erred in considering it a strike. However, Teas' was convicted for conduct that occurred after he was an adult and thus his prior conviction was properly considered a most serious offense. Teas was properly sentenced as a persistent offender. The sentence should be affirmed.

As an initial matter, Teas did not raise this issue to the trial court. At sentencing, Teas agreed with that he qualified as a persistent offender and therefore the State did not produce evidence it would have otherwise produced to prove that Teas committed his predicate sex offense as an adult and it is therefore properly used as his first of two most serious offenses after which the Legislature requires a defendant be sentenced to life in prison. As noted from the judgment and sentence from Teas' prior conviction for Child Molestation in the First Degree, the conviction was the result of a guilty plea. CP 97. That judgment and sentence also shows that Teas committed the crime on or about July 7, 1994 to Sept 2, 1996.

CP 98. This document shows that Teas entered a guilty plea, therefore admitted the conduct charged occurred on dates when he was an adult. Had Teas raised this issue at the trial court level, the State would have admitted his guilty plea statement in this case in which Teas admits that “between or about the 7<sup>th</sup> day of July, 1994 through the 2<sup>nd</sup> day of September, 1996, I had sexual contact with J.M. (female, dob: 7/7/90), who is less than twelve years old and not married to me. I am at least thirty-six months older than the victim.” Teas was born on February 6, 1977. The date range in which he molested a child under the age of twelve spanned for over two years, only 7 months of which Teas was under the age of eighteen. From February 6, 1995 through September 2, 1996, Teas admitted to committing Child Molestation in the First Degree as an adult. This was clearly his understanding as well, as the judgment and sentence indicates that his conviction for Child Molestation in the First Degree is one of the listed offenses that upon a second conviction of those on the list the court would be required to sentence him to life as a persistent offender. CP 111-12.

As Teas failed to raise this issue at the trial court level, the State did not rebut Teas’ current argument that his prior Child Molestation conviction did not constitute a strike offense. While this does involve an issue of constitutional magnitude which may be raised for the first time on

appeal, and a claimed erroneous sentence may be challenged at any time, the trial court did not improperly sentence Teas, and at most this Court should remand to allow additional evidence to be presented, to include Teas' guilty plea statement in which he admits to committing the crime as an adult. *See State v. Knippling*, 141 Wn.App. 50, 168 P.3d 426, *affirmed*, 166 Wn.2d 93, 206 P.3d 332 (2007) (holding a defendant is free to challenge an erroneous sentence based on a miscalculated offender score at any time).

When a person enters a guilty plea, that person admits to the conduct occurring on the date range included in the plea statement. In *In re Crabtree*, 141 Wn.2d 577, 9 P.3d 814 (2000), the defendant entered a guilty plea to Rape of a Child in the First Degree, Child Molestation in the First Degree, and Statutory Rape in the First Degree, that occurred between June 1, 1988 and August 31, 1988. *Crabtree*, 141 Wash.2d at 580. The Supreme Court found Crabtree admitted he committed the offense after the effective date of the statute by virtue of his plea:

...in Crabtree's guilty plea statement he admitted he committed rape of a child and child molestation between June 1, 1988 and August 31, 1988. This constituted an admission of criminal acts between July 1 and August 31. Crabtree was convicted and sentenced for crimes he admitted occurred after the effective date of the statute."

*Id.* at 585. Similarly, from Teas' judgment and sentence, we can see he entered a plea to a crime that occurred on a date range, thus constituting an admission of that criminal act on all the dates included in the date range. *See* CP 97-98. Teas admitted this act occurred over a time period. By doing so, he therefore admitted this occurred between February 6, 1995 and September 2, 1996, after he turned 18 years old. Teas admitted to sufficient facts to sustain a finding that he committed the crime as an adult.

The issue in *Crabtree*, was whether the defendant had been convicted of a crime that occurred before the statute was in effect. The court found that because he pled guilty and admitted to the relevant conduct, that he was not prejudiced by the charging document containing one month out of three that was before the effective date of the statute. *Crabtree, supra* at 585. The Court found that Crabtree was not prejudiced by this charging document "because he was *not* convicted of an offense that *may have* occurred during the month before the statute came into effect." *Id.* (emphasis original). He admitted he committed these crimes during a charging period which included time after the statute went into effect. *Id.* Though the court in *Crabtree* also found there was evidence outside of the guilty plea to support this finding, the court's holding is clear that a guilty plea to a date range which spans the commencement

date of a statute admits the relevant conduct after the statute is in effect. Teas is in the same position as Crabtree. When a defendant pleads guilty to an information, he pleads guilty to the information as charged. *State v. Bowerman*, 115 Wn.2d 794, 799, 802 P.2d 116 (1990). The fact of a guilty plea alone shows he was properly sentenced as a persistent offender.

When a defendant is found to be a persistent offender, the court must sentence the defendant to life in prison without the possibility of parole. RCW 9.94A.570. As Teas was previously convicted of child molestation in the first degree and the current offense was for rape in the first degree, he was properly found to be a persistent offender. RCW 9.94A.030(38).

Additionally, the sentence of life without parole does not violate Teas' right to be free from cruel punishment under the Washington State Constitution, article I, sec. 14. In determining whether a punishment is prohibited as cruel under article I, section 14, our Courts apply the four *Fain* factors, considering: 1) the nature of the offense; 2) the legislative purpose behind the statute; 3) the punishment the defendant would have received in other jurisdictions; and 4) the punishment meted out for other offenses in the same jurisdiction. *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014) (quoting *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980)). In applying these factors, it is clear that the punishment

Teas received was not cruel. Rape in the first degree is a most serious violent sex offense, and he used a deadly weapon during its commission. Additionally, Teas' crime was against a stranger and somewhat predatory in nature. Under the second factor, the purpose of the persistent offender law is to deter criminals and to segregate those serious and persistent offenders from the rest of society. *State v. Rivers*, 129 Wn.2d 697, 713, 921 P.2d 495 (1996) (citations omitted). Under the third factor, the sentence Teas would have received in another jurisdiction, Washington is in good company with the state of Oregon's passage of Senate Bill 1050 in 2017 wherein repeat rapists and certain sex offenders can be sentenced to life in prison based on "two strikes and you're out." ORS 137.725. In addition, many other states impose a mandatory life sentence for repeat sex offenders.<sup>5</sup> Thus under the third *Fein* factor, Teas' sentence is not out of proportion to what he would likely have received in many other states. And under the fourth factor, all adult offenders in Washington convicted of two most serious offenses from a certain list are sentenced to life in prison without the possibility of parole. *See* RCW 9.94A.570, 9.94A.030(38); *Witherspoon*, 180 Wn.2d at 889. All these factors support the conclusion that Teas' life sentence does not violate article I, section 14

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<sup>5</sup> *see* "Significant State Legislation 1996-2004 on Sex Offender Sentencing, January 2006" by National Public Radio, available at: [https://www.npr.org/programs/morning/features/2006/oct/prop83/ncsl\\_sentencing.pdf](https://www.npr.org/programs/morning/features/2006/oct/prop83/ncsl_sentencing.pdf)

of the Washington Constitution. If the state prohibition against cruel punishment is not violated, then neither is the U.S. Constitution's prohibition against cruel and unusual punishment as Washington provides greater protection from cruel punishment. *Rivers*, 129 Wn.2d at 712.

In *State v. Morin*, 100 Wn.App. 25, 995 P.2d 113 (2000), Division I of this Court addressed whether the amendment to the persistent offender law requiring a life sentence for certain sex offenders after a second conviction was cruel. The Court concluded that the *Fain* factors, as applied, led to the conclusion that Morin's sentence of life was not cruel or grossly disproportionate to the offense he committed. *Morin*, 100 Wn.App. at 34. Similarly, Teas has a prior conviction for Child Molestation in the First Degree, and a second conviction for Rape in the First Degree. The punishment for his crime, for the predation he engaged in, was not grossly disproportionate to the offense he committed. The sentence was not cruel and the trial court did not err in imposing a life sentence.

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**CONCLUSION**

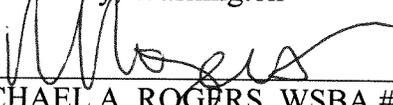
The trial court should be affirmed in all respects.

DATED this 27<sup>th</sup> day of November, 2018.

Respectfully submitted:

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