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Division II
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No. 51254-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

James Gorman-Lykken,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

James Gorman-Lykken was deprived of a fair trial and due process throughout his trial for the charge of rape in the second degree, in which his girlfriend of five years, Nicole Kunkel, alleged he had nonconsensual sex with her.

Mr. Gorman-Lykken questioned Ms. Kunkel's account of the medication she claimed made her incapable of consent. But the trial court denied his request to continue trial in order to obtain the toxicology report of her blood that had already been sent to the lab for expedited processing.

The court disregarded Mr. Gorman-Lykken's objection to a corrections officer sitting near him while he testified. The "to-convict" instruction misinformed the jury that they could convict Mr. Gorman-Lykken if the prosecutor proved either, rather than each, of the charged elements. And in closing argument, the prosecutor wrongly claimed the defense theory was that "drug addicts can't be raped," told the jury that Mr. Gorman-Lykken and his attorney lied, and made unsubstantiated prejudicial misstatements that mischaracterized the evidence and law.

The jury convicted Mr. Gorman-Lykken, and he was sentenced to serve 123 months to life in prison and \$900 in court costs. Mr. Gorman-Lykken seeks reversal and remand for a new trial because he was so significantly deprived his rights to due process and a fair trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to continue the trial for defense counsel to obtain the results of Ms. Kunkel's blood test.
2. The trial court provided an erroneous "to convict" instruction.
3. The trial court erred by allowing jail security to sit near Mr. Gorman-Lykken when he testified, without conducting an individualized inquiry into whether such security was required.
4. The prosecutor committed numerous acts of intentional, flagrant misconduct throughout closing argument.
5. Cumulative error deprived Mr. Gorman-Lykken of a fair trial.
6. The trial court erred in imposing a discretionary legal financial obligation without assessing Mr. Gorman-Lykken's ability to pay.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Due process requires the accused be given a fair opportunity to defend against the State's accusations, and the right to present relevant evidence and a complete defense. U.S. Const. amends. VI, XIV; Const. art. 1, §§3, 22. Where the question of whether Ms. Kunkel was capable of consent due to her drug use was the central question at trial, did the court err in denying Mr. Gorman-Lykken's request to continue the trial so that he could obtain the results of Ms. Kunkel's toxicology report that the prosecutor had already sent it off for expedited testing?

2. Jury instructions that do not accurately state the law violate the accused's right to a fair trial. And due process requires the "to convict" instruction to correctly inform the jury of each element the State must prove beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22. Were Mr. Gorman-Lykken's jury trial and due process rights violated by the trial court's misstatement of the law in the "to convict" instruction that only required the prosecution to prove "either" of the three elements listed in the "to-convict" instruction, rather than each of the elements beyond a reasonable doubt?

3. The court must ensure the accused is treated with the physical indicia of the presumption of innocence in order to protect his right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, §§21, 22. Where a courtroom security measure impacts the defendant's right to a fair trial and the presumption of innocence, the court must set out a factual basis, on the record, for the challenged use of courtroom security. Here, the corrections officer moved from sitting near Mr. Gorman-Lykken at counsel table to sitting near him while he testified, over defense objection. Is reversal required because the court failed to conduct an individualized analysis of the need for this level of courtroom security that so undermined the presumption of innocence and fairness of Mr. Gorman-Lykken's trial?

4. Prosecutorial misconduct may deprive the accused of a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Did the prosecutor's comments during closing argument that impugned both Mr. Gorman-Lykken and his trial counsel, misstated the law and evidence of consent, and mischaracterized the defense theory in a manner intended to inflame the jury, constitute such flagrant and ill intentioned misconduct that reversal of Mr. Gorman-Lykken's conviction is required?

5. Did the cumulative effect of these serious constitutional errors deprive Mr. Gorman-Lykken of a fair trial and due process under article I, § 3 and the Fourteenth Amendment? Const. art. I, §3; U.S. Const. Amend. XIV.

6. Did the trial court's failure to conduct an individualized inquiry into Mr. Gorman-Lykken's ability to pay costs before imposing the court filing fee require reversal and remand for the court to determine his ability to pay, or in the alternative, to strike this discretionary fee?

D. STATEMENT OF THE CASE

James Gorman-Lykken and Nicole Kunkel dated on-and-off for five years, and lived together for three years of their relationship. RP 194, 345. They also lived with Ms. Kunkel's brother, Randy Kunkel. RP 226.

Ms. Kunkel and Mr. Gorman-Lykken had previously engaged in consensual anal sex on numerous occasions. RP 187-88. One morning,

Ms. Kunkel woke up and felt pain in her anus. RP 180. Ms. Kunkel alleged that Mr. Gorman-Lykken had sex with her while she was asleep. RP 180. Mr. Gorman-Lykken was charged with Rape in the second degree, domestic violence, based on her allegation. CP 4.

1. Ms. Kunkel's conflicting claims.

Ms. Kunkel wrote a statement under penalty of perjury on the day she reported Mr. Gorman-Lykken to police. RP 195. She wrote that when she asked Mr. Gorman-Lykken whether he had sex with her the previous night, “he admitted he had done so as I had said yes, so he did his thing and that I loved every minute of it.” RP 197. Ms. Kunkel wrote, in capital letters, “to the best of my knowledge, I did not consent to any sexual activity” the night before. RP 200.

Ms. Kunkel also wrote that they had been training her son not to ask her for things when she was asleep, because, as she wrote in capital letters, “we all know mom will sign her life over if I’m asleep.” RP 202-203. At trial, she said this means, “you can talk to me and have a full-on conversation and I won’t remember a thing about it.” RP 203.

But when Officer Drakos responded to Ms. Kunkel’s call, she reported to him that Mr. Gorman-Lykken told her that he had sex with her while she was asleep. RP 195. At trial, Ms. Kunkel repeated this claim. RP 180. Ms. Kunkel refused to see the difference between saying that Mr.

Gorman-Lykken said she consented to sex the previous night, and her statement that he had sex with her while she was sleeping. RP 199-200.

When confronted with her written statement, Ms. Kunkel accused defense counsel of adding words to her statement and twisting it to sound like she did consent. RP 203. At trial, Ms. Kunkel continued to equivocate on the issue of consent, at times expressing certitude she did not consent, but at times stating she did not believe she consented. RP 221.

When she initially reported the incident to police, Ms. Kunkel did not include the same details she later testified to, including what she claimed were significant conversations with Mr. Gorman-Lykken earlier in the day about not wanting to have sex that night; Mr. Gorman-Lykken grabbing her sexually that night; and no evidence of lubrication. RP 208-209, 214. The prosecutor tried to characterize these discrepancies in her statement as coming from a lack of experience filling out police statements, but in fact, Ms. Kunkel had previously written police statements for her sister, and one involving the father of her son. RP 215.

In a pre-trial interview, Ms. Kunkel stated that Mr. Gorman-Lykken had raped her like this “give or take 2,000” times before. RP 205. She then reduced this claim to 500 times anally, and 500 times vaginally, but still claimed this was a low estimate. RP 206. At trial, Ms. Kunkel said

she might have been exaggerating, but said it happened so many times she could not quantify it. RP 190.

Ms. Kunkel also said she had called police about 2000 times before to report Mr. Gorman-Lykken raping her. RP 207. But she said she would “chicken out” when they responded to her call. RP 206-207. When asked for a more specific number of times she had called, she said it was more like 50-60 times. RP 207. There was no record of her ever calling police about her claims presented at trial. RP 421-422.

2. Mr. Gorman-Lykken testified, with a corrections officer seated near him, that he and Ms. Kunkel had consensual sex.

Mr. Gorman-Lykken was determined to be “low” risk level in a pre-trial risk assessment. Supp. CP_____ (sub no. 3). But because he remained incarcerated pre-trial, a corrections officer sat near him throughout the trial. RP 341-342. When he testified, the corrections officer moved from sitting near Mr. Gorman-Lykken at counsel table, to sitting near him at the witness stand, over his objection. RP 341-342.

Mr. Gorman-Lykken testified that the morning of July 4, when he and Ms. Kunkel woke up, they both snorted Oxycodone and Adderall, something they commonly did together. RP 349. Ms. Kunkel did this in addition to taking her regular prescription medication. RP 350, 354.

In the early evening, they walked to a fireworks show, drinking just enough alcohol to make Mr. Gorman-Lykken think Ms. Kunkel was “buzzed.” RP 348, 351. Ms. Kunkel said the alcohol made her feel nauseous. RP 178. After the fireworks, they started to walk home. RP 351. After they waited at the bus stop, Ms. Kunkel’s brother, Randy Kunkel, drove by and picked them up. RP 352.

Around this time, Mr. Gorman-Lykken and Ms. Kunkel were not getting along. RP 345. Mr. Gorman-Lykken said they were on the brink of breaking up, and they argued throughout the day. RP 347, 352.

They got home around 11:30 p.m. and Ms. Kunkel took another dose of her prescriptions, including Adderall, Gabapentin, and possibly Oxycodone. RP 353. Ms. Kunkel went to their bedroom and Mr. Gorman-Lykken followed. RP 354-355. He denied that she told him they were not having sex that night. RP 370.

He described kissing her and asked if she was feeling okay because he knew she had pain from an earlier car accident. RP 355. He said he asked her if she wanted to have sex and she said yes. RP 355. He said he placed his hand in her vagina (“fisting”) and had oral and anal sex with her. RP 355-356. This is something they had done about 30-50 times over the years. RP 188, 356. Ms. Kunkel agreed this was a consensual form of sex they had engaged in and enjoyed together over the years. RP

187-188. They typically use oil or saliva for lubrication, and this time Mr. Gorman-Lykken said he used saliva. RP 188, 356.

He said Ms. Kunkel was coherent, seemed to understand what was happening, and was enjoying it. RP 357. He had no doubt she was awake. RP 357. The next day, while they were showering together, she accused him of raping her while she slept, which he denied. RP 359. He never said he had sex with Ms. Kunkel while she was asleep. RP 359.

Mr. Gorman-Lykken explained that Ms. Kunkel sometimes does not remember having sex after taking her pills, but that does not mean she is not “coherent” and “making her own decisions” at the time. RP 359-60.

The prosecutor argued in closing that Mr. Gorman-Lykken “got up on the stand and lied” about Ms. Kunkel telling him not to have sex with her while she was asleep. RP 406. Conflating lack of memory with lack of consent, the prosecutor repeatedly argued to the jury that Mr. Gorman-Lykken’s testimony about Ms. Kunkel’s lack of memory was an admission that she was incapable of consent, which meant he admitted to committing the crime. RP 404, 416, 440-441.

3. The day before trial Randy Kunkel surprised both defense counsel and the prosecutor that he would testify about the critical issue of consent.

The State named Mr. Kunkel as a witness only the Thursday or Friday of the week before trial. RP 145, 148. At that time, the prosecution

and defense thought Mr. Kunkel was nothing more than a “circumstantial witness” who could corroborate that he picked up Ms. Kunkel and Mr. Gorman-Lykken from the bus stop and that they were arguing. RP 146, 149.

It was not until the day before trial that the prosecutor again spoke with Mr. Kunkel and learned that he would be testifying about the central issues of “notice of consent” and “lack of consent,” which the prosecutor deemed so important that he “felt it was absolutely necessary” to immediately inform defense counsel the day before trial. RP 149-150. The prosecutor described Mr. Kunkel’s late-emerging testimony about the central issue in the case to be as much a surprise to him as it was to defense counsel. RP 150.

At trial, Mr. Kunkel testified consistent with these late-developing revelations. He said that Ms. Kunkel told Mr. Gorman-Lykken she wanted to be left alone when they got home that night, and specifically that she told him he was not allowed to do things sexually to her while she was asleep that night and on other occasions. RP 385-386.

Yet when Mr. Gorman-Lykken’s counsel highlighted in closing argument that Mr. Kunkel did not come forward with this information until the day before trial, the prosecutor argued to the jury in rebuttal that

defense counsel's statement was "not true," and "as false as the accusations or testimony the defendant gave." RP 440.

4. The central, disputed issue of Ms. Kunkel's drug use.

After talking to police, Ms. Kunkel went to the hospital, saying that she believed she had been raped the previous night. RP 243-244. Ms. Bellar, the sexual assault nurse, examined Ms. Kunkel, and testified about abrasions and contusions she observed on Ms. Kunkel's anus. RP 281-282.

Ms. Bellar collected Ms. Kunkel's blood for testing, which she said was critical in a case where the person was under the influence at the time of the alleged assault. RP 301, 306. It is protocol to draw blood and send it for testing, even if, as in this case, the report is made more than twelve hours after the allegation, because there can still be toxins and medications in a person's blood beyond the 12-hour mark. RP 306.

Ms. Kunkel's blood was sent for expedited testing by the lab, but the results were not available by the time of trial. RP 11.

Mr. Gorman-Lykken asked for the trial to be continued in order for the lab to complete the toxicology report of Ms. Kunkel's blood and to obtain an expert to examine the results if needed. RP 10. The prosecutor did not object to this request, noting that a rush had already been placed on

the lab results. RP 8. The court denied Mr. Gorman-Lykken's request to continue. RP 10.

At trial, Ms. Bellar relied on Ms. Kunkel's description of the medication she took to opine that Ms. Kunkel would have been unconscious at the time Ms. Kunkel claimed she did not consent to sex with Mr. Gorman-Lykken. RP 301. Ms. Bellar also opined that Ms. Kunkel's medication would have been out of her system by the time her blood was taken. RP 303. This conclusion again depended entirely on Ms. Kunkel accurately reporting both the timing and quantity of her drug use to her. RP 303, 304.

Mr. Gorman-Lykken questioned the reliability of Ms. Kunkel's description of her drug use. Mr. Gorman-Lykken said that Ms. Kunkel obtained pills outside her regular prescriptions of Oxycodone, which she was prescribed after a recent car wreck. RP 177, 350, 354.

Ms. Kunkel denied being a drinker, even when confronted with her Facebook posts about drinking alcohol. RP 212, 214. At trial, she said she had some alcohol the night of July 4 when she and Mr. Gorman-Lykken went out. RP 212. But when she reported the events of previous night to Susie Bellar, the sexual assault nurse, she denied consuming alcohol that night. RP 304.

Ms. Kunkel continued to deny a drug or drinking problem when she spoke to the probation officer in the pre-trial sentence report. Supp. CP_____ (sub no. 27, p. 2/8). Ms. Kunkel also denied Mr. Gorman-Lykken had a drug or alcohol problem. Supp. CP_____ (sub no. 27, p. 2/8). Mr. Gorman-Lykken, by contrast, described a longstanding problem with addiction to the probation officer. He said this was an addiction he shared with Ms. Kunkel, which included recreational opiates and Adderall. Supp. CP_____ (sub no. 27, p. 6/8). Mr. Gorman-Lykken's mother confirmed at sentencing that Mr. Gorman-Lykken has a longstanding, severe drug and alcohol problem. RP 489, 492.

On cross-examination, the prosecutor accused Mr. Gorman-Lykken of dragging Ms. Kunkel "through the mud" for his description of her drug use. RP 365. In rebuttal closing argument, the prosecutor argued to the jury that Mr. Gorman-Lykken's attempt to impeach Ms. Kunkel on the issue of her drug and alcohol use put her on trial, and was an unfair "theory" that "drug addicts can't be raped." RP 439, 443.

5. Mr. Gorman-Lykken was convicted after the jury was instructed to convict him if the prosecutor proved either of the elements beyond a reasonable doubt.

The controverted issue in this case was whether Ms. Kunkel was incapable of consent due to her medication use. RP 414, 419. But rather than instructing the jury in the "to convict" instruction that it must find the

prosecutor proved every element beyond a reasonable doubt, including element (2), incapacity to consent, the jury was instructed, “if you find from the evidence that either (1), (2), and (3) has been proved beyond a reasonable doubt,” the jury had a duty to return a guilty verdict. CP 29. The jury convicted Mr. Gorman-Lykken as charged. CP 33-34.

After trial when Ms. Kunkel spoke with the probation officer about Mr. Gorman-Lykken’s sentence range, Ms. Kunkel “sat in stunned silence. When she regained composure, her voice was shaking and noticeably upset.” Supp. CP _____ (sub no. 27, p. 2/8). Ms. Kunkel told the probation officer, “[i]t makes me sick. I didn’t want to punish him; I wanted him to care, and love me the right way.” Supp. CP _____ (sub no. 27, p.2/8).

Mr. Gorman-Lykken received a mid-range sentence of 123 months to life in prison and the court imposed \$900 in court fees, without addressing his ability to pay. CP 52.

E. ARGUMENT

1. Mr. Gorman-Lykken was deprived of his right to due process and a fair trial by the trial court denying his request for a continuance to obtain Ms. Kunkel’s blood test results.

The court’s refusal to continue the trial for Mr. Gorman-Lykken to obtain Ms. Kunkel’s toxicology report violated his right to due process and a fair trial. RP 11.

- a. The accused has a due process right to present evidence relevant to his defense; a court's denial of a continuance that infringes on this right may violate due process.

The Constitution requires that the accused have “a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI; XIV. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). This includes the constitutional right to present relevant evidence. *Jones*, 168 Wn.2d at 720.

A court’s “failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case.” *State v. Downing*, 151 Wn.2d 265, 274, 87 P.3d 1169 (2004). Whether the denial of a continuance rises to the level of a constitutional violation requires a case by case inquiry, and constitutional errors are reviewed de novo. *Id.* at 275; *Jones*, 168 Wn.2d at 719. “In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.” *Downing* at 273. If the accused is prejudiced by the court’s denial of a continuance

or if the result of the trial likely would have been different had the continuance been granted, reversal is required. *State v. Deskins*, 180 Wn.2d 68, 82, 322 P.3d 780 (2014).

- b. The results of Ms. Kunkel's blood test were material to Mr. Gorman-Lykken's defense.

The central issue at trial was whether Ms. Kunkel was incapacitated by the drugs she took the night she claimed Mr. Gorman-Lykken raped her, and whether Mr. Gorman-Lykken had reason to believe that Ms. Kunkel was capable of consent at the time of sexual intercourse. CP 24, 29.

The prosecution sent Ms. Kunkel's blood and urine samples taken during her exam with Ms. Bellar to the State Toxicologist for testing within a week of obtaining them. RP 8. But "for whatever reasons those samples were never sent up to Seattle to be tested." RP 8. The prosecutor contacted the detective, who put a rush on them. RP 8.

Several days before trial, Mr. Gorman-Lykken moved for a continuance based on wanting to see the toxicology results prior to trial. CP 7; RP 6. Mr. Gorman-Lykken emphasized the importance of knowing the combination of drugs and alcohol in Ms. Kunkel's system. RP 7. Defense counsel also stated he had been in contact with a defense expert who would be available for trial in the next month, but would need to see

the toxicology workup of the blood. RP 7. The prosecutor agreed with defense counsel that the requested continuance “is workable.” RP 8.

The trial court stated “with the history with the lab the idea that we’re going to get that back timely to allow anybody to look at it is pretty slim.” RP 9. However, the prosecutor informed the court the results could come in time because of their priority status. RP 9.

The defense cited an additional ground for continuance based on receiving only a “de minimus” report from the sexual assault nurse, which led him to think her testimony would be very limited and not damaging to his case. RP 11. However, upon speaking with the prosecutor the day before trial, defense counsel learned that the nurse would be offering much more detailed testimony than what was contained in the report provided. RP 11. The prosecutor acknowledged the sexual assault reports used to be “significantly more thorough” than the one provided here. RP 12. The prosecutor did not oppose the continuance, recognizing “the rock that defense counsel is placed behind.” RP 12. The prosecutor preferred to continue the trial, “rather [than] have to come back two years from now and retry it.” RP 12.

Defense counsel emphasized that not only did he want an expert to review the results, but more generally, he believed Ms. Kunkel was under the influence of a “cocktail of other drugs” and some alcohol. RP 10. But

he did not know how much, because he did not have the toxicologist results. RP 10.

The trial court denied Mr. Gorman-Lykken's request to continue on the narrow basis that the proffered theory that Ms. Kunkel's use of Gabipentin might have caused somnambulism would not "result in any evidence that could be placed before a jury." RP 10. The court did not address the general defense argument of needing to know what the mixture of substances were in Ms. Kunkel's blood stream. RP 10.

- c. The trial court's refusal to grant a continuance prejudiced Mr. Gorman-Lykken and violated his right to due process.

Ms. Bellar affirmed that when a person claims to have been a victim of this kind of sexual assault, knowing what is in the person's bloodstream is "critical." RP 306. At trial, Ms. Bellar testified about Ms. Kunkel's self-reported medication intake, and used this as a basis to opine that Ms. Kunkel's prescribed medication would make her fall into "a very heavy sleep, and not be able to respond." RP 296.

Ms. Bellar's opinions depended entirely on Ms. Kunkel accurately reporting her medication use to her. RP 303. But at a minimum, Ms. Kunkel did not reveal to Ms. Bellar that she drank alcohol that night when in fact she did. RP 304. And Ms. Kunkel continued to claim she was "not a drinker," even when confronted with her own previous statements about

drinking. RP 213-214. Mr. Gorman-Lykken testified that he and Ms. Kunkel together used much more Oxycodone and Adderall than reported by Ms. Kunkel, and that she did not take it as prescribed. RP 349-350, 354. Without Ms. Kunkel's blood results, the defense was limited to impeaching Ms. Bellar about her limited basis for opinion about Ms. Kunkel's mental state on the night in question, but was denied access to evidence that Mr. Gorman-Lykken believed would undermine the accuracy of Ms. Kunkel's self-report to Ms. Bellar. RP 11, 302-303.

In closing, the prosecutor emphasized Ms. Bellar's testimony about the interaction of Ms. Kunkel's drugs and sleep, and acknowledged, "you may want the blood." RP 412. But the prosecutor then argued, "it doesn't matter," "the blood wasn't going to show anything anyways." RP 412. This claim was based on Ms. Bellar's testimony about the half-life of the medication Ms. Kunkel told her she took. RP 308. Ms. Bellar's opinion depended entirely on Ms. Kunkel accurately reporting her drug intake to Ms. Bellar. RP 303.

The trial court failed to consider Mr. Gorman-Lykken's constitutional right to defend against the State's accusations and present relevant evidence. RP 10, 12. The trial court provided no other relevant countervailing reason for denying his request to continue other than the ancillary determination that a specific expert theory proffered by the

defense may not be admissible. RP 10; *Downing*, 151 Wn.2d at 273 (a court should consider due process, materiality, and surprise in deciding whether to grant a continuance).

Reversal is required because the trial court's denial of the continuance prejudiced Mr. Gorman-Lykken and deprived him of his constitutional right to fully defend against the State's accusations against him and present evidence relevant to his defense. *Deskins*, 180 Wn.2d at 82; *Jones*, 168 Wn.2d at 720.

2. Mr. Gorman-Lykken is entitled to a new trial because the “to convict” instruction erroneously allowed the jury to convict him of the charged offense if it found the State proved “either” rather than “each” or “all” of the elements beyond a reasonable doubt.

The “to-convict” instruction stated that the jury could convict Mr. Gorman-Lykken if the prosecutor proved *either* of the elements beyond a reasonable doubt, rather than *each* element. This misstatement of the law deprived Mr. Gorman-Lykken of his foundational due process and jury trial rights.

- a. The accused is deprived of due process if a misstatement of law in the “to-convict” instruction relieves the State of its burden of proving every element beyond a reasonable doubt.

To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his

theory of the case. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)); U.S. Const. amends. VI, XIV; Const. art I, § 22.

It is fundamental to criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Though jury instructions that misstate the law may be subject to harmless error analysis, the “to convict” instruction enjoys a “special status.” *State v. Pope*, 100 Wn. App. 624, 630, 999 P.2d 51 (2000). This is because the “to convict” instruction “serves as a yardstick by which the jury measures the evidence to determine the defendant’s guilt or innocence.” *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)) “It cannot be said that a defendant has had a fair trial...if the jury might assume that an essential element need not be proved.” *Smith*, 131 Wn.2d at 263 (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). Thus, even in cases where the error may seem “picayune,” “the jury has the right...to regard the ‘to convict’ instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand.” *Smith*, 131 Wn.2d at 263.

Where, as here, the defense does not object to a “to-convict”¹ instruction that relieves the prosecution of its constitutional obligation to prove each and every element beyond a reasonable doubt, the error is subject to review under RAP 2.5(a). *O’Hara*, 167 Wn.2d at 105 (to determine whether the instruction was an error of constitutional magnitude, the court examines “whether the instruction omitted an element so as to relieve the State of its burden or merely failed to further define one of those elements.”). Review of a constitutionally deficient “to-convict” instruction is de novo. *State v. Clark-El*, 196 Wn. App. 614, 619, 384 P.3d 627 (2016)(citing *State v. Brooks*, 142 Wn. App. 842, 848, 176 P.3d 549 (2008)).

- b. The “to-convict” instruction erroneously told the jury it could convict Mr. Gorman-Lykken of the charged offense if it found “either” of the elements of the crime was proven beyond a reasonable doubt, rather than “each” or “all” of the elements.

Here, the court’s “to convict” instruction misstated the law, relieving the prosecution of having to prove beyond a reasonable doubt each element of the offense.

¹ It appears that the prosecutor proposed the instructions, and both parties accepted the court’s proposed instructions. RP 376, 381, 390-391.

The “to convict” instruction for the charged crime in Mr. Gorman-Lykken’s case stated that “each of the following elements of the crime must be proved beyond a reasonable doubt”:

- (1) That on or about July 5, 2017, the defendant engaged in sexual intercourse with Nicole Kunkel;
- (2) That the sexual intercourse occurred when Nicole Kunkel was incapable of consent by reason of being physically helpless or mentally incapacitated;
- (3) That the acts occurred in the State of Washington.

These elements were followed by, “if you find from the evidence that **either** (1), (2), and (3), has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.” CP 29 (emphasis added). The court read this instruction verbatim to the jury. RP 400.

This was error because it allowed the jury to find that if the State proved **either** element (1), (2), and (3) beyond a reasonable doubt, the jury had a duty to return a verdict of guilty.

Washington Pattern Jury Instruction 4.21 contains the language that the jury should have been instructed with: “If you find from the evidence that **each** of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.” The use of the word “either” rather than “each” was plainly error, because it allowed

the jury to find either (1) or (2) in order to convict Mr. Gorman-Lykken, rather than both.

- c. This instructional error was certainly prejudicial because it relieved the State of having to prove the central, disputed element of incapacity.

This error in the “to-convict” instruction was certainly harmful because element (2) was the crucially disputed element of consent.

It is presumed that a jury follows the instructions provided by the court. *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015) (citing *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008)). Accordingly, a “clear misstatement of the law” in a jury instruction is presumed to have misled the jury and be prejudicial. *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977).

A conviction following an instructional error that relieves the State of its burden of proof requires reversal unless the State proves “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Williams-Walker*, 167 Wn.2d 889, 910, 225 P.3d 913 (2010) (internal citations omitted); *Brown*, 147 Wn.2d at 341 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))). An instructional error is not harmless if the factual basis for the jury’s verdict was ambiguous. *Williams-Walker*, 167 Wn.2d at 918. Here, where the error in the instruction relieved the State of having

to prove the element of incapacitation, which was the controverted issue at trial, the State cannot meet its burden to show the error did not contribute to the verdict. CP 29.

This error is not mitigated by the correct statement of the prosecution's burden of proof in instruction three, or the first part of the erroneous "to convict" instruction, because the jury is presumed to follow the "to convict instruction," and is not required to search the other instructions to make sense of the erroneous "to convict" instruction. CP 22, 29; *Smith*, 131 Wn.2d at 265. This must be all the more true where, as here, the error was the final statement of the prosecution's burden of proof in the instructions. CP 29.

This instructional error in the "to convict" instruction requires reversal and remand for a new trial because it relieved the prosecution of its burden to prove each element beyond a reasonable doubt. *Brown*, 147 Wn.2d at 339 (reversal required where a misstatement in the "to convict" instruction relieves the State of its burden of proof).

- 3. Mr. Gorman-Lykken was deprived of his right to a fair trial and the presumption of innocence by having a corrections officer sit near him throughout trial and when he testified, absent the court finding there was a need for such a drastic security measure.**
 - a. Security measures that are inherently prejudicial violate the right of the accused to a fair trial.

The accused has a fundamental right to a fair trial, including the right to be presumed innocent. U.S. Const. amends. VI and XIV; Const. art. I, § 22; *State v. Butler*, 198 Wn. App. 484, 493, 394 P.3d 424 (2017). The presumption of innocence in favor of the accused is “undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Butler*, 198 Wn. App. at 493 (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126(1976) (internal citation omitted)).

At trial, the accused is entitled to have his guilt or innocence determined “solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.” *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (citing *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)).

Security forces in the courtroom have the capacity to “create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.” *Holbrook*, 475 U.S. at 569 (citing *Kennedy v. Cardwell*, 487 F.2d 101, 108 (6th Cir. 1973)). Courtroom practices that unnecessarily mark the defendant as dangerous or guilty undermine the presumption of innocence. *State v. Flieger*, 91 Wn. App. 236, 240, 955 P.2d 872 (1998). The accused is “entitled to the physical indicia of innocence which

includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” *State v. Jaime*, 168 Wn.2d 857, 861-862, 233 P.3d 554 (2010).

Where a trial practice may undermine the right to a fair trial, the “the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.” *Estelle*, 425 U.S. at 504 (citing *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965)).

- b. The corrections officer sitting near Mr. Gorman-Lykken while he testified deprived him of the right to be presumed innocent.

The accused is deprived of a fair trial when the presumption of innocence is undermined by a security measure that singles out the defendant as a particularly dangerous or guilty person. *Jaime*, 168 Wn.2d at 862. “When courtroom arrangements inherently prejudice the fact-finding process, it violates due process unless the arrangements are required by an essential state interest.” *Butler*, 198 Wn. App. at 493 (citing *Holbrook*, 475 U.S. at 568-72).

Courts must examine the use of security forces in the courtroom on a case-by-case basis. *Holbrook*, 475 U.S. at 569. A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. *Jaime*, 168 Wn.2d at 865. This evaluation of the likely effects of a particular

courtroom security measure must be “based on reason, principle, and common human experience.” *Estelle*, 425 U.S. at 504.

In both *Butler* and *Holbrook*, the accused’s right to a fair trial was not violated by security officers who positioned themselves as spectators in the courtroom and their presence was not specifically tied to the accused.

In *Holbrook*, the defendant was tried for armed robbery with five codefendants. During trial, the customary courtroom security force was augmented by having an additional four uniformed state troopers sit in the first row of the spectator’s section during trial. *Holbrook*, 475 U.S. at 562, 564. The Court did not find “an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom’s spectator section.” *Id.* at 571. The court reasoned that four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. *Id.* at 571. Significantly, there were fewer troopers than defendants, which would have undermined a jury perception that the defendants were particularly dangerous. *Id.* at 571.

Likewise in *Butler*, the presence of identifiable security guards in the courtroom during a portion of the victim’s testimony was “innocuous.” *Butler*, 198 Wn. App. at 494. The jail officer sat quietly, relaxed, and not

particularly close to Butler. *Id.* at 494. And the additional officer was present during the victim's testimony, not the defendant's testimony. Even though the additional officer in the courtroom did not specifically single Mr. Butler out, the court still issued an instruction to dispel any possible confusion the jury might have had about an additional officer in the courtroom, informing the jury that the presence of this additional officer was due to a routine shift change. *Id.* at 494.

By contrast, Mr. Gorman-Lykken's custody status meant that a jail guard sat near him throughout the entire trial. RP 342. When it was time for Mr. Gorman-Lykken to testify, the corrections guard moved to sit near Mr. Gorman-Lykken while he testified based on their stated policy: "if he's up here, we're up here." RP 341. Mr. Gorman-Lykken objected to "the proximity of the jail officer close to Mr. Gorman-Lykken." RP 341. Mr. Gorman-Lykken asked the court "to reconsider the usual protocol here." RP 341. The court understood the correction staff's policy to require an officer to "be in close proximity to somebody who is testifying that's been accused of a crime." RP 342.

The court recognized Mr. Gorman-Lykken's specific concern with having a corrections staff seated next to him while he testified:

I'm sensitive to the concern of -- the concern is I think that, well, we have to have this officer nearby because this person is dangerous, this person is going to run. I mean, the jury could think

many different things, and I think that's the concern that [defense counsel] in part is expressing by bringing the motion to change the position of the corrections officer.

RP 342-3. The court acknowledged that the jury already would have perceived that Mr. Gorman-Lykken was being supervised by the corrections officer, noting it was not “any surprise” to the jury what the corrections officer was doing in the courtroom. RP 342. This individualized security focus on Mr. Gorman-Lykken signaled “official concern” that alerted the jury that Mr. Gorman-Lykken was in need of specific security provisions. *Holbrook*, 475 U.S. at 569.

- c. The trial court failed to exercise its discretion to determine whether this prejudicial procedure was necessary.

Rather than engage in an analysis of whether this prejudicial protocol was necessary for Mr. Gorman-Lykken, the court noted only the size of the officer, rather than the need for her presence:

Well, I'll note for the record that sometimes we'll see one or two or three officers assigned to a particular person who's been accused of a crime. Sometimes those individuals are large, larger than average. I'll note that the corrections officer is not one of or [sic] largest corrections officers, and there's only one of her.

RP 342. The court concluded, without assessing the need for this security measure, “I think on the whole I'm comfortable having the officer stay where she's at.” RP 343.

Had the court considered whether the procedure was necessary, it could not have found an “essential state interest” in having a corrections

officer sit near Mr. Gorman-Lykken on the witness stand. *Butler*, 198 Wn. App. at 493. Mr. Gorman-Lykken's pre-trial risk assessment found him to be "low" risk. Supp. CP _____ (sub no. 3). He had minimal criminal history, consisting of misdemeanor offenses and an assault in the third degree from over ten years ago. CP 6. There was simply no reason to think that this jail protocol that so significantly singled out Mr. Gorman-Lykken was "essential" or even remotely necessary. *Estelle*, 425 U.S. at 504; *Butler*, 198 Wn. App. at 493. The court's failure to analyze the need for this procedure was an abuse of discretion.

This blanket procedure of allowing a corrections officer to sit near Mr. Gorman-Lykken while he testified was inherently prejudicial because it denied him the "indicia" of innocence which seriously undermined his right to a fair trial and the presumption of innocence. *Jaime*, 168 Wn.2d at 861. The trial court's failure to engage in fact finding to determine whether Mr. Gorman-Lykken's trial presented particular security concerns was an abuse of discretion that denied Mr. Gorman-Lykken a fair trial, requiring reversal of his conviction. *Id.* at 866-867.

- 4. Mr. Gorman-Lykken's right to a fair trial was violated by the prosecutor's flagrant, ill-intentioned misconduct, which included telling the jury that Mr. Gorman-Lykken lied on the stand, impugning defense counsel, and mischaracterizing the defense theory and evidence in a manner intended to inflame the jury.**

a. Prosecutorial misconduct deprives the accused of due process.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. U.S. Const. amends. VI, XIV; Const. art. I, §22. Prosecutorial misconduct may deprive the accused of this constitutional right to a fair trial. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 703–04, 286 P.3d 673 (2012).

“Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial.” *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). The prosecutor has a duty to ensure a verdict is free from prejudice and based on reason, not passion. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). The prosecutor may not “la[y] aside the impartiality that should characterize his official action to become a heated partisan.” *Id.* Nor may the prosecutor “see[k] to procure a conviction at all hazards,” “by vituperation of the prisoner and appeals to prejudice.” *Id.*

A prosecutor’s improper conduct that prejudices the accused requires reversal and remand for a new trial. *State v. Lindsay*, 180 Wn.2d 423, 444, 326 P.3d 125 (2014). Prejudice is established if there is a substantial likelihood that the prosecutor’s statements affected the jury’s

verdict. *Id.* at 440 (citing *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012)). Prejudice is determined by looking at “the context of the total argument, the issues, the evidence and the instructions.” *Warren*, 165 Wn.2d at 28.

Where there is no objection at trial, reversal is still required if the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. *Glassman*, 175 Wn.2d at 704. And cumulative error may warrant reversal for prosecutorial misconduct, even if each error standing alone would otherwise be considered harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *Lindsay*, 180 Wn.2d at 430.

b. The prosecutor committed misconduct throughout closing argument and rebuttal.

i. The prosecutor expressed his personal opinion that Mr. Gorman-Lykken lied on the stand.

A prosecutor has “wide latitude to argue inferences from the facts concerning witness credibility.” *Warren*, 165 Wn.2d at 30. But “[i]t is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant.” *Lindsay*, 180 Wn.2d at 437 (citing *Reed*, 102 Wn.2d at 145). A defendant is prejudiced when it is “clear and unmistakable that counsel is expressing a personal opinion.”

Warren, 165 Wn.2d at 30 (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)).

In closing the prosecutor argued, “I mean, he’s been around her. He knew. He knew. **And yet he got up on the stand and lied.** He said he had never been told not to have sex with her when she sleeps ever.” RP 406 (emphasis added). The prosecutor’s claim that Mr. Gorman-Lykken lied on the stand is not an inference on witness credibility, but a statement about who the prosecutor believes told the truth in a case of competing testimony. Ms. Kunkel and her brother testified that she told Mr. Gorman-Lykken not to have sex with her that night, and Mr. Gorman-Lykken claimed she did not tell him this. RP 218, 370, 385. This was a “clear and unmistakable” expression of personal opinion about who told the truth in regards to the central question in the case, consent. *Warren*, 165 Wn.2d at 30.

ii. The prosecutor impugned defense counsel and misstated the defense theory in rebuttal.

Though the prosecutor may argue against the defense theory, the prosecutor may not “impugn the role or integrity of defense counsel.” *Lindsay*, 180 Wn.2d at 431-432. The prosecutor is not permitted to make prejudicial statements not supported by the record. *Weber*, 159 Wn.2d at 276 (citing *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963)).

Prosecutorial argument that maligns defense counsel “can severely damage an accused’s opportunity to present his or her case.” *Lindsay*, 180 Wn.2d at 432. Courts must allow the prosecution the freedom to strike “hard blows” based on the evidence and all fair inferences therefrom, but courts may not permit “foul” blows. *United States v. Prantil*, 764 F.2d 548, 555 (9th Cir. 1985). It is improper for prosecutors to “use arguments calculated to inflame the passions or prejudices of the jury.” *State v. Thierry*, 190 Wn. App. 680, 690, 360 P.3d 940 (2015) (citing *Glasmann*, 175 Wn.2d at 704).

In rebuttal argument, the prosecutor “is entitled to make a fair response to the arguments of defense counsel.” *State v. Gauthier*, 189 Wn. App. 30, 37–38, 354 P.3d 900 (2015) (citing *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997) And improper remarks in rebuttal may not require reversal “if they were invited or provoked by defense counsel and are in reply to his or her acts and statements.” *Thierry*, 190 Wn. App. at 690. However, a prosecutor may not make “improper remarks” that “are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Id*; *Weber*, 159 Wn.2d at 276-77.

- a) The prosecutor wrongly described defense counsel’s argument about Mr. Kunkel coming forward the day before trial to be “as false as” the testimony given by Mr. Gorman-Lykken.

In closing argument, defense counsel highlighted Mr. Kunkel's late disclosure and bias, arguing that Mr. Kunkel did not come forward to law enforcement or the prosecution team "until the day before trial." RP 427-428. "Nobody reached out to him, he didn't reach out until then. So his loyalty to his sister obviously is part of the equation here." RP 428.

In rebuttal, the prosecutor stated this was false, and impugned defense counsel's veracity for making this argument:

And defense counsel makes this inaccurate statement that the day before trial Mr. Kunkel was contacted or came forward. It's not true. Mr. Kunkel was contacted and came forward much earlier than the day before yesterday. That's an inaccuracy. That's plain false. That came out in testimony. It's plain false. **It's as false as the accusations or testimony that the defendant gave.**

RP 440 (emphasis added).

This was not a fair response to defense counsel's argument, because (1) defense counsel's statement was generally accurate, and (2) the argument was calculated to inflame and prejudice the jury.

The day of trial, defense counsel and the prosecutor made a record of the late disclosure of the substance of Mr. Kunkel's testimony. RP 145-154. Defense counsel described, "it does not appear that Mr. Laurine had a conversation with Mr. Kunkel until yesterday midmorning," and this is when Mr. Kunkel revealed he would testify to Ms. Kunkel's statements about consent. RP 146. Defense counsel described this as "ambush"

because “Mr. Laurine didn’t even really know exactly what the substance of this witness testimony would be until yesterday.” RP 147.

The prosecutor concurred in defense counsel’s description of events, acknowledging that the critical testimony did not emerge until the day before trial:

I had asked Ms. Kunkel to have her brother contact me as soon as possible...[f]inally, I spoke with her early **yesterday morning** in preparation for trial on the phone. I said you need to have your brother contact me as soon as possible. He contacted me at his lunch break. The nature of that discussion was such that I felt it was absolutely necessary for me to tell defense counsel the facts that he was relating to me. They are important because they do go to an issue of notice and notice of consent that was given to the defendant and lack of consent and especially given the circumstances of the events.

RP 149-50 (emphasis added).

Mr. Gorman-Lykken requested that Mr. Kunkel not be permitted to testify because of this late development in his testimony. RP 154. In response, the prosecutor painted himself as an equal a victim of this late disclosure: “He’s being ambushed no more than I. Is there a surprise involved? Certainly.” RP 150.

At trial, Mr. Kunkel agreed with defense counsel that the first time he mentioned anything to law enforcement about previous conversations he said he overheard between Ms. Kunkel and Mr. Gorman-Lykken was two days earlier. RP 386.

Because defense counsel's argument in closing was accurate, it cannot be argued that defense counsel invited this inaccurate claim in rebuttal. And the manner of comparing the "lies" of defense counsel to the "lies" of the defendant was certainly inflammatory, because it repeated the prosecutor's impermissible opinion that Mr. Gorman-Lykken lied, and impugned defense counsel's integrity. *Lindsay*, 180 Wn.2d at 433. The statement is a "foul blow," that was both inaccurate and inflammatory. *Prantil*, 764 F.2d at 555.

- b) The prosecutor misstated the defense theory, misinforming and inflaming the jury in rebuttal.

The prosecutor again impugned defense counsel by mischaracterizing the defense theory in rebuttal.

Defense counsel argued in closing that the jury could acquit Mr. Gorman-Lykken by finding either the state failed to meet its burden of proof that Ms. Kunkel was physically or mentally incapacitated, or based on the affirmative defense that Mr. Gorman-Lykken reasonably believed that Nicole Kunkel was not mentally incapacitated and/or physically helpless. RP 419-420; CP 24, 29. The defense then argued, based on the evidence at trial, that both of the Kunkels' credibility problems created reasonable doubt and supported the affirmative defense. RP 420-432. The defense highlighted the fact that Mr. Gorman-Lykken's claims about his

and Ms. Kunkel's drug use were not rebutted, and that at a minimum, Ms. Kunkel failed to report alcohol use to the sexual assault nurse. RP 433-435.

The prosecutor responded in rebuttal closing argument with a misstatement of the defense theory at trial: "According to the defendant—and his theory is basically this—that drug addicts can't be raped, and that's not true and that's not fair." RP 443. This misstatement impugned defense counsel and Mr. Gorman-Lykken by inaccurately arguing they were pursuing a trial defense that would certainly prejudice the jury against them, and misstates the actual affirmative defense that Mr. Gorman-Lykken advanced at trial. This tactic of misrepresenting defense counsel's argument in rebuttal does not comport with the prosecutor's duty to "seek convictions based only on probative evidence and sound reason." *Thierry*, 190 Wn. App. at 694.

This prejudicial misstatement that imputes a false theory onto counsel and Mr. Gorman-Lykken was far more inflammatory and prejudicial than the prosecution's impermissible description of defense counsel's presentation of the case as a "crook" in *Lindsay*, or the labels of "bogus" and "sleight of hand" in *State v. Thorgerson*. *Lindsay*, 180 Wn.2d at 433 (citing *State v. Thorgerson*, 172 Wn.2d 438, 450, 258 P.3d 43 (2011)). Because the claim was made in rebuttal, defense counsel had no

chance to respond, which only compounded the damage of this flagrant misconduct. *See Lindsay*, 180 Wn.2d at 443.

- c) The prosecutor argued in rebuttal that Ms. Kunkel was on trial.

The defense's closing argument highlighted the problems with Ms. Kunkel's credibility, including her claim that Mr. Gorman-Lykken raped her like this 2000 times, and her claim that she reported this to police 2000 times, at least 50-60 times, but there was no record of any such report presented at trial. RP 421-422. The defense highlighted the inconsistencies in Ms. Kunkel's statements, and also highlighted the differing evidence about her drug use and accuracy of her reporting about drug use. RP 423-427; RP 429-434.

In rebuttal, the prosecutor characterized the defense's argument about the evidence as an unwarranted attack on Ms. Kunkel:

Now, it's very easy for defense counsel and the defendant to come up here and claim that she's a drug addict, you know, insinuate that she's on methamphetamine or that she's finding Adderall on the black Market. It's real easy for them to do that. She's already on trial just by giving up here and saying that he raped her. Everything that she does and says from the moment that she makes that accusation and even before that accusation went on trial, everything.

RP 439. This characterization of Ms. Kunkel as being on trial, unfairly attacked by the defense, is not a "fair response to the arguments of defense counsel" during rebuttal argument. *Gauthier*, 189 Wn. App. at 37-38. It is

an inflammatory appeal to the jurors' sympathies and a derogatory and misleading misstatement of defense counsel's argument about the credibility of evidence in closing.

iii. The prosecutor misstated the law, argued facts not in evidence, and made unsubstantiated prejudicial misstatements about Mr. Gorman-Lykken's testimony.

The prosecutor focused on Mr. Gorman-Lykken's testimony that sometimes Ms. Kunkel did not remember having sex after snorting Oxycodone. RP 360. The prosecutor argued that this testimony meant Mr. Gorman-Lykken "admitted" that Ms. Kunkel did not consent at the time of intercourse, which was a misstatement of his testimony, a misstatement of the law of consent, and a prejudicial claim not supported by the record. RP 404, 416.

Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced. *Glasmann*, 175 Wn.2d at 705. The prosecuting attorney commits misconduct by misstating the law. *Allen*, 182 Wn.2d at 373-74. And prosecutors may not "make prejudicial statements that are not sustained by the record." *State v. McKenzie*, 157 Wn.2d 44, 58, 134 P.3d 221 (2006) (citing *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003)). The prosecutor's repeated

mischaracterization of Mr. Gorman-Lykken's testimony violated each of these principles.

On cross-examination, the prosecutor questioned Mr. Gorman-Lykken about telling Officer Wiper that Ms. Kunkel gets "drowsy" from her medication and sometimes forgets about having sex. RP 365. Mr. Gorman-Lykken stated that people can forget about having sex, especially when they have been together five years. RP 367. He explained that Oxycodone is a powerful drug, and he too, has forgotten, or been unaware that he had sex after sniffing Oxycodone. RP 369. Mr. Gorman-Lykken was clear that lack of memory after the fact did not mean Ms. Kunkel was not aware of what was happening at the time: "she's totally there...and coherent and making her own decisions, but sometimes she doesn't remember exactly what it was that happened." RP 360

In closing, the prosecutor mischaracterized Mr. Gorman-Lykken's testimony as an admission of Ms. Kunkel's lack of consent:

and he said these medications make her drowsy, and she's [sic] sometimes forgets about consenting to sex. So that's a big statement. These drugs, these medications make her drowsy, and she forgets about sex... **she forgets about having sex. She doesn't know.** He knows that she doesn't know. He also knows the effect that those drugs have on her. They put her to sleep. He is very much aware of what's going on, and he's very much aware of what went on that night. He said that she did not remember, and that statement she did not remember, **admitting that her memory, lack of memory is followed by unconsciousness.** She was unconscious. And if a person is unconscious, they're incapable of

consenting. And if they're incapable of consenting and someone has sex with them, then that person has committed rape in the second degree. It's that simple.

RP 416 (emphasis added).

Based on this unsupported conclusion that failure to remember an event means the person was unconscious at that time, the prosecutor wrongly argued Mr. Gorman-Lykken admitted an element of the offense: "he has admitted every element of the crime." RP 416, 417.

In rebuttal, the prosecutor again restated this unsupported, illogical leap that lack of memory equals incapacity to consent: "If she can't remember it, she can't consent to it because she's not there, she's not present, she's not involved." RP 440-441. This was both a misstatement of fact and law. Mr. Gorman-Lykken's testimony about lack of memory was clearly not an admission of lack of consent, because he differentiated the two. RP 360. And it also misstates the law, that a lack of memory establishes the element of incapacitation. CP 29. This highly prejudicial argument, that Mr. Gorman-Lykken "admitted it," was not supported by fact or law, and was therefore improper and highly prejudicial.

- c. This flagrant, ill intentioned misconduct prejudiced Gorman-Lykken and could not have been cured by an instruction, requiring reversal and remand for a new trial.

Here, though not objected to during trial,² the prosecutor's flagrant and ill intentioned misconduct in closing argument was so pervasive and inflammatory "that no instruction or series of instructions can erase their combined prejudicial effect." *Glasmann*, 175 Wn.2d at 707.

A prosecuting attorney commits prejudicial misconduct when "there is a substantial likelihood that the instances of misconduct affected the jury's verdict." *Allen*, 182 Wn.2d at 376. The focus of this inquiry is "whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks." *Pierce*, 169 Wn. App. at 552 (citing *State v. Emery*, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012)).

Arguments that have an "inflammatory effect" on the jury are generally not curable by a jury instruction. *Pierce*, 169 Wn. App. at 552 (citing *Emery*, 174 Wn.2d at 763). And comments made at the end of the prosecutor's rebuttal closing are more likely to cause prejudice. *Lindsay*, 180 Wn.2d at 443. Repetitive misconduct can have a "cumulative effect." *Allen*, 182 Wn.2d at 376. Where, as here, the misconduct is cumulative and pervades the closing argument, reversal may be required even if

² Mr. Gorman-Lykken filed a motion for a new trial alleging prosecutorial misconduct in closing argument after the jury rendered its verdict, which the trial court denied. CP 37; RP 467.

each error standing alone might otherwise be considered harmless. *Weber*, 159 Wn.2d at 279 (citing *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)).

Here, the prosecutor's improper and highly inflammatory arguments would have "engendered an incurable prejudice in the minds of the jury." *Pierce*, 169 Wn. App. at 556. There is no jury instruction that could have cured the prosecutor expressing his belief that Mr. Gorman-Lykken lied on the stand, or that his attorney lied to the jury and advanced an unfair defense theory that "drug addicts deserve to be raped" in rebuttal. These expressions of opinion about the defense were so derogatory that even if factually corrected, the prosecutor's sentiment towards counsel and the defendant could not have been undone. Courts recognize that improper insinuations or suggestions are apt to carry more weight against a defendant. *Thierry*, 190 Wn. App. at 694 (citing *U.S. v. Solivan*, 937 F.2d 1146, 1150 (6th Cir. 1991)).

And the fact that the inflammatory misstatement of the defense theory and characterization of defense counsel's impeachment of Ms. Kunkel was made in rebuttal is all the more prejudicial because there was no opportunity for defense counsel to refute these misstatements. *Lindsay*, 180 Wn.2d at 443. And like in *Lindsay*, these misstatements become all

the more incurable in a case like Mr. Gorman-Lykken's that turns on witness credibility. *Id.* at 444; see also *Thierry*, 190 Wn. App. at 693–94.

The prosecutor's opinion about Mr. Gorman-Lykken lying on the stand and misstating his testimony and the law of consent becomes even more incurable in light of the erroneous jury instruction that allowed the jury to convict Mr. Gorman-Lykken without the State proving the element of incapacity beyond a reasonable doubt. *State v. McCreven*, 170 Wn. App. 444, 471, 284 P.3d 793 (2012) (Where jury instruction impermissibly lowered the prosecution's burden of proof, the prosecutor's misstatements cannot be harmless when viewed in the context of the entire case); CP 29.

Finally, the prosecutor's impermissible comments about Mr. Gorman-Lykken's veracity must also be considered in light of the fact that his right to testify with the presumption of innocence was already undermined by the corrections officer who sat near him when he testified.

Each instance of misconduct warrants reversal, but the cumulative effect of the misconduct rendered the misconduct incurable, requiring reversal of Mr. Gorman-Lykken's conviction. *Glasmann*, 175 Wn.2d at 707.

5. Cumulative error deprived Mr. Gorman-Lykken of a fair trial.

The accused may be denied a fair trial by the accumulation of non-reversible errors. *State v. Perrett*, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)).

The appellate court considers errors committed by the trial court as well as instances of misconduct by others, including the prosecutor. *See Greiff*, 141 Wn.2d at 929; *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). And where the State's case is weak, the accused is more likely to be prejudiced by the effect of cumulative errors. *United States v. Lloyd*, 807 F.3d 1128, 1168 (9th Cir. 2015).

Mr. Gorman-Lykken's trial was plagued by significant constitutional errors that ranged from evidentiary and instructional errors to misconduct and unfair trial proceedings. The cumulative effect of these errors seriously eroded Mr. Gorman-Lykken's right to a fair trial. Where this case turned on witness credibility, and Ms. Kunkel's credibility was questionable, these errors were far more likely to have prejudiced the jury. Mr. Gorman-Lykken's conviction should be reversed for a new trial.

6. This Court should strike the \$200 court filing fee.

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay court costs.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This requires

the sentencing court to take into account a defendant's financial resources and the nature of the burden imposed by payment, on the record. *Id.* at 838.

Believing it to be mandatory, the court imposed a \$200 court filing fee, in addition to the mandatory \$500 victim assessment and DNA fee. CP 54. The court did not assess Mr. Gorman's Lykken's ability to pay.

The legislature recently amended the statutory scheme to limit when legal financial obligations may be imposed on an indigent person. As amended, RCW 36.18.020(2)(h) bars a court from imposing a court filing fee after conviction when the person is indigent as defined in RCW 10.101.010(3) (a) through (c). Contrary to the previous version of the statute, which required criminal filing fee "irrespective of the defendant's ability to pay," RCW 36.18.020(2)(h) is now discretionary because the court can no longer impose this fee on an indigent person. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (describing RCW 36.18.020(2)(h) as mandatory because it was imposed irrespective of a person's ability to pay).

Mr. Gorman-Lykken asks this court to apply the amended statute to his pending case, and strike this discretionary fee from his judgment and sentence. *See State v. Rose*, 191 Wn. App. 858, 863-864, 365 P.3d 756 (2015) (pending cases are decided according to the law in effect at the

time of the decision). Or in the alternative, to remand for the court to assess Mr. Gorman-Lykken's ability to pay this \$200 discretionary fee. *Lundy*, 176 Wn. App. at 103 (A court must assess a defendant's ability to pay when imposing *discretionary* legal financial obligations).

F. CONCLUSION

Mr. Gorman-Lykken was deprived of his constitutional right to due process and a fair trial from pre-trial through the prosecutor's rebuttal. The court denied Mr. Gorman-Lykken the right to fully defend against the State's accusations by refusing to grant a continuance to obtain Ms. Kunkel's toxicology results. His right to the presumption of innocence was seriously eroded by the court allowing a corrections officer to sit near him when he testified, and the prosecution was relieved of having to prove the disputed element of consent by the erroneous "to convict" instruction. Pervasive, flagrant and ill intentioned prosecutorial misconduct compounded these errors.

Reversal for a new trial is warranted for each separate constitutional violation, and certainly the cumulative effect of these errors entitles Mr. Gorman-Lykken to a new trial.

DATED this 10th day of August 2018.

Respectfully submitted,

s/ Kate Benward

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 51254-8-II
v.)	
)	
JAMES GORMAN-LYKKEN,)	
)	
APPELLANT.)	

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