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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CLINTON JAMES CALDWELL, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Karena Kirkendoll, Judge

No. 17-1-02807-1

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly exercised its discretion in admitting testimony that defendant falsely claimed Pappas raped him under ER 403, where the conduct was a manifestation of defendant's level of intoxication, corroborated his bizarre behavior, proved his ability to form intent, and where defendant failed to show the probative value of the evidence was substantially outweighed by unfair prejudice? (Appellant's Assignments of Error 1, 2)
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B. STATEMENT OF THE CASE.

1. PROCEDURE

On July 25, 2017, the State filed an Information charging Clinton Caldwell, hereinafter “defendant,” with one count of assault in the second degree in violation of RCW 9A.36.021, and one count of felony harassment in violation of RCW 9A.46.020(1)(a)(i), 2(b). CP 3-4. Each count included a domestic violence enhancement under RCW 10.99.020. CP 3-4.

Pre-trial hearings commenced on December 5, 2017. RP 3.<sup>1</sup> The Honorable Karena Kirkendoll presided over the trial. *Id.* During motions in limine, defendant moved to exclude evidence of his conduct during his transport to the jail. RP 42. Specifically, defendant wanted to exclude evidence that he falsely claimed that the victim, Kaitlin Pappas, raped him. *Id.* Defendant yelled “rape” until he arrived at the jail, where he was thereafter transported to the hospital before he retracted the accusation. RP 43-44. While being transported, defendant called the arresting officer names and repeatedly attempted to kick out the patrol car window. RP 42-45. The State argued that the sexual assault allegation provided a “complete picture of the intoxication,” because the State intended to prove defendant was so intoxicated that he was violent toward the victim, and the “level of anger

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<sup>1</sup> The verbatim report of proceedings are contained in nine (9) volumes with consecutive pagination and will be referred to as “RP” followed by the page number.

that [he was] showing in his current state is highly relevant” to the events that transpired that night. RP 43. The trial court weighed the prejudicial effect of the testimony against the probative value and found that defendant calling the arresting officer a “douchebag” and “nerd” was more prejudicial than probative. CP 85-88 (Conclusion of Law 2). The court ruled that the State could elicit testimony regarding the sexual assault allegation and that defendant was transported to the hospital for a rape kit, because it was relevant to show defendant’s intoxicated state and state of mind, and the prejudicial effect of that evidence did not substantially outweigh its probative value. CP 85-88 (Conclusion of Law 3); RP 44. Additionally, the court ruled that under the Rule of Completeness, if the State chose to elicit testimony regarding defendant’s sexual assault allegation, then defendant would be permitted to introduce statements he made in the patrol car denying that he committed an assault. CP 85-88 (Conclusion of Law 4); RP 325-326.

The State called victim Kaitlin Pappas, responding officers Clayton Grubb and Kristopher Clark, ride-along witness Kayla Martin, treating physician assistant Ryan Barlow, and forensic specialist Renae Campbell to testify at trial. RP 317, 342, 448, 472, 521, 537, 549. During defendant’s case-in-chief, he recalled Pappas and Officer Grubb to testify and called bartender Jordan Hurst, private investigator Misty McMains-Brickey, and

defendant's mother Susan McAllister-Caldwell as witnesses. RP 561, 570, 573, 626, 635. Defendant also chose to testify in his own defense. RP 653.

During trial, the State reserved questions about defendant's false sexual assault allegation until cross-examining defendant. RP 691. Defense timely objected, and the court clarified its earlier ruling from motions in limine. RP 691-2. Defendant's objection was based on his belief that if the State asked about claiming sexual assault, then the State also had to ask about defendant denying assaulting Pappas. RP 691. The court clarified that the State's questions about the sexual assault allegation simply opened the door for the defense to ask questions about defendant's denial during redirect examination. RP 691-2, 699-700. Defendant did not request a limiting instruction addressing the rape allegation, so no limiting instruction was given.<sup>2</sup> During closing argument, the State argued that the sexual assault allegation was a manifestation of defendant's continued rage. RP 747. After an argument in support of Pappas credibility, the State pointed out the inconsistencies in defendant's testimony. RP 751-762. This line of argument concluded with the State arguing that defendant's false rape

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<sup>2</sup> Defendant did propose, and the court gave, an instruction to the jury that they may give "such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances." *See* CP 30, 35-66 (Instruction 3). Defendant also proposed a voluntary intoxication instruction modeled after WPIC 18.10. *See* CP 26-27. This instruction was given to the jury. CP 35-66 (Instruction 13).

allegation, in addition to his conflicting testimony, showed defendant's lack of credibility. RP 760-762. The jury was instructed that they are the sole judges of the credibility of each witness, and that the lawyers' arguments are not evidence. CP 35-66 (Instruction 1). The State reminded the jury that arguments are not evidence. RP 787.

The jury found defendant guilty of all counts. CP 67-70. The jury also returned special verdict forms finding that defendant and the victim, Kaitlin Pappas, were members of the same family or household as it relates to RCW 10.99.020. RP 806-807; CP 71-74. As a result, defendant was sentenced to twelve months and one day for the second degree assault count and six months for the felony harassment count, with both counts to run concurrent to one another. RP 828-829, CP 91-102. The court also imposed a period of community custody and ordered compliance with various conditions. CP 96-97, 101. Defendant filed a timely appeal. CP 106-107.

## 2. FACTS

Victim Kaitlin Pappas met defendant on the dating website Match.com. RP 344. Pappas and defendant communicated through the dating website every day for about two weeks before deciding meeting for a date. RP 344, 404. The date took place on Friday, July 21, 2017.<sup>3</sup> RP 346.

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<sup>3</sup> Pappas and defendant were both over the age of 16 at the time of the date. RP 415, 653.

Pappas met defendant at HG Bistro in Sumner, Washington. RP 344, 347. Defendant arrived early and had been text messaging Pappas on her way to the restaurant. RP 348. Defendant ordered Pappas a “Smith and Wesson” alcoholic drink and himself an alcoholic beverage. RP 348, 406-7. The waitress “kind of forgot” about Pappas and defendant, which frustrated defendant. RP 348. He wanted to leave, so he requested their food to go. *Id.* Defendant invited Pappas to Tacoma to walk the waterfront. *Id.* Defendant claimed they ate at the restaurant, but Pappas testified the two left before eating their food. RP 348, 658. Even though the date was not going well, Pappas felt as though, based on their online conversations, she had “a lot to work with” with defendant, and she was still “interested in getting to know him.” RP 348-349. Pappas felt that continuing to the waterfront “was the only way to kind of save the date at that point.” *Id.*

On the way to the waterfront, Pappas ate the coconut shrimp she had ordered at the restaurant inside her car. RP 349-350. Pappas needed to use the restroom, so the two stopped at “a little dive bar called the Unicorn that [defendant] suggested.” RP 350. While there, defendant ordered the two another alcoholic drink. RP 350-1. Defendant suggested Pappas move her car “to a more safe location,” so defendant parked Pappas’ vehicle at his home. *Id.*

After parking her car, defendant wanted Pappas to meet his mother who was inside. RP 352. It was about 8:00PM according to Pappas. RP 353. Defendant's mother was asleep inside. RP 352. The pair woke her up. *Id.* Feeling awkward about waking defendant's mother, the two grabbed a skateboard and left defendant's home. *Id.* Defendant suggested they go to the actual waterfront where there are different places to get appetizers and drinks. RP 353. They went to a two-story bar/restaurant. RP 354. They took the elevator to the bar. *Id.* In the elevator, defendant unexpectedly kissed Pappas. RP 355-356. Once seated, Pappas ordered a beer and defendant ordered a "Vitamin C." *Id.* They stayed briefly. *Id.* Defendant had put the skateboard "kind of in the walkway," so a staff member asked him to move it. RP 354-355. This "kind of irritated [defendant]," so they left. RP 355. Since they were "enjoying each other's company at that point in time," the encounter "wasn't a big enough deal to [Pappas] that [she] would have stopped the date over it." *Id.* Defendant denied being angry at any waitstaff. RP 662.

In the elevator leaving the bar, Pappas gave defendant a hard time about the previous elevator kiss, telling him, "Okay. Don't try that move again on me." RP 356. Defendant shouted at a nearby couple, "Do you think it's weird to kiss your girl in an elevator?" *Id.* Pappas felt awkward about

defendant's comment to the couple, but he was "just kind of having fun" so she ultimately brushed it off. *Id.*

The couple continued the night, eventually going back to the Unicorn. RP 356-357. Pappas estimated it was about 9:30PM when they arrived. *Id.* She went straight to the restroom. *Id.* She talked to a few ladies in line who were also on dates. RP 358. After about ten minutes, she returned to the bar, defendant used the restroom, and she sat with the ladies she had met in line. *Id.* While talking, these women alerted Pappas that defendant was in an altercation – shouting back and forth – with another bar patron. *Id.* Defendant was angry. *Id.* Other patrons separated defendant, who left the bar. *Id.* Pappas followed. *Id.* Defendant acknowledged this altercation at trial, but claimed it was the result of Pappas engaging another man to play a game of pool. RP 666. Defendant also claimed Pappas left the bar first, he followed her and asked her to another bar, where the two had more drinks. RP 668-670.

They walked back to defendant's house that was a few blocks away because Pappas had to get her vehicle. RP 359. Once there, they sat on a hammock and discussed what happened at the bar. *Id.* Defendant tried to explain himself. *Id.* Pappas did not see the altercation start or hear what was said, so she "had no reason to doubt anything that he was saying or that he was not in the right." RP 360. They talked for about an hour. *Id.* Because

both parties had been drinking, Pappas decided to stay the night at defendant's house. *Id.* She felt "comfortable and safe," and she was "enjoying his company" at that point in time. *Id.* They went into the house and continued to talk. RP 361. Pappas testified that the talking "led to more than talking," and they had sex, but defendant denied having sex with Pappas at trial. RP 361, 673.

After going to bed, Pappas woke up to what she thought was running water. *Id.* Defendant was "peeing on the floor and the wall and the door." *Id.* Pappas was confused, because she had not drunk enough to feel intoxicated, just enough to feel insecure about driving. *Id.* "[Defendant] peeing everywhere didn't make any sense." *Id.* Pappas tried to tell defendant he was urinating on the wall. *Id.* He told her, "Don't worry about it." *Id.* She persisted. *Id.* He told her, "Don't fucking worry about it." RP 362. Again, she tried to tell defendant what he was doing. *Id.* He replied, "I told you not to fucking worry about it." *Id.* Defendant jumped on top of Pappas. *Id.* He grabbed her by the neck and began punching and strangling her. *Id.* Pappas was afraid. RP 363. She tried to fight and yell but realized this made defendant more aggressive. *Id.* He was screaming, "You think you're so smart. You dumb bitch. I'm going to fucking kill you. You smart now?" *Id.* She grew calm. *Id.* She thought defendant was going to kill her. RP 364.

When defendant stopped hitting Pappas, she got angry and yelled at him, “You’re crazy. Why would you do that to me? What are you doing?” RP 364. Defendant jumped on her again. *Id.* Pappas tried to talk him off, saying, “You can’t do this to me. You don’t want to do this to me.” *Id.* Her words were intermittent because defendant still had his hands around her neck. *Id.* She couldn’t breathe while he was strangling her. RP 366. Defendant looked at Pappas “like he was looking through [her].” RP 364. She asked him to let her go, only to be punched again. RP 365. Pappas pleaded to use the restroom. *Id.* Defendant responded, “You can find the fucking bathroom yourself.” *Id.* Pappas realized defendant was going to let her go. *Id.* He told her, “Just don’t fucking touch me.” *Id.* She tried to crawl over him carefully but touched him accidentally. *Id.* He jumped on top of her again and said, “Don’t fucking touch me.” *Id.* Defendant started punching and strangling Pappas again until he finally “gassed out.” *Id.* Pappas grabbed her things, scared that defendant was going to get up again. RP 365-366. She put on her pants and shoes before running out of defendant’s house. RP 368. She called the police. *Id.* Pappas testified, “I didn’t know where I was. I just ran.” *Id.* Defendant denied that any of these physical contacts or threats happened. RP 674.

The police found Pappas a few blocks away. RP 372, 523. She was “extremely distraught, crying, panicked, and quite shaken.” RP 523. Pappas

was taken to the hospital, put in a neck brace and examined. RP 372. After speaking to Pappas, the police located defendant's home. RP 527-528. They knocked on the door. RP 529. Several minutes later, defendant's mother answered. *Id.* Defendant was arrested. RP 530. The arresting officer observed defendant "was intoxicated. He was agitated we were there. And he had slurred speech while speaking to us." *Id.* Defendant was angrily yelling at the officers. RP 531.

The officer who first contacted Pappas had a "ride-along" observer with him that night. RP 549-550. She stayed in the passenger seat while police went to defendant's home. RP 550. Once defendant was in the back of the patrol car, his anger was directed at the observer, because he thought "[she] was the one who called the cops on him." *Id.* At trial, defendant first denied confusing the observer with Pappas, but after further questioning, he ultimately admitted to believing she was Pappas and yelling at her while in the patrol car. RP 669-670. Defendant wanted to get revenge on Pappas for calling the police, so he told the arresting officer that he had been raped and claimed she "sucked [his] dick so hard" that it hurt. RP 697-698. Defendant continued to yell "rape" in the back of the patrol car. RP 698. The jail would not book defendant, so he was transported to the hospital. *Id.* There, defendant declared he felt better. *Id.* He admitted to lying to the police to get even with Pappas. *Id.*

Later that weekend, on Sunday the 23rd, Pappas received two text messages from defendant. RP 399. The first was sent at 7:48PM and read, “Sorry for everything”. RP 399; CP 32-34, Exh. 39. A second message came ten minutes later at 7:58PM. RP 400. It read, “Sorry someone else sent that wrong number in [sic] will erase this. Number [sic] now.” *Id.*; CP 32-34, Exh. 39. Defendant attempted to excuse these messages by saying he had missed a date with another woman and sent the messages to Pappas by mistake. RP 675. Defendant admitted during trial that he wrote both text messages. RP 675, 697.

The following Monday, Pappas met a forensic photographer to take pictures of her injuries. RP 372-373. She had bruises under her jaw, on her neck, swelling behind her ears, and bumps throughout her head. RP 392; CP 32-34; Exh. 10, 15, 17-19, 22. She had an abrasion and bruising on her chest and arms as well. RP 392; CP 32-34; Exh. 23-25, 26-30. She did not have any bruises before the night in question and had not engaged in activity over the weekend to cause more bruising. RP 373. The bruises “became more obvious” and “darkened” over the two days. *Id.* Pappas had swelling in her throat for several days after. RP 392. Defendant denied hitting Pappas. RP 676. Defendant seemed to imply her injuries resulted from falling off the skateboard and said, “[I]f I would have punched Ms. Pappas, her whole face would be black and blue.” RP 671, 703.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE THAT DEFENDANT FALSELY ACCUSED THE VICTIM OF SEXUAL ASSAULT, WHERE THE CONDUCT WAS A MANIFESTATION OF DEFENDANT'S LEVEL OF INTOXICATION, CORROBORATED HIS BIZARRE BEHAVIOR, PROVED HIS ABILITY TO FORM INTENT, AND WHERE DEFENDANT FAILED TO SHOW THE PROBATIVE VALUE OF THE EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596 (2017). Appellate courts "will reverse a trial court's evidentiary ruling 'only when no reasonable person would take the view adopted by the trial court.'" *Id.* (quoting *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)).

Under the evidence rules, relevant evidence is presumed admissible except as limited by constitutional requirements or as otherwise required by statute, evidence rules, or other rules or regulations applicable in Washington courts. ER 402; *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987). Evidence Rule (ER) 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The threshold of relevant evidence is low and even minimally relevant evidence is admissible. *Kappelman v. Lutz*,

167 Wn.2d 1, 9, 217 P.3d 286 (2009). All relevant evidence is somewhat prejudicial. 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 403.2 (6<sup>th</sup> ed. 2017-2018). ER 403 governs the exclusion of relevant evidence on grounds of prejudice, confusion or waste of time. ER 403 states:

Although relevant, evidence *may* be excluded if its probative value is *substantially* outweighed by the danger of *unfair* prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Emphasis added). The touchstone of this balancing process is the term “unfair” prejudice. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (citing *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758, *review den’d*, 104 Wn.2d. 1016 (1985)). “Unfair” prejudice usually refers to prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among jurors. *Id.* If it is distinctly prejudicial in such a sense, and if other, less inflammatory evidence is available to adequately make the same point, the balance is tipped toward exclusion. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). Moreover, the evidence’s probative value must be *substantially* outweighed by unfair prejudice. *Lockwood v. A.C. & S*, 44 Wn. App. 330, 350, 722 P.2d 826 (1986). If the balance is substantially in favor of prejudice, the judge need not exclude the evidence, but merely has the discretion to do so. *Id.* The decision to admit

or exclude evidence must be based on the case's own facts and circumstances. *Id.* The burden of demonstrating unfair prejudice is on the party seeking to exclude the evidence. *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999).

The trial court has broad discretion in administering the rule, and its judgment in the balancing process will rarely be disturbed on appeal. *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). *See also, Lockwood v. A.C. & S.*, 44 Wn. App. 330, 350, 722 P.2d 826 (1986) (citing *State v. Sargent*, 40 Wn. App. 340, 347-49, 698 P.2d 598 (1985) (“[the] cases indicate the trial court is rarely overruled when admitting evidence and, where it is, the evidence admitted had little or no relevance but extreme prejudice.”)). Furthermore, the Court of Appeals may affirm the trial court on any basis supported by the record. *State v. Poston*, 138 Wn. App. 898, 158 P.3d 1286 (2007).

Defendant claims that testimony regarding his false sexual assault allegation against Pappas was more prejudicial than it was probative, and therefore the trial court erred in denying the defense's motion in limine to exclude this evidence. Brief of Appellant (“BOA”), 9. However, the evidence had high probative value because it was a manifestation of defendant's level of intoxication, corroborated his bizarre behavior, put him in proximity to the victim, and proved his ability to form intent. Any

prejudice resulting from this evidence was neither unfair nor did it substantially outweigh the probative value of the testimony. The evidence was properly admitted under ER 403.

Defendant moved to exclude all the statements made to police the night he was arrested. RP 42. He kicked the window of the patrol car, called the arresting officer names, and concluded with the rape allegation against Pappas. *Id.* Defendant argued that this conduct was more prejudicial than probative, and because there would be “a lot of evidence offered” that defendant was intoxicated, the evidence should be excluded. RP 42-43. The State argued that this conduct showed the “complete picture of intoxication.” RP 43. The court confirmed that defendant’s rape allegation led defendant to being transported to the hospital before being booked into jail. RP 43-44. The court excluded the evidence regarding defendant’s name-calling and kicking the patrol car window but concluded that the evidence regarding defendant’s false rape allegation went to defendant’s level of intoxication and state of mind that night and the prejudicial effect of that evidence did not substantially outweigh its probative effect. CP 85-88 (Conclusion of Law 3); RP 44. Additionally, under the Rule of Completeness, if the State chose to elicit the testimony of the sexual assault, then defendant would be permitted to introduce statements he made in the patrol car denying that he committed an assault. CP 85-88 (Conclusion of

Law 4). When the State began this line of questioning while cross examining defendant, defense objected. RP 691. The court clarified its earlier ruling: "... Under the rule of completion, everything that came in during that conversation on that subject at that time is admissible." RP 692. By the State then introducing evidence that defendant falsely accused Pappas of rape, the door was opened for defendant to introduce evidence that during the transport to jail, he repeatedly denied assaulting Pappas, which arguably constituted favorable evidence to defendant. RP 700.

Defendant argues that the evidence of his false sexual assault allegation only tended to prove intoxication. BOA, 10. But his classification of this evidence ignores its additional probative value. Defendant's rape allegation was a manifestation of a high level of directed anger at Pappas and corroborated that he exhibited assaultive behavior that a number of witnesses testified to. RP 367, 530, 551. The allegation acknowledged that defendant was in close physical proximity to Pappas that night. It showed how defendant was behaving in an erratic manner, like Pappas' testimony described. Additionally, defendant admitted that he made this accusation in direct retaliation against Pappas for calling the police.<sup>4</sup> Therefore, his false rape allegation proved that defendant, despite his high level of intoxication,

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<sup>4</sup> RP 697.

was able to form rational, complex thoughts and, thus, able to form the requisite intent for the assault charge. CP 35-66 (Instructions 9, 10 and 12). This allegation directly rebutted defendant's voluntary intoxication instruction and helped the jury adequately assess defendant's ability to form intent. CP 35-66 (Instructions 12 and 13). Accordingly, defendant's rape allegation had unmatched probative value in this case, and any resulting prejudice was neither unfair nor substantially outweighed the probative value.

Unfair prejudice is prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among jurors. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (citing *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758, review den'd, 104 Wn.2d. 1016 (1985)). For example, in *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985), the court held that gruesome photos of a murder victim were more prejudicial than probative where one photo was marginally relevant to show premeditation, but that relevance was outweighed by the substantial prejudice of the other gruesome photos. *Sargent*, at 348-9. The evidence in this case is not the type of evidence, like in *Sargent*, that is more likely to arouse an emotional response rather than a rational decision from the jury. As such, the trial court properly allowed this evidence under ER 403 by concluding that the probative value of the evidence showing defendant's

intoxication and state of mind, which would include his anger and intentionality, was not substantially outweighed by any prejudicial effect of the evidence.

At the time defendant made the rape allegation, he was also kicking the patrol car windows and calling the officer names. RP 42. The court excluded the name calling and window kicking evidence but allowed testimony of the rape allegation. RP 44; CP 85-88. By selecting certain evidence to exclude that was part of the same incident, the court struck a proper balance and excluded evidence deemed unfairly prejudicial. Case law supports other trial courts making similar decisions. For example, the Washington Supreme Court held in *State v. Powell*, 126 Wn.2d 244, 265, 893 P.2d 615 (1995),

*... The trial court carefully sorted through the proposed testimony and excluded a substantial amount of evidence in an effort to balance out the overall prejudicial effect. In so doing, it appears that the judge excluded evidence which may have been admissible otherwise. Moreover, the evidence admitted was highly probative for motive and res gestae purposes and, as the judge observed, was less inflammatory than some of the evidence the court refused. In some instances, the court explicitly accepted or rejected the prejudice concerns raised by Powell. We therefore find that the trial court did not err in admitting any evidence on this basis.*

(Emphasis added).

Likewise, defendant's rape allegation was proper *res gestae* evidence of the events that transpired the night of the assault. This Court clarified *res gestae* evidence in *State v. Grier*, 168 Wn. App. 635, 647, 278 P.3d 225 (2012). "Res gestae evidence completes the story of the crime on trial by providing its immediate context of happenings near in time and place." *Id.* (internal quotes omitted) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) *aff'd* 96 Wn.2d 591, 637 P.2d 961 (1981)). In *Grier*, this Court ruled that Grier's name-calling, threatening gestures, and statements on the night of the murder were admissible as *res gestae* evidence because it was evidence of the continuing events leading to the murder. *Id.* at 644. Defendant's rape accusation in the present case is analogous to the evidence admitted in *Grier*. Although the accusation occurred after the assault, defendant's statement was evidence of the continued events, anger, and intent to harm the victim in this case. Defendant's actions after he was arrested helped complete the story of the crime on trial by providing the context of the events and by telling the jury the whole story of what happened the night of the assault.<sup>5</sup> Under *Grier* and *Powell*, the trial court did not abuse its discretion in admitting the sexual

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<sup>5</sup> See also, *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004).

assault allegation to come in under either ER 403 or the *res gestae* exception.

Lastly, defendant makes a broad argument that this evidence was unfair because, due to the State's closing argument, it painted defendant as a person who is willing to lie to authorities, and "because the jury's determination of guilt or innocence depended entirely on its weighing of Pappas's and [defendant's] credibility, the evidence is not harmless." BOA, 11. Again, unfair prejudice refers to prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among jurors. *Rice*, at 13 (citing *Bernson*, at 736). This evidence was not unfair, because the State made an argument that was a reasonable inference from the evidence and did not invite an emotional response from the jury. Matters of credibility are part of the jury's considerations. *State v. Holbrook*, 66 Wn.2d 278, 279, 401 P.2d 971, 972 (1965); CP 35-66 (Instructions 1, 3).<sup>6</sup> Prosecutors are afforded wide latitude in closing argument to draw reasonable inferences from the evidence and may comment on witness credibility based on the evidence. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). Defendant has failed to meet his burden of establishing that the evidence was substantially outweighed by unfair

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<sup>6</sup> "You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances." CP 35-66 (Instruction 3).

prejudice. The trial court properly exercised its discretion in admitting defendant's false sexual assault allegations. For the above stated reasons, there was no error and defendant's convictions should be affirmed.

- a. Even if this Court finds that admission of the sexual assault allegation was an abuse of discretion, the error was harmless.

An erroneous evidentiary ruling that is not of constitutional magnitude is not prejudicial unless, within reasonable probabilities, the trial's outcome would have been different had the error not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (citing *Brown v. Spokane County Fire Protection Dis. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983), *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980), *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). The improper admission or exclusion of evidence constitutes harmless error if the evidence is of minor significance in reference to the overwhelming evidence as a whole and did not affect the outcome of the trial. *Bourgeois*, 133 Wn.2d at 403 (citing *Nghiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994)). It is harmless error if cumulative evidence is improperly admitted. *Hoskins v. Reich*, 142 Wn. App. 557, 570-571, 174 P.3d 1250 (2008).

Even if this Court finds the trial court abused its discretion in admitting the false rape allegation evidence, any error was harmless. The

evidence of defendant's false rape allegation was of minor significance and did not alter the outcome of the trial. The other properly admitted evidence overwhelmingly proved defendant's guilt. The jury heard evidence from Pappas that defendant had been volatile and angry at various people throughout the night. Pappas testified that defendant strangled her. The jury saw photos of the bruises on Pappas neck, face and arms. CP 32-34; Exh. 10, 15, 17-19, 22-30. A physician's assistant diagnosed Pappas with cervical strain from the strangulation. RP 480. The jury heard Pappas' 911 call and heard from multiple witnesses how scared she was the night of the assault. RP 363, 370, 523; CP 32-34; Exh. 8. Witnesses also testified that Pappas did not appear to be intoxicated the night of the assault, and defendant sent Pappas an apology text later that weekend. RP 477-478, 480, 567; CP 32-34, Exh. 39. Pappas' story was thoroughly consistent about the events that transpired.

The only prejudice defendant's false allegation may have had, if any, was not unfair and it related to defendant's credibility which was deteriorated by his own testimony absent the sexual assault allegation. Several witnesses discussed how intoxicated defendant was the night of the assault, so much so that he was urinating in his room. RP 361 (Pappas testified defendant urinating on wall); RP 530 (arresting officer testified defendant was intoxicated and agitated); RP 543-4 (responding officer

opined defendant appeared intoxicated based on his experience, observed puddle consistent with urine); RP 551 (ride-along observer testified defendant smelled like he had been drinking); RP 687 (defendant admits to being drunk). Defendant was agitated the entire night, though he denied it. He was combative with another bar patron earlier in the evening. He was combative toward police. Defendant initially denied being aggressive toward the ride-along observer when he confused her with Pappas, then said he couldn't remember if he was angry toward her, and then admitted to yelling at her. RP 688-690. The jury heard from that observer that defendant confused her as Pappas and he was extremely angry at her. Defendant also admitted to lying in the context of an interaction with Pappas: he sent a text message apologizing to her, but upon not getting a response, he tried to excuse the message by falsely claiming another person sent it. The physical evidence of the events was undeniable, with apparent bruising on Pappas' neck, yet defendant tried to imply her injuries were from falling off a skateboard. Defendant eroded his own credibility. Thus, any error in admitting evidence of defendant's false rape allegation was harmless, and defendant's convictions should be affirmed.

2. DEFENDANT’S CHALLENGE TO THE TERM “DATING RELATIONSHIP” FAILS, AS THE WASHINGTON STATE SUPREME COURT RECENTLY UPHELD THAT TERM AS CONSTITUTIONAL IN *STATE V. NGUYEN*.

Defendant challenges the constitutionality of the term “dating relationship” by arguing that the term is unconstitutionally vague. BOA, 16. The jury here found that defendant and Pappas were in a dating relationship. CP 35-66 (Instruction 27), 71, 73. Defendant relies on *United States v. Reeves*, 591 F.3d 77 (2d Cir. 2010) in support of his argument. *Reeves* interpreted the term “significant romantic relationship.” *Reeves*, at 81. The Court of Appeals distinguished *Reeves* in *State v. Norris*, 1 Wn. App. 2d 87, 95, 404 P.3d 83 (2017), holding that the term “dating relationship,” unlike “significant romantic relationship,” in the context of a community custody condition was not unconstitutionally vague. Our Supreme Court recently accepted review of *Norris*, and in a consolidated opinion under *State v. Nguyen*, 191 Wn.2d 671, 682, 425 P.3d 847 (2018), affirmed the appellate court on this issue.

Defendant challenges the constitutionality of the statutes defining “dating relationship,” specifically RCW 9.94A.030(20)<sup>7</sup>, which refers to

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<sup>7</sup> RCW 9.94A.030(20) provides, “‘Domestic violence’ has the same meaning as defined in RCW 10.99.020 and 26.50.010.”

RCW 26.50.010 and RCW 10.99.020. RCW 10.99.020(3) and (4) state in relevant part:

- (3) “Family or household members” means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.
- (4) “Dating relationship” has the same meaning as in RCW 26.50.010.

RCW 26.50.010(2) defines a “dating relationship” as:

“Dating relationship” means a social relationship of a romantic nature. Factors that the court may consider in making this determination include: (a) the length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties.

Though defendant’s case relates to “dating relationship” in the context of a sentencing aggravator and not a community custody provision as analyzed in *Nguyen, Nguyen* looks at RCW 26.50.010(2) which applies in this case. *Nguyen*, 191 Wn.2d at 852-53.

Both this defendant and the defendant Norris in *Nguyen* relied on *United States v. Reeves*, 591 F.3d 77 (2d Cir. 2010), to support the claim that the term “dating relationship” is unconstitutionally vague. *Nguyen*, 191 Wn.2d at 682-3. In *Reeves*, the defendant was required as part of his community custody provision to notify the Probation Department when he established a “significant romantic relationship.” 591 F.2d at 80. Our Supreme Court blatantly rejected the argument that the statute in *Nguyen* is like the statute in *Reeves*, holding that “the terms ‘significant’ and ‘romantic’ are highly subjective qualifiers, while ‘dating’ is an objective standard that is easily understood by persons of ordinary intelligence.” *State v. Nguyen*, 191 Wn.2d 671, 683, 425 P.3d 847 (2018). Thus, the court held that “dating relationship” is not unconstitutionally vague. *Id.* Based on *Nguyen*, in this case, the instruction given to the jury defining “dating relationship” and the jury’s finding that defendant and Pappas were in a dating relationship should be upheld.

3. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO PROVE THAT DEFENDANT AND PAPPAS WERE IN A DATING RELATIONSHIP, WHERE THEY MET ON A DATING WEBSITE, COMMUNICATED DAILY FOR TWO WEEKS, PAPPAS MET DEFENDANT'S MOTHER, AND WHERE THEY HAD SEXUAL INTERCOURSE AT THE END OF THEIR DATE.

As indicated above, both counts in this case were charged as domestic violence incidents pursuant to RCW 10.99.020. CP 3-4. The jury found that defendant and Pappas were members of the same family or household. CP 71, 73. The jury was instructed that "family or household members means a person sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship." CP 35-66 (Instruction 27). By the jury finding that defendant and Pappas had a dating relationship, defendant's convictions were classified as domestic violence incidents. This increased defendant's offender score to a 2. CP 92; RP 819-20. See RCW 9.94A.525(21). Allegations of domestic violence must be pled and proven beyond a reasonable doubt when the factual finding increases a defendant's standard range sentence. *Blakely v. Washington*, 542 U.S. 296, 303-4, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2005); RCW 9.94A.525(21); *State v. Shelley*, 3 Wn. App. 2d 196, 199, 414 P.3d 1153 (2018).

Defendant asserts there was insufficient evidence for the jury to have found he was in a dating relationship with Pappas. BOA, at 11. A defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). Sufficient evidence supports a conviction when, viewing it in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). In challenging the sufficiency of the evidence, all reasonable inferences are drawn in favor of the State and the defendant admits the truth of the State's evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017). Circumstantial evidence is not to be considered any less reliable than direct evidence. *Id.* at 266. Finally, the reviewing court will defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Holbrook*, 66 Wn.2d 278, 279, 401 P.2d 971, 972 (1965).

The jury here was instructed on the definition of "dating relationship" as defined in RCW 10.99.020(4) and RCW 26.50.010(2):

"Dating relationship" means a social relationship of romantic nature. In deciding whether two people had a "dating relationship," you may consider all relevant factors, including

(a) the nature of any relationship between them; (b) the length of time that any relationship existed; and (c) the frequency of any interaction between them.

CP 35-66 (Instruction 27).

When viewing the evidence in the light most favorable to the State, there was sufficient evidence for any rational trier of fact to find that defendant and Pappas had a dating relationship beyond a reasonable doubt.

Defendant met Pappas on Match.com, a dating website. RP 344. The couple communicated every day for two weeks before deciding to meet in person. *Id.* After meeting at a restaurant, defendant invited Pappas to several more locations, but first, he had Pappas meet his mother. RP 409, 576, 660. The couple continued to go to different establishments throughout the night. RP 344, 348, 350-2, 354, 356-7, 359. A bartender saw them leaving arm-in-arm. RP 565. Defendant kissed Pappas in an elevator, showing his romantic interest in their relationship, and referred to her as his “girl” to another couple. RP 356, 411. Defendant paid for the entire night. RP 681. When the night out concluded, defendant and Pappas returned to defendant’s home and had, what is typically viewed as the highest level of romantic engagement, sexual intercourse. RP 416.

The violence toward Pappas began only after the consummation of the couple’s relationship. At the point directly prior to defendant becoming violent, there was every indication that the dating relationship would

continue. Defendant should not be excused from a domestic violence aggravator simply because he was violent early in the relationship. Pappas was in a similar position of vulnerability that the statute seeks to protect, and she should be provided the protection of the statute.

There is no doubt that the relationship was a dating relationship. Defendant's violence ended the relationship's future. Defendant's argument that the relationship cannot meet some nonexistent minimum requirement to qualify as a "dating relationship" because defendant committed these acts at the end of the first date does not negate the romantic nature of their budding relationship. Defendant relies on the assertion that the relationship's brevity is a critical factor in determining the existence of a "dating relationship," but the statute does not require the jury to rely solely on this factor.<sup>8</sup> Even when considering the relationship's duration, long-term involvement is not required under the statutory definition of a "dating relationship." The evidence must establish that the couple had a "social relationship of a romantic nature." CP 35-66 (Instruction 27). Any reasonable trier of fact could find that two adults, who met on a dating website, talked every day for two weeks, met one of the other's parents, and had sex, are involved in a "social relationship of romantic nature." Thus,

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<sup>8</sup> Defendant's brief claims the jury is "required" to consider length, nature and frequency of interaction. BOA, 14. The language of the statute permits, but does not require, the jury to consider length of the relationship. *See also*, CP 35-66 (Instruction 27).

there was sufficient evidence to support the jury's finding that defendant and Pappas were in a dating relationship. Accordingly, this Court should affirm defendant's convictions.

4. HOUSE BILL 1783 REQUIRES DEFENDANT'S JUDGMENT AND SENTENCE BE AMENDED TO STRIKE THE \$200 FILING FEE AND INTEREST ON NON-RESTITUTION FEES AFTER JUNE 7, 2018.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, amended the legal financial obligation (LFO) system in Washington State. Particularly, House Bill 1783 eliminates interest accrual on the non-restitution portions of LFOs as of June 7, 2018, and establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction. Laws of 2018, ch. 269, §§ 1, 18. House Bill 1783 also amended the discretionary LFO statute, former RCW 10.01.160 and 36.18.020(h) to prohibit courts from imposing discretionary costs or the \$200 filing fee on indigent defendants. Laws of 2018, ch. 269, §§ 6, 17.

Our Supreme Court recently held in *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018), that House Bill 1783 applies to cases that are pending on appeal. Defendant's case, like *Ramirez*, is still pending on direct appeal and is therefore subject to the provisions of House Bill 1783.

Defendant was found indigent at the time of sentencing. CP 80-81; RP 529. The sentencing court imposed a mandatory \$500 crime victim assessment fee, \$100 DNA database collection fee, and a \$200 criminal filing fee. CP 93. The court also ordered that the financial obligations shall accrue interest from the date of the judgment. CP 94. Because defendant's case is subject to House Bill 1783, the State agrees that the \$200 criminal filing fee should be stricken, and as of June 7, 2018, interest cannot accrue on non-restitution portions of defendant's LFOs. Defendant is still subject to the mandatory \$500 crime victim assessment fee and the \$100 DNA collection fee because this is his first felony conviction. *See* CP 92. Defendant's Judgment and Sentence should be remanded to reflect these changes.

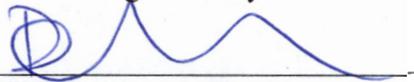
D. CONCLUSION.

For the above stated reasons, the State respectfully requests this Court affirm defendant's convictions. However, the State agrees this Court should remand for the trial court to strike the \$200 criminal filing fee and

the imposition of interest on non-restitution LFOs after June 7, 2018, from defendant's Judgment and Sentence pursuant to House Bill 1783.

DATED: January 14, 2019.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.14.19 Therunika

Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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