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No. 51752-3-II
Lewis County 17-1-00387-21

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

STATE OF WASHINGTON,

Respondent,

v.

ZACKARY W. CALDWELL,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
LEWIS COUNTY

The Honorable Judge Joely O'Rourke

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, ill-intentioned and prejudicial misconduct which compel reversal.

2. In the alternative, appointed counsel was prejudicially ineffective in relation to the repeated misconduct.

3. Even if the individual types of misconduct would not compel reversal standing alone, the cumulative corrosive effect of that misconduct deprived appellant Zackary Caldwell of his due process rights to a fair trial.

B. QUESTIONS PRESENTED

1. Where the only issue at trial is whether the alleged victim's claims are credible despite her having told police and a forensic nurse a very different version of events and lying to them, does the prosecutor commit flagrant, ill-intentioned and prejudicial misconduct by repeatedly inquiring into and emphasizing the trauma the accuser suffered as a result of criminal justice procedures and Mr. Caldwell's decision to exercise his constitutional right to jury trial in a way which bolstered the accuser and implied jurors should draw a negative inference from Caldwell's exercise of his rights?

2. Is it flagrant, prejudicial and ill-intentioned misconduct in an indecent liberties case for the prosecutor to denigrate defense counsel for challenging the credibility of the accuser by claiming that counsel was requiring the accuser to follow a non-existent guidebook for victims and suggesting community concerns as a result?

3. Does a prosecutor commit flagrant, prejudicial and ill-intentioned misconduct and misstating the crucial burden of proof beyond a reasonable doubt by telling jurors they had to decide which version of events was reasonable and suggesting they had to choose sides as part of their role in deciding the case?

4. Even if any of the misconduct is not deemed so flagrant, prejudicial and ill-intentioned that it could not have been cured if counsel had sought an instruction, should the Court should reverse and remand for a new trial based on counsel's ineffective assistance in failing to object or handle the pervasive

misconduct?

5. Where there is no dispute that sexual intercourse occurred and the only issue is whether the accuser, who changed her version of events, is credible, does the cumulative effect of the prosecutor's repeated acts of misconduct compel reversal where the misconduct misleads the jury as to its proper role and the state's burden, incites passions and prejudices and bolsters the accuser, denigrates counsel for reasonable challenges to the accuser's credibility and misstates and misleads about the prosecutor's burden of proof?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Zackary W. Caldwell was charged by amended information filed in Lewis County superior court with indecent liberties. CP 26-27; 9A.44.060(1).

Pretrial proceedings were held before the Honorable James W. Lawler on July 7, August 2 and 10, and September 14, 2017, October 4 and 26, 2017, before the Honorable Joely A. O'Rourke, February 8 and 15, 2018, before the Honorable J. Andrew Toynbee, and trial was then held before Judge O'Rourke on February 21-23, 2018.[1] 1RP 1, 2RP 1, 3RP 1, 127, 321. The jury found Mr. Caldwell guilty as charged. CP 110. Post-trial proceedings were held before Judge Toynbee on March 1 and 29, 2018, after which Judge O'Rourke

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[1]The verbatim report of proceedings in this case consists of five volumes, not all of which are chronologically paginated. They will be referred to herein as follows:

The volume containing the proceedings before Judge Lawler on July 7, August 2 and 10 and September 14, 2017, as "1RP;"

the volume containing the proceedings before Judge Toynbee on February 8 and 15, March 1 and 29, 2018, as "2RP;"

the three chronologically volumes containing the pretrial, trial and sentencing proceedings before Judge O'Rourke on October 4 and 26, February 21-23, and April 17, 2018, as "3RP."

imposed a standard-range sentence, on April 17, 2018. 1RP 1, 2RP 1, 3RP 1, 380-92.

Mr. Caldwell appealed and this pleading follows. CP 141.

2. Testimony at trial

Morgan Jones met Zackary Caldwell on a joint high school wrestling team involving their two schools and they ultimately ended up dating for about a week one summer during "fair season." 3RP 56, 88. Jones admitted that, during that time, they had sex, but she said it was only once. 3RP 58.

After that, Jones and Caldwell would run into each other every now and then at a high school wrestling event but they did not start dating again during that time. 3RP57. Jones was very excited, however, when she ran into him on the campus of college right as it started. 3RP 60.

From then on, Jones and Caldwell "hung out" together all the time. 3RP 60, 90. Although Jones said they were not dating, she conceded they again had another sexual encounter. 3RP 60. This time, she performed oral sex on him. 3RP 60.

At trial, Jones testified that she and Caldwell were "best friends" during this time. 3RP 53-55, 66. She did "everything" with Caldwell - going to school, skipping classes, going to car "meets" and confiding in each other, Jones said, about "everything." 3RP 67.

The "blow job" encounter had occurred in September of 2015 and just after that Jones got a boyfriend, Austin Dacus. 3RP 67-80, 101. Jones testified that Dacus was a good friend to Caldwell - "best"

friends, she thought. 3RP 67-68, 101. Caldwell would later say they were friends but not that close. 3RP 254-56.

Jones told Dacus about her past with Caldwell but she thought he was not bothered by it. 3RP 68. In fact, Jones, said, she, Dacus and Caldwell ended up spending a lot of time together, the three of them. 3RP 68-69. She and Caldwell still spent time alone, too, and it was not an "issue." 3RP 68-69.

At some point at the beginning of December of 2015, Jones could not live in her house anymore because she was fighting with her mom. 3RP 69. Caldwell offered to let her move into his home, where he lived with his mom and brother (and sometimes others). 3RP 69-70. Jones did so and slept on the couch. 3RP 69-70.

A day or two later, Jones, her boyfriend, Caldwell and others had a party in the evening at Caldwell's home. 3RP 90-91. They were all smoking marijuana and drinking alcohol. 3RP 91.

Jones testified that she was "smoking a lot of weed" and drinking that day - so much she got sick in the bathroom because she was "way too high." 3RP 70. She started smoking before the party, although she could not remember if it was in the morning or afternoon. 3RP 91-92. She also drank a lot of alcohol, including an alcoholic beverage named "Sparks" and bottles of "Mike's Hard Lemonade." 3RP 92.

Jones also testified at trial that her memory was not very clear because she had ingested such large amounts of drugs and alcohol. 3RP 93-94. She could not recall how many "Sparks" or bottles of

"Lemonades" she drank to get her into that condition. 3RP 92. She did recall throwing up chicken nuggets in the bathroom. 3RP 92-95.

Jones told jurors that, at some point, her head was spinning and her stomach upset, so she went to lay on the couch. 3Rp 73. She said she could hear and was aware of "everything that was going on" but did not want to open her eyes, because it made things worse. 3RP 73. Jones could not say at trial if anyone else had been on the couch when she laid down on it. 3RP 75. Indeed, at first she did not recall who was still at the party then, either, and was not sure but thought the TV was on. 3RP 93. A little later, however, she recalled that her boyfriend had left before then, although she did not know when. 3RP 110.

Eventually, Jones said, she either passed out or fell asleep. 3RP 74-75. According to Jones, she was awakened in the early morning hours by "breathing" in her ear and on her neck and feeling her body pushed into the couch. 3RP 76. After a moment, she said, she realized that Caldwell was on top of her, "sort of kneeling" over her as she was lying on her left side. 3RP 76-77. She felt his penis in her vagina and after a short few seconds he ejaculated inside of her. 3RP 77.

Although Jones was awake, she did not move while this was going on, instead pretending to be asleep. 3RP 77-78. She first testified that she was afraid and shocked. 3RP 77. When she spoke to police later, however, she did not claim any fear. 3RP 100.

She also first said that she did not fight back because she

knew there was a size difference and it would be pointless. 3RP 78. But she then conceded that she was not really "frightened," more just "shocked." 3RP 78. She did not say anything, protest or push against him or back in any way. 3RP 94.

When she later spoke to police, Jones told the officers that she had "stayed as still as possible" because she was "not a morning person." 3RP 100. At trial, Jones would say she had said that because she was uncomfortable talking to a male officer. 3RP 100-101. She also admitted that Caldwell was not holding her down; his hands were on either side of her. 3RP 94.

A few seconds after she woke up, it was over. 3RP 78. Jones said Caldwell used the blanket to wipe up the mess on her leg, pulled up her pants and left, walking into the bathroom and then his room. 3RP 78. Jones grabbed her phone, saw that it was 6:40 in the morning, got up, and ran out the door. 3RP 80, 111.

Once outside, Jones called a friend, Cody Bickle, and he took her to a local hospital. 3RP 81. She told them she needed a rape kit done but they had no one certified to do such work, so they sent her to another hospital. 3RP 82. Bickle drove her there and, once there, a physical exam was conducted and Jones talked to a forensic nurse. 3RP 82-83. By that time, Jones' boyfriend had arrived. 3RP 82-83.

The next day, Jones reported the incident to police. 3RP 85-86. Jones testified at trial that she waited a day because she did not want to "throw" her "best friend under the bus." 3RP 86. She also said was not feeling well because her body hurt and the medicine the

doctors gave her made her sick. 3RP 86, 102. And she said she was tired of answering the same questions and just wanted it all to stop. 3RP 86-87. Finally, Jones said, she had not wanted to talk to police because she knew she would end up "sitting in this chair," apparently referring to testifying. 3RP 102-104.

Jones also testified about her boyfriend at the time, how she "loved him so much." 3RP 87-88, 103. She suggested that he had broken up with her the next day because she did not want him to touch her, saying, "he left me" over the incident. RP 87-88, 103.

On cross-examination, Jones conceded that what she told police and the forensic nurse was in fact neither wholly truthful nor complete. 3RP 96-100.

Jones did not tell police that there was a party at the house that night. 3RP 96. She did not tell them that other people had been there. 3RP 96. She did not tell them how much alcohol she actually had to drink. 3RP 96-98. She did not tell them how much marijuana she actually smoked. 3RP 96-98. She did not tell them that she might have passed out from the effects because she had so much. 3RP 96-98. And despite her testimony at trial to the contrary, Jones never told police that she was "spinning harder" than she ever had before and had to lie down. 3RP 96-98.

With police, Jones knew that there was someone else on the couch at the time she fell asleep. 3RP 96-98. With police, there was no party and no one else there - she and Caldwell were instead "cuddling" together on the couch alone. 3RP 96. With police, she

had fallen asleep, not passed out. 3Rp 96-97. With police, Jones said that she only had *one* "Sparks" to drink. 3RP 96. And with police, Jones said nothing about hard lemonade, let alone about downing so many bottles of "Mike's Hard Lemonade" alcohol that she could not recall their number. 3RP 96-98. Instead of "spinning" harder than ever in her life, with police, Jones had gotten sick but also described herself as simply "being buzzed." 3RP 98.

Jones repeated roughly the same version of events to police that she had given to the forensic nurse seen only hours after the incident occurred. 3RP 157. To the nurse, Jones said that she and Caldwell had been on the couch together watching TV and she had fallen asleep. 3RP 157. Jones told the nurse that she only had one "Sparks," saying nothing about any "Mike's Hard Lemonade." 3RP 97-98, 180-82. And when asked by the nurse about drug use, Jones had answered, "[n]o," although she admitted use of marijuana that day. 3RP 156, 178-82.

At trial, Jones would try to explain these discrepancies. 3RP 98. She declared she had not thought it was "necessary to disclose" everything to officers about what she had consumed, because she did not think that was "the important part" of why she was talking to police. 3RP 98. She said she had been scared of being arrested for being a minor and having used drugs and alcohol and thought that, if she was honest, she would have been taken to "juvie[.]" 3RP 97-99. She said the others there were also "minors." 3RP 96.

Centralia Police Department officer Phillip Reynolds spoke to

Jones when she made the report. 3RP 116. Jones had told the officer that she did not say anything to Caldwell about them not having sexual contact or that she wanted to stop that part of the relationship at any point. 3RP 119. She said she was with someone else and thought it would be obvious what that meant. 3RP 120.

Lisa Curt worked as a "sexual assault nurse examiner" at the hospital and was called in to do "a forensic examination," which she described as taking "a statement regarding the events from the client[.]" 3RP 140-49. Curt used a standardized form and wrote as much as she could "verbatim" when Curt would question the patient. 3RP 150-51. She would also do a physical "head-to-toe assessment" for bruising or other evidence she needed to document. 3RP 191.

Jones reported to Curt that she had a medical disorder which caused her to suffer memory loss and frequent headaches. 3RP 165-66. Jones also told the nurse she suffered from depression and had, in the past, engaged in self-harm which included scratching herself. 3RP 165-66, 178.

The nurse testified at trial that Jones had a two-centimeter tear near the vaginal opening which could be caused by sexual activity without lubrication. 3RP 164. Curt conceded, however, that the tear could have been caused by having consensual sex with someone, too. 3RP 169. Jones had told the nurse that she had other recent sexual contact. 3RP 172-73. Indeed, Curt said, just a day or two earlier Jones had engaged in intercourse with her boyfriend, so the tear could have come from that, although the nurse thought it

might then show indications of healing, which it did not. 3RP 172-73.

Zackary Caldwell came in and spoke to police voluntarily, talking with CPD Detective Sergeant Carl Buster. 3RP 184-88. Caldwell told the officer that yes, he and Jones had engaged in sex, but that it had been consensual. 3RP 187-88.

Like Jones, Caldwell told police that they had been lying on the couch together, snuggling and watching movies, when she fell asleep. 3RP 188, 203-205. After awhile, Caldwell said, Jones had started stripping off her clothes in her sleep. 3RP 150, 188. He was lying behind her and woke her up, after which they ended up having sex. 3RP 150, 188, 207. At trial, he would clarify that he woke her up and asked her if she knew she was getting undressed. 3RP 260-65. She had said she was and then reached and started fondling his penis. 3RP 260-65. He moved her leg for better access and they then started having sex. 3RP 260-65.

Deputy Sergeant Buster testified that, when Caldwell told him that Jones had been "stripping" in her sleep, the officer did not exactly understand what that meant. 3RP 150-51. Buster nevertheless asked no follow-up questions on that topic. 3RP 150-51.

Buster and Caldwell talked about the relationship between Caldwell and Jones and their history of sexual activity together. 3RP 203. Caldwell told the Deputy Sheriff that he had known Jones for years and she had said she could not get pregnant. 3RP 206-207. As a result, Caldwell explained, they always had unprotected sex. 3RP 206-207.

Contrary to what Jones had said, Caldwell told the officer that they were both laying on their sides and he was behind her while they had sex. 3RP 207. Caldwell admitted to the officer that it did not go on very long, saying he did not "last." 3RP 207-208.

Caldwell willingly provided the DNA sample the officer requested and DNA swabs taken during the medical exam from Jones had a mixture which appeared to include both of them. 3RP 209, 216-17.

Several witnesses who knew both Jones and Caldwell at the relevant time testified on Caldwell's behalf. Bailey Poole was part of the group that "hung out" with both of them. 3RP 225-26. Poole described seeing Jones and Caldwell together and how it seemed like "they were into each other." 3RP 225-27. The two would kiss and hug in front of Poole and seemed to have "kind of like a friends-with-benefits thing for a while." 3RP 227, 232.

With Poole there, Jones and Caldwell would "make out" on the couch while they were all watching TV. 3RP 237-38. Jones would also go sit on Caldwell's lab and rub against him in front of Poole. 3RP 237-38. Poole would see Jones and Caldwell together and physically very affectionate for a little while, then Jones would not be around for a little, but then she would come back and it would all be the same again. 3RP 228, 237-38.

Poole was actually living at Caldwell's house at the time that Jones had moved in and the incident occurred. 3RP 229. Poole did not think she looked upset when, after the incident, she had come to

pick up her things from the home. 3RP 229-30. But Poole also admitted to having a "terrible memory." 3RP 230-31.

When asked for Jones' reputation at the time for "truth and veracity" in the community, Poole said it was that she was not "very trustworthy." 3RP 231.

Cody Bickle, the person who drove Jones to the hospitals and stayed with her that day, also testified on Caldwell's behalf. 3RP 240-41. Bickle worked at the local "vape shop" where Jones and Caldwell had "hung out" and, he said, had become "super close" friends with both. 3RP 240-41. After he picked her up and took her to the hospitals that morning, Bickle had stayed with Jones all day, even letting her crash at his home that night. 3RP 241-43. Bickle thought that Jones had seemed "in shock" when he picked her up and said she was upset and cried a little. 3RP 245-47.

To Bickle, however, it did not seem like she was acting as if she had been assaulted. 3RP 247-48. He thought she seemed more like she was unhappy "because of something she did." 3RP 247-48. He also thought her behavior was odd the following day, because she seemed her usual happy self and was acting like nothing had happened. 3RP 243-44. Bickle explained he had several friends and loved ones who had been sexually assaulted and had been there afterwards, helping them cope. 3RP 243-44. What he saw with Jones was different than what he had seen with others. 3RP 243-44.

Bickle, too, was asked about the reputation Jones had in the community for "truth and veracity." 3RP 244. He conceded that she

was dishonest and said that she actually had a "huge reputation" for it. 3RP 244.

Zackary Caldwell testified that he and Jones had started dating in high school and had sex the first day, during "fair" week, in a car. 3RP 251-52. They dated for about two weeks before she broke up with him. 3RP52. During that time they had sex a few times, in the car or at her house when her parents were not home. 3RP 252-53.

Jones and Caldwell met up again when he was serving as a referee to the wrestling matches for her little sister. 3RP 253. They started texting each other a lot. 3RP 253. She sent him sexy pictures, but he no longer had them, having lost all the photos on his phone during an "icloud update." 3RP 253.

Jones and Caldwell started another romantic relationship again when they ran into each other at the beginning of college in Fall of 2015. 3RP 253-54. Jones would come over and hang out at Caldwell's place after school, waiting for her mom to come pick her up to drive her home. 3RP 254. During this time, Caldwell said, they had sex several times a week. 3RP 255.

After a few weeks, Caldwell introduced her to Dacus, who became her boyfriend. 3RP 255. But even after she started dating Dacus, however, Caldwell and Jones would have sexual relations "[o]ff and on." 3RP 255. They would do so when Jones' boyfriend was not around and nobody else was at the house. 3RP 255. Throughout these first few months of college, from August to December of 2015, they were intimate, with her initiating sex

sometimes and him, others. 3RP 256.

On the day of the incident, Caldwell said, he smoked pot all day from the time he woke up. 3RP 256-57. He did not see Jones smoking it until about 5 p.m., when she did it in the garage with him. 3RP 356-58. At that time, though, she seemed like she was "coming down" after having been already "high." 3RP 256-58.

There was not a lot of pot at the house and the amount they smoked was small. 3RP 259. Caldwell described it as only sufficient to maybe cause a "slight head change where you feel euphoric and your body would probably feel about the same." 3RP 259. They continued to smoke small amounts throughout the evening and he noticed Jones split a can of "Sparks" about midnight but said she otherwise seemed pretty sober. 3RP 259-60.

At about 3:30 or 4 in the morning, Caldwell took Dacus home. 3RP 260. When he got back, he and Jones smoked a little more marijuana together in the garage, then went inside and watched movies. 3RP 260-62. They were watching a horror movie and Jones fell asleep but Caldwell did not. 3RP 261. She was laying in front of him on the couch and she started taking off her clothes, appearing to still be asleep. 3RP 261-62. Caldwell knew Jones had a history of sleepwalking, having seen her try to open his front door when she was asleep. 3RP 262.

Because she was taking her clothes off, Caldwell woke Jones up. 3RP 262-63. He told her she was "getting naked" and she responded, "I know." 3RP 263. She mumbled something, then

reached and grabbed his penis and started stroking it. 3RP 263. She had pulled her pants down past her butt. 3RP 263. He then moved his penis from her hand and put it into her and she was "grinding" into him for a few minutes before he ejaculated. 3RP 263.

Caldwell testified that when he engaged in the sexual activity with Jones, she was awake. 3RP 263-64, 382. Indeed, he said, she was reciprocating, pushing back into him. 3RP 264. He had picked up her leg for "easier access." 3RP 264. Throughout, she did not say to stop or push him away. 3RP 264-65.

Caldwell said he thought that, when she started rubbing his penis, that was an indication that she wanted to have sex. 3RP 265. He thought that she was consenting based on her actions. 3RP 265. He did not mention that she had rubbed him to police or details about that but explained that the officer had only asked general questions and Caldwell had not volunteered details. 3RP 270-82.

Had Jones said or done anything to indicate she wanted to stop, Caldwell testified, he would have done so. 3RP 265-66. Having sex like this, however, was consistent with the way they would have sex together over the years. 3RP 265-66.

D. ARGUMENT

1. THE COURT SHOULD REVERSE AND REMAND FOR A NEW TRIAL BASED ON THE PROSECUTOR'S FLAGRANT, ILL-INTENTIONED AND PREJUDICIAL MISCONDUCT OR, IN THE ALTERNATIVE, COUNSEL'S INEFFECTIVE ASSISTANCE

Prosecutors are not like other attorneys. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Instead, they are "quasi-judicial" officers, with specific duties different from those shouldered by the defense. See State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Prosecutors represent not only the public and the alleged victims but also the defendants and justice system itself, and thus are required to seek verdicts based on reason and evidence, rather than passion or emotion. Id.; see Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935). This duty to ensure a fair trial is in stark contrast to the idea of a prosecutor-partisan, seeking to "win" a conviction at all costs. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Where a prosecutor commits misconduct, that may violate the defendant's state and federal due process rights to a fair trial. See, Dye v. Hofbauer, 546 U.S. 1, 4-5, 126 S. Ct. 5, 163 L.Ed. 2d 1 (2005); see also, State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Such a violation occurs if the prosecutor makes improper comments and there is a substantial likelihood that they affected the jury's verdict. Reed, 102 Wn.2d at 145. Even if counsel fails to object below, where the prosecutor's misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the

prejudice, reversal is required. See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

In this case, this Court should reverse and remand for a new trial, because the prosecutor committed flagrant, ill-intentioned misconduct which was so prejudicial in the context of this case that no instruction to disregard would have erased the taint from jurors' minds. In the alternative, if the Court finds that the misconduct could have been cured, it should reverse and remand based on counsel's ineffective assistance for failing to take reasonable steps to do so.

a. Violation of duty to seek a verdict free of prejudice and based on evidence and reason

The prosecutor committed flagrant, ill-intentioned and prejudicial misconduct by repeatedly eliciting the jurors' passions and prejudices for Ms. Jones and encouraging the jurors to decide the case based upon those strong emotions, rather than the evidence at trial - and reason. This improper invocation and bolstering went directly to the heart of the only issue in the case and prevented the jury from fairly and impartially deciding the case. Further, the prosecutor not only denigrated counsel but also bolstered Jones by suggesting that jurors should draw a negative inference from facts relating to Caldwell's exercise of his constitutional rights.

i. Relevant facts

At trial, in direct examination of Jones, the prosecutor repeatedly elicited from her how awful and hard the entire process of

reporting the crime and going to trial had been, including especially the physical exam:

> Q: And what was this examination like?
>
> A: It was absolutely terrible. They were using swabs, and it was painful and measuring things. And I absolutely hated it. They took the clothes that I was wearing. They gave me a bag that had clothes that didn't fit me to wear, and it was - - I absolutely hated it.

3RP 82. A moment later, after eliciting that the nurse had told Jones she had a small abrasion and that it needed to be measured, the prosecutor went on:

> Q: And were they using tools and things to do this?
>
> A: Yes, they were.
>
> Q: And was this nurse just a stranger to you before you met her?
>
> A: Yes.
>
> Q: And was she now looking essentially into your private areas?
>
> A: Yes.
>
> Q: And did this procedure involve, you know, invasive tools entering your vagina?
>
> A: Yes.
>
> Q: Was this uncomfortable?
>
> A: Very.
>
> Q: Was it something you wanted to be going through?
>
> A: No.
>
> Q: Why did you go up there for this procedure or for this examination?
>
> A: To get a rape kit done, because I knew what just

> happened was wrong. And it was my first response of to get it done.

3RP 83-84.

Later, when the nurse was testifying, the prosecutor asked on direct examination if the nurse would describe the physical exam done on Jones as "invasive" and whether it involved "inserting things" into cavities. 3RP 152.

In closing argument, the prosecutor used the theme that Jones had experienced a "living nightmare" in this case. 3RP 324. The prosecutor then again emphasized the trauma to Jones caused by the process of reporting a crime:

> What happens at Centralia [hospital]? This isn't just your average doctor's appointment at this point. You've heard about this, this process, this experience. This isn't something that Morgan wanted to go through. **This is an invasive, very personal, potentially humiliating examination.** You are having a stranger, a nurse, put swabs up in her vagina. You are having someone examine you from head to toe. You're having to recount a sexual assault to a complete stranger, and that's what she did.

3RP 325-26 (emphasis added). A moment later, after saying that Jones had not gone "enthusiastically" to report to police, the prosecutor went on:

> **And what did this all get her? Well, she's been subjected to multiple interviews, had to talk to the defense attorney, came in here told her story to a group of 14 strangers, talked about this experience, which is obviously upsetting to her.** And you got to witness Morgan. Morgan sat right here in this chair, right here. You guys are right here. She was this close to her. You heard her. You saw into her eyes. You saw her emotion. She was upset as she got up there and talked about this.
>
> This was difficult, I was submit to you, for her to say. This has been a process for her, she explained. She lost her

> relationship with her boyfriend, she has had to talk about this multiple people. **She has had to go through this process since 2015.**

3RP 328 (emphasis added).

In closing argument, as expected, counsel raised Jones' lack of credibility, including the different versions of events she had given to police and the forensic nurse versus at trial and her behavior after the incident. In rebuttal closing argument, the prosecutor faulted counsel for these challenges, claiming that counsel was essentially saying there was a "guide book for how a young lady, a female, a woman acts as a victim of sexual assault" and only those who act a particular way are actually deemed victims. 3RP 349-51. The prosecutor talked about this "guide book," asking if Jones should carry it around, saying that the defense was saying that a victim would do "A, B, C, D, E." 3RP 350. The prosecutor then went on:

> Is there a guide book for how a young lady, a female, a woman acts as a victim of sexual assault? Is there a guide book that Morgan Jones should carry around, "How Do I Behave After I've Been Sexual[ly] Assaulted?" Are there rules for how a lady, a woman, is supposed to behave after being sexually assaulted? And if she doesn't meet the standards that other people impose and say that's the way you should act, then you are not a victim? **Is that how it works? That if you don't act a certain way that someone else says you should, then you are not a victim of sexual assault? Is that how it works around here? No.**

3RP 350-51 (emphasis added). A little later, the prosecutor returned to this theme, saying, "the defense's position is that she didn't follow the right order of events, you know, for a woman that has been sexual[ly] assaulted that, you know, she violated the handbook essentially, that she was supposed to call the police on the way to the

hospital," saying "you will have to excuse Morgan" for that. 3RP 352-53.

After discussing why the state thought Mr. Caldwell's testimony was inconsistent and "just doesn't make sense," the prosecutor returned to the theme of the difficulty of being a victim in a criminal case:

> So ultimately, you need to ask yourself, does this make any sense to you that a woman, a young lady, with a boyfriend, would one night all of a sudden have consensual sex with her boyfriend's friend, her friend, then **submit herself to an invasive, uncomfortable physical examination, interviews with law enforcement, defense attorneys, testify in front of all of you just because. . .she felt like calling it sexual assault.** Does that make any sense? I submit it does not.

3RP 361 (emphasis added).

ii. <u>These arguments were flagrant, prejudicial and ill-intentioned misconduct</u>

These arguments were all flagrant, prejudicial and ill-intentioned misconduct. This Court reviews alleged misconduct in light of the evidence, the issues in the case, the jury instructions and the total argument made. <u>See</u> <u>State v. Dhaliwal</u>, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Applying those considerations here, the prosecutor committed multiple types of incredible pervasive and prejudicial misconduct.

First, the prosecutor's repeated emphasis on and invocation of sympathy for Jones and what she had to go through as a normal part of a jury trial proceeding was an improper appeal to the jurors' passions and prejudices - also improper bolstering and further,

improperly drawing negative inferences from Mr. Caldwell's exercise of his protected constitutional rights.

It is highly improper misconduct for a prosecutor to appeal to the jurors' sympathy in an effort to gain a conviction. See State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992); see Reed, 102 Wn.2d at 147. A conviction should be based solely on the evidence, not on sympathy or antipathy. See Belgarde, 110 Wn.2d at 507. Mr. Caldwell was entitled to have the jury decide the case based on the evidence, not on sympathy for Jones because of how awful the forensic exam felt and whether "subjecting" to the normal criminal investigation such as interviews was traumatic and hard.

Further, while a prosecutor enjoys wide latitude in closing argument to draw reasonable inferences from the evidence she may not make arguments inviting the jury to decide a case based on passions or prejudices. See State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

Here, that is exactly what the prosecutor did when repeatedly eliciting testimony about and emphasizing the trauma Jones went through not during the commission of the crime but as part of prosecuting the case. There is no question that Jones went through a physical forensic exam because she was reporting a crime - so does every person claiming a similar offense. The prosecutor deliberately and repeatedly commented on it a way designed to incite an emotional response and bolster Jones - forced to go through a

"terrible exam" (3RP 82) which was "invasive" (3RP 83-84, 152, 324-28), and potentially humiliating (3RP 325),"subjected to multiple interviews" by police but also, importantly, by defense counsel (3RP 328-39, 361), and had to come in to testify in front of strangers (3RP 328, 361).

Not only were these comments unfair efforts to incite the jury's passions and prejudices to bolster Jones and make her more sympathetic, they also impinged on fundamental constitutional rights. The accused have a constitutional right to trial by jury. See State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), reversed in part and on other grounds by, State v. W.R.,Jr., 158 Wn.2d 759, 147 P.3d 1201 (2014). Having to come into court and testify - and the trauma or difficulty that involves - was required of Jones because Mr. Caldwell exercised that constitutional right. And both the state and federal constitutions guarantee the right to counsel, which includes having counsel interview the accuser and conduct cross-examination. See State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994).

It is misconduct for the prosecutor to draw a negative inference from the defendant's exercise of his rights. Belgarde, 110 Wn.2d at 512. Indeed, it is not just misconduct but grave, serious and constitutionally offensive misconduct for a prosecutor to suggest that a defendant's exercise of his rights should be used against him to infer anything negative. See id; see State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85

S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

Yet here, the prosecutor exhorted the jury about what going to police and reporting the crime "got" Jones - i.e., what she had to suffer as a result: being "subjected to multiple interviews," that she "**had to talk to the defense attorney,**" that she had to testify about it "to a group of 14 strangers" by testifying and how upsetting that was. 3RP 328, 361 (emphasis added). In case jurors missed the prosecutor's implication that Jones was more credible because of what she had suffered, the prosecutor declared the opinion, "[t]his was difficult, I would submit to you," for Jones to testify but also the entire process. 3RP 328. Not only did she suffer for reporting, she even "lost her relationship with her boyfriend" over the allegations. 3RP 328.

Then, to ensure that jurors understood that not just the crime but Caldwell going to trial had victimized Jones, the prosecutor again emphasized that Jones "has had to talk about this to multiple people," and "**has had to go through this process since 2015.**" 3RP 328 (emphasis added).

Thus, the prosecutor repeatedly invoked emotion and bolstered Jones, trying to remedy the serious defects in her credibility, based on passions and prejudice about what she had to endure *not* during the incident but as part of the trial process which Mr. Caldwell was constitutionally entitled to have occur. Having to testify, having to be interviewed by defense counsel, having a jury hear the accusations - all are fundamental parts of Caldwell's exercise

of his fundamental rights to require the state to meet its constitutional burden and to due process.

Then, the prosecutor went far further in rebuttal closing argument. After counsel engaged in the expected challenges to Jones' credibility, in rebuttal closing argument, the prosecutor denigrated counsel and impugned the defense with the "guide book" claims. There is no question that a prosecutor has wide latitude in closing argument to draw reasonable inferences and comment on credibility of witnesses, even to respond to remarks of counsel. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Even improper remarks by a prosecutor will not support reversal if invited or provoked by defense counsel, "unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Here, the comments more than meet that standard. Not only did the prosecutor make up a fake "guide book" for victims and claim that defense counsel was holding Jones to it, the prosecutor effectively invoked community concerns about believing women claiming sexual misconduct. 3RP 349-51. Indeed, the prosecutor suggested that accepting the defense meant adopting such a "guidebook" to the detriment of safety of women in the community, saying, "**is that how it works? That if you don't act a certain way that someone else says you should, then you are not a victim of sexual assault? Is that how it works around here? No.**" 3RP 350-51

(emphasis added).

It is flagrant, prejudicial misconduct to incite the jurors in a way which invokes concern for community safety or vindication. See State v. Ramos, 164 Wn. App. 327, 263 P.3d 1256 (2011). A defendant is entitled to be convicted based on the evidence, not on appeals to concerns wholly irrelevant to his guilt or innocence. See United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991). The "evil lurking in such prosecutorial appeal" is that it implies to jurors that, by convicting, they will somehow assist in sending a message or solving some pressing social problem." Id. Indeed, such invitations are extremely likely to inflame jurors to such a degree that no curative instruction can neutralize its prejudice. Id.

The prosecutor's repeated emphasis on the trauma Jones had to go through as a result of the criminal case, that she had to talk to strangers, go through an "invasive" procedure, talk to defense counsel, testify in front of people in court, and have her credibility challenged - all were flagrant, ill-intentioned prejudicial misconduct which compel reversal. Mr. Caldwell did not deny having sex with Ms. Jones. The only issue at trial was whether Jones' claims during her testimony, coupled with the vaginal tear explicable from Jones' intercourse with her boyfriend, was sufficient to prove beyond a reasonable doubt that it happened as a crime. Jones' damaged credibility had to be explained, given that she had admittedly lied to police and the forensic nurse about crucial facts like how drunk and high she was, how much she had to imbibe, what she drank, whether

there was a party, whether other people were around, whether anyone was on the couch, whether she was cuddling with Caldwell first and watching television - in short, virtually every fact about the circumstances of the crime except the fact of intercourse. There was no question the prosecutor would need to work hard to rebut the challenges to Jones' lack of credibility as a result.

Thus, for example, the prosecutor's preemptive, stark and damaging attack on counsel's tactical decision to call two "buddies" of Caldwell as witnesses, both young men, to opine that Jones did not act like they thought a victim of sexual assault should. 3RP 353. In initial closing, the prosecutor used some hyperbolical language which might otherwise be improper in trying to challenge their credibility (defendant calling witnesses is "parading" them, mocking one of the young men over his "professional opinion," faulting both for them not giving a "basis" for why they were saying Jones' reputation in the community was for dishonesty even though the rules of evidence do not allow for specific instances to be discussed,[2] etc.). 3RP 353-55.

While "hard," sarcastic and skirting close to the line of impropriety in another context, however, in the context of this case, those arguments were fair. No reasonable defense counsel would expect to, with impunity, call young men as witnesses to denigrate a young woman alleging sexual abuse for not acting they way they

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[2]See State v. Linton, 36 Wn.2d 67, 87, 216 P.2d 761 (1950) (only use of "general reputation" permitted, not "specific acts[.]"

thought she should. Indeed, it could plausibly be argued that counsel's tactical decision was one virtually no reasonable attorney might make, given how obvious the problems with such testimony and how bad the potential revulsion of jurors to such a tactic might be. Nevertheless, that tactical decision meant the prosecutor's arguments, in this context, were "hard" blows, but fair.

In stark contrast - the prosecutor's argument invoking sympathy for Jones, bolstering her improperly, denigrating counsel with a made up "guide" book and raising the specter of the community, drawing negative inferences based on the long process to trial, having to testify, having to *talk to defense counsel* and police. These arguments misstated the fact of counsel's argument and were designed to sway the jury on the crucial issue for the state.

Mr. Caldwell did not dispute that he had sex with Jones that night. The only issue for the state was whether the small vaginal tear and Jones' testimony would be sufficient to convince the jury, beyond a reasonable doubt, that it was a criminal act. Jones lied to police and the forensic nurse about virtually every fact relevant to the incident except that intercourse had occurred - who was there, what was happening, what she was doing before, what she had to drink, what she had to smoke, whether she watched television - even telling them that she was "cuddling" with Caldwell when at trial she testified that was not true. Even though the state tried to minimize the damage by claiming these were "omissions," they were very serious issues with her credibility. Given that she had admitted very

recent consensual sex which might have caused the tear and simply not yet healed, the prosecutor's whole case depended upon the jury being swayed to believe Caldwell's version of events at trial in order to convict. These arguments by the prosecutor went directly, almost surgically, to that end in an effort to ensure that emotion and improper passion would sway jurors to its "side."

These were not fair, "hard" blows - they were "foul," flagrant, ill-intentioned and prejudicial misconduct. They were pervasive. They were emotional. They were likely to invoke not only strong sympathy for Jones but strong antipathy for Caldwell and for his attorney, even the normal process of a criminal trial and the fact that Caldwell chose to go to trial and force Jones to testify and talk to defense attorneys and others. These comments were so corrosive that, even if a curative instruction had been requested, it could not have erased the significant, material prejudice to Mr. Caldwell's due process rights to a fundamentally fair proceeding. This Court should so hold.

b. Violation of duties not to mislead the jury about their duties and role and not to misstate the crucial burden the prosecution had to bear

i. Relevant facts

In closing argument, the prosecutor indicated to jurors that they had to decide who was telling the truth and lying in order to decide the case. The prosecutor told the jury they had to decide between the two versions of events, saying, "[n]ow, **we know what this all comes down to ultimately**. It's going to be what she told

you and what Zack said." 3RP 332-33 (emphasis added). The prosecutor also said that, "[w]hat is going to happen is Mr. Caldwell's attorney is going to get to talk to you, **tell you their version of events[."]** 3RP 332-33 (emphasis added). A little later, the prosecutor told the jurors, "**You have to look at both versions of events and decide which one** makes more sense[.]" 3RP 360 (emphasis added).

ii. These arguments misstated and minimized the state's burden of proof

These arguments were also serious, prejudicial and ill-intentioned misconduct which compel reversal. The prosecutor's arguments misstated the jury's role and proper function and minimized the prosecutor's constitutionally demanded burden of proof. Both state and federal due process requires the state to prove every element of its case, beyond a reasonable doubt. See State v. Byrd, 125 Wn.2d 707, 713-14, 778 P.2d 396 (1995); Sixth Amend.; Fourteenth Amend.; Art. 1, § 22. And the words of a prosecutor hold great sway with jurors. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Suarez-Bravo, 72 Wn. App. 359, 369, 864 P.2d 426 (1994).

It is misconduct to tell jurors that they had to effectively "pick a side" by deciding which side gave a more reasonable version of events. See State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). The jury's job is not to "choose sides" but rather determine whether the state has met its

constitutional burden of proving the case beyond a reasonable doubt. Id.

Indeed, other courts have noted a serious constitutional concern in employing such analysis (albeit in another context). United States v. Pine, 609 F.2d 106, 108 (3rd Cir. 1979). In Pine, the Court pointed out that "casting the jury's ultimate decision of whether to convict or acquit in terms of a mere credibility choice" between the state's witnesses and those of the defense "tend[s] to dilute and thereby impair the constitutional requirement of proof beyond a reasonable doubt." Id.

Another federal court also found that suggesting that the jury is required to determine "whose version of events is more likely true, the government's or the defendant's," improperly invokes a lesser burden for the state. United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994). Choosing between two alternatives is much more akin to applying a "preponderance" standard, i.e., saying something is "more likely than not" or "more probably than not" true. See State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

The argument not only misstates the law but also misleads the jury as to the proper burden of proof the state has to meet - and the jurors' proper role. A juror could easily "believe" the state's witness more than the defendant's *even if the state failed to prove its case beyond a reasonable doubt* because "which side is more reasonable" or "who do you believe" is a comparative analysis which does not

necessarily require that either side have any particular level except that one has more than the other.

Another problem with this type of argument is that, because it makes the jurors "treat the matter of proof as a fair fight" between the defendant and the state, despite the serious disparity in resources. See United States v. Guest, 514 F.2d 777, 780 (1st Cir. 1975). And again, jurors are not required to pick a side, nor should they - they are only required to determine whether the state has met its constitutionally mandated burden of proving guilt beyond a reasonable doubt.

Our courts have soundly condemned similar arguments as presenting the jury with a "false choice." See State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). It is flagrant, prejudicial and ill-intentioned misconduct for a prosecutor to argue that a jury must find the state's witnesses are lying in order to fail to convict. State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). A witness may give testimony which is either wholly or partially incorrect without "deliberate misrepresentation" being involved, and testimony of witnesses may be in conflict even if both are attempting in good faith to testify as to the truth. State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). This is true even where, as here, there is evidence of two versions of events. See Fleming, 83 Wn. App. at 213-14.

By telling the jury they effectively had to choose sides in order

to decide the case, the prosecutor misstated the crucial law of - and the state's burden for - proof beyond a reasonable doubt. The correct standard for that burden is the means by which the presumption of innocence is guaranteed, so that it is absolutely essential the jury is aware of and applies the correct standard. See State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

Indeed, the standard is so challenging that even learned judges have difficulty defining it and it has been subject to many years of litigation, so that the state's highest court has cautioned against the "temptation to expand upon it" because of the risk of improper dilution of the prosecution's burden and the presumption of innocence. 161 Wn.2d at 317-18. In this case, in this context, given the very significant problems with the state's case, these arguments were so grounded in the emotional narrative the state was invoking throughout that they could not have been cured by instruction. This flagrant, ill-intentioned and prejudicial misconduct also separately compels reversal and this Court should so hold.

c. In the alternative, reversal is required for counsel's ineffectiveness

It is Mr. Caldwell's position that the misconduct was so flagrant and ill-intentioned that it compels reversal even though counsel failed to object. Reversal is required where the prosecutor's misconduct meets that standard and there is a substantial likelihood the improper conduct affected the jury's verdict. See State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), abrogated in part and on

other grounds by, State v. Gregory, __ Wn.2d __, 427 P.3d 621 (October 11, 2018). But in the unlikely event this Court does not believe that the misconduct was so flagrant, prejudicial and ill-intentioned that it could not have been "cured" by instruction, the Court should nevertheless reverse based on counsel's ineffectiveness in failing to object and seek such instruction on Mr. Caldwell's behalf.

Both the state and federal constitutions guarantee the right to effective assistance of appointed counsel. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Despite a strong presumption of ineffectiveness, counsel is ineffective if his performance is deficient and if that deficiency causes his client prejudice. See Stenson, 132 Wn.2d at 705.

To determine whether counsel's performance is deficient, the question is whether his conduct fell below an "objective standard of reasonableness." Id. Normally, the decision whether to object is a strategic decision, within counsel's province as a tactical matter. See State v. Poltoff, 138 Wn. App. 343, 349, 159 P.3d 955 (2007). But only those tactical decisions which can be deemed "sound" are deserving of deference. Id. An attorney's reasonable but ultimately unsuccessful tactical decision will not support a finding of ineffective assistance but where there is no conceivable legitimate strategic explanation for the attorney's decision, that will rebut even the strong presumption that counsel was effective. See State v. Kyllo, 166

Wn.2d 856, 870, 883, 204 P.3d 916 (2009); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 89 (2004).

There could be no tactical reason to fail to object to the pervasive, corrosive misconduct below. There could have been such a reason for not objecting to the first impropriety during direct examination, in order to avoid emphasizing the impropriety to jurors. Once the prosecutor's conduct continued, however, and with its pervasiveness throughout the trial and argument, counsel's failure to object cannot be seen as a reasonable tactical decision. The misconduct went directly to the jury's ability to fairly and impartially decide the case.

Here, if this Court finds that the misconduct could have been cured by an objection, it should find there was no conceivable legitimate tactic explaining counsel's failures below. There is no question that counsel may make mistakes and still satisfy the standards of being "effective." The accused are guaranteed a fair trial, not a perfect one. See State v. Lazcano, 88 Wn. App. 338, 354 P.3d 233, review denied, 185 Wn.2d 1008 (2016). Thus, counsel's decision to call young men to try to discredit a young woman victim accusing a friend of theirs of sexual assault was a tactical decision, arguably what some might see as a mistake, does not on its face support a claim of ineffective assistance despite its obvious drawbacks.

Given the scope and pervasiveness of the misconduct here, however, how it invoked passions and prejudices against Mr.

Caldwell and bolstered Ms. Jones' with troubled credibility, any reasonable attorney would have objected if such objection had even a chance of curing the prejudice. In the unlikely event the Court finds that any of the misconduct could have been cured by instruction, counsel was ineffective in failing to object and seek such instruction.

2. EVEN IF EACH OF THE ACTS OF MISCONDUCT DID NOT INDEPENDENTLY SUPPORT REVERSAL, THEIR CUMULATIVE EFFECT DEPRIVED MR. CALDWELL OF HIS STATE AND FEDERAL DUE PROCESS RIGHTS TO A FAIR TRIAL

Appellant submits that each of the individual types of misconduct employed by the prosecutor below independently support reversal and remand for a new, fair trial. But even if the Court disagrees that each, standing alone, is insufficient to support reversal, it should grant that remedy based on the cumulative impact of all of the prosecutor's misconduct below. To determine whether the cumulative effect of a prosecutor's misconduct prevented the jury from fairly and impartially deciding the case and the defendant from having a fair trial, the Court looks at the alleged misconduct in the context of the whole trial and evidence admitted to determine impact. See Suarez-Bravo, 72 Wn. App. at 362.

Here, this Court should find the cumulative effect all of the misconduct compels reversal even if individual misconduct does not, because the prosecutor's actions and arguments below went directly to the only real issue at trial. There was no question that Jones and Caldwell had sex. The only question was whether the jury would

decide that Jones' testimony and evidence of a small tear which could have occurred in consensual sex a day or so prior was sufficient to prove, beyond a reasonable doubt, that Caldwell had committed the crime of indecent liberties. The jury did not have to believe Caldwell's version of events, nor did it have to "choose sides." Taken together, all of the misconduct in this case so corroded the process that it prevented Mr. Caldwell from receiving a fundamentally fair trial. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 6th day of December, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, to Lewis County Prosecutor's Office, and by depositing it in U.S.P.S. first-class postage prepaid, at Zackary Caldwell, DOC 406114, WCC, P.O. Box 2049, Airway Heights, WA. 99001-2049.

DATED this 6th day of December, 2018,

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