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

STATE OF WASHINGTON,

Respondent,

v.

DAVID ROBERT VIGIL,

Appellant.

OPENING BRIEF OF APPELLANT

Appeal From Pierce County Superior Court No. 18-1-00505-3

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I. IDENTITY OF APPELLANT

The appellant is David Vigil (“Mr. Vigil”).

II. ASSIGNMENTS OF ERROR

- A. The trial court denied Mr. Vigil his right to present a defense, to confront and cross-examine adverse witnesses, and to a fair trial, in violation of the Sixth Amendment to the United States Constitution and Art. 1, § 22 to Washington’s Constitution by excluding his proffered prior sexual conduct evidence.
- B. The trial court abused its discretion in denying Mr. Vigil’s motion to admit prior sexual conduct evidence and in excluding the proffered evidence from trial.
- C. The trial court abused its discretion in denying Mr. Vigil’s motion to reconsider his motion to admit prior sexual conduct evidence.
- D. The trial court abused its discretion in declining to consider Mr. Vigil’s polygraph results in evaluating whether the prior sexual conduct evidence was admissible on Mr. Vigil’s motion to reconsider.
- E. The trial court erred in finding no. 20 in its Findings of Fact and Conclusions of Law that “[i]t is uncontroverted that this [i.e. the alleged criminal conduct] was done without J.B.’s consent.” CP 194.
- F. The trial court erred in finding no. 31 in its Findings of Fact and Conclusions of Law that it did not find credible Mr. Vigil’s testimony that he took the pictures to send to a mutual friend, Amber Roberts, as a prank, rather than for purposes of sexual gratification. CP 195.
- G. The trial court erred in finding no. 33 in its Findings of Fact and Conclusions of Law that it did not find credible Mr. Vigil’s testimony “that he had the type of relationship with Ms. Roberts that sending these photographs to her would be appropriate”, which it found “in part because on surrebuttal, the defendant testified that he knew Ms. Roberts would be unhappy with what

he had done so he stopped contacting her and removed her from his Facebook ‘friends.’” CP 195.

- H. The trial court erred in finding no. 34 in its Findings of Fact and Conclusions of Law that “the reasonable inference from the defendant’s actions is that he took the pictures for the purpose of gratifying his sexual desires.” CP 195.
- I. The prosecutor committed flagrant and ill-intentioned misconduct by improperly stating its opinions on Mr. Vigil’s credibility during closing argument.
- J. The cumulative effect of the errors caused prejudice and denied Mr. Vigil his right to a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Whether the trial court improperly excluded Mr. Vigil’s proffered prior sexual conduct evidence in violation of the Sixth Amendment to the United States Constitution and Art. 1, § 22 to Washington’s Constitution, given that the proffered evidence was substantially similar to the charged conduct and was highly probative on the issues of consent and purpose.
- 2. Whether the unconstitutional exclusion of Mr. Vigil’s proffered prior sexual conduct evidence was harmless beyond a reasonable doubt.
- 3. Whether the trial court abused its discretion in excluding Mr. Vigil’s proffered prior sexual conduct evidence from trial, given its factual similarity and relevance to the charged conduct.
- 4. Whether the trial court abused its discretion in declining to consider Mr. Vigil’s polygraph results in evaluating whether the prior sexual conduct evidence was admissible on Mr. Vigil’s motion to reconsider.
- 5. Whether the trial court abused its discretion in denying Mr. Vigil’s motion to reconsider on the grounds that the proffered testimony constituted inadmissible prior bad acts evidence.

6. Whether the trial court's abuse of discretion in excluding Mr. Vigil's proffered prior sexual conduct evidence was prejudicial.
7. Whether the trial court erred in finding no. 20 in its Findings of Fact and Conclusions of Law that "[i]t is uncontroverted that this [i.e. the alleged criminal conduct] was done without J.B.'s consent." CP 194.
8. Whether the trial court erred in finding no. 31 in its Findings of Fact and Conclusions of Law that it did not find credible Mr. Vigil's testimony that he took the pictures to send to a mutual friend, Amber Roberts, as a prank, rather than for purposes of sexual gratification. CP 195.
9. Whether the trial court erred in finding no. 33 in its Findings of Fact and Conclusions of Law that it did not find credible Mr. Vigil's testimony "that he had the type of relationship with Ms. Roberts that sending these photographs to her would be appropriate", which it found "in part because on surrebuttal, the defendant testified that he knew Ms. Roberts would be unhappy with what he had done so he stopped contacting her and removed her from his Facebook 'friends.'" CP 195.
10. Whether the trial court erred in finding no. 34 in its Findings of Fact and Conclusions of Law that "the reasonable inference from the defendant's actions is that he took the pictures for the purpose of gratifying his sexual desires." CP 195.
11. Whether the prosecutor committed flagrant and ill-intentioned misconduct by improperly stating its opinions on Mr. Vigil's credibility and guilt during closing argument.
12. Whether the prosecutor's misconduct was prejudicial.
13. Whether the cumulative errors prejudiced Mr. Vigil and deprived him of his right to a fair trial.

IV. STATEMENT OF THE CASE

Mr. Vigil was charged with one count of indecent liberties, contrary to RCW 9A.44.100(1)(b), and one count of voyeurism in the

first degree, contrary to RCW 9A.44.115(2)(a) and (b). Clerk's Papers (CP) 42-43. Prior to trial, Mr. Vigil waived his right to a jury and elected to proceed to a bench trial. Verbatim Report of Proceedings, Vol. 1 (1VRP) 4-8. Pretrial hearings on Mr. Vigil's motion to allow prior sexual conduct evidence and motion to reconsider were held on October 2, 2018 (10.02.2018 VRP 1) and October 8, 2018 (10.08.2018 VRP 1) and the trial, along with a CrR 3.5 hearing, commenced on March 18, 2019 (1VRP 1).

1. Trial evidence.

Mr. Vigil is a Human Resources Specialist for the United States Army who, at the time of the charged offenses, was stationed at Joint Base Lewis McChord ("JBLM"). 4VRP 327. He met J.B., the complaining witness, when J.B. was Mr. Vigil's supervisor while the two were stationed at Fort Wainwright Army base in Alaska. 2VRP 104-06; 4VRP 329. They got along in the workplace but did not have a close relationship outside of work. 2VRP 109.

Mr. Vigil transferred to JBLM in October of 2015, where J.B. had been working. 2VRP 110; 4VRP 331. At some point, Amber Roberts ("Ms. Roberts"), a mutual friend who had also been stationed at Fort Wainwright, suggested that Mr. Vigil ask to stay at J.B.'s residence and park his vehicle at the residence during a period of leave. 4VRP

335-37. Thereafter, Mr. Vigil, J.B., and her new husband, Mr. Bailey, developed a close friendship, with Mr. Vigil and Mr. Bailey becoming “very close friends”. 2VRP 110, 196, 214; 4VRP 342-43. They would engage in recreational activities together, such as fishing, boating, shooting, drinking, barbecues, and hiking. 2VRP 110-11, 196-97.

Mr. Vigil would spend the night at the Bailey residence once or twice per month, on nights when they were drinking so Mr. Vigil could avoid driving back to JBLM. 2VRP 112, 218; 4VRP 340-41. Mr. Vigil testified he had no romantic or sexual interest in J.B., and never suggested to her that he wanted to have any kind of physical relationship. 4VRP 345-47. J.B. similarly testified that Mr. Vigil never made any physical or verbal sexual advances towards her. 2VRP 198.

On the night of February 3, 2018, Mr. Vigil, J.B., and Mr. Bailey went out to jointly celebrate Mr. Bailey’s and J.B.’s birthdays. 2VRP 116, 216. Four other friends joined them. 2VRP 116-17. They went out to a restaurant called El Gaucho around 7:00 p.m. 2VRP 117-18. Mr. Vigil and Mr. Bailey had a glass of whiskey before heading out. 2VRP 118. Everyone then drank alcohol at El Gaucho, including cocktails, whiskey, and two bottles of wine. 2VRP 119-20; 4VRP 349-50.

After leaving El Gaucho, the group went on to the Tacoma Cabana Club, where they continued to drink alcoholic beverages. 2VRP

120-21. They then left the bar and went home around 11:00 p.m. 2VRP 121-22. J.B. described herself as being under the influence and described Mr. Vigil as being “highly intoxicated” by the end of the evening. 2VRP 122. Mr. Vigil described himself as “very impaired” and J.B. was also impaired, evidenced by slurring her speech. 4VRP 350-51.

Back at the Bailey residence, Mr. Vigil, Mr. Bailey, and J.B. sat on the couch, watched television, and resumed drinking alcoholic beverages. 2VRP 123-25, 218-19. J.B. fell asleep on the couch and Mr. Bailey attempted to wake her to go to their bedroom upstairs, but to no avail. 2VRP 130, 220-21. He also awoke Mr. Vigil at that time, and Mr. Vigil went into the guest room to lie down and sleep in the guest bed at that time. 4VRP 352-53.

J.B. testified that she woke up “to a sensation within [her] vagina” and saw Mr. Vigil standing over her telling her to go back to sleep. 2VRP 131-32. Her pants were down, and she heard the sound of a cellphone taking pictures. 2VRP 131-32. She asked Mr. Vigil what he was doing, asked to see his phone, and called for her husband. 2VRP 134-35. Mr. Vigil told her to go back to sleep and told her he did not do anything. 2VRP 137. At trial, on redirect, she testified that Mr. Vigil “just kept repeating: I’m sorry, I’m sorry, I’m sorry.” 2VRP 209.

Mr. Vigil testified that, without manipulating J.B.'s body in any way, J.B.'s "pants were stretched so tight you could see her underwear through it", so he thought he would take a picture and send it to Ms. Roberts in jest. 4VRP 361-64. One of the pictures depicted J.B.'s leggings pulled slightly down, exposing "a tattoo of Amber's lips on [J.B.'s] right buttocks." 4VRP 366. The tattoo on J.B.'s right buttock depicted Ms. Roberts' lips, as Ms. Roberts kissed J.B.'s buttock with lipstick to leave an imprint, which J.B. then had tattooed. 4VRP 366-67.

Mr. Vigil intended to send the picture to Ms. Roberts, possibly with a joke about Ms. Roberts' lips getting bigger in reference to J.B. having gained weight since getting the tattoo. 4VRP 366-68. Mr. Vigil also took more revealing photographs of J.B.'s vagina and anus, which he thought would be humorous to send to Ms. Roberts. 4VRP 369-73. Mr. Vigil denied being aroused by viewing or taking pictures of J.B.'s private areas, testifying that he has never been attracted to J.B. and took the pictures as a joke rather than for sexual gratification. 4VRP 373-74. The defense introduced testimony and evidence establishing that Mr. Vigil and Ms. Roberts previously engaged in sexually explicit jokes,

including sending each other graphic images, via Facebook.¹ 5VRP 459-60.

Mr. Bailey awoke to the screaming and went downstairs. 2VRP 221-22. He saw J.B. pointing at Mr. Vigil and saying that he touched her. 2VRP 222. J.B. then went upstairs while Mr. Bailey continued to speak with Mr. Vigil about what had occurred. 2VRP 138-39. Mr. Bailey demanded to see Mr. Vigil's cell phone and observed a message saying that pictures were deleted. 2VRP 224-25. Mr. Bailey demanded that Mr. Vigil leave the residence. 2VRP 225. The State's detective and forensic expert were able to recover the deleted photographs, which were admitted as exhibits. 2VRP 238-40; 3VRP 302-03. The photographs depicted body parts identified as belonging to J.B. 3VRP 308.

Once she was upstairs, J.B. called 911 and told dispatch she had been raped. 2VRP 139-40. During the 911 call, J.B. told dispatch at least twice that she was intoxicated. 2VRP 170-71. She equivocated during the phone call as to whether she was molested or raped, and also told

¹ Mr. Vigil testified that he ceased contact with Ms. Roberts, including removing him from his list of Facebook "friends", following this incident because he believed Ms. Roberts was closer with J.B., was fearful that Ms. Roberts would forward messages or posts he sent via Facebook to J.B., and was embarrassed by J.B.'s allegation of rape. 5VRP 456-57.

² In the initial motion and the court's analysis, the first and second incidents were treated as isolated incidents. CP 14; 10.02.2018 VRP 38.

dispatch as well as Officer Wendy Haddow, in contrast to her testimony, that Mr. Vigil was “on top of [her] in a sexual manner.” 2VRP 172. The report of Ofc. Haddow reports J.B. stating that she saw Mr. Vigil inserting his fingers into her vagina, but J.B. questioned the veracity of Ofc. Haddow’s report on this point during her testimony and in fact testified that she filed a complaint against Ofc. Haddow for mistreating her in the investigation. 2VRP 177. At trial, J.B. testified she “did not see 100 percent him touching me. However, when I woke up, his hands were down in my crotch area.” 2VRP 200.

When she went back downstairs, Mr. Vigil had left the area. 2VRP 140. Mr. Bailey and J.B. then discussed what had happened while waiting for the arrival of law enforcement. 2VRP 227. Following the advice of the investigating officers, J.B. went to Tacoma General Hospital to undertake a forensic rape examination. 2VRP 141-42, 227. The examining nurse did not notice any injuries. 3VRP 274-75. Additionally, the several swabs taken of various parts of J.B.’s body, including her vagina, did not contain any DNA besides that of J.B. 3VRP 316.

In closing argument, the prosecutor asked the court to disbelieve Mr. Vigil’s testimony, stating Mr. Vigil’s denial of sexual motivation “is not believable, it’s not reasonable”, it is “not reasonable, It’s not a

reasonable excuse. It's not a reasonable explanation. He is not credible. He has bias." 5VRP 468-69. The prosecutor also argued that Mr. Vigil admitted to swiping his finger on J.B.'s "inner thighs" to remove her underwear. 5VRP 466. In fact, Mr. Vigil testified that he pulled the underwear "down slightly from the waist and therefore giving it more slack towards the genital area". 4VRP 370. At no point did Mr. Vigil testify to running his finger down J.B.'s inner thighs.

In the defense closing, defense counsel argued there was no evidence of sexual gratification, and that Mr. Vigil should instead be convicted only of the lesser included offense of assault in the fourth degree. 5VRP 481-83.

In the State's rebuttal, the prosecutor made numerous statements of opinion, stating "[i]t is absurd to me that Mr. Vigil, in that state of mind, would be a gentleman in an attempt to try to avoid actually placing his hands on her vagina and instead be so careful as to go around the edges and around the sides. I don't think that's reasonable." 5VRP 485. The prosecutor argued further that, "in the State's opinion, [it] would be an absurd result that if your intent, as Mr. Vigil would have you to believe, was to embarrass or humiliate [J.B.], that he is not guilty of this. [...] I don't think he's being credible in that, that he's not attracted to her when he took these pictures anyways." 5VRP 485-86.

2. Mr. Vigil's pretrial statement.

Officer Avalos of the Tacoma Police Department testified that, on the morning of February 4, 2018, he, along with a senior training officer, was dispatched to the Bailey residence to investigate an alleged sexual assault of an alleged victim identified in the trial court proceedings as J.B. 1VRP 31-36. Mr. Bailey and J.B. told Ofc. Avalos that Mr. Vigil committed the assault following a night of drinking, something Mr. Vigil, Mr. Bailey, and J.B. do together "often". 1VRP 36. Based on the information he obtained from J.B. and Mr. Bailey, Ofc. Avalos believed he had probable cause to arrest the suspect, identified as Mr. Vigil, who was believed to have travelled to JBLM following the alleged assault. 1VRP 37.

Ofc. Avalos contacted military police to detain Mr. Vigil and then met with Mr. Vigil in a holding cell at the military police station before moving to a separate room for an interview. 1VRP 38-41. Ofc. Avalos could not recall whether Mr. Vigil was in handcuffs when he arrived. 1VRP 41. At the outset of the interview, Ofc. Avalos read Mr. Vigil his Miranda rights before questioning him about the events of the evening and J.B.'s allegations. 1VRP 41-42. Ofc. Avalos testified that Mr. Vigil was "vigilant" and appeared able to understand the rights advisement. 1VRP 44-45.

Mr. Vigil advised Ofc. Avalos that he had been out drinking with J.B. and Mr. Bailey to celebrate Mr. Bailey's birthday. 1VRP 49, 70. Mr. Vigil state he had consumed "approximately three to four glasses of wine, three to four glasses of whiskey, a glass of rum, and a mixed drink" that evening. 1VRP 49-50, 66-67. Each glass of whiskey was four to five ounces. 1VRP 68. The three returned to the Bailey residence around 1:45 a.m., at which point Mr. Vigil had one or two glasses of whiskey. 1VRP 72. J.B. then called 911 around 2:24 a.m., and Mr. Vigil was documented as being "in custody" at 4:45 a.m. 1VRP 73.

Despite having consumed this amount of alcohol, Ofc. Avalos testified he had "no concern about his level of sobriety". 1VRP 49-50. However, he conceded that he did not do anything to assess Mr. Vigil's level of intoxication, such as field sobriety tests or a preliminary breath test. 1VRP 58-61.

Mr. Vigil testified he did not ask any questions about his rights because he was "intoxicated", "drunk", "incoherent", had slept only 30 minutes in the 24 hours prior, and was "confused" by the allegations with which he was confronted. 1VRP 78-79. He testified he would have invoked his right to an attorney had he not been intoxicated and in a confused mental state. 1VRP 80.

Mr. Vigil told Ofc. Avalos that he merely attempted to wake J.B. up from being passed out on the couch, at which point she began screaming. 1VRP 50. Then, after being asked to hand over his phone, Mr. Vigil left the residence in an Uber, a taxi service. 1VRP 52.

Mr. Vigil advised further that he met J.B., the alleged victim, when J.B. was Mr. Vigil's supervisor at an Army base in Alaska, and that they had been friends but were not romantically involved. 1VRP 52. At the conclusion of the interview, Ofc. Avalos took possession of Mr. Vigil's phone and transported him to Pierce County Jail. 1VRP 54-55.

Mr. Vigil moved to suppress his pretrial statements pursuant to CrR 3.5 on the grounds he was too intoxicated to knowingly and voluntarily waive his Miranda rights. The trial court denied Mr. Vigil's CrR 3.5 motion, holding:

Although alcohol in hindsight may have affected his judgment, understandably so -- I have no doubt that he drank as much he did -- he indicated that he knew he had right to remain silent, and had the right to an attorney.

1VRP 93. Ofc. Avalos' testimony was later admitted as trial evidence pursuant to stipulation. 3VRP 317.

3. Motion to admit prior sexual conduct evidence.

Prior to trial, Mr. Vigil filed a motion to admit prior sexual conduct evidence. CP 12-30. In his motion, he asked the court for an order allowing him to introduce evidence at trial that, on multiple

previous occasions, J.B. and her husband engaged in similar conduct towards Mr. Vigil. CP 12-30.

During the first incident, occurring in October 2017, J.B. and Mr. Vigil were drinking together, as they did frequently both with and without J.B.'s husband, Mr. Bailey. CP 14-15, 47-48. On this occasion, Mr. Vigil fell asleep or "passed out" on the couch and awoke to a flash going off, at which point he saw J.B. taking cell phone photos of Mr. Vigil's erect penis. CP 14-15, 47-48. During a second incident,² Mr. Vigil awoke to J.B. pulling his elastic waistband of his gym pants and underwear away from his body. CP 14-15, 47-48. When Mr. Vigil asked what she was doing, J.B. let go of his waistband, stepped back, and said "nothing, go back to sleep". CP 14-15, 47-48.

In a third incident, during another night of heavy drinking, Mr. Vigil awoke on a bed in the Bailey residence to Mr. Bailey ejaculating on his face, with J.B. standing nearby laughing and saying she was going to send the picture to "Amber", a mutual friend. CP 14. In a fourth incident, yet again after heavy drinking, Mr. Vigil fell asleep on the

² In the initial motion and the court's analysis, the first and second incidents were treated as isolated incidents. CP 14; 10.02.2018 VRP 38. However, on the motion to reconsider, Mr. Vigil described these two incidents as a single incident. CP 47-48. The facts are analyzed herein as they were analyzed on the record by the trial court. However, it is submitted that whether incidents one and two were the same incident or separate incidents is immaterial to the issues on appeal.

couch in the Bailey's living room. CP 14-12. He was awakened by Mr. Bailey to find J.B. slumped into Mr. Vigil's lap with her mouth on his exposed penis, which was not exposed at the time he passed out. CP 15; 10.02.2018 VRP 6-7.

Mr. Vigil sought to introduce this evidence of prior similar conduct involving him and the Baileys to establish at trial that he was acting within the consensual sexual conduct boundaries established in the course of the long relationship between him and J.B., and that the motivation behind the act was for reasons other than sexual gratification. CP 15. Given the similarity of this prior conduct and its relevance to the crucial issues of consent and sexual motivation, Mr. Vigil argued to the trial court that the evidence was admissible and not barred by RCW 9A.44.020, Washington's "rape shield" statute. CP 16-30. The State submitted a brief in opposition to the motion, arguing that the proffered evidence was not relevant because it would not tend to establish consent. CP 31-39.

The trial court heard the motion on October 2, 2018. 10.02.2018 VRP 1-40. With respect to the first and second incidents, the court held the evidence "may be relevant" given the similarity of the prior conduct to the charged conduct, but the probative value was "minimal" because "there is no context as to time frame". 10.02.2018 VRP 37. As to the

third incident, the court again found the proffer inadequate due to lack of timeframe, and found the incident too dissimilar given the lack of any photographs taken. 10.02.2018 VRP 38. As to the fourth incident, the court found the allegations were insufficient to show J.B. acted intentionally in putting her mouth on Mr. Vigil's penis, and that evidence of this incident would serve only to attack J.B.'s character. 10.02.2018 VRP 39. Accordingly, the court denied the motion and excluded the evidence. 10.02.2018 VRP 39-40.

Following the court's denial of Mr. Vigil's motion to admit prior sexual conduct evidence, Mr. Vigil submitted a motion to reconsider and declaration in support. CP 47-48. In his declaration, Mr. Vigil established a timeframe for the first incident, declaring that it occurred in "mid to late October" 2017. CP 47-48. Defense counsel also submitted a declaration stating that his notes from an August 30, 2018 telephone call with Mr. Vigil revealed that Mr. Vigil advised at that time that the first incident occurred in "10/2017". CP 45-46.

At the hearing on the motion for reconsideration, defense counsel presented the court with polygraph results showing Mr. Vigil was "truthful" in his account of the October 2017 incident in which J.B. photographed his erect penis while he slept. CP 151-57; 10.08.2018 VRP 4-5. The court declined to review the polygraph results, stating

“[t]he polygraph will have no weight in my decision.” 10.08.2018 VRP

5. The court then denied the motion to reconsider because, even though new evidence clarified the timeline, “allowing this testimony would be touching on prior bad acts of the alleged victim which is inadmissible”.

10.08.2018 VRP 7.

4. Findings, verdict, and sentencing

Following the trial, on June 14, 2019, the trial court entered its Findings of Fact and Conclusions of Law Re: Bench Trial, finding Mr. Vigil guilty of one count of indecent liberties and one count of voyeurism in the first degree. CP 192-97; 5VRP 492-501. In its findings of fact, the trial court rejected Mr. Vigil’s defense, finding:

20. It is uncontroverted that this [i.e. the alleged criminal conduct] was done without J.B.’s consent.

31. The defendant testified that his purpose in taking these photographs was to later send them to a friend, Amber Roberts. The defendant denied that he took these pictures for purposes of sexual gratification. The Court does not find this credible.

33. The defendant testified on direct examination that he had the type of relationship with Ms. Roberts that sending these photographs to her would be appropriate. The Court does not find this credible in part because on surrebuttal, the defendant testified that he knew Ms. Roberts would be unhappy with what he had done so he stopped contacting her and removed her from his Facebook “friends.”

34. Based on the totality of the circumstances, the reasonable inference from the defendant’s actions is that

he took the pictures for the purpose of gratifying his sexual desires.

CP 193-95.

Prior to sentencing, Mr. Vigil filed a pre-sentence report (CP 139-43) requesting a low-end sentence, 36 months community custody, and other standard fines and conditions, along with letters in support and the polygraph examination results in which Mr. Vigil was found to be “truthful” when describing the prior sexual conduct initiated by J.B. (CP 144-57; 8VRP 518.).

The matter proceeded to sentencing on the same day. CP 200-11. With no criminal history, Mr. Vigil faced standard sentencing ranges under the 1981 Sentencing Reform Act of 4-12 months for voyeurism in the first degree and 31-41 months for indecent liberties. CP 200-01. The court sentenced him to 31 months in prison, followed by 36 months of community custody. CP 204-05.

Mr. Vigil timely appealed on June 14, 2019 and hereby submits this Opening Brief in support. CP 147.

V. ARGUMENT

A. **THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. VIGIL'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO CONFRONT ADVERSE WITNESSES, AND TO A FAIR TRIAL BY EXCLUDING PRIOR SEXUAL CONDUCT EVIDENCE.**

1. **Standard of Review**

Appellate courts review de novo constitutional issues including a denial of the Sixth Amendment and Art. 1, § 22 rights to present a defense, to confront witnesses, and to a fair trial. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012) (alleged confrontation clause violations reviewed de novo); State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (alleged violations of the right to present a defense reviewed de novo). An erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the state can show the error was harmless beyond a reasonable doubt. State v. Franklin, 180 Wn.2d 371, 377 n. 2, 325 P. 3d 159 (2014); State v. Dye, 178 Wn. 2d 541, 548, 309 P. 3d 1192 (2013).

2. **The prior sexual conduct evidence was highly probative and its exclusion violated Mr. Vigil's constitutional rights.**

The trial court erred and violated Mr. Vigil's constitutional rights to present a defense, to confront adverse witnesses, and to a fair trial, contrary to the Sixth Amendment of the United States Constitution and Art. 1, § 22 of the Washington State Constitution by excluding from trial

evidence that J.B. had previously initiated similar sexual conduct with Mr. Vigil. This wrongfully excluded evidence was crucial to Mr. Vigil's defense and should have been admitted. The evidence, if admitted, would have supported a defense of consent, as it would have shown that the conduct was within the confines of the boundaries of the relationship. It also would have raised reasonable doubt as to whether the act was performed for sexual gratification. Given the critical nature of this evidence to Mr. Vigil's defense, the State cannot show that the wrongful exclusion of this critical evidence was harmless beyond a reasonable doubt.

A criminal defendant has a right to present evidence in defense of the charged crimes pursuant to the Sixth Amendment of the United States Constitution and Art. 1, § 22 of the Washington Constitution. U.S. Const. Amend. VI; Wash. Const. art. 1 §22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Thus, absent a compelling justification, excluding exculpatory evidence deprives a defendant of "the basic right to have the prosecutor's case encounter and 'survive to the crucible of meaningful adversarial testing.'" Crane v. Kentucky, 476 U.S.

683, 689- 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). “The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions.” State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); see Jones, 168 Wn.2d 713.

These rights do not include a right to present irrelevant evidence. State v. Gregory, 158 Wash.2d 759, 786 n. 6, 147 P.3d 1201 (2006). However, “if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Darden, 145 Wn.2d at 622. For evidence of high probative value “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.” Jones, 168 Wn.2d at 580 (quoting State v. Hudlow, 99 Wash.2d 1, 16, 659 P.2d 514 (1983)).

In Hudlow, Washington’s Supreme Court distinguished between evidence of general promiscuity of a rape victim and evidence that, if excluded, would deprive defendants of the ability to testify to their versions of the incident. Hudlow, 99 Wn.2d at 17-18. Whereas evidence of general promiscuity is typically rightly excluded, evidence of high

probative value may not be restricted regardless of how compelling the State's interest in exclusion may be if excluding the evidence would deprive defendants of the ability to testify to their versions of the incident. Jones, 168 Wn.2d at 580 (citing Hudlow, 99 Wn.2d at 16-18).

Prior to trial, Mr. Vigil represented to the court that he intended to admit evidence, as set forth hereinabove, that on one occasion he awoke to discover J.B. taking pictures of his erect penis while he lay "passed out" on the couch. CP 14-15; 47-48. Mr. Vigil also awoke to J.B. pulling his waistband away from his body to look at his penis and, upon being asked what she was doing, J.B. responded "nothing." CP 14-15.

On the third occasion, Mr. Vigil awoke to Mr. Bailey ejaculating on his face, with J.B. standing nearby saying she was going to send the picture of the incident to Ms. Roberts. CP 14. In the fourth incident, Mr. Vigil woke up to find J.B.'s mouth on his exposed penis. CP 14-15. Mr. Vigil filed a declaration asserting that these incidents were true and passed a polygraph examination³ where he was determined to have answered truthfully when describing the incident in which J.B. exposed

³ Although the polygraph results would not have been admissible at trial, it should have been considered in evaluating the admissibility of the proffered evidence. See ER 104(a) ("Preliminary questions concerning [...] the admissibility of evidence shall be determined by the court [...]. In making its determination it is not bound by the Rules of Evidence except those with respect to privileges"). The court's decision to disregard the polygraph results was an abuse of discretion.

and took pictures of his erect penis while he was “passed out”. CP 151-52.

This first incident is identical to the conduct with which Mr. Vigil was charged, aside from the reversed roles played by the two individuals. If the prior sexual conduct evidence would have been admitted, it would have been highly probative as to the elements of consent and whether Mr. Vigil acted for the purpose of sexual gratification. As to consent, the fact that J.B. initiated precisely the same and similar conduct in the course of their relationship establishes that Mr. Vigil’s conduct was within the consensual boundaries of that relationship. As to sexual gratification, the evidence would have corroborated Mr. Vigil’s testimony that his purpose was reciprocation and to continue a sort of inside joke between Mr. Vigil, J.B., and Ms. Roberts, rather than to gratify his sexual desires.

The exclusion of this substantially similar prior sexual conduct evidence effectively deprived Mr. Vigil of a defense, wholly precluding him from explaining what he did and why he did it. Without the context that would have been established by the prior sexual conduct evidence, the only inference to be drawn was that Mr. Vigil acted without consent and to gratify his sexual desires. This was not marginally relevant evidence that a court should balance against the State’s interest in excluding the evidence. This also was not evidence meant to cast the

complaining witness in any negative light. Instead, it was relevant evidence of extremely high probative value, without which Mr. Vigil lacked a viable defense. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, excluding this evidence at trial was improper and violated Mr. Vigil's rights under the Sixth Amendment and Washington Constitution Art. 1, § 22.

3. The proffered prior sexual conduct evidence was not barred by the rape shield statute.

RCW 9A.44.020(2), Washington's rape shield statute, prohibits evidence of "the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards" for purposes of attacking the victim's credibility or to prove consent *except* that:

when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

RCW 9A.44.020(2). Additionally, pursuant to RCW 9A.44.020(3), such evidence is admissible when the court finds that it:

is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially

outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant.

Mr. Vigil's proffered prior sexual conduct evidence fits squarely within both of these exceptions for the purpose of proving that the charged conduct fell within the established consensual boundaries of the long-standing relationship, as it shows that J.B., on several occasions, engaged in and initiated factually similar sexual conduct/acts with the defendant, without first obtaining verbal consent from the defendant, and these acts were done while the defendant was asleep or passed out after a night of drinking, just as Mr. Vigil was charged with doing in this case. Mr. Vigil should have been permitted to introduce this evidence undermining J.B.'s attempt to change the boundaries of their relationship after the fact. By a plain reading of the statute, it is clear this evidence should have been admissible at trial, even without engaging in a subsection (3) hearing to balance the delineated factors.

Engaging in the RCW 9A.44.020(3) balancing test nonetheless leads to the same result. RCW 9A.44.020(3) makes evidence of the victim's past sexual behavior admissible on the issue of consent only if: (1) it is relevant; (2) its probative value substantially outweighs the probability that its admission will create a substantial danger of undue prejudice; and (3) its exclusion will result in denial of substantial justice

to the defendant. Hudlow, 99 Wash.2d at 7.

In Hudlow, the court stated:

Without other factors tending to indicate the past consensual sexual activity is factually similar in some respects to the consensual sex act claimed by defendant, it should not be considered relevant. Factual similarities between prior consensual sex acts and the questioned sex acts claimed by the defendant to be consensual would cause the evidence to meet the minimal relevancy test of ER 401. Such a particularized factual showing would demonstrate enough similarity between the past consensual sexual activity and defendant's claim of consent that it would have the necessary predictive value required by ER 401.

Hudlow, 99 Wn.2d at 11. The Hudlow court went on to discuss other factual situations that may exist in which past sexual conduct may be relevant, such as:

(1) evidence of prior sexual conduct by complainant with defendant; (2) to rebut medical evidence on proof of origin of semen, venereal disease or pregnancy; (3) distinctive sexual patterns so closely resembling defendant's version of the alleged encounter as to tend to prove consent on the questioned occasion; (4) evidence of prior sexual conduct by complainant with others, known to the defendant, tending to prove he believed the complainant was consenting to his sexual advances; (5) evidence of sexual conduct tending to prove complainant's motive to fabricate the charge; (6) evidence tending to rebut proof by the prosecution regarding the complainant's past sexual conduct; and (7) evidence of sexual conduct offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the acts charged.

Hudlow, 99 Wn.2d at 11 (citing Berger, Man's Trial, Woman's

Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 98-99 (1977)).

Pursuant to the factors identified in Hudlow, the proffered evidence in this case was highly probative. As set forth above, the prior conduct is factually similar to the charged conduct. The prior conduct plainly constitutes “evidence of prior sexual conduct by [J.B.] with [Mr. Vigil]”. It indisputably involved “distinctive sexual patterns so closely resembling defendant’s version of the encounter as to tend to prove consent on the questioned occasion”. In fact, the prior pattern was nearly identical to both Mr. Vigil’s and J.B.’s accounts of the occasion in question, with the only difference being the parties’ respective roles.

This evidence not only meets the applicable Hudlow factors, but also establishes that the sexual boundaries of the relationship between these adults was first defined by J.B. After J.B. expanded the boundaries, Mr. Vigil chose to reciprocate J.B.’s acts, within the sexual boundaries already established. This evidence is highly relevant, and it meets the relevant evidence standard discussed in Hudlow.

This high relevance also substantially outweighs any conceivable unfair prejudice. In conducting this balancing test, the Hudlow court stated that “the balancing process should focus not on potential prejudice and embarrassment to the complaining witnesses, but instead should look to

potential prejudice to the truth finding process itself.” Hudlow, 99 Wn.2d at 12-13. “These considerations — the integrity of the truth finding process and defendant’s right to a fair trial — should be the factors considered by the trial court in exercising its discretion to admit or exclude the evidence.” Id. at 14 (emphasis added)

Here, the probative value of the proffered evidence far outweighed any potential prejudice because it was Mr. Vigil’s entire defense and the fact-finder knowing the full boundaries of the sexual relationship between the adults was paramount to the truth finding process. Without context to Mr. Vigil’s actions, the fact-finder could only interpret the facts one way and find Mr. Vigil guilty. Against that high probative value, the unfairly prejudicial impact is nonexistent. The only possible prejudicial impact was “embarrassment to the complaining witness”, which, as held in Hudlow, is not the type of prejudice taken into consideration. In no way would admitting this prior sexual conduct evidence undermine the truth finding process. To the contrary, the prior sexual conduct evidence would only have enhanced that process.

The testimony was not proffered to portray J.B. as sexually promiscuous or otherwise cast her in a negative light. The evidence was proffered to establish reasonable doubt as to whether J.B. consented to Mr. Vigil performing factually similar sexual acts through her prior course of

conduct. Mr. Vigil's reciprocation of the same conduct in the same manner and under the same circumstances was critical to inform the fact-finder of the whole story. The probative value of this evidence substantially outweighs any possible unfair prejudice.

Finally, Mr. Vigil's right to substantial justice was irreparably harmed and he was denied his right to present a defense by the wrongful exclusion of this highly probative prior sexual conduct evidence. As detailed hereinabove, the excluded evidence was crucial to Mr. Vigil's defense. Without this evidence, the finder of fact could infer no motive for Mr. Vigil's conduct other than sexual gratification and there was no basis upon which the finder of fact could find reasonable doubt as to the element of consent. As set forth above, the exclusion of this evidence deprived Mr. Vigil his constitutional right to present a defense and confront adverse witnesses. Depriving Mr. Vigil of evidence crucial to his defense and to confronting J.B. caused clear irreparable harm to Mr. Vigil's right to substantial justice. Thus, under the Hudlow analysis, the evidence should have been admitted.

In Hudlow, the Court rejected the defendant's proffer of prior acts on materially different facts than those presented here. In Hudlow, the court found that:

the evidence proffered by the defense concerned only the general promiscuity of the two victims and lacked further

indicators showing any past consensual sexual activity comparable to the story offered by respondents Hudlow and Harper. Mr. Proctor's testimony failed to show any factual similarities between the incident forming the basis of the present charges and any of the past sexual activity allegedly consented to by Ms. Smith or Ms. Strong. For instance, no testimony was offered showing that the two women had ever engaged in sex with men other than sailors whom they knew or that they had sexual relations with men who had picked them up hitchhiking. Such evidence would have had greater value in aiding the jury to predict whether consent was given in this case. Without such particularized factors, however, the relevancy of the evidence was limited at best.

Hudlow, 99 Wn.2d at 17.

In Mr. Vigil's case, on the other hand, Mr. Vigil's proffered evidence is of the exact particularized evidence the court in Hudlow would have ruled admissible. Mr. Vigil proffered evidence of prior sexual acts factually similar, in fact nearly identical, to the conduct for which Mr. Vigil was charged and convicted. Furthermore, J.B.'s prior acts were done without first obtaining the consent of the defendant, and thus, established the non-verbal consensual boundaries of their sexual relationship. Unlike the evidence in Hudlow, the excluded evidence here was highly relevant. Preventing this highly relevant evidence from being admitted caused substantial prejudice to the defendant in presenting his defense, in violation of the Sixth Amendment and Washington's Constitution Art. 1, § 22.

Moreover, "[e]ven if the rape shield statute did apply, it cannot be

used to bar evidence of extremely high probative value per the Sixth Amendment.” Jones, 168 Wn.2d at 718. The rape shield statute was created for the purpose of ending an antiquated common law rule that "a woman's promiscuity somehow had an effect on her character and ability to relate the truth." Id. (citing Hudlow, 99 Wn.2d at 8). The statute was aimed at ending the misuse of prior sexual conduct evidence, so that a woman's general reputation for truthfulness could not be impeached because of her prior sexual behavior. Id. More specifically, the statute "is based on the observation that such evidence is usually of little or no probative value in predicting the victim's consent to sexual conduct on the occasion in question." Id. at 9 (citing State v. Geer, 13 Wn.App. 71, 73-74, 533 P.2d 389 (1975)).

Nonetheless, “[e]vidence of past sexual conduct, such as meeting men in bars before consenting to sex or other distinctive sexual patterns, could be relevant if it demonstrates ‘enough similarity between the past consensual sexual activity and defendant's claim of consent.’” Jones, 168 Wn.2d at 718 (quoting Hudlow, 99 Wn.2d at 11). If the evidence is of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Id. Because the excluded evidence here was highly probative, constituting the entire basis for Mr. Vigil’s defense, it should

have been admitted even if it would have been inadmissible under the rape shield statute.

4. The wrongful exclusion of the prior sexual conduct evidence also constituted an abuse of discretion.

As set forth above, Mr. Vigil's proffered prior sexual conduct evidence was critical to his defense, particularly with respect to raising reasonable doubt as to the elements of consent and sexual gratification. Also as set forth hereinabove, there was no valid basis for excluding the evidence under Washington's rape statute or any other rule of evidence. The proffered evidence was nearly identical to the charged conduct, with the exception being that in the prior instance, J.B. was the initiator. CP 14-15, 47-48. It is difficult to conceive of more relevant prior sexual conduct evidence.

The court even acknowledged that at least the first incident "may be relevant" due to the similarity with the charged conduct. 10.02.2018 VRP 37-38. The court nonetheless excluded the evidence due to "no context as to time frame". 10.02.2018 VRP 37-38. However, in connection with his motion to reconsider, Mr. Vigil provided the timeframe, stating in a sworn declaration and a polygraph examination, that the incident occurred in mid to late October 2017, less than four months prior to the incident of which he was convicted. CP 47-48; 8VRP 518.

In response to this new evidence undermining the basis for its prior ruling, the court improperly disregarded the polygraph results in violation of ER 104(a) and constructed a new justification for the initial ruling that had not been briefed and that constituted a clear misapplication of the law. CP 151-57; 10.08.2018 VRP 4-5. Specifically, the court ruled that even though the timeframe had been provided, the evidence was still not admissible because “allowing this testimony would be touching on prior bad acts of the alleged victim which is inadmissible”. 10.08.2018 VRP 7.

Of course, Washington’s prior bad acts rule, ER 404(b), only precludes admission of prior bad acts evidence “to prove the character of a person *in order to show action in conformity therewith.*” ER 404(b) (emphasis added). Mr. Vigil did not proffer evidence of J.B.’s photographing of his penis in October 2017 to establish that J.B. photographed his penis on February 4, 2018. The evidence of the October 2017 incident was not proffered to show J.B.’s conformity therewith on February 4, 2018, but rather to show Mr. Vigil had an explanation for his actions other than sexual gratification and that his actions were within the consensual boundaries of the relationship as established by J.B.’s prior conduct. ER 404(b) simply had no application, and the misapplication of this rule was the court’s only reason provided for denying Mr. Vigil’s motion to reconsider. See State v. Foxhoven, 161 Wn. 2d 168, 175, 163

P.3d 786 (2007) (“ER 404(b) evidence, may, however, be admissible for another purpose, such as proof of motive, plan, or identity.”).

As to the other incidents, in addition to unjustifiably disregarding Mr. Vigil’s provision of a timeframe in connection with his motion to reconsider, the court applied a patently unreasonable standard of similarity. The court’s reasoning with respect to the second incident did violence to any reasonable definition of “similar”, concluding that the incident in which Mr. Vigil caught J.B. lifting his waistband away from his body to look at his penis while he was passed out drunk was too dissimilar from the charged incident in which J.B. caught Mr. Vigil lifting her waistband away from her body to take a picture of her vagina while she was passed out drunk. 10.02.2018 VRP 38.

As to the third and fourth incidents, the court engaged in reasoning that can only be deemed *post hoc* justifications for a predetermined ruling. As to the third incident, despite the allegation that J.B. was “looking at her phone saying she was going to send the picture to a mutual friend, Amber”, the court found the incident too dissimilar because “we don’t have any testimony or any facts that indicated that an actual picture was taken.” CP 14; 10.02.2018 VRP 38. Whether a picture was actually taken and sent to Ms. Roberts is irrelevant to the similarity analysis. Evidence of a prior incident in which J.B. threatened to take a

sexually embarrassing picture of Mr. Vigil to send to Amber is highly relevant to Mr. Vigil's defense that he took the picture at issue to send to Amber. The court's analysis of the fourth incident was similarly poorly reasoned, turning on the unsupported assumption that J.B. accidentally put her mouth on Mr. Vigil's penis while Mr. Vigil was passed out.

10.02.2018 VRP 39.

Accordingly, the trial court's decision to exclude the evidence, denying both Mr. Vigil's initial motion and subsequent motion to reconsider filling in the missing timeframe that formed the basis of the court's initial ruling, was based on untenable grounds and for untenable reasons. See State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (recognizing a trial court abuses its discretion when its decision is based on untenable grounds or for untenable reasons). These abuses of discretion warrant reversal and remand.

5. The wrongful exclusion of Mr. Vigil's prior sexual conduct evidence was not harmless beyond a reasonable doubt.

It cannot be said that the trial court's evisceration of Mr. Vigil's defense and violations of Mr. Vigil's constitutional rights under the Sixth Amendment and Art. 1, § 22 were harmless beyond a reasonable doubt. A constitutional error is deemed harmless only if the reviewing court is convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error. State v. Aumick, 126 Wn.2d 422, 430,

894 P.2d 1325 (1995). Where the error was not harmless, the defendant is entitled to a new trial. State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979). The State bears the burden of showing a constitutional error was harmless. State v. Easter, 130 Wn. 2d 228, 242, 922 P.2d 1285 (1996).

It is apparent from the pretrial proceedings that defense counsel and Mr. Vigil elected to waive his fundamental right to a jury trial in response to the court's adverse pretrial evidentiary ruling because he felt he would be unable to persuade a jury that reasonable doubt without being able to testify to J.B.'s prior sexual conduct towards him. At trial, he was indeed prevented from advancing his defense of consent and, as a result, the trial court found "[i]t is uncontroverted that [the alleged criminal conduct] was done without J.B.'s consent." CP 194 (Finding of Fact no. 20). The reason this fact was uncontroverted was because the trial court wrongfully precluded Mr. Vigil from presenting evidence that would have controverted the State's position on the element of consent. The excluded evidence also could have led to a different outcome as to the sexual gratification element of the offenses. The evidence upon which the State ultimately relied cannot be said to have been so overwhelming that it would have obtained the same result regardless. Had Mr. Vigil been permitted to present the excluded evidence, the trial court's Findings of Fact nos. 20, 31, 33, and 34 would have been severely undermined. CP

194-95.

But for the trial court's erroneous exclusion of Mr. Vigil's proffered prior sexual conduct evidence, Mr. Vigil would have been able to present to a jury of twelve peers evidence that J.B. initiated sexual conduct of the precise same nature on a prior occasion, along with other similar sexual conduct. Such a trial would have been fundamentally different from the trial that occurred. Under these circumstances, the State cannot meet its burden of establishing that the outcome would have been the same beyond a reasonable doubt. Therefore, it cannot be said that the trial court's constitutional violations were harmless beyond a reasonable doubt, and remand is required.

6. The trial court's abuse of discretion was prejudicial.

Even if the Court finds the trial court's erroneous evidentiary ruling somehow does not rise to a constitutional violation, the abuse of discretion nonetheless warrants reversal under the prejudice standard for non-constitutional error. Evidentiary error is grounds for reversal only if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Based on the facts presented and the highly probative nature of the wrongfully excluded evidence, it cannot be said that the error was harmless. Had Mr. Vigil been permitted to present this evidence to a jury of his peers, there is a reasonable probability the jury would have had reasonable doubt as to whether the charged conduct was within the consensual boundaries established primarily by J.B. in the course of their relationship, and/or as to whether the charged conduct was motivated by sexual desire or rather was part of a perverse inside joke between three friends. Therefore, reversal is necessary even if the exclusion of the evidence does not rise to a constitutional violation.

B. THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT NOS. 20, 31, 33, AND 34.

Challenges to a court's findings of fact are reviewed to evaluate whether the findings are supported by substantial evidence. State v. Hill, 123 Wn. 2d 641, 647, 870 P.2d 313 (1994). The trial court erred in making its Findings of Fact Nos. 20, 31, 33, and 34.⁴ Had Mr. Vigil been permitted to present his prior sexual conduct evidence, the trial court would not have been able to find that “[i]t is uncontroverted that this

⁴ These challenges to specific findings of fact are primarily being raised here not as standalone grounds for reversal, but rather to preempt any argument by the State that Mr. Vigil has conceded any dispositive findings as true by failing to assign error pursuant to RAP 10.3(g). Mr. Vigil asserts these findings were erroneous largely because they were not informed by highly probative contrary prior sexual conduct evidence that was wrongfully excluded.

[i.e. the alleged criminal conduct] was done without J.B.'s consent." CP 194. This issue would have very much been controverted with competent and credible evidence. Similarly, the court's finding no. 31 that Mr. Vigil did not take the pictures to send to Ms. Roberts as a prank, rather than for purposes of sexual gratification, would have been severely undermined by the fact that J.B. engaged in similar conduct on prior occasions.

The trial court erred in finding no. 33 that it did not find credible Mr. Vigil's testimony "that he had the type of relationship with Ms. Roberts that sending these photographs to her would be appropriate", which it found "in part because on surrebuttal, the defendant testified that he knew Ms. Roberts would be unhappy with what he had done so he stopped contacting her and removed her from his Facebook 'friends.'" CP 195. The court premised this finding on a misreading of the record. At no point did Mr. Vigil testify that "he knew Ms. Roberts would be unhappy with what he had done so he stopped contacting her..."

To the contrary, Mr. Vigil testified specifically that he was embarrassed by J.B.'s allegation of rape, which is something he vehemently denied doing throughout the proceedings and which was based on such vague and conflicting testimony from J.B. that the State

ultimately elected not to pursue the charge of rape. At no point did he testify that he thought Ms. Roberts would be unhappy with his photographing of J.B.'s private areas. Furthermore, had the prior sexual conduct evidence been admitted, it would have been established that such conduct was well within the scope of the prior relationship.

The trial court erred in finding no. 34, as the wrongfully excluded evidence would have established that a reasonable inference from Mr. Vigil's actions is that he took the pictures as part of a long running perverse inside joke between three friends. CP 195.

C. THE PROSECUTOR ENGAGED IN FLAGRANT AND ILL-INTENTIONED MISCONDUCT BY IMPROPERLY STATING PERSONAL OPINIONS ON MR. VIGIL'S CREDIBILITY.

The prosecutor committed flagrant and ill-intentioned misconduct and denied Mr. Vigil a fair trial by his improper comments on Mr. Vigil's guilt and credibility. The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and Art. 1, § 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). "A '[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." State v. Monday, 171

Wn.2d 667, 677, 257 P. 3d 551 (2011) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P. 2d 500 (1956); State v. Reed, 102 Wn.2d 140, 145-47, 684 P. 2d 699 (1984)). Thus, prosecutorial misconduct can deprive an accused person of this fundamental right. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Moreover, “[a]s a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.” State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). It is the prosecutor’s duty to “seek a verdict free of prejudice and based on reason.” State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. den’d, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969).

To establish that the prosecuting attorney committed misconduct during closing argument, Mr. Vigil must prove that the prosecuting attorney’s remarks were both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). “Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record.” State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008).

Once the Court finds that a prosecuting attorney’s statements were improper, the Court must then determine whether the defendant was

prejudiced under one of two standards of review. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). “If the defendant objected at trial, the defendant must show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” Id. However, if the defendant failed to object, “the defendant is deemed to have waived any error, unless the prosecutor’s misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.” Id. at 760-61. Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P. 3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P. 2d 245 (1995)); State v. Ish, 170 Wn. 2d 189, 195, 241 P. 3d 389 (2010)).

The prosecutor in Mr. Vigil’s case committed clear prejudicial misconduct when he spent a considerable portion of his closing and rebuttal arguments telling the jury that he believed Mr. Vigil’s testimony was a lie. “It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant.” State v. Lindsay, 180 Wash. 2d 423, 437, 326 P.3d 125, 132-33 (2014) (citing Reed, 102 Wn.2d at 145; Am. Bar Ass’n, Model Code of Professional Responsibility and Code of Judicial Conduct § DR 7-106(C)(4) (1980)). Such argument constitutes misconduct because “[w]hether a witness has

testified truthfully is entirely for the jury to determine.” Ish, 170 Wn.2d at 196. Expressing personal opinions on credibility also violates the advocate-witness rule, which “prohibits an attorney from appearing as both a witness and an advocate in the same litigation.” Id. (quoting United States v. Prantil, 764 F.2d 548, 552-53 (9th Cir. 1985)).

Applying these principles in Lindsay, the Supreme Court held that a prosecutor engaged in prejudicial misconduct by referring to the defendant’s testimony as “the most ridiculous thing I’ve ever heard” and a “crock”. Lindsay, 180 Wash. 2d at 438. The Court reversed the defendant’s convictions, holding “the prosecutor in this case impermissibly expressed his personal opinion about the defendant’s credibility to the jury”, among other acts of misconduct. Id.

Similarly, in this case, the prosecutor told the finder of fact multiple times that Mr. Vigil’s testimony was not believable or credible, stating his testimony “is not believable, it’s not reasonable”, it is “not reasonable, It’s not a reasonable excuse. It’s not a reasonable explanation. He is not credible. He has bias.” VRP 468-69. The misconduct was compounded on rebuttal when the prosecutor argued:

It is ***absurd to me*** that Mr. Vigil, in that state of mind, would be a gentleman in an attempt to try to avoid actually placing his hands on her vagina and instead be so careful as to go around the edges and around the sides. ***I don’t think*** that’s reasonable. [...] ***in the State’s opinion***, [it] would be an absurd result that if your intent, as Mr.

Vigil would have you to believe, was to embarrass or humiliate [J.B.], ***that he is not guilty of this.*** [...] ***I don't think he's being credible*** in that, that he's not attracted to her when he took these pictures anyways.

5VRP 485-86 (emphasis added).

These improper expressions of personal opinion as to Mr. Vigil's credibility directly invaded the province of the court, telling the finder of fact what it should and should not believe. The prosecutor also directly stated his opinion on guilt, telling the court "I don't think he's being credible" when Mr. Vigil says "that he is not guilty of this." 5VRP 486. The assertion that "[i]t is absurd to me" to accept Mr. Vigil's testimony is equivalent to the prosecutor's assertions in Lindsay that the defendant's testimony was "the most ridiculous thing I've ever heard". As in Lindsay, these comments on the defendant's credibility and guilt are impermissible.

Furthermore, given that prosecutors have been sternly admonished by Washington's Supreme Court from making statements of the precise nature the prosecutor made in this case, the improper statements must be deemed flagrant and ill-intentioned. Otherwise, the Supreme Court's jurisprudence condemning the precise conduct in which the prosecutor engaged in Mr. Vigil's case would be rendered meaningless. Were the Court to hold that the statements, although improper, fell below the "flagrant and ill-intentioned" requirement, prosecutors would be on notice that, even though "impermissible", they are free to comment on a

defendant's guilt and credibility in closing with impunity. The prosecutor had actual or at least constructive knowledge that he was forbidden from making such statements by virtue of the holding in Lindsay and other cases cited herein. To nonetheless make nearly identical statements cannot be considered anything other than flagrant and ill-intentioned.

The misconduct here was also highly prejudicial because the case turned entirely on the court's assessment of Mr. Vigil's credibility. Indeed, as to the dispositive finding on the most contested issue in the case, the court, echoing the prosecutor's language, stated "[t]he Court does not find [Mr. Vigil's testimony that he did not take the pictures for sexual gratification] credible" and "[t]he Court does not find [Mr. Vigil's testimony that he had the type of relationship with Ms. Roberts that sending these photographs would be appropriate] credible". CP 194-95 (Findings of Fact nos. 31 & 33). A curative instruction under these circumstances would have been meaningless, and thus would not have resolved the issue.

The prosecutor's admonition to the jury that they should not believe Mr. Vigil because his testimony was untrue unfairly undermined the core of the defense theory of the case, particularly given that the court had already deprived Mr. Vigil of the right to present prior sexual conduct evidence. These comments were not isolated, but rather repeated multiple

times during the prosecution's discussion of Mr. Vigil's testimony. See In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (“[t]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011))); State v. Henderson, 100 Wn. App. 794, 805, 998 P. 2d 907 (2000) (holding that the cumulative effect of repeated instances of misconduct may be so flagrant that no instruction can erase the error)). Additionally, the prejudice was exacerbated by the prosecutor's repetition of his personal opinion of Mr. Vigil's testimony during rebuttal. See Lindsay, 180 Wash. 2d 423 (citing United States v. Sanchez, 659 F.3d 1252, 1259 (9th Cir. 2011) (finding it significant that prosecutor made improper statement “at the end of his closing rebuttal argument, after which the jury commenced its deliberations”); United States v. Carter, 236 F.3d 777, 788 (6th Cir. 2001) (finding it significant that “prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations”)). Although the court sat as the finder of fact, Mr. Vigil did not waive his right to a fair and impartial trial free of prosecutorial misconduct by waiving a jury. The prosecutor's expressions of personal opinion regarding the credibility of

Mr. Vigil's testimony during closing were sufficiently pervasive to require reversal, even under the higher standard applied when trial counsel fails to make a contemporaneous objection.

D. THE CUMULATIVE ERRORS WARRANT REVERSAL.

“Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless.” State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). In this case, each of the errors described above would, individually, warrant reversal. The accumulation of error, however, was all the more prejudicial. Mr. Vigil was denied his right to a fair trial by the cumulative effect of the errors and this Court should reverse his conviction and remand for a new trial.

VI. CONCLUSION

For the foregoing reasons, the trial court and the State committed numerous errors and constitutional violations, to Mr. Vigil's prejudice. Therefore, Mr. Vigil respectfully requests that this Court reverse his convictions and remand for further proceedings.

Respectfully submitted this 7th day of February, 2020.

LAW OFFICE OF COREY EVAN PARKER

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CERTIFICATE OF SERVICE

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on February 7, 2020, I caused to be served the document to which this is attached to the parties listed below in the manner shown next to their names

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