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NO. **53677-3-II**

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID ROBERT VIGIL,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin, Judge

No. 18-1-00505-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

After an evening of drinking, appellant, David Vigil, spent the night at the home of his friends, J.B. and her husband. After J.B. fell asleep on the couch and her husband retired to bed, Vigil commenced a 12-minute long session of sexual abuse against J.B. wherein he removed her pants and underwear, penetrated her vagina with his fingers, and took explicit photos of her genitalia. Vigil was convicted of indecent liberties and voyeurism.

On appeal, Vigil claims that the trial court violated his constitutional rights by excluding his proffered evidence that he argues would have shown that J.B. "consented" to his abuse of her, based on the "boundaries of their relationship," and that he did not commit these acts for sexual gratification. This proffered evidence was that on a prior occasion, J.B. had photographed Vigil's erect penis while he slept. The proffered evidence also included allegations that J.B.'s husband once ejaculated on his face when he was sleeping and that he once awoke to find a passed-out J.B. with her mouth on Vigil's penis.

The trial court properly excluded this evidence because the proffered evidence would not have demonstrated that J.B. "consented" to Vigil's acts when they were committed. The trial court also properly excluded this proffered evidence in regard to Vigil's "sexual gratification" argument because admitting this evidence would be in violation of the Rape

Shield law. In any event, any error in the exclusion of this evidence was harmless.

Vigil also claims that the trial prosecutor committed misconduct during his closing and rebuttal arguments by arguing that Vigil was a liar and improperly expressing his personal opinion. Vigil's argument fails because the prosecutor properly focused his argument on credibility and inferences drawn from the evidence showing that Vigil was guilty. In any event, Vigil cannot show that any purported "errors" in the prosecutor's argument had a substantial likelihood of affecting the verdict.

Finally, Vigil argues that cumulative error denied him a fair trial. However, as Vigil fails to show that any error occurred, much less an accumulation of errors, this claim, too, should be rejected.

This Court should reject Vigil's claims and affirm his convictions and sentence.

II. RESTATEMENT OF THE ISSUES

1. **Did the trial court properly exclude Vigil's proffered evidence as to the issue of whether J.B. consented to his acts?**

2. **Did the trial court properly exclude Vigil's proffered evidence on the issue of whether he committed his acts for sexual gratification?**

3. **If the trial court erred in excluding Vigil's proffered evidence, was any such error harmless?**

4. **Did the trial court properly enter Findings of Fact Nos. 20, 31, 33, and 34?**

5. **Did the prosecutor commit misconduct during his closing and rebuttal arguments when he argued that Vigil was not credible based on inferences from the evidence presented at trial?**

6. **Did any cumulative error deprive Vigil of his right to a fair trial?**

III. STATEMENT OF THE CASE

In his opening brief, David Vigil sets forth the factual and procedural history of this case. Appellant's Opening Brief at 3-18. The State agrees that this statement of the case accurately reflects the record. For brevity and judicial economy, the State will not unnecessarily repeat the factual and procedural history here. Any additional pertinent facts will be set forth and addressed in the argument section.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY EXCLUDED THE PRIOR SEXUAL CONDUCT EVIDENCE CONCERNING VIGIL'S VICTIM AND HER HUSBAND

Vigil claims that the trial court abused its discretion and violated his constitutional rights to present a defense, confront adverse witnesses, and to a fair trial by excluding prior sexual conduct evidence concerning the victim, J.B., and her husband, Mr. Bailey. Specifically, Vigil argues that the trial court erred by excluding evidence that J.B. had previously taken a

picture of Vigil's erect penis while he was sleeping, that J.B.'s husband had ejaculated on Vigil's face while he was sleeping, and that Vigil had awoken once to find J.B. passed out with her mouth on Vigil's penis. Vigil contends that this evidence would have demonstrated that his actions against J.B. were done with the consent of J.B., as they were committed within the boundaries of their established relationship, and that these actions were done without the purpose of sexual gratification. Appellant's Opening Brief at 19-38. Vigil's claim should be denied. The trial court properly excluded this evidence because the proffered evidence would not demonstrate that J.B. "consented" to Vigil's acts when they were committed. 10.02.2018 VRP 36. The trial court also properly excluded this proffered evidence in regard to Vigil's "sexual gratification" argument because "allowing this testimony would be touching on prior bad acts of the alleged victim which is inadmissible." 10.08.2018 VRP 7. In any event, any error in the exclusion of this evidence was harmless.

Criminal defendants have a constitutional right under both the United States Constitution and the Washington Constitution to present a defense. United States Constitution, Amendment VI; Washington Constitution, Article I, §22. That right does not, however, include the right to introduce inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). The right to defend means simply that "'[a]

defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.'" *State v. Rafay*, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012), quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

Criminal defendants also have a constitutional right to confront witnesses. United States Constitution, Amendment VI; Washington Constitution, Art. I, § 22. "The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The right of confrontation, like the right to present a defense, does not obviate the rules of evidence. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). "In keeping with the right to establish a defense and its attendant limits, 'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.'" *Id*., quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Moreover, even a defendant's right to present *relevant* evidence may be limited by compelling government purposes. *Hudlow*, 99 Wn.2d at 16.

A trial court has considerable discretion regarding the admissibility of evidence. *State v. Stumpf*, 64 Wn. App. 522, 527, 827 P.2d 294 (1992). A trial court's ruling concerning admissibility of evidence is reviewed for an abuse of discretion. *Aguirre*, 168 Wn.2d at 361. Abuse of discretion

occurs when a trial court's decision to admit or not admit evidence is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Washington's rape shield law is found at RCW 9A.44.020 (formerly codified at RCW 9.79.150(3)). It states that evidence regarding a "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" is not admissible on the issue of credibility at all and is not admissible on the issue of consent unless certain procedures are followed. RCW 9A.44.020. The rape shield statute is customarily applied to preclude evidence of prior sexual activity or misconduct of a victim. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992) (rape shield statute does not provide a basis for excluding evidence of prior sexual abuse). The Washington Supreme Court has upheld the validity of the statute against attacks that it violates a defendant's right of confrontation under the Sixth Amendment of the federal constitution and Art.1, § 22 of the state constitution. *Hudlow*, 99 Wn.2d 1.

When a defendant seeks to introduce evidence of a victim's prior sexual activity, he must comply with the procedural requirements of RCW 9A.44.020, which are: 1) filing a written motion stating he has an offer of proof of the relevancy of the past sexual behavior of the victim on the issue of consent; 2) filing affidavits with the motion in which the offer of proof shall be stated; 3) assuming the court determines that the offer of proof is sufficient, establishing the legal criteria for admission are met in a hearing on the matter; and 4) adducing the evidence at trial in a manner consistent with the court's order allowing such evidence. RCW 9A.44.020(3)(a)(b)(c) and (d).

To establish that the evidence is admissible as a matter of law, three criteria must be met: 1) it must be 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 a substantial justice to the defendant. RCW 9A.44.020(3)(d); *Hudlow*, 99 Wn.2d at 7. Failure to meet any of the factors results in inadmissibility of the proffered evidence. *Hudlow*, 99 Wn.2d at 7. If the three criteria are met, the evidence may be admissible on the issue of consent only if it otherwise meets the requirements of ER 401. *Hudlow*, 99 Wn.2d at 7-11.

1. Vigil's Proffered Evidence Was Not Admissible as to the Issue of Consent

The trial court ruled that Vigil's proffered evidence was inadmissible on the issue of whether J.B. consented to Vigil's acts:

> What is interesting in regard to the facts of this case is at no point in time is the alleged victim able to give consent. That much is clear from the facts, and I don't believe that is actually being disputed. What I am hearing is based on the alleged victim's prior contact with the defendant that somehow there was an inference of consent. Well, if we read the definition of "consent," it means "at the time of the act of sexual intercourse or sexual contact"; and at the time of the act in this case, the alleged victim was unable to give what is defined as "consent."
>
> In regard to the crimes the defendant is charged with, Counsel for the Defense says the victim or alleged victim's prior conduct is relevant to place into context the defendant's actions at the time of the alleged crimes. Well, in regards to the indecent liberties, consent is not a defense, so then the argument would have to go to the sexual gratification aspect of that crime; and in regards to the voyeurism, I believe that also requires sexual gratification, so I believe the Defense's argument is really "sexual gratification," not so much "consent."
>
> In regard to the argument, and Counsel for the Defense said it at the beginning, it's really a "what I did was because of prior conduct, doing to her what she did to me." There is error in that reasoning, and the State hit it in his arguments to this Court. Consent in the past, especially sexual consent in the past, does not make any future sexual incidents consensual between individuals.

10.2.2018 VRP 35-36.

Evidence of consensual sex with others in the past, without more, does not meet the bare relevancy requirement of ER 401. In *Hudlow*, the Court required a "particularized factual showing" of similarity between the

prior consensual sex acts and the acts in question claimed by defendant to be consensual. *Hudlow*, 99 Wn.2d at 10-11. Even if such similarity is shown, the probative value must also substantially outweigh the danger of undue prejudice. *Id*. at 11. The prejudice must be to the fact-finding process itself; i.e., the introduction of evidence of the victim's past sexual history confuses the issues, misleads the factfinder, or causes the case to be decided on an improper or emotional basis. *Id*. at 12-14. The trial court must also consider the effect exclusion of the evidence will have on a defendant's right to a fair trial. *Id*. at 14-16. The law cannot operate to exclude evidence of a highly probative value as then the defendant's constitutional right to present a defense and cross-examine witnesses must prevail. *Id*. at 16. But as the Supreme Court articulated in *Hudlow*, the assessment of whether there has been a constitutional violation is linked to the probative value of the evidence at issue and "if the evidence of prior sexual history of the complaining witnesses is not relevant under ER 401 standards, there is no problem under the Sixth Amendment or Const. art. 1, § 22." *Id*. at 16. The Court also found that the compelling state interests behind the rape shield law are sufficient to exclude minimally relevant prior sexual history evidence. *Id*. In order to show a constitutional violation, a defendant must demonstrate that the excluded evidence was of "high probative value." *Id*.

Admission of evidence of prior sexual history is within the sound discretion of the trial court. *Hudlow*, 99 Wn.2d at 17; *State v. Blum*, 17 Wn. App. 37, 46, 561 P.2d 226, review denied, 89 Wn.2d 1004 (1977). Balancing probative value against prejudice is also a matter within the trial court's discretion and the decision should be overturned only if no reasonable person could have taken the view adopted by the trial court. *Hudlow*, 99 Wn.2d at 18; *State v. Kalamarski*, 27 Wn. App. 787, 789, 620 P.2d 1017 (1980); *Blum*, 17 Wn. App. at 46.

Consent is defined as: "at the time of the act of sexual intercourse or contact, there are actual words or conduct indicating freely given agreement to have sexual intercourse or contact." RCW 9A.44.010(7). "In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless." RCW 9A.44.030(1).

"The inquiry as to the relevancy of prior sexual behavior of the complaining witness must be whether, under ER 401, the woman's consent to sexual activity in the past, without more, makes it more probable or less probable that she consented to sexual activity on this occasion." *Hudlow*,

99 Wn.2d at 10. Thus, "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." *Id*. at 11.

This examination of past sexual activity requires an all-encompassing examination of both the past sexual activity and the circumstances comprising Vigil's defense. Here, Vigil claims J.B. consented to the unconscious sexual contact as her past behavior defined the sexual boundaries of their relationship. This is not a consent defense in traditional terms. Typically, a victim claims unwanted sexual contact occurred in some form or fashion on a specific date. The defense argues it was not unwanted and was consensual on this specific date. The defense then uses past consensual sexual acts to support the theory that those (similar) acts make it more probable the victim consented to the immediate incident.

However, here, there is no question that J.B. (verbally or otherwise) did *not* consent to the acts that occurred on February 4, 2018. She was passed out. Vigil instead attempts to expand the meaning of "consent" and have it determined by what he *assumed* the sexual boundaries of the relationship to be. However, unilateral assumptions do not equate to consent.

Even assuming the truthfulness of Vigil's proffered evidence, nothing about the ejaculation incident would tend to show J.B. consented to having her vagina penetrated and photographs taken of her private areas. J.B.'s husband's actions are his alone during the ejaculation incident. The only factual similarity Vigil alleges is that J.B. had a camera. She was not the one exposing herself and Vigil was not exposed. The factual similarity to the immediate incident is tenuous at best.

Furthermore, Vigil waking up to a passed-out J.B. having her mouth on his penis does not grant him the right to at some later point in time penetrate and photograph J.B.'s vagina. It is undisputed that J.B. was passed out during this incident and therefore was not acting willfully or deliberately at this time. It is simply irrational for someone to believe that because of that, there is some "unspoken" agreement that grants all parties carte blanche to do whatever they wanted to each other.

Finally, although J.B. taking pictures of Vigil's exposed penis may be more factually similar to Vigil's crimes, when viewed through the lens of what consent *legally* is, it is unreasonable to claim that consent equates to quid pro quo. The Rape Shield law allows evidence to support a defendant's claim that the current incident is consensual based on past *consensual* acts between the parties involved. In this case, the exposed penis incident would logically *not* be consensual. Vigil chose not to report

it for whatever reason. The instant incident was also not consensual. Therefore, the defense is essentially arguing that the trial court should have admitted this evidence not to support the argument that the incident was consensual based on what was in Vigil's mind, but to support a theory that "you did it to me so I can do it to you." For Vigil to argue he could penetrate and photograph J.B.'s vagina because he assumed she was okay with it is an antiquated and old-fashioned interpretation of consent and sexuality. Vigil sought to use this excuse that he was allowed to abuse J.B. whenever he wanted to in the future.

Vigil is essentially making the argument that once he, J.B., and Bailey are drunk together, all bets are off. J.B. clearly did not consent to this incident. Any evidence surrounding any previous sexual incidents have minimal or no probative value to the fact-finding process.

In addition, even if a small portion of Vigil's proffered evidence was minimally probative, any probativeness was substantially outweighed by the potential for prejudice.

> [T]he balancing process should focus not on potential prejudice and embarrassment to the complaining witnesses, but instead should look to potential prejudice to the truthfinding process itself. Rape shield statutes such as the one before us are, by their very nature, intended to minimize the embarrassment and humiliation to the prosecuting witness by limiting the introduction of evidence of prior sexual behavior. Thus, considerations of prejudice to the victim are built into the rape shield statute and further consideration of that factor may go too far in protecting the victim at the expense of

> defendant's right to a fair trial. The prejudice to the factfinding process itself must be considered to determine whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis.

Hudlow, 99 Wn. 2d at 13-14.

Here, the admission of any of these incidents would have confused the issues and caused the factfinder to decide the case on an improper basis. For the State to prove this case beyond a reasonable doubt, it had to show that the victim was "incapable of consent by reason of being ... mentally incapacitated." Vigil's claim of consent is misplaced. He does not dispute that the victim was passed out and incapable of consent. If anything, his request to admit these past acts went to Vigil's state of mind. Anyone can claim they have a right to something when in fact they clearly do not under the law.

Furthermore, Vigil's proffered evidence had nothing to do with what J.B. consented to. Allowing this evidence would thus confuse the issues. It would be a different scenario if Vigil had previously done the same acts to J.B. with her consent. Additionally, it would be a different scenario if Vigil had evidence showing J.B. has consented to having her vagina penetrated and photographed under similar circumstances by others prior to this

incident. However, that was not the issue before the factfinder. Allowing this evidence would have misled the factfinder as to what constitutes "consent."

If the evidence is of minimal relevancy, the evidence may be excluded if the state's interest in applying the rape shield law is compelling in nature. The State's interest in applying the rape shield law is to bar evidence that may distract or inflame the factfinder if it is of arguable probative worth. *Id*. "The rape shield law bars minimally probative evidence that may distract or inflame jurors to acquit defendants on the basis of prejudice, furthers the truth-determining function of rape trials, and encourages victims to report and prosecute sex crimes, [then] it furthers compelling state interests." *Id*. at 18.

Here, Vigil testified to his version of the events that evening. What he thought J.B. would be okay with is not the same thing as actual consent. The ejaculation and oral sex incidents do not offer anything probative to J.B.'s "consent" to being undressed, penetrated, and photographed. Furthermore, the previous incident involving Vigil being photographed, even if minimally relevant, would prejudice the factfinder and confuse the issues. The trial court properly excluded the proffered evidence.

2. Vigil's Proffered Evidence Was Not Admissible as to the Issue of "Sexual Gratification"

The trial court also ruled that Vigil's proffered evidence was inadmissible as to the issue of whether Vigil committed his acts for sexual gratification:

> THE COURT: What is the defense you're claiming, now, Counsel? What is "the" defense?
>
> MR. GRAVES: He is charged with indecent liberties, and he's charged with voyeurism, and he did the volitional acts; and if he testifies, he will say that, but he did not take those photos for the purpose of sexually gratifying himself but rather because she had taken photos of him, and it was his intention to show them to her. Second, the same issue, the same element, if you will, is available -- or I'm sorry, required in the felony voyeurism. The photographs need to be taken for the sexual gratification of him, the person whose photograph is being taken or a third party. If you drop down to the misdemeanor, it's a completely different intention and ultimate outcome or result, but we're not there, so in answer to "why did you do this?"
>
> THE COURT: What's interesting in this one is I understand Defense Counsel's argument. I believe it's flawed in that the State has the burden on both charges, and there is no affirmative defense that puts the onus on the defendant to put forth the defense that he is attempting to do. So looking at the elements the State has to prove in regards to both charges and looking at the rape shield statute under RCW 9A.44.020 and the date of this incident that the defendant recollects, mid to late October of 2017, and the alleged incident that he's charged with occurred February 4, 2018, approximately four months later, taking consent out of the argument or the discussion, allowing this testimony would be touching on prior bad acts of the alleged victim which is inadmissible; so, I'm going to deny the request to reconsider my ruling prohibiting the use of this testimony in the trial.

10.08.2018 VRP at 7-8.

This issue is more straightforward than the issue regarding "consent." In essence, Vigil claims that he should have been allowed to introduce his proffered evidence to demonstrate that he did not commit his acts against J.B. for sexual gratification. Instead, as he testified, he only did them as "a joke" and he wanted to show J.B. the pictures later. VRP 373. In order to demonstrate his "real motivation" in undertaking his acts against J.B., he wanted to use J.B.'s "past sexual behavior" to bolster his own credibility. That is an improper purpose. As the trial court properly found, the rape shield statute is applied to preclude evidence of prior sexual activity or misconduct of a victim. *Markle*, 118 Wn.2d at 438.

3. Even if the Trial Court Erred in Excluding Vigil's Proffered Evidence, Any Such Error Was Harmless

Vigil claims that the trial court's exclusion of his proffered evidence violated his constitutional rights and were not harmless beyond a reasonable doubt. Appellant's Opening Brief at 35-37. In the alternative, Vigil claims that if this Court finds that the trial court's "error" was only an "erroneous evidentiary ruling" that did not rise to a constitutional violation, the abuse of discretion nonetheless warrants reversal under the prejudice standard for non-constitutional error. Appellant's Opening Brief at 37-38. The State contends that if this Court finds that the trial court erred in excluding Vigil's proffered evidence, any such error was an abuse of discretion which did not rise to the level of a constitutional violation. *See Stumpf*, 64 Wn. App. at

527 (a trial court has considerable discretion regarding the admissibility of evidence); *Aguirre*, 168 Wn.2d at 361 (a trial court's ruling concerning admissibility of evidence is reviewed for an abuse of discretion); *Hudlow*, 99 Wn.2d at 17 (admission of evidence of prior sexual history is within the sound discretion of the trial court). However, under either standard, any error in excluding this evidence was harmless.

A constitutional error is deemed harmless only if the reviewing court is convinced beyond a reasonable doubt any reasonable factfinder 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). 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).

Here, the evidence presented at trial overwhelmingly demonstrates that Vigil *himself* did not even believe that he had J.B.'s "consent" to violate her and that his actions, rather than a "joke" between friends, were done for

his sexual gratification. When J.B. woke up to Vigil violating her and taking pictures of her genitalia, he did not tell her it was a joke. Rather, he denied doing anything inappropriate, but then apologized profusely and attempted to delete the photographic evidence. VRP 137, 209. Similarly, when Bailey confronted him, Vigil again apologized and denied he committed any impropriety. VRP 224-225. Vigil also did not tell law enforcement that what he did was a joke between friends; instead, he denied committing any acts against J.B. VRP 50-52, 376.

This behavior is not consistent with a man who thought that J.B. would have consented to his actions. Rather, his behavior after getting caught demonstrated just the opposite – he apologized, denied wrongdoing, and attempted to destroy evidence of his crimes because he knew his actions were not consensual.

Similarly, his actions clearly showed that Vigil committed his crimes, at least in part, for sexual gratification. Vigil did not just take a quick picture of J.B.'s underwear through her leggings or only a photograph of her tattoo to send to a mutual friend as a joke. Rather, he waited for J.B.'s husband to leave the room before commencing a 12-minute long assault, along with taking a progression of increasingly explicit pictures of J.B.'s genitalia. VRP 431. He did not stop there – rather, he penetrated J.B.'s vagina with his fingers. VRP 142, 187, 193, 272. Vigil admitted that he

was attracted to female genitalia and his excuse that he found his good friend "disgusting" was not at all credible. VRP 373-374.

Even if the trial court had admitted Vigil's proffered evidence, the overwhelming evidence of both the lack of J.B.'s consent and his motivation for sexual gratification renders any error in excluding this evidence harmless under any standard. Vigil's claim to the contrary should be denied.

B. THE TRIAL COURT PROPERLY MADE FINDINGS OF FACT NOS. 20, 31, 33, AND 34.

Vigil claims that the trial court erred in making Findings of Fact Nos. 20, 31, 33, and 34. In doing so, Vigil concedes that this argument is "not a standalone ground[] for reversal" but is based on his previous argument that the trial court prejudicially erred by excluding "highly probative contrary prior sexual conduct evidence." Vigil admits that he makes this argument "to preempt any argument by the State that [he] has conceded any dispositive findings as true by failing to assign error pursuant to RAP 10.3(g). Appellant's Opening Brief at 38-40. Vigil's claim should be denied because these findings are supported by substantial evidence.

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). Here, Vigil challenges the

following factual findings: (20) "It was uncontroverted that this 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 the 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 circumstances, the reasonable inference from the defendant's actions is that he took the pictures for the purpose of gratifying his sexual desires."

Here, as demonstrated above, Vigil's proffered evidence was properly excluded by the trial court and substantial evidence at trial supported these findings of fact. Vigil's claim to the contrary should be rejected.

C. THE TRIAL PROSECUTOR DID NOT COMMIT MISCONDUCT IN HIS CLOSING OR REBUTTAL ARGUMENTS

Vigil claims 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." Appellant's Opening Brief at 40-47. Not so. In closing argument and rebuttal, the prosecutor properly focused his argument on credibility and inferences drawn from the evidence showing that Vigil was guilty. In any event, Vigil cannot show that any purported "errors" in the prosecutor's argument had a substantial likelihood of affecting the verdict. Vigil's claim to the contrary should be rejected.

To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 127 S. Ct. 2986 (2007). A court reviews the defendant's allegations of prosecutorial misconduct under an abuse of discretion standard. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995). Furthermore, the prosecutor's comments are reviewed "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." *State v. Bryant,* 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

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 verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant did not object at trial, the issue is waived 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 (*citing State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)). Under this heightened standard, the defendant must show that (1) "'no curative instruction would have obviated any prejudicial effect on the jury'" and (2) the misconduct resulted in prejudice that "'had a substantial likelihood of affecting the jury verdict.'" *Id*. at 761 (*quoting State v. Thorgerson,* 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

Vigil first argues that the prosecutor "spent a considerable portion of his closing and rebuttal arguments telling the jury that he believed Mr. Vigil's testimony was a lie." Appellant's Opening Brief at 42-43. However, Vigil does not identify in the record any part of the prosecutor's arguments where he stated that Vigil "lied." Rather, the prosecutor properly argued that Vigil was not credible based on the evidence presented at trial.

For example, the prosecutor stated that "You know, Mr. Vigil, on the stand, although denied placing his hands on her vagina, I would ask the Court to not find that credible." VRP 466. This argument was properly based on the evidence because J.B. testified that Vigil penetrated her vagina with her fingers. VRP 142, 187, 193, 272. The prosecutor also stated that

Vigil was "not credible" when he denied committing his crimes for sexual gratification. VRP 468-470. Here, again, the evidence admitted at trial, including the types of photographs Vigil was taking, the time it took to take these photographs, and his admitted attraction to that area of a female's anatomy, properly allowed the prosecutor to challenge Vigil's credibility. In any event, even if the prosecutor had called Vigil a "liar," "[a] prosecutor may argue that a witness lied, if the prosecutor is drawing a conclusion from other evidence that contradicts the witness' or defendant's testimony." *State v. McKenzie,* 157 Wn. 2d 44, 59, 134 P. 3d 221 (2006). Here, when read in context, the prosecutor did just that.

Vigil next argues that the prosecutor's "misconduct was compounded" when on rebuttal 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). Vigil claims that the prosecutor is improperly expressing his personal opinion in this argument. Appellant's Opening Brief at 43-44.

"It is improper for a prosecutor personally to vouch for the credibility of a witness. … Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." *State v. Brett*, 126 Wn.2d at 175 (internal quotation marks omitted) (*quoting State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). "[P]rosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another. The same rule has been applied as to credibility of a defendant." *State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996) (citation omitted). "[P]rejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence but is expressing a personal opinion." *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990); *see also Brett*, 126 Wn.2d at 175.

Here again, in context, the prosecutor was arguing inferences from the evidence, i.e., that the evidence presented at trial showed that Vigil not only touched J.B.'s vagina, but he penetrated her with his fingers, and that the types of pictures he took, the time he took to take them, his admitted attraction to female genitalia, and his attempt to cover up what he did by hiding these pictures from J.B. and her husband demonstrated that he took these picture for sexual gratification. This argument was proper.

Here, the prosecutor's argument was proper. Moreover, Vigil waived any claim of prosecutorial misconduct by failing to lodge an objection at trial. As Vigil has not met his burden to show that the prosecutor's argument was so flagrant and ill-intentioned that any potential prejudice could not be rectified by a curative instruction and that the misconduct resulted in prejudice that "had a substantial likelihood of affecting the []verdict," he is barred from asserting this argument for the first time on appeal. For these reasons, Vigil's claim should be denied.

D. VIGIL IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE AS HE CANNOT SHOW THAT ANY PREJUDICIAL ERROR OCCURRED, LET ALONE AN ACCUMULATION OF SUCH ERRORS

Vigil claims that cumulative error denied him a fair trial. Appellant's Opening Brief at 47. No so. Vigil fails to show that any error occurred, much less an accumulation of errors which deprived him of a fair trial. His claim to the contrary should be denied.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might not have been prejudicial, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281

(1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998) ("although none of the errors discussed above alone mandate reversal….").

The test for whether cumulative errors require reversal of a defendant's conviction is whether the totality of the circumstances substantially prejudiced the defendant, depriving him of a fair trial. *In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory,* 192 Wn.2d 1, 427 P.3d 621 (2018). The defendant bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial. *Id*. The cumulative error doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

Reversals for cumulative error are reserved for egregious circumstances when a defendant is truly denied a fair trial, either because of the enormity of the errors, (*see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of

accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts as to cumulative error), because the errors centered around a key issue, (*see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of State witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case)), or because the same conduct was repeated, some so many times that a curative instruction lost all effect (*see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions)). The defendant bears the burden of proving an accumulation of errors of such magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).

As Vigil has failed to show actual and substantial prejudice that denied him the right to a fair trial, he is not entitled to relief under the cumulative error doctrine. This court should reject Vigil's claim.

V. CONCLUSION

For the aforementioned reasons, the State respectfully requests that this Court deny Vigil's claims and affirm his convictions and sentence.

RESPECTFULLY SUBMITTED this 24th day of August, 2020.

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8-24-20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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