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No. 36359-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

GORDON J. ENNIS,

Appellant.

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

The Honorable James M. Triplet
The Honorable Maryann C. Moreno

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Gordon J. Ennis accepts this opportunity to reply to the State's brief. Mr. Ennis requests that the Court refer to his opening brief for issues not addressed in this reply.

B. COUNTERSTATEMENT OF THE FACTS

Mr. Ennis offers the following counterstatement of the case, in response to the State's comments on the evidence. (State's Brief, pgs. 2-17).

The State noted K.S. was sending flirtatious messages to Mr. Rassier on the night of the incidence, characterizing him as K.S.'s "boyfriend." (State's Brief, pg. 4). However, K.S. indicated she and Mr. Rassier were "somewhat seeing each other, nothing exclusively, though." (1RP 837-838)[1].

The State also indicates that after everyone exited the hot tub, Ms. Roseland testified Mr. Ennis saw K.S. naked in the living room. (State's Brief, pg. 5 at n. 12). However, Ms. Roseland does not affirmatively state Mr. Ennis saw K.S. naked, only that he may have had the opportunity to observe K.S. naked from where he happened to be standing. (1RP 1066). Notably, when Ms. Roseland was asked whether she saw K.S. dance in front of Mr. Ennis, she testified it was not directed "at anyone particular." (1RP 1105). Then Ms. Roseland denied having seen K.S. dance in front of Mr. Ennis. (1RP 1105). The video shows K.S. dancing only in front of Mr. Ennis and only giving Mr. Ennis a hug afterward. (State's Exhibit P-33).

[1] "1RP" was transcribed by Terri Cochran, containing the trial and other motions on these dates: 2/7/18, 2/20/18, 2/22/18, 2/26/18, 2/27/28, 3/1/18, 3/5/18, 3/6/18, 3/7/18, 5/11/18, 6/4/18, 6/27/18, 7/13/18, 8/10/18, 8/16/18, and 8/24/18.

C. ARGUMENT IN REPLY

Issue 1: Whether the trial court erred when it instructed the jury that K.S.'s testimony need not be corroborated in order to find Mr. Ennis guilty of second degree rape, because: (a) the jury instructions were misleading and interfered with Mr. Ennis's constitutional right to present a defense; (b) the giving of the instruction was an improper court comment on the evidence and precedent should be overruled for being incorrect and harmful.

a. Whether the jury instructions were misleading and interfered with Mr. Ennis's constitutional right to present a defense.

This argument pertains to Issue 1(a), raised in Mr. Ennis's opening brief. (Appellant's Brief, pgs. 45-54).

The State asserts Mr. Ennis cannot claim error that the noncorroboration instruction was erroneously given in combination with the reasonable belief instruction, claiming the error was not preserved for review. (State's Brief, pgs. 17-21). However, the State skirts the issue.

Mr. Ennis asserted his constitutional right to present a defense was violated when the noncorroboration instruction was given in conjunction with the reasonable belief instruction. (Appellant's Brief, pgs. 50-54). Constitutional errors "are treated specially because they often result in serious injustice to the accused." *State v. Kronich*, 160 Wn.2d 893, 889, 161 P.3d 982 (2007), *overruled on other grounds*, *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). Here, a manifest error affecting a constitutional right—the right to present a defense—is an error that is reviewable on appeal because it interferes with Mr. Ennis's right to present his defense and theory of the case. *State v. O'Hara*, 167 Wn.2d 91, 107, 217 P.3d 756 (2009) (citing *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996) (reversed because self-defense jury instruction was

misleading and deprived defendant of his ability to argue his theory of the case). As acknowledged by the State, the error here is constitutional. *Id*.

The State claims the trial court could not have recognized that using the noncorroboration and reasonable belief instructions together worked to deprive Mr. Ennis of his constitutional right to present a defense, nor was it an improper judicial comment on the evidence. (State's Brief, pgs. 18-19). But the error is "manifest" in that it has "practical and identifiable consequences in the trial of the case." *Kronich*, 160 Wn.2d at 899 (citation omitted). The trial court should have known the misgivings several courts have expressed over the giving of the noncorroboration instruction, as the comments to WPIC 45.02 specifically recommend against giving such an instruction. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 45.02 (4th Ed. 2016). The cautionary language under the comments to WPIC 45.02 alone should have been enough to preclude the giving of such an instruction, and it is completely foreseeable the noncorroboration instruction would interfere with a reasonable belief instruction in such a way – procedurally, substantively, practically and structurally - as to deprive a defendant of presenting his theory of the case. (Appellant's Brief, pgs. 45-54). The error had practical and identifiable consequences at trial.

More recently, this Court also has expressed its misgivings over the noncorroboration instruction. *State v. Steenhard*, 2019 WL 3302416, at *7-9, 11-12 (Wn. Ct. App. Jul. 23, 2019); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). While this Court found the noncorroboration instruction was a correct statement of the law, it also found the instruction's use contributed to the prejudice suffered by the defendant.

Id. at *11-12. This Court stated the noncorroboration instruction "suggested to the jury" that the alleged victims' testimony, and not the defendant's testimony, "could prevail without verification from another witness." *Id*. at *11. This Court reversed due to a manifest error affecting a constitutional right, finding the use of the noncorroboration instruction contributed to actual prejudice. *Id*.

Here, the instructional errors deprived Mr. Ennis of his right to present his theory of the case and his constitutional right to present a defense. The giving of the noncorroboration instruction was a manifest error affecting a constitutional right and the error was not harmless. RAP 2.5(a); (Appellant's Brief, pgs. 45-63).

The State further urges this Court to apply the abuse of discretion standard as some of the jury instruction issues were raised on a motion for a new trial. (State's Brief, pgs. 19-21). The State cites no supporting authority for its proposition the defendant's issues must be reviewed under an abuse of discretion standard merely because some of the issues were raised below. (State's Brief, pgs. 19-21). Moreover, some of the issues were not raised in Mr. Ennis's motion for new trial, and thus the abuse of discretion standard would not apply. (CP 410-429).

The State claims Mr. Ennis ignores case law establishing jury instructions are to be read as a whole when he asserts the combination of the noncorroboration instruction and reasonable belief instruction was misleading and interfered with the right to present a defense. (State's Brief, pgs. 22-24). Yet Mr. Ennis is asking this Court to consider those instructions as a whole—not separately. (Appellant's Brief, pg. 52). The effect of reading the instructions together creates the assigned error: the chilling effect on Mr. Ennis's right to present a defense, denuding the burden of proof and muddling the

instructional law that Mr. Ennis doesn't have to prove beyond a reasonable doubt that K.S. was or was not incapacitated – only that he believed that she was not incapacitated by a preponderance of evidence. (Appellant's Brief, pgs. 45-54).

The State claims the instructions were not confusing. (State's Brief, pg. 24). It correctly asserts the jury needed only to find K.S.'s uncorroborated testimony credible beyond a reasonable doubt to find guilt. (State's Brief, pg. 24). Yet the State ignores the strong reservations appellate courts have had over the noncorroboration instruction, and this Court's recent decision wherein it was determined the use of the noncorroboration instruction contributed to a finding of actual prejudice. *Steenhard*, 2019 WL 3302416, at *11; (Appellant's Brief, pgs. 45-54).

b. Whether the jury instructions were misleading and interfered with Mr. Ennis's constitutional right to present a defense.

This argument pertains to Issue 1(b), raised in Mr. Ennis's opening brief. (Appellant's Brief, pgs. 54-63).

Judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). The constitutional prohibition on judicial comments on the evidence is strictly applied. *Seattle v. Arensmeyer*, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971).

The State criticizes Mr. Ennis for asking this Court to overrule precedent finding the noncorroboration instruction is not an impermissible comment on the evidence. (State's Brief, pg. 25). Yet this Court recently also expressed its misgivings about using the noncorroboration instruction, finding the instruction's use contributed to prejudice suffered by the appellant. *Steenhard*, 2019 WL 3302416, at 11-12 (Wn. Ct. App. Jul. 23, 2019). Appellate courts are permitted to reconsider its precedent when a party so

requests. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). While the decision is not taken lightly, the Court reviews precedent based upon whether it must be rejected because it is so problematic despite the benefits of adhering to precedent. *Id*. Moreover, Mr. Ennis is required to exhaust his remedies and request this Court overrule prior opinions approving of the use of the noncorroboration instruction in order to preserve error for review in the Washington State Supreme Court. RAP 13.4(a) & (b).

At this point, all three appellate divisions have recognized misgivings about employing a noncorroboration instruction, and the Washington Supreme Court Committee on jury instructions already recommends against giving the instruction. *State v. Chenoweth*, 188 Wn. App. 521, 535-538, 354 P.3d 13 (2015) (Division One); *State v. Zimmerman*, 130 Wn. App. 170, 180-183, 121 P.3d 1216 (2005) (Division Two); *State v. Steenhard*, 2019 WL 3302416, at *8-9 (Wn. Ct. App. Jul. 23, 2019) (Division Three); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 45.02 (4th Ed. 2016). In 2003, the Indiana Supreme Court overruled its "substantial history of appellate approval" and finding the giving of a noncorroboration instruction was error. *Ludy v. State*, 784 N.E.2d 459, 462 (Ind., 2003). In 2015 the Florida Supreme Court found the noncorroboration instruction to be an improper comment on the evidence. *Gutierrez v. State*, 177 So.3d 226, 231-232 (Fla. 2015). Other jurisdictions also found error when a noncorroboration instruction was given to the jury. *Veteto v. State*, 8 S.W.3d 805, 816-17 (Tex. App. 2008), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008) ("[E]ven though the legislature provides for convictions based on uncorroborated evidence, a charge based on that evidence is an improper comment on the weight of the evidence"). Substantial precedential value can be recognized by this Court, not only because of

Washington appellate courts' hesitancy to support a noncorroboration instruction, but also because of other jurisdictions' holdings.

It should also be recognized that the noncorroboration instruction approved in 1949 by the Washington State Supreme Court in *State v. Clayton* contained a qualifier in that the burden of proof—beyond a reasonable doubt—was included in the instruction:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

State v. Clayton, 32 Wn.2d 571, 572, 202 P.2d 922 (1949) (quotations omitted). In contrast, here in Mr. Ennis's case, the noncorroboration instruction did not emphasize the burden of proof of beyond a reasonable doubt. (CP 324). The additional qualifying language in *Clayton* distinguishes the language used in Mr. Ennis's case, as in Mr. Ennis's case the burden of proof of beyond a reasonable doubt was not presented with the noncorroboration instruction—it was in a separate instruction. *Clayton*, 32 Wn.2d at 572; (CP 319, 321, 324).

Finally, the State argues that even if the trial court erred by issuing a noncorroboration instruction, such error was harmless as an appellate court could conclude the jury verdict would have been the same absent the error. (State's Brief, pgs. 29-30). Mr. Ennis respectfully disagrees. As set forth in Mr. Ennis's opening brief, there were multiple reasons why a juror could find his testimony was credible. (Appellant's Brief, pgs. 61-63, 77-78, 84-85, 91, 94-95, 111-112, 119-120). Even at the point where K.S. was allegedly the most intoxicated she was able to make the decision not to ride

home in Ms. Roseland's car. (1RP 596, 733). Hours later, but minutes before the alleged incident, Mr. Ennis, and Mr. and Mrs. Strosahl all testified K.S. was not cognitively impaired, was interacting with others, and walking around. (1RP 663-665, 667-668, 1332-1334, 1422-1426). To Mr. Strosahl, K.S. appeared to know what she was doing. (1RP 1334). And when K.S. hugged Mr. Ennis in the kitchen, it appeared to Mrs. Strosahl, K.S's behavior seemed "flirty" and inappropriate because she knew Mr. Ennis was a married man. (1RP 665, 668).

Mr. Ennis was not the only person to observe K.S. walk into the kitchen and put her arms around him somewhere around 2:30 a.m. in the morning. (1RP 663-665, 667-668, 1332-1334, 1422-1426). K.S. interacted with Mr. and Mrs. Strosahl as well as Mr. Ennis at that point, and no witnesses testified K.S. appeared unaware of her surroundings or incapacitated. (1RP 663-665, 667-668, 1332-1334, 1422-1426). K.S. was the only one who stated she could not recall what was happening at that point. (1RP 922-923). K.S. also was able to phone Mr. Rassier immediately after the alleged incident, indicating she was not unconscious. (1RP 858, 861-862). K.S. also testified she did not remember dancing in front of Mr. Ennis earlier in the evening, but the footage reveals K.S. was in control of her faculties. (State's Exhibit P-33).

The State additionally asserts K.S.'s "objective and obvious manifestations" of intoxication throughout the night were enough for the jury to determine she was mentally incapacitated or physically helpless. (State's Brief, pg. 30). Yet the State ignores the other evidence presented at trial from Mr. Ennis and Mr. and Mrs. Strosahl that K.S. was not incapacitated minutes before the sexual contact occurred. (1RP 663-665, 667-668, 1332-1334, 1422-1426). Mr. Ennis never denied having sexual contact with K.S.; he

testified the contact was initiated by K.S. (Appellant's Brief, pgs. 34-36). Mr. Ennis's testimony was interpreted as a confession by alternate Juror No. 37, and it can be reasonably interpreted that this was the view held by other members of the panel as well. This is why the issue of credibility was so important in Mr. Ennis receiving a fair trial.

While K.S. may not remember or claims not to remember, it appeared to three others she was aware of her surroundings and could communicate with others, including earlier in the evening when she made the decision not to ride home in Ms. Roseland's car since she thought she might vomit. (1RP 596, 730-731, 733). Given these events, Mr. Ennis could have reasonably believed K.S. was not incapacitated at the time she initiated intimate contact—since she appeared to him and others not to be incapacitated. As addressed in Mr. Ennis's opening brief, a reasonable belief K.S. was not incapacitated is a defense to second degree rape[2]. (Appellant's Brief, pgs. 46, 51-52). A jury could have found Mr. Ennis' belief to be reasonable had it been properly instructed without the noncorroboration instruction. (CP 324-325). The noncorroboration instruction unfairly highlighted one witness's testimony above all others.

The evidence was not so overwhelming that this Court could conclude the verdict would have been the same beyond a reasonable doubt absent the error. *State v. Clark-El*, 196 Wn. App. 614, 620, 384 P.3d 627 (2016). The noncorroboration instruction was an improper judicial comment on the evidence, and it should never again be given to a jury. (Appellant's Brief, pgs. 54-63); *State v. Chenoweth*, 188 Wn. App. 521, 535-538, 354

[2] Mr. Ennis notes he raised the issue of ineffective assistance of counsel for the way his trial counsel, Mr. Cossey, effectively detracted from the reasonable belief defense during closing argument and also did not appear to understand the defense. (Appellant's Brief, pgs. 107-112). The cumulative effect of Mr. Cossey's ineffectiveness combined with the other errors in the trial deprived Mr. Ennis of a fair trial. (Appellant's Brief, pgs. 118-121).

P.3d 13 (2015) (Division One); *State v. Zimmerman*, 130 Wn. App. 170, 180-183, 121 P.3d 1216 (2005) (Division Two); *State v. Steenhard*, 2019 WL 3302416, at *8-9 (Wn. Ct. App. Jul. 23, 2019) (Division Three); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 45.02 (4th Ed. 2016); *Ludy v. State*, 784 N.E.2d 459, 462 (Ind., 2003); *Gutierrez v. State*, 177 So.3d 226, 231-232 (Fla. 2015); *Veteto v. State*, 8 S.W.3d 805, 816-17 (Tex. App. 2008), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008).

The case should be reversed and remanded for a new trial without the use of the noncorroboration instruction.

Issue 2: Whether reversal and remand is required when the State committed misconduct by (a) eliciting improper testimony regarding defendant's constitutional right to silence and commenting on the defendant's constitutional right to silence in closing argument; (b) vouching for the credibility of the victim several times during closing argument; (c) impugning the integrity of defense counsel, commenting on the evidence, and expressing a personal opinion as to the defendant's guilt; (d) violating a motion in limine; (e) arguing impeachment evidence as substantive evidence; and (f) causing cumulative error due to the multiple instances of misconduct.

This argument pertains to Issues 2(a)-(f), raised in Mr. Ennis's opening brief. (Appellant's Brief, pgs. 63-96).

a. The State's comments on silence.

The State claims the correct standard of review is abuse of discretion. (State's Brief, pg. 31). Because Mr. Ennis raised the issues under the prosecutorial misconduct standard of review, the State's errs in its assertion that abuse of discretion applies. (Appellant's Brief, pgs. 63-78). Moreover, Mr. Ennis raises Detective Armstrong's statements for the first time on appeal in his opening brief, and thus abuse of discretion could not apply to that issue. (Appellant's Brief, pgs. 63-78; CP 410-463).

The State claims Mr. Ennis opened the door to comments on his prearrest silence when he testified he offered to clip his fingernails. (State's Brief, pgs. 37-39). While Mr. Ennis does not dispute the State was entitled to attempt rebuttal of his statement, the State is mistaken in asserting his testimony opened the door to comments on his constitutional right to silence. (State's Brief, pgs. 37-39). First, the State did rebut Mr. Ennis's testimony. (1RP 1472). Detective Armstrong indicated he did not remember Mr. Ennis making the statement about offering to clip his fingernails. (1RP 1472). The State went too far, however, when it used *Miranda* language to ask if Mr. Ennis had "remained silent" during the DNA collection meeting. (1RP 1472). The "open door" tenet does not allow limitless questioning about all topics related to a line of questioning. *See State v. Gefeller*, 76 Wn.2d, 449, 455, 458 P.2d 17 (1969). The general rule is "when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, *within the scope* of the examination in which the subject matter was first introduced." *Id.* (citations omitted) (emphasis added). But there are limits on the "open door" rule. For example, "a passing reference to a prohibited topic during direct does not open the door for cross-examination about prior misconduct." *State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). Here, the fact that Mr. Ennis said he offered to clip his fingernails did not allow the State carte blanche to question Detective Armstrong about Mr. Ennis's decision to remain silent, nor comment five separate times on his silence throughout its closing argument. (1RP 1472, 1496, 1497, 1499, 1500, 1510; Appellant's Brief, pgs. 74-75). Moreover, the State rebutted Mr. Ennis's testimony when Detective Armstrong testified he did not remember Mr. Ennis offering to clip his fingernails. (1RP 1472). The

State went too far and improperly commented on Mr. Ennis's silence. (Appellant's Brief, pgs. 63-78).

The State also claims its five statements concerning Mr. Ennis's silence during closing argument were not improper because they were directed at the defendant's credibility while testifying, explained to the jury the court's instructions relating to credibility determinations, and emphasized the defendant's actions prior to trial. (State's Brief, pgs. 41-43). But the five statements during closing argument only emphasized Mr. Ennis's silence. The first statement pointed out Mr. Ennis spoke for the "first time" at trial and then when on to state Mr. Ennis was not "presumed credible." (1RP 1496); (State's Brief, pg. 39). This first statement infers Mr. Ennis is not telling the truth because it is the first time he has spoken publicly about the incident. (1RP 1496). The second statement focuses in on this theme of silence, specifically pointing out the "timing" of the statement. (1RP 1497). The only explanation for the State's emphasis on the timing of his statement is to point out the defendant has not spoken about the incident until trial—a direct reference to his silence. (1RP 1497). The third statement does the exact same thing when the prosecutor stated "[y]ou can look at the *timing* of the statements in this case…." (1RP 1499). There is no other reasonable explanation for focusing on the "timing" of Mr. Ennis's statements other than to make him look guilty because he has remained silent prior to the moment of trial. In the fourth statement, the State does it again by pointing out the defendant "spoke to you the other day after having two years and four months and access to his reports and being seated in the courtroom throughout this…." (1RP 1500). The timing of Mr. Ennis's statements is once again emphasized. (1RP 1500). And finally, the fifth statement, wherein the State argued that

the DNA evidence "took away some options from the defendant as to what he would testify to" and "the defendant's actions prior to taking the stand need to be considered and not ignored." (1RP 1510). The State's justifications for the constant references to the timing of Mr. Ennis's statements cannot be reconciled. They were planned and consistent with their opening statement that as jurors you only need to believe K.S. to convict. (1RP 563). The State's specific statement at the close of its opening statement was "If you find [K.S.] credible, that will be enough to find guilty in this case." (1RP 563). No one is saying the State cannot attempt to impeach a witness or argue about the credibility of a witness, but the arguments here were unacceptable because they emphasized Mr. Ennis's prior silence. The unfairness of emphasizing silence has been extensively briefed. (Appellant's Brief, pgs. 63-81); *see also State v. Holmes*, 122 Wn. App. 438, 443, 93 P.3d 212 (2004).

In *Holmes*, a detective testified the defendant appeared surprised when arrested, and the State emphasized that factor during closing argument. *Id*. at 441-443. The *Holmes* court found this was constitutional error as these were improper comments on the defendant's silence. *Id*. at 446. The court noted it is fundamentally unfair to allow silence to be used to "impeach an exculpatory explanation offered by that person at trial… and it is 'highly prejudicial' for the State to suggest in this manner that silence casts doubt on the defendant's credibility." *Id*. at 443 (citations omitted). The State in *Holmes* argued the defense opened the door to the comments on silence because the detective agreed the defendant was cooperative when arrested. *Id*. 443. But the court rejected this argument, noting the detective's comments did not contradict the defendant's exculpatory portrayal of himself as cooperative. *Id*. at 444. And though

defense counsel attempted to neutralize the detective's comments during questioning, the court found the "lingering suggestion was powerful: [that the defendant] knew he was guilty, and for that reason was not surprised to be confronted with the charges." *Id*. at 447. The court found the error was not harmless and reversed, noting the case was based on credibility determinations which "cannot be duplicated by a review of the written record…." *Id*. at 447 (citation & quotations omitted).

Here, the State during closing argument emphasized Mr. Ennis's silence and the timing of that silence as a means of degrading his credibility. (State's Brief, pgs. 41-43). The door was not opened as to Mr. Ennis's silence. *See Stockton*, 91 Wn. App. at 40. Mr. Ennis was merely illustrating he was being cooperative by offering to cut his nails, and his cooperation during the meeting was recognized by the State. (1RP 1467). Detective Armstrong's comment that Mr. Ennis was silent throughout the DNA collection meeting was an improper comment on his silence, and combined with the five references to the silence's timing during closing argument was constitutional error. *Holmes*, 122 Wn. App. 445-447; (Appellant's Brief, pgs. 63-78). The constant references to Mr. Ennis's silence during closing argument were flagrant and ill-intentioned, especially given the State recognized it was not supposed to raise the issue of silence at trial. (1RP 1465-1467). *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (setting forth the standard). This was not accidental or inadvertent.

The constitutional error is not harmless as this court cannot be convinced beyond a reasonable doubt a jury would reach the same result absent the error. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The entire case was based upon credibility determinations. (Appellant's Brief, pgs. 77-78, 84-86, 103, 119-120). According to the

testimony of three people, K.S. was conscious and interactive minutes before the alleged incident. (1RP 663-665, 667-668, 1332-1334, 1422-1426). Mr. Ennis testified K.S. initiated the romantic and sexual contact. (Appellant's Brief, pgs. 34-36). No one witnessed the incident other than K.S. and Mr. Ennis, making this one officer's word over another officer's word. (Appellant's Brief, pgs. 25, 34-36). The evidence not so overwhelming this Court can be convinced beyond a reasonable doubt the verdict would have been the same absent this constitutional error. Mr. Ennis's right to a fair trial was prejudiced and the State's conduct had a substantial likelihood of affecting the jury verdict. A curative instruction would not have obviated the prejudice. *See Holmes*, 122 Wn. App. at 446-447 (noting the juxtaposition of defense counsel gambling on whether requesting a curative instruction due to an improper comment on silence would do more harm than good). The case must be reversed and remanded for a new trial.

Finally, the State also claims Mr. Cossey was not ineffective for failure to object at trial to the State's comments on Mr. Ennis's silence. (State's Brief, pgs. 43-44). The State claims tactical reasons prevented Mr. Cossey from objecting; but the State found ways to comment on Mr. Ennis's silence no less than six times: eliciting rebuttal testimony from Detective Armstrong, and the five additional comments during closing argument. The decision not to object was not tactical. (Appellant's Brief, pg. 118).

b. The State committed misconduct by impugning defense counsel, commenting on the evidence, and expressing an opinion as to the defendant's guilt during testimony.

The State admits the prosecutor's unsolicited comment was improper, but denies it impugned defense counsel. (State's Brief, pgs. 49-50). The State claims the statement "makes no suggestion that defense counsel was engaging in 'sleight of hand,' or

subversive tactics, and did not otherwise impugn defense counsel." (State's Brief, pgs. 49-50). But the State's suggestion that Mr. Cossey would "clean up" Ms. Beaver's testimony later does suggest sleight of hand, subversive tactics, and an attempt to pull the wool over the jury's eyes. (1RP 1361; Appellant's Brief, pgs. 86-91). The State also claims that even if the statement impugned defense counsel, there was no reason why a curative instruction would not have cured the error. (State's Brief, pg. 50). However, defense counsel did object, and there is no requirement that defense counsel also request a curative instruction in order to preserve the error and show reversible prejudice on appeal. *State v. Dhaliwal*, 79 P.3d 432, 442, 150 Wn.2d 559 (2003) (recognizing higher standard of prejudice is required where trial counsel did not object *or* request a curative instruction). The State provides no authority for the proposition that an objection alone does not preserve the error for appeal. (State's Brief, pg. 50).

The State further concedes the prosecutor improperly commented on Ms. Beaver's credibility when it made the comment about her testimony. (1RP 1361; State's Brief, pg. 50). However, the State mistakenly downplays the importance of Ms. Beaver's testimony and claims her testimony was not central to the case nor was her credibility important. (State's Brief, pg. 50-51). Ms. Beaver testified she observed K.S. seeking persistent physical touch with Mr. Ennis while the party-goers were playing a game in the living room. (1RP 1356-1357). Specifically, she testified she saw Mr. Ennis sitting in a chair while the game was being played:

> [COSSEY]: … Where were you sitting during the game?
> [BEAVER]: Um, I was sitting on the loveseat pretty much almost across from that.
> …
> [COSSEY]: Okay. At that time did you see any more interaction between [K.S.] and Mr. Ennis?

> [BEAVER]: Yes.
> [COSSEY]: What did you see?
> [BEAVER]: I saw [K.S.] sitting down beside Gordon, *and she had her arms kind of up on his legs and she was leaning in on him*.
> [COSSEY]: Okay. And that was during the game or after the game?
> [BEAVER]: That was during the game.
> [COSSEY]: And what did you observe Mr. Ennis do?
> [BEAVER]: *I observed Mr. Ennis move his legs away, and then [K.S.] just kind of moved closer and continued to put her legs on him*.
> [COSSEY]: And how long was that interaction for?
> [BEAVER]: *Mm, pretty much the whole time we played the game*…. And then shortly after that [K.S.] started dancing… kind of in front of Mr. Ennis.
> [COSSEY]: Was that a dance for everybody?
> [BEAVER]: *It didn't seem to be*.

(1RP 1356-1357) (emphasis added). Ms. Beaver testified that K.S. then danced in front of Mr. Ennis again, later, a second time. (1RP 1357). Ms. Beaver's testimony that K.S. was seeking physical contact with Mr. Ennis is not unimportant testimony as the substance of her testimony could lead a juror to many different conclusions: that K.S. was seeking out Mr. Ennis's attention, that Mr. Ennis reasonably believed K.S. was attracted to him and wanted physical contact, and finally that K.S. was making subtle advances towards Mr. Ennis which later gave Mr. Ennis the reasonable belief she was not incapacitated but was pursuing him. (1RP 1356-1357). This testimony was important to the defense and it should not be discounted.

The State also claims its use of the word "assault" when questioning K.S. and responding to defense counsel's objection was not improper. (State's Brief, pgs. 51-57). The problem is that the State was expressing, each time it asked the question and when it responded to defense counsel's objection, that an assault had in fact occurred. (Appellant's Brief, pgs. 89-90). "Assault" is a legal term of art. In general, the common law recognizes assault as an intentional touching of another person that is harmful or

offensive. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (4th Ed. 2016); *see State v. Smith*¸ 159 Wn.2d 778, 154 P.3d 873 (2007). Touching is offensive if the touching would offend an ordinary person who is not unduly sensitive. WPIC 35.50. "An act is not assault, if it is done with the consent of the person alleged to be assaulted." WPIC 35.50. Thus every time the State asked K.S. about being assaulted or sexually assaulted, the State was expressing a legal conclusion and its personal opinion on the defendant's guilt. (1RP 862, 866, 867, 869, 877, 879-880, 933-934). The State was not asking whether K.S. was assaulted, it was telling the jury K.S. was assaulted—directing and legally concluding that the contact was an unwanted assault. (1RP 862, 866, 867, 869, 877, 879-880, 933-934). Because whether the sexual contact between K.S. and Mr. Ennis was consensual (or reasonably believed to be consensual because Mr. Ennis reasonably believed K.S. was not incapacitated) was the issue at the heart of the case. The State's constant hammering away at and misuse of the language was misconduct. Defense counsel was also ineffective for not objecting earlier. (Appellant's Brief, pgs. 96-97, 118).

The most egregious portion of the State's conduct and misuse of the terms "assault" and "sexual assault" was when Mr. Cossey finally objected to the inappropriate behavior. (1RP 933-934). The State's response was a direct conclusion as to the defendant's guilt: "Your Honor, *I'm stating the fact that there was an assault where fingers were placed inside this woman's vagina*." (1RP 934). The State told the jury the contact was unwanted and expressed a personal belief as to the defendant's guilt by legally concluding Mr. Ennis was committing an assault or sexual assault. (1RP 934). It makes no difference whether K.S. used the term "assault" prior to the State's rampant use

of the word because the State's misconduct occurred when its questions were direct expressions of the State's personal opinion of the defendant's guilt. *State v. Reed*, 102 Wn.2d 140, 145-146, 684 P.2d 699 (1984) (prosecutor improperly asserted personal belief in the accused's guilt by concluding the accused "was clearly a murder two") (quotations omitted). Here, the State stated a crime had occurred—an assault—thereby directly expressing its personal opinion as to the defendant's guilt. The State did this repeatedly during questioning and unnecessarily made the statements upon Mr. Cossey's objection to the flagrant and ill-intentioned conduct. (1RP 862, 866, 867, 869, 877, 879-880, 933-934). This conduct was intentional and prejudiced Mr. Ennis's right to a fair trial.

When trial counsel does object to improper statements, the appellant must show the statements caused prejudice—that a there was a "substantial likelihood that the prosecutor's statements affect the jury's verdict." *State v. Lindsay*, 180 Wn.2d 423, 440, 326 P.3d 125 (2014) (citation omitted). Here, the prosecutor's improper conduct was pervasive and there is a substantial likelihood it affected the verdict. The State made defense counsel look like he was hiding something, commented on the credibility of Ms. Beaver--a witness who was testifying for the defense and testified as to K.S.'s attempts at physical contact with Mr. Ennis, and the State proceeded to express a personal opinion as to Mr. Ennis's guilt ten times while questioning K.S. and responding to Mr. Cossey's objection. (1RP 862, 866, 867, 869, 877, 879-880, 933-934). This was all done in front of the jury. The improper conduct was substantially likely to affect the verdict. The case must be remanded for a new trial.

Issue 3: Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel because: (a) counsel was not free from conflict and the representation adversely affected his client; (b) counsel failed to request a change of venue despite successfully moving for mistrial; (c) counsel dismissed and failed to advance a legally valid reasonable belief defense to the charge of second degree rape by incapacitation; (d) counsel failed to present exculpatory evidence through testimony of Ms. Beaver and Ms. Weese; (e) and counsel failed to object to the majority of the State's misconduct.

This argument pertains to Issues 3(a)-(e), raised in Mr. Ennis's opening brief. (Appellant's Brief, pgs. 96-118).

a. Counsel was not free from conflict and the representation adversely affected his client.

The State asserts that "other suspect" evidence would not have assisted Mr. Ennis in his defense. (State's Brief, pgs. 64-73). Mr. Ennis disagrees, and the State cannot presume what competent counsel would have done with the information.

For example, perhaps trial counsel would have presented a different theory, one that involved questions of promiscuity on the part of K.S. As distasteful as this argument may seem to the State, it is possible a victim could be sexually promiscuous, and that possibility is something that cannot be explored when defense counsel withholds such information from use.

The State's arguments also ignore the fact that Mr. Ennis told Mr. Cossey he believed or reasonably believed the sexual contact with K.S. was consensual from the beginning of his conversations with Mr. Cossey. (CP 1382 at line 565). "At the beginning it was established that it was consensual…." (CP 1379 at line 428-429). The State still attempts to make Mr. Ennis look as though he came up with this story and that Mr. Ennis was "forced . . . to abandon any claim that he and K.S. did not have sexual contact." (State's Brief, pg. 71).

b. Counsel failed to request a change of venue despite successfully moving for mistrial.

The State asserts Mr. Cossey never moved for cause to remove any of the empaneled jurors (including alternates). (State's Brief, pg. 76). However, Mr. Cossey unsuccessfully moved for cause to remove Juror No. 37, who had read extensively about the case. (1RP 224-227). This same juror became the first alternate juror on the panel. (CP 305; 1RP 534). Juror No. 37 also wrote to the judge after the verdict. (CP 1058). The following excerpts from her letter demonstrate her bias:

> *I listened to Mr. Ennis, on the stand, under oath and confess to the crime* that had been brought before the court. When it came time for the deliberation I was not able to be part of that decision but felt my fellow jurors made the right one when they returned Mr. Ennis guilty as charged….
>
> I believe the term of due process has been done; on the stand *he confessed* to what he was on trial for and he was found guilty.

(CP 1058) (emphasis added). Mr. Ennis did not confess on the stand, but explained he thought the contact was consensual. (Appellant's Brief, pgs. 34-36). This same juror had read extensively about the case but was not removed for cause. Mr. Cossey should have moved for a change of venue. (Appellant's Brief, pgs. 104-107).

c. Counsel dismissed and failed to advance a legally valid reasonable belief defense to the charge of second degree rape by incapacitation.

The State cites to *State v. Coristine*, arguing it was a valid tactical decision in that case for defense counsel not want to raise the reasonable belief affirmative defense. *State v. Coristine*, 177 Wn.2d 370, 300 P.3d 400 (2013) (State's Brief, pg. 77-78). Yet there, the reasonable belief instruction was given over defense counsel's objection. *Coristine*, 177 Wn.2d at 383. Here, the record demonstrates Mr. Cossey was not prepared for trial—did not even know about the reasonable belief instruction until the trial was over—

and thus was completely unprepared for the defense. (Appellant's Brief, pgs. 107-114). And, as extensively briefed, the appellate courts have found ineffective assistance of counsel where trial counsel did not present the reasonable belief affirmative defense. (Appellant's Brief, pgs. 107-110); *State v. Powell*, 150 Wn. App. 139, 155-158, 206 P.3d 703 (2009); *In re Hubert*, 138 Wn. App. 924, 930-932, 158 P.3d 1282 (2007). The facts in *Coristine* are not comparable to this case. *Coristine*, 177 Wn.2d 370.

Moreover, the State claims it was not unreasonable for Mr. Cossey to tell the jury not to consider the reasonable belief defense because he painted a picture of doubt over whether K.S. was actually incapacitated. (State's Brief, pgs. 78-80). However, the State fails to recognize that the reasonable belief affirmative defense is not a defense that is incompatible with what Mr. Cossey poorly chose to focus on. There were two defenses to this case that were compatible with each other: (1) first, that K.S. was not so incapacitated to know what she was doing and she consented, and (2) that Mr. Ennis reasonably believed K.S. was not incapacitated, an affirmative defense to which the only burden of proof was a preponderance of the evidence. (CP 325; Appellant's Brief, pg. 113). Both theories could and should have been advanced; it was not a tactical decision to dismiss one theory over the other, especially when three witnesses testified K.S. was walking, conscious, and interacting with others in the kitchen minutes before the sexual contact occurred. (1RP 663-665, 667-668, 1332-1334, 1422-1426) (Appellant's Brief, pgs. 111-112); *Powell*, 150 Wn. App. at 155-158; *Hubert*, 138 Wn. App. at 930-932. It should be noted during pretrial motions the State originally moved the trial court to limit Mr. Strosahl's testimony as to the type of hug he observed K.S. give Mr. Ennis minutes before the incident occurred. (1RP 29; CP 51-52). The State withdrew this motion,

stating that because Mr. Ennis was pursuing a consent defense the evidence would be admissible as to what Mr. Strosahl observed about the type of hug and what it implied; but Mr. Cossey never bothered to ask Mr. Strosahl what the hug appeared to imply or what his observations were about K.S.'s demeanor when she hugged Mr. Ennis and put her head on his chest. (1RP 1333). Had Mr. Cossey been properly prepared and understood the availability of the reasonable belief instruction and how the lower burden of proof for the affirmative defense was by a preponderance of the evidence, Mr. Cossey could have and should have further explored what K.S.'s demeanor was when she gave Mr. Ennis the hug. (CP 324; 1RP 29, 1333). The demeanor of K.S. during the hug would have been helpful to both of the compatible defenses of consent and reasonable belief; yet Mr. Cossey never explored it. (1RP 1333).

And it cannot be tactical that Mr. Cossey waited until the eleventh hour to research the jury instructions, only to finally realize there was such a thing as a reasonable belief affirmative defense, and present that instruction at the close of the case and when it is now too late to tailor his trial strategy and witness testimonial evidence to point out why Mr. Ennis reasonably believed K.S. was incapacitated. (Appellant's Brief, pg. 112); (1RP 1476-1477) (Mr. Cossey admitting lack of research on jury instructions). A trial attorney needs more time to consider and determine how the evidence fits into a theory of the case; the theory of the case and defense should not be developed after the close of the evidence. (*Id.*).

d. Counsel failed to present exculpatory evidence through testimony of Ms. Beaver and Ms. Weese.

The State claims Ms. Beaver's impressions as to K.S.'s "puppy love" for Mr. Ennis would not have been admissible, anyway, because it was based upon mere

speculation. (State's Brief, pgs. 80-84). However, the State ignores that Ms. Beaver observed K.S. seeking physical touch from Mr. Ennis during the evening and that Ms. Beaver was attracted to Mr. Ennis, which is why she was watching him closely. (1RP 1356-1357, 1362-1364). Ms. Weese would have testified she thought K.S. and Mr. Ennis were a couple, but for defense counsel agreeing to limit the testimony. (1RP 739-741). Ms. Weese noticed K.S. was particularly interested in Mr. Ennis being by her side that evening after getting out of the hot tub, and was calling for him and caressing his hand. (1RP 771). Both women observed that there was more than going on than their hunches—their opinions were based on behavior they observed. Ms. Beaver and Ms. Weese would have been permitted to testify as to K.S.'s behavior and demeanor towards Mr. Ennis. (Appellant's Brief, pgs. 114-118). Defense counsel was ineffective for failure to pursue this exculpatory testimony.

Issue 4: Whether cumulative error warrants reversal where several errors worked to deny Mr. Ennis his constitutional right to a fair trial.

This argument pertains to Issue 4, raised in Mr. Ennis's opening brief. (Appellant's Brief, pgs. 118-121).

The State claims cumulative error does not apply because the evidence against Mr. Ennis was overwhelming. (State's Brief, pgs. 84-85). Mr. Ennis disagrees. (Appellant's Brief, pgs. 118-121).

K.S. claimed not to recall a majority of the events of the evening, including dancing in front of Mr. Ennis. (1RP 844; State's Exhibit P-33). Yet a video recording shows K.S. standing on two feet, picking up her drink, sipping her drink, smiling, looking at the camera, dancing in front of Mr. Ennis, flipping the bird, and hugging Mr. Ennis. (State's Exhibit P-33). From the video, she did not appear to be stumbling, incoherent, or

unaware of her surroundings. (State's Exhibit P-33). Also, at this point in the evening, K.S. was seen leaning on Mr. Ennis's legs during the game and resting her legs on Mr. Ennis, an observation Ms. Beaver made. (1RP 1356-1357). Ms. Beaver admitted she had been attracted to Mr. Ennis and had been watching his actions closely during the evening. (1RP 1362-1364).

After the hot tub, several witnesses observed that K.S. appeared to be cognitively aware of her surroundings and capable of making decisions for herself. (1RP 596, 733, 787-788, 792). Allegedly at a time when she was supposed to be very intoxicated to the point of passing out—K.S. chose not to ride home in Ms. Roseland's car because she did not want to vomit in the car. (1RP 596, 733).

Finally, a few hours later in the early morning hours around 2:30 a.m., K.S. appeared to three witnesses to be coherent, walking around, interacting with others, and not stumbling. (1RP 663-665, 667-668, 1332-1334, 1422-1426). At this point K.S. approached Mr. Ennis and gave him what Mrs. Strosahl considered to be a "flirty" hug. (1RP 665, 668). Mr. Strosahl described the hug as one where K.S. was laying her head on Mr. Ennis's chest area and had her arm around his neck. (1RP 1333). And Mr. Ennis testified the physical contact was initiated by K.S. (Appellant's Brief, pgs. 34-36). Immediately after the alleged incident, K.S. was cognitively aware to call her friend Mr. Rassier several times. (1RP 858, 861-862).

K.S. did not recall any flirting with Mr. Ennis. (1RP 922). Yet the dancing in front of him and hugging him during the game, leaning on Mr. Ennis during the game with her arms and legs, and the flirty hug in the kitchen in the early morning hours

indicate something different. In the least, these actions indicated to the ordinary observer that she was seeking physical contact with Mr. Ennis.

And K.S.'s coherency and self-control in the kitchen at 2:30 a.m. indicate Mr. Ennis had a reasonable belief she was not incapacitated. Other witnesses besides Mr. Ennis interacted with her and did not think she was incapacitated—it is reasonable Mr. Ennis would not think K.S. was, either.

The facts do not indicate overwhelming evidence against the Mr. Ennis. Due to the cumulative effect of the numerous errors throughout the trial, and substantial evidence indicating Mr. Ennis thought K.S. was consenting and not incapacitated, the case should be reversed. The errors individually and as a whole materially affected the outcome of the trial. *See Issues 1, 2 and 3 of Appellant's Brief.*

D. CONCLUSION

Based upon the arguments set forth above and those set forth in Mr. Ennis's opening brief, his conviction for second degree rape should be reversed and remanded for a new trial.

Respectfully submitted this 26th day of December, 2019.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent	)	COA No. 36359-7-III
vs.	)	Spokane Co. No. 15-1-04544-1
GORDON J. ENNIS Defendant/Appellant	)	PROOF OF SERVICE

I, Mark E. Vovos, counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 26, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Mr. Gordon Ennis, DOC #406486
Monroe Correctional Complex – WSRU
P.O. Box 777
Monroe, WA 98272

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Having obtained prior permission, I also served a copy on the Respondent at SCPAappeals@SpokaneCounty.org using the Washington State Appellate Courts' Portal.

Dated this 26th day of December, 2019.

/s/ Mark E. Vovos
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