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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 OPENING BRIEF

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A. SUMMARY OF ARGUMENT

After attending a fall harvest party with few fellow Spokane Police officers, Gordon Ennis was accused by K.S. of second degree rape based on physical helplessness or mental incapacitation. Mr. Ennis was denied the right to a fair trial due to multiple errors, and his conviction must be reversed and remanded for a new trial.

The trial court erred by issuing a noncorroboration instruction to the jury, which states that the alleged victim's testimony need not be corroborated in order to find the defendant guilty of second degree rape. Because the noncorroboration instruction was misleading and interfered with Mr. Ennis's right to present a defense, the conviction must be reversed. The trial court also erred by issuing the noncorroboration instruction because it is an impermissible court comment on the evidence. While courts have upheld the giving of the instruction, several have expressed misgivings that it is used. Because the stare decisis allowing courts to instruct juries with the noncorroboration instruction is incorrect and harmful, the conviction must be reversed.

The State committed misconduct in several instances, requiring reversal. The State elicited improper testimony and commented on Mr. Ennis's right to silence in closing argument. The State also vouched for the credibility of the victim, impugned defense counsel, commented on the

evidence, expressed a personal opinion as to the defendant's guilt, violated a motion in limine regarding the scope of a witness's testimony, and used impeachment evidence as substantive evidence. These cumulative errors require reversal.

Finally, Mr. Ennis was denied his constitutional right to effective assistance of counsel. Prior defense counsel failed to provide representation free from conflict and that conflict adversely affected Mr. Ennis, failed to move for a change of venue which was not tactical, dismissed and failed to advance a valid "reasonable belief" defense, failed to elicit exculpatory evidence from two witnesses, and failed to object to most of the State's misconduct. The case must be reversed.

Finally, the errors herein are so numerous as to warrant reversal based on cumulative error. The conviction must be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in issuing the noncorroboration instruction as the instruction misled the jury and interfered with the defendant's right to present a defense.
2. The trial court erred in issuing the noncorroboration instruction as the instruction was an impermissible court comment on the evidence.
3. The State committed prosecutorial misconduct by:
 - a. eliciting improper testimony and commenting on the defendant's right to silence;
 - b. vouching for the credibility of the victim;
 - c. impugning defense counsel;
 - d. commenting on the evidence;
 - e. expressing a person opinion as to the defendant's guilt;

- f. violating a motion in limine regarding Doug Strosahl's testimony;
 - g. arguing impeachment evidence as substantive evidence.
4. The defendant's Sixth Amendment right to effective assistance of counsel was violated when trial counsel:
 - a. failed to withdraw from representation when a conflict of interest existed;
 - b. failed to request a change of venue;
 - c. failed to research and become competent in the law, thereby dismissing and failing to advance a valid legal defense;
 - d. failed to pursue and present available exculpatory evidence at trial;
 - e. failed to elicit exculpatory evidence from two witnesses;
 - f. and failed to object to most of the State's misconduct.
 5. The trial court erred in denying defendant's motion for new trial.
 6. Defendant assigns error to the court's oral ruling denying the defendant's motion for new trial. (CP 1149-1168; 1RP 1769-1782).
 7. The errors during the trial were so numerous and prejudicial as to have the cumulative effect of denying the defendant his constitutional right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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.
- b. Whether the giving of the noncorroboration instruction was an improper court comment on the evidence, and whether case precedent stating otherwise should be abrogated for being incorrect and harmful.

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.

- a. The State committed misconduct by eliciting improper testimony regarding defendant's constitutional right to silence and commenting on the defendant's constitutional right to silence in closing argument.
 - i. When viewed in context, the comments by the State during final argument invited the jury to draw an inference of guilt from the defendant's silence and adherence to his constitutional rights.
 - ii. The State's argument was a clear violation of Art. I, sec. 22.
- b. The State's repeated vouching for the "truthfulness" and credibility of the victim witness during closing argument warrants reversal for prosecutorial misconduct.
- c. The State committed misconduct by impugning defense counsel, commenting on the evidence, and expressing an opinion as to the defendant's guilt during testimony.
- d. The State committed misconduct by violating a motion in limine regarding whether Mr. Strosahl believed K.S.'s story.
- e. The State committed misconduct by improperly arguing impeachment evidence as substantive evidence.
- f. Whether cumulative error applies when multiple instances of misconduct were so flagrant and ill intentioned no curative instruction would have obviated the prejudice.

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; and (e) counsel failed to object to the majority of the State's misconduct.

- a. Whether Mr. Ennis was denied his Sixth Amendment right to conflict free representation, constituting ineffective assistance of counsel, where defense counsel's actual conflict adversely affected his representation of the defendant.
- b. Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to request a change of venue for the second trial.

- c. Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when counsel dismissed a defense and failed to advance a valid defense to the charge of second degree rape by mental incapacity or physical helplessness.
- d. Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to elicit exculpatory evidence.
- e. Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to object to most of the State's misconduct.

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

D. STATEMENT OF THE CASE

On October 24, 2015, Heather Strosahl¹ hosted a fall harvest party in her home in Colbert. (1RP 1316-1317)². She and her fiancé at the time, Doug Strosahl, a Spokane Police officer, invited several co-workers, friends and family members. (1RP 566, 568). The party was an opportunity for everyone to socialize and enjoy each other's company.

¹ At the time of the incident, Mrs. Strosahl's last name was "Lickfold." (1RP 745, 1162).

² The volumes of transcripts are referred to in this opening brief as follows:

"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, 2/27/18, 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.

"2RP" was transcribed by Tammey McMaster, containing the hearing from 5/19/17.

"3RP" was transcribed by Rebecca Weeks, containing the hearing from 5/25/17.

"4RP" was transcribed by Allison Stovall, containing the hearing from 6/7/17.

"5RP" was transcribed by Allison Stovall, containing the hearing from 8/18/17.

(1RP 568-569, 1316-1317). Though many were invited, only about six guests attended most of the party. (1RP 1317). Mr. Strosahl, invited two co-workers—Gordon Ennis and K.S., a Spokane Police officer working in the sexual assault unit³—to the party. (1RP 569, 818-819, 919). A few others briefly stopped by. (1RP 1317).

The party was to start at 7:00 pm, but guests began to trickle in for the party sometime afterwards. (1RP 572-573). Most of them arrived towards the beginning of the party, to include: Megan Weese, Gina Watkins, Melissa Beaver, K.S., and Callie Roseland. (1RP 572-573). Gordon Ennis arrived later, around 9 pm. (1RP 573). The guests ate, drank, and socialized in the kitchen. (1RP 573). K.S. had brought Ms. Roseland, her roommate, to the party and they spent time outside at the fire pit talking with Mr. Strosahl. (1RP 572-574). Mrs. Strosahl wanted everyone to play a game, but it did not last very long due to lack of interest. (1RP 574-575). Sometime during the game, K.S. danced in front of Mr. Ennis while he was seated facing her. (State's Exhibit P-33). She bent down to give him a hug afterwards. (State's Exhibit P-33).

³ Initials are used throughout the Appellant's opening brief to respect this individual's identity. *See State v. Emery*, 161 Wn. App. 172, 180 fn. 2, 253 P.3d 413 (2011).

After the game, the guests decided to get in the hot tub. (1RP 575). Mrs. Strosahl wound up loaning several of her swimsuits to the women at the party. (1RP 575). While in the hot tub, the guests drank with one another and some of the women's tops were removed. (1RP 576-577, 762). After an hour or so, Mrs. Strosahl got out of the tub to make more drinks and thereafter noticed her friend Ms. Beaver had fallen asleep in a bedroom downstairs, likely due to intoxication. (1RP 578-582). Mrs. Strosahl assisted Ms. Beaver in getting to bed. (1RP 578-582). Afterwards, the guests got out of the hot tub and most changed back into their clothing. (1RP 583-584).

After the hot tub, the party began to wind down and Mr. Strosahl went to bed. (1RP 584). Ms. Watkins, Mrs. Strosahl's sister, went to sleep in a guestroom. (1RP 584, 619).

Mrs. Strosahl, Ms. Roseland, and Ms. Weese assisted K.S. by changing her clothing and placing her in a guest bedroom, as K.S. was likely intoxicated at that time. (1RP 584-587).

At some point Mr. Strosahl woke up and came into the kitchen where Mrs. Strosahl was cleaning. (1RP 597-598). The Strosahl's and Mr. Ennis went to the room where K.S. was staying and teased her about not being able to hold her liquor. (1RP 600). They turned on the bedroom

light. (1RP 600). K.S. sat up, smiled, and giggled in response to the group. (1RP 600-601).

Eventually they left K.S.'s room and returned to the kitchen. (1RP 600-601).

The Strosahl's and Mr. Ennis went back into the kitchen. (1RP 664-665). Not long after, K.S. came to the kitchen, walked "right up to Gordon [Ennis] and she wrapped her arms around his neck and laid her head on his chest." (1RP 601-602). The small group continued to talk, and K.S. responded to a smart comment from Mr. Strosahl. (1RP 602). Finally, around 2:30 a.m., the Strosahl's went to bed and Mr. Ennis and K.S. went "off down the hallway in the opposite direction". (1RP 602). K.S. was not stumbling nor appeared to be unaware of her surroundings. (1RP 664-665).

K.S. later accused Mr. Ennis of nonconsensual sexual contact during the party. (1RP 849-851, 853-854, 862, 891-894).

The State charged Mr. Ennis with a single count of second degree rape, alleging K.S. had been "incapable of consent by reason of being physically helpless or mentally incapacitated." (CP 1).

At trial, witnesses testified consistent with the facts above. (1RP 564-1476).

Pretrial Hearings (First Trial)

On May 19, 2017, the parties brought forth a potential issue to the trial court regarding Doug Strosahl's testimony. (2RP 9-10). The State expressed concerns whether Rob Cossey, Mr. Ennis' defense counsel, knew of undisclosed information about Mr. Strosahl as an alternative suspect, despite the fact Mr. Strosahl was not charged nor was he currently a suspect. (2RP 10-13). The parties discussed whether it appeared Mr. Strosahl would be taking the Fifth Amendment during his testimony, and whether he would provide any sort of statement prior to trial to the parties. (2RP 11-12). The trial court further inquired of the situation, asking defense counsel:

THE COURT: And at this point, Mr. Cossey, again, if you can't answer it, tell me that, but are you thinking that there is some potential suspect issues with Mr. Strosahl? Is that possible, is that—are we going on a different path?

MR. COSSEY: I gave my word to Mr. Bugbee I would not disclose that.

(2RP 15). The court then stated it needed Mr. Bugbee present at the next hearing, because the court needed to know whether Mr. Strosahl was going to take the Fifth Amendment. (2RP 19).

A few days later on May 25, 2017, the trial court addressed the issue of Mr. Strosahl's testimony again. (3RP 2-27). A new attorney, Joseph Sullivan, was now representing Mr. Strosahl because Mr. Bugbee noted a conflict in his representation of Mr. Strosahl. (3RP 2-3, 13). After more discussion about the substance of Mr. Strosahl's potential trial testimony, Mr. Cossey indicated that he

no longer believed there was any issue with Mr. Strosahl's testimony as Mr. Strosahl intended to merely testify to what was in the police report. (3RP 9). The State was unsatisfied with this answer, adding it needed more information in the event there would be a disclosure during trial that it was not prepared for. (3RP 14017). The trial court opined as to what Mr. Strosahl would say, stating: "I'm assuming it's a representation as to what the witness would say as opposed to a general discussion about defenses or other things that maybe aren't statements." (3RP 24-26). Mr. Cossey never disagreed with or corrected the court's statement. (3RP 24-26).

On June 7, 2017, while the court and parties were discussing motions in limine, the basis of what Mr. Cossey knew about Mr. Strosahl was again brought to the attention of the court, for the third time. (4RP 39-40, 55-58, 66-67, 76-79). Mr. Cossey finally revealed to the trial court the information provided to him by Mr. Bugbee was related to an alternative suspect theory, but promised the court he would not be exploring that avenue:

MR. COSSEY: Well, there's four options on defense. It didn't happen.

THE COURT: Right.

MR. COSSEY: Denial; he wasn't there.

THE COURT: Alibi, basically, "I was somewhere else."

MR. COSSEY: Consent or a third party or another alternative.

THE COURT: "Either a codefendant or somebody else did, but it wasn't me."

MR. COSSEY: I am not at all heading down the path of the alternative suspect—

THE COURT: Okay.

MR. COSSEY: —period. The information that was provided to me by Mr. Bugbee, true or not—just saying what the information was—would be in that latter, and that latter is not going to be used by me in any shape or form in this trial.

THE COURT: Okay.

...

MR. COSSEY: ... the bottom line is this. I am not going to proceed down that road. I may take Mr. Strosahl off my witness list, period, and let the [S]tate deal with all these issues, but I do not intend to use an alternative theory on anything that was given to me by Mr. Bugbee, period.

...

THE COURT: ... is it fair to say that anything that you might have heard from Mr. Bugbee—again, whether true or not, as you said it—would fall under the other suspect, or I'll even throw alibi in there, under that area of defenses?

MR. COSSEY: 100 percent.

(4RP 79-82). After that disclosure, the State's concerns were allayed. (4RP 82).

At the same hearing, the court addressed other motions in limine regarding Mr. Strosahl's testimony. (4RP 86-98, 116). The State wanted to limit Mr. Strosahl's testimony due to the fact that Mr. Strosahl did not think K.S.'s story made sense when K.S. informed him about her allegations against Mr. Ennis. (4RP 85-86, 89-90). Mr. Cossey agreed he would not inquire on the first issue as to whether Mr. Strosahl thought K.S.'s story made sense unless the door was opened. (4RP 86-90).

After attempting to select a jury in this first trial, defense counsel moved for a mistrial, citing pretrial publicity as the reason. (CP 269-270, 272, 276-78; 5RP 2-4). The court granted the motion for mistrial, and the parties later filed a

joint motion for change of venue. (CP 269-270, 276-280; 5RP 2-4). A member of the public also contacted the court to express his concerns and belief the trial should be moved out of the county due to the publicity the case generated. (CP 275).

In December, 2017, the first trial judge, the Honorable James M. Triplet, recused himself from the case. (CP 282). The same day, the Honorable Maryann C. Moreno was preassigned to the case. (CP 283).

Pretrial Hearings (Second Trial)

On February 7, 2018, during a pretrial hearing the State deferred its motion for change of venue to defense counsel. (1RP 10-11). Defense counsel stated “we wanted to see what the jury and what kind of jury panel we could seat,” adding it was not withdrawing the motion but reserving the motion. (1RP 12). The court agreed to reserve. (1RP 12).

Other motions in limine were discussed. (1RP 22-41). Defense counsel again noted he would not seek to introduce Mr. Strosahl’s opinion on whether he believed K.S.’s allegations when she first told him. (1RP 27-28). The State moved to keep out any testimony from Ms. Weese regarding her opinion of K.S. and Mr. Ennis’ relationship. (CP 51-52; 1RP 29). The State once again sought assurance regarding the alternative suspect theory, and Mr. Cossey once again asserted he could not reveal the information about Mr. Strosahl. (1RP 30). The

parties agreed to address Ms. Weese's opinion testimony about the relationship between K.S. and Mr. Ennis later. (1RP 39-40).

Jury Selection (Second Trial)

The court issued forth a jury questionnaire and the parties conducted individual voir dire on several members of the jury. (1RP 53-534). According to the questionnaires, about 40 percent of the potential jury pool had some prior knowledge of the case due to their exposure to media. (Exhibit C-2, Juror Questionnaires). Five of the seated jurors—to include one alternate juror—admitted to some form of exposure to pretrial publicity regarding the allegations in this case. (CP 304-309; 1RP 143-154, 192-197, 197-201, 206-209, 210-224). All claimed the pretrial media exposure could not affect their ability to be impartial and fair. (1RP 143-154, 192-197, 197-201, 206-209, 210-224). Defense counsel moved for cause to remove Juror No. 37 from the pool due to the juror's admitted extensive exposure to news stories surrounding the case. (1RP 224-227). Despite the large jury pool available and this juror's lengthy exposure to the media surrounding the case, the court refused to remove the juror for cause because the juror claimed impartiality. (1RP 226-227). Juror No. 37 was ultimately seated as the first alternate juror. (CP 305; 1RP 534).

Many jurors admitted to prior knowledge of the case through media exposure. During individual voir dire, one potential juror noted she did not think she could be objective after reading extensively about the case. (1RP 353-354).

She already formed opinions. (1RP 353-354). She explained she learned about “possible cover-up’s and things like that” in regards to this case in the newspaper and on television. (1RP 353). Another juror recalled the media wherein there was mention of “cutting of the fingernails.” (1RP 239). And when the court asked another juror whether the media exposure caused him to form an opinion about the case, he answered: “Well, I—I mean, yeah. I mean, I don’t—doesn’t everyone? I—yeah, I guess. I mean, you hear stuff and you form an opinion.” (1RP 249).

Testimony (Second Trial)

The State made an opening statement. (1RP 550-563). Therein, the State said the following:

And [K.S.] told Doug Strosahl what had happened. Doug Strosahl didn’t do anything. He just left.

(1RP 561).

Defense counsel never made an opening statement. (1RP 563, 1346).

Heather Strosahl’s Testimony

Heather Strosahl testified consistent with the facts above. (1RP 564-637, 646-694). Mrs. Strosahl noted during the party K.S. was drinking Fireball and Angry Orchard hard ciders mixed together. (1RP 602, 626). She noticed K.S. seemed to be flirting with Mr. Ennis earlier in the evening, around the time the game started, which no one wanted to play. (1RP 649-650). Also, to Mrs.

Strosahl it seemed K.S. was dancing in a provocative manner in front of Mr. Ennis. (1RP 49-650, 679-680; State's Exhibit P-33).

After getting out of the hot tub, Mrs. Strosahl said K.S. made the decision to stay in a guest bedroom at the home because K.S. was concerned she would vomit in her roommate's car on the way home. (1RP 596).

Mrs. Strosahl testified that later in the party and in the early morning hours, around 2:15 a.m., Mr. and Mrs. Strosahl and Mr. Ennis went into the guest bedroom to check on K.S. and tease her. (1RP 658). The group flipped on the light and K.S. sat up, leaning on her arm, and smiled. (1RP 658-661). She did not appear to have a "glassy" look of intoxication and seemed aware of her surroundings because she laughed in response to Mr. Strosahl's joke. (1RP 661). Mrs. Strosahl explained that at 2:15 a.m. in the morning she was not worried about K.S. when she checked on her. (1RP 673-674). After, Mrs. and Mrs. Strosahl left and went to the kitchen with Mr. Ennis. (1RP 661-665).

Mrs. Strosahl testified K.S. came into the kitchen soon after and stood right next to Mr. Ennis. (1RP 663). K.S.'s subsequent behavior surprised Mrs. Strosahl, as she observed K.S. wrap her arms around Mr. Ennis and place her head on his chest. (1RP 664-665). Mrs. Strosahl thought the behavior was inappropriate because Mr. Ennis was married and the embrace lasted a couple of minutes. (1RP 601-602, 665). Minutes later, the Strosahl's went to bed and Mr. Ennis and K.S. headed in the opposite direction towards the guest room. (1RP

607-608, 668). The witness observed she thought the way K.S. and Mr. Ennis walked down the hallway towards the bedroom was “flirty.” (1RP 668).

According to Mrs. Strosahl, none of K.S.’s movements indicated she was not in control when she came into the kitchen in those early morning hours before the incident: K.S. laughed in response to something Mr. Strosahl had said, she made eye contact with Mr. and Mrs. Strosahl, and she did not appear to have any coordination problems. (1RP 664-665). To Mrs. Strosahl, K.S. appeared to be much less intoxicated—after a few hours of sleep—than she did earlier in the evening: her eyes were open, she was standing upright, and walking down the hallway on her own. (RP 586-587, 591, 652-653, 667-668, 690). From what Mrs. Strosahl recalled, K.S. did not drink any more alcohol between her exit from the hot tub and the time Mrs. Strosahl went to bed around 2:30 a.m. (1RP 628, 646-648). Mrs. Strosahl testified her husband had also appeared much less intoxicated after a couple of hours of sleep—from the time between when he got out of the hot tub and the time he came into the kitchen around 2:00 a.m. (1RP 689-690).

Gina Watkins’ Testimony

Gina Watkins, sister to Heather Strosahl, also testified. (1RP 695-736). During the night, Ms. Watkins noticed K.S. dancing in front of Mr. Ennis in the living room in a “flirtatious” manner, which surprised Ms. Watkins. (1RP 725-

726, 733-734). Ms. Watkins also recalled seeing another guest, Melissa Beaver, flirt with Mr. Ennis in the hot tub. (1RP 701-702).

Ms. Watkins did not notice any signs of extreme intoxication with K.S., though she did state K.S. was exhibiting some signs of alcohol consumption. (1RP 728). She recounted how after getting out of the hot tub K.S. had wandered into Ms. Watkins' room holding a garbage can and gagging. (1RP 708, 715). Ms. Watkins realized K.S. was not as intoxicated as she first assumed, because when Ms. Watkins suggested K.S.'s roommate take K.S. home, K.S. immediately responded that she could not ride in the car because she would get sick. (1RP 730-731, 733). Thus Ms. Watkins believed K.S. was cognitively aware of her surroundings. (1RP 733).

Megan Weese's Testimony

Prior to Ms. Weese's testimony, the State moved to limit what she could say about her impression as to whether Mr. Ennis and K.S. were a couple. (1RP 739-741). Defense counsel agreed, without objection, to limit the testimony as to Ms. Weese's impressions. (1RP 739-741). The court asked for further clarification, and the State explained Ms. Weese was "to stay away from conclusions about whether [K.S. and Mr. Ennis] were a couple, whether or not they were single, whether or not there was something going on between them." (1RP 740). Defense counsel added that in Ms. Weese's interview, "she talked

about she thought they were a couple. We pressed her about how she thought that, and she really can't answer that." (1RP 740).

Ms. Weese, an emergency-room nurse, testified she knew both Mrs. Strosahl and Ms. Watkins through her employment, and she attended the party. (1RP 6744-750, 760-795). Ms. Weese observed K.S. was excited to see Mr. Ennis and hugged him when he arrived at the party. (1RP 750). During her testimony, Ms. Weese appeared to hold back her impressions about the nature of the hug due to the State's motion in limine and defense counsel's agreement to it:

Q. When [Mr. Ennis] first gets there—

A. Yeah.

Q.—[K.S.] makes a point to go over and greet him?

A. Yes.

Q. And greets him very warmly?

A. Yes.

Q. And I think the word you said is "excited"?

A. Yeah.

Q. And—what do you mean by that? I mean, there's a lot of different ways. I mean, my kids get excited at Christmas and the you're—

[STATE]: Your Honor, I'm going to object to that question.

THE COURT: I'll sustain. What she observed.

Q. Okay. You observed her being excited?

A. (Moved head up and down.)

Q. What did you observe by her excitement?

A. Um, I don't know what I can say.

THE COURT: I think you need to rephrase it, so make it specific.

MR. COSSEY: Okay.

Q. When you described it as she was excited to see him, from your personal observations why did you reach that conclusion?

THE COURT: Sustained, sustained.

[STATE]: Your Honor—

THE COURT: Sustained.

[STATE] –objection.

THE COURT: Do not answer.

MR. COSSEY: Okay.

Q. What was her physical demeanor towards
Mister—

MS. FITZGERALD: I'm going to object—

THE COURT: I'm going to sustain it.

MS. FITZGERALD: --your Honor. We've been
through this.

MR. COSSEY: Well, I—she can describe—

THE COURT: Then ask her.

Q. Describe her actions towards him.

A. She was looking at him. She was near him.

Q. How near?

A. Near. I believe they hugged.

Q. Okay. How long did that last, that interaction?

A. They were still near each other. They—they
went out to the fire together....

(1RP 782-783).

Ms. Weese testified she knew the party-goers entered the hot tub
around 11 p.m. because she called her husband on her phone just prior.

(1RP 760-761). Everyone at the party got into the hot tub. (1RP 762).

She saw Ms. Beaver sitting on Mr. Ennis' lap, kissing. (1RP 763, 765-
766).

Ms. Weese testified after everyone exited the hot tub she stayed at Mrs.
Strosahl's house to help with the intoxicated guests. (1RP 765-767). She
remembered helping K.S. change her clothes. (1RP 767-768). However, Ms.
Weese testified that in her experience as a nurse, though Ms. Weese knew K.S.
was intoxicated to some degree, she believed K.S. could have put herself to bed if

she had wanted to. (1RP 787-788). K.S. was able to walk to a bedroom on her own power and no one carried her there. (1RP 787). And Ms. Weese did not see K.S. stumbling nor did she think K.S. would fall. (1RP 792).

During this, K.S. kept asking for Mr. Ennis, stating “Gordon, where’s Gordon? I want Gordon.” (1RP 771, 789-790). When Mr. Ennis appeared, K.S. grabbed his hand and caressed it. (1RP 771, 790). Ms. Weese recounted the event, stating:

So when I was walking with her into the room, she just kept—like she didn’t really—she didn’t want our help and she just kept saying, “Gordon, where’s Gordon? I want Gordon.” Um, and Gordon did show up. And she grabbed his hand at that point, and she was kind of caressing his hand. And I kind of stepped out at that point, “Fine, you don’t need my help. I’ve done my job,” and I left the room.

(1RP 771). Ms. Weese also noticed K.S. and Mr. Ennis were around each other most of the evening. (1RP 771).

Ms. Weese also recalled that after the hot tub, and when she was assisting Mrs. Strosahl, K.S. was aware enough to make the decision to stay at Mrs. Strosahl’s home and not seek a ride home with her roommate. (1RP 788).

Melissa Beaver’s Testimony

Next, Melissa Beaver was set to testify. (1RP 798). Prior to her testimony the State once again sought to limit testimony from Ms. Beaver regarding her impressions of K.S. and Mr. Ennis and their relationship. (1RP 798-799). The parties and court discussed the issue as follows:

[STATE]: . . . Your Honor . . . the next witness that the state intends to call is Melissa Beaver. There are some very similar issues in Melissa Beaver's previous interview that there were with Ms. Megan Weese in terms of opinions that she gave about the victim in this case that really aren't substantiated . . . by observations. And so the state is asking for the Court to find in Ms. Beaver's case, as the Court found it in Ms. Weese's case, that she can testify to her observations but not to give any opinions above and beyond anything that she personally observed . . .

MR. COSSEY: Well, the rules of evidence are clear. I mean, I'm—I know I push the boundaries sometimes by mistake, not intentionally. But, you know, if there's nothing that she—if it's, again, the same type of situation where it's gut instinct on her opinion without based on any outward facts that I can lay a foundation for, obviously that would not be admissible in front of the jury.

THE COURT: Well, tell me what we're talking about.

[STATE]: So in essence, Ms. Beaver had gone through her first interview with detectives Mitchell and Satake, had given a full interview, said she had nothing else to add. And then she tells them that she wants to go back on the record; they do; the tape-recording starts; they give the time; it's only been a couple minutes since the recording was turned off; and then Ms. Beaver expounds on this idea that she thought that the victim had some kind of puppy love going for Mr. Ennis. When asked to articulate the reasons why she thought that there was some kind of puppy love going on, she's not able to—to rationalize it, she's not able to give objective facts about it. She just states that that was her feeling and that's what she thought was going on.

And so that—that testimony, her—if Mr. Cossey intended to—to go there, and I don't know that he is, would, I think, be improper for the jury to hear.

THE COURT: Okay.

Mr. Cossey, anything else?

MR. COSSEY: No, your Honor.

THE COURT: All right. So she'll be able to testify to her observations, but any opinions that she has that she cannot specifically—I mean, things like gut feelings and impressions, that sort of thing would not be admissible.

(1RP 798-799).

Melissa Beaver finally testified. (1RP 803-810). She attended the party, drank alcohol that evening, and remembered getting into the hot tub. (1RP 804-805). Although she remembered being in the hot tub and talking and laughing with others, she did not remember making out with Mr. Ennis. (1RP 804-805). She lost her memory that evening around the time she was in the hot tub. (1RP 805).

K.S.'s Testimony

K.S. testified about the incident. (1RP 811-851, 853-883, 885-938). She stated she is a patrol officer with the Spokane Police Department. (1RP 814-815). Through work, she met fellow officers Kyle Huett, Doug Strosahl, and Gordon Ennis. (1RP 815-817, 826-828). K.S. was invited to the party at Mr. Strosahl's house on October 24, and K.S. brought along her roommate, Callie Roseland. (1RP 819). K.S. and Ms. Roseland arrived at the party around 7:30 p.m. and she brought a six-pack of Angry Orchard cider beer. (1RP 821-822, 900). K.S. and Ms. Roseland greeted the hosts and started mingling with other guests. (1RP 823). K.S. made a drink for herself by mixing a shot of Fireball into a bottle of cider. (1RP 823). Ms. Roseland, Mr. Strosahl, and K.S. went outside and sat by

the fire pit for awhile to chat. (1RP 823-824). K.S. estimated Mr. Ennis arrived at the party around 9 p.m. (1RP 826).

K.S. explained she had worked peripherally with Mr. Ennis on the job. (1RP 831-833). K.S. said at the time Mr. Ennis was a sergeant and she respected him and she had never had any negative experiences with him. (1RP 831-833). K.S. said when Mr. Ennis arrived at the party she was excited to see him and she gave him a hug because “it was a friendly face that I knew.” (1RP 834). She claimed no romantic or flirtatious intention, and also claimed she had “zero interest” in Mr. Ennis romantically. (1RP 834-835, 920). The only people at the party K.S. knew personally were Mr. Strosahl, Mr. Ennis, and Ms. Roseland. (1RP 836). She spent time in the kitchen with the other guests. (1RP 836). K.S. drank about three to four Angry Orchard ciders with Fireball whiskey mixed in, plus one separate shot of Fireball, and did not have anything to drink before the party. (1RP 836, 841-842, 900, 908, 910, 912). K.S. testified she learned through her academy training that generally a person “burns off” one drink per hour. (1RP 912-913). After drinking about 5 or 6 drinks, K.S. noted her intoxication level is high enough that she will not remember events. (1RP 930-931).

K.S. was texting messages on her phone with her friend and former coworker Spenser Rassier throughout the evening. (1RP 837, 961). K.S. and Mr. Rassier were seeing each other, but not exclusively. (1RP 837-838).

K.S. started to feel the effects of the alcohol she was drinking and did not “really remember” the game. (1RP 841-842, 844, 901, 903-904). K.S. admitted to memory lapses during the party and believed it was due to drinking too much. (1RP 842). K.S. also stated in the past when she had a lot of alcohol, she has had memory lapses. (1RP 843). And she had no memory of dancing in front of Mr. Ennis. (1RP 844; State’s Exhibit P-33). A video of the dance depicts K.S. standing on two feet, picking up her drink, sipping from her drink, smiling, looking at the camera, dancing in front of Mr. Ennis, flipping the bird, and hugging Mr. Ennis. (1RP 844; State’s Exhibit P- 33).

K.S. remembered after the game that Mrs. Strosahl was gathering her extra swimsuits so the guests could go in the hot tub. (1RP 845, 905). K.S. recalled that she did not bring a swimsuit with her and that Ms. Roseland had a swimsuit in the trunk of her car. (1RP 845). K.S. also remembered holding a drink in the hot tub, that it was crowded, and trying a sip of Mr. Ennis’ drink. (1RP 845, 904-905). K.S. also remembered one of the women in the hot tub taking her top off. (1RP 846, 905). And she recounted exiting the tub to assist Mrs. Strosahl in getting more drinks. (1RP 847). She did not recall contact with Mr. Ennis or any flirtation with him the night of the party. (1RP 922). Nor did she recall being in the kitchen with only Mr. and Mrs. Strosahl and Mr. Ennis. (1RP 923). K.S. admitted she experienced memory loss prior to becoming sick and vomiting. (1RP 922).

After that, K.S. claims she did not remember much other than throwing up into a trash can or toilet. (1RP 847, 904). She did not recall Mr. and Mrs. Strosahl and Mr. Ennis coming into her room early in the morning and flipping on the light. (1RP 888-889). K.S. testified the next thing she remembered was waking up in a bed with Mr. Ennis next to her. (1RP 848). She said she woke up feeling a thrusting in her pants and Mr. Ennis's fingers were in her vagina. (1RP 848). K.S. stated she was not conscious or awake when Mr. Ennis touched her. (1RP 850). She stated when she became aware of her surroundings, she moved away from him and may have started crying. (1RP 850, 927). According to K.S., Mr. Ennis got up, said he had to leave, and left. (1RP 853).

After Mr. Ennis left, K.S. grabbed her cell phone and went to the bathroom and called Mr. Rassier. (1RP 858). According to her phone's call log, she made several calls in a row at 3:07 a.m. to Mr. Rassier. (1RP 861). He picked up on the fourth call. (1RP 861-862). She told Mr. Rassier what had happened but did not identify who the assailant was. (1RP 862). K.S. said she was still having memory lapses, but spoke to Mr. Rassier for about 30 minutes on the phone. (1RP 863-864). She said she then fell asleep for a few hours. (1RP 866-867). K.S. called Ms. Roseland to come give her a ride home. (1RP 868-869).

K.S. decided to tell Mr. Strosahl her allegations against Mr. Ennis. (1RP 871). K.S. told Mr. Strosahl about the situation sometime after 8:22 a.m. the

morning of October 25. (1RP 875-877). K.S. said Mr. Strosahl “downplayed it and then asked if I needed any water and then he left the room.” (1RP 876). He never returned. (1RP 876-877). She said she was upset about what happened and was upset Mr. Strosahl did not seem to care. (1RP 880).

K.S. changed out of the borrowed clothes and back into her own clothes. (1RP 877). K.S. left the clothes she was allegedly assaulted in on the floor of the guest bedroom she had been sleeping in and then left with her roommate. (1RP 878). When K.S. returned home she showered. (1RP 879-880). Later towards the evening on October 25, 2015, K.S. reported the incident to Kyle Huett and identified Mr. Ennis as the assailant, who began the process of reporting to other officers for investigation. (1RP 889-893). K.S. went to the hospital to have a sexual assault kit completed. (1RP 894, 940-950).

K.S. testified from July 2015 to February or March of 2016 she was on “light duty” for an injury. (1RP 919). During that time she worked in the sexual assault unit. (1RP 919). She also has training in preservation and collection of evidence. (1RP 926). About 18 hours passed since the incident and before she went to the hospital. (1RP 926-927, 943).

Spencer Rassier Testimony

Mr. Rassier testified K.S. called him around 3:00 a.m. on October 25, and she was very upset. (1RP 960-962). According to his testimony, her speech sounded slurred and Mr. Rassier thought she was intoxicated—though this

information was absent from his prior interview with an investigator. (1RP 959, 965, 972-975). Mr. Rassier said he was on the phone with K.S. for a long time, and later testimony indicated the call lasted 54 minutes. (1RP 966, 1226, 1289-1290, 1302).

Callie Roseland's Testimony

K.S.'s roommate, Ms. Roseland, also testified. (1RP 1038-1074, 1086-1147). Ms. Roseland is a person who does not drink very much alcohol. (1RP 1046). But contrary to what four other party-goers had observed of K.S., Ms. Roseland appeared to believe K.S.'s intoxication level was to the point of incoherency after she exited the hot tub. (1RP 1057, 1061-1074). Ms. Roseland described K.S. had "extreme confusion, glassed over eyes, stumbling, mumbling, disoriented, all of the above what you think of when you see a completely drunk person." (1RP 1062).

Yet Ms. Roseland admitted she previously told law enforcement that K.S. was walking around and assisting another partygoer with her swimsuit top after K.S. exited the hot tub. (1RP 1107, 1111-112, 1115, 1120-1121).

Ms. Roseland was present when K.S. told Mr. Strosahl of the allegations early the next morning. (1RP 1091-1092). She said Mr. Strosahl did nothing after K.S. informed him of the allegations—he just left the room. (1RP 1092).

DNA Collection, Other Evidence, & State's Motion

A forensic specialist testified. (1RP 1031-1037). She collected DNA from Mr. Ennis on October 27, 2015. (1RP 1032-1033). The specialist decided not to take fingernail clippings because the nails were so short it would have injured Mr. Ennis. (1RP 1035). She noted Mr. Ennis was cooperative and respectful during collection. (1RP 1037).

A sergeant testified he was present when DNA was collected from Mr. Ennis after the alleged incident and that Mr. Ennis was cooperative. (1RP 1172-1173). He decided not to collect evidence from Mr. Ennis' fingernails, stating they were too short to collect evidence. (1RP 1172-1173).

Detective Armstrong testified about 16 text messages were sent from K.S.'s phone between the hours of 7:32 p.m. on 24 October 2015 and 3:45 a.m. on 25 October 2015. (1RP 1279-1283). None of the text messages contained grammatical errors. (1RP 1283-1285). Also, it appeared the video of K.S. dancing in the living room was likely taken around 10:20 p.m. (1RP 1295-1296).

The State rested. (1RP 1307).

Before the defense presented its case to the jury, the State once again reminded the court that Mr. Cossey was not to question Ms. Beaver about her belief that K.S. "had a puppy love thing or a wanting or longing for Gordon Ennis." (1RP 1308-1309). The State also once again asked that Mr. Strosahl not

comment on K.S.'s credibility when she first reported the allegation to him. (1RP 1310).

Doug Strosahl's Testimony

The defense called Doug Strosahl to testify. (1RP 1313-1345). He indicated he worked for the Spokane Police Department for 20 years, and was married to Heather Strosahl; they were engaged and living together when they hosted a fall harvest party in his home. (1RP 1313, 1316). Mr. Strosahl had known Mr. Ennis for over 20 years. (1RP 1313).

Mr. Strosahl recalled wanting to tease K.S. for not being able to hold her alcohol and going into the guest room where she was staying. (1RP 1331). K.S. woke up when the group entered her room, and was propped up on her elbow. (1RP 1331). K.S. smiled, laughed, and nodded her head at Mr. Strosahl when he teased her. (1RP 13331-1332). Mr. and Mrs. Strosahl and Mr. Ennis went back to the kitchen, where they stood talking for only about a minute before K.S. entered the kitchen. (1RP 1332). K.S.'s eyes were open, she was walking, she was not stumbling, and when Mr. Strosahl made a comment to her, she reacted by looking directly at him and laughing and nodding. (1RP 1333-1334). Mr. Strosahl testified:

...[K.S.] walked directly up to Gordon and she put her arms up over his shoulders so that her hands were around the back of his neck and laid her—I guess it would be the left side of her face up against his shoulder, chest area, so that she was looking towards his neck.

(1RP 1333). At that point Mr. Strosahl decided to go to bed and observed Mr. Ennis and K.S. heading in the opposite direction, walking down the hallway together with their arms around each other's waists. (1RP 1333-1334). Mr. Strosahl did not see any signs K.S. was too intoxicated to know what she was doing. (1RP 1334). K.S. did not appear to be having trouble walking or functioning. (1RP 1334). Mr. Strosahl did not see any signs K.S. was too intoxicated to know what she was doing. (1RP 1334).

Melissa Beaver's Testimony (Defense)

Ms. Beaver was called by the defense to testify. (1RP 1347-1364). She remembered when Mr. Ennis arrived at the party, K.S. gave him a really big hug and seemed excited to see him, and K.S. was talking with Mr. Ennis. (1RP 1352). During the game in the living room, Ms. Beaver saw K.S. sitting beside Mr. Ennis:

Q. What did you see?

A. 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.

Q. Okay. And that was during the game or after the game?

A. That was during the game.

Q. And what did you observe Mr. Ennis do?

A. 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.

Q. And how long was that interaction for?

A. Mm, pretty much the whole time we played the game.

...

Q. At what—what happened after the game broke up? What did everybody do?

A. Everybody just kind of started talking, and Heather [Strosahl] put some music on. And then shortly after that Kesley started dancing.

Q. Okay. Dancing where?

A. Um, kind of in front of Mr. Ennis.

...

Q. Was that a dance for everybody?

A. It didn't seem to be.

Q. And after that what happened?

A. Um, shortly after that Heather started dancing as well. And then [K.S.] kind of almost bumped, kind of, Heather out of the way and started dancing again in front of Gordon.

Q. Okay. A second time?

A. Yes.

(1RP 1356-1358).

Ms. Beaver remembered being in the hot tub and socializing but did not remember kissing Mr. Ennis nor sitting on his lap. (1RP 1359).

However, Ms. Beaver did tell interviewing detectives she had been interested in Mr. Ennis the evening of the party because she found him attractive which was why she was watching his interactions with others.

(1RP 1362-1364.) The State objected to Ms. Beaver testifying about her observations of what the relationship was between K.S. and Mr. Ennis.

(1RP 1364).

When the State cross-examined Ms. Beaver about a previous statement wherein she stated K.S. and Ms. Roseland were wasted at the party, but Ms. Beaver wanted to clarify her statement, the State made following comment:

No, that's fine. Mr. Cossey can clean that up, and you can explain why you're changing it now.

(1RP 1361). The court sustained defense counsel's objection. (1RP 1361).

Gordon Ennis's Testimony

Mr. Ennis was finally given the opportunity to testify. (1RP 1367-1470). Prior to K.S.'s allegations, Mr. Ennis had worked with the Spokane Police Department for about 13 years and had been promoted to sergeant. (1RP 1368-1370). He was a firearms instructor for 5 or 6 years, and he had been a sergeant supervising six or seven patrol officers. (1RP 1372). He met K.S. when she was training to become a reserve officer, and he was her firearms instructor for a period of time. (1RP 1375). He and K.S.'s work shifts had overlapped so they would run into each other on almost a weekly basis. (1RP 1386).

Mr. Ennis arrived at the party around 9:30 p.m. (1RP 1381). He did not know most of the guests—only K.S., and Mr. and Mrs. Strosahl. (1RP 1373-1374, 1383). After Mr. Strosahl, K.S., and Ms. Roseland came inside from talking down at the fire pit, Mr. Ennis said K.S. “came up and she gave me a big hug. She wrapped her arms around me and jumped up. She looked excited to see me.” (1RP 1387). The group socialized in the kitchen for awhile before K.S. poured out shots of Fireball for everyone. (1RP 1387-1388). K.S. was not slurring her words or having difficulty communicating, though she appeared to be slightly intoxicated. (1RP 1389-1390).

Eventually the party guests moved to the living room to play a game. (1RP 1391-1393). During this timeframe, K.S. danced in front of Mr. Ennis, and gave him a hug. (1RP 1393-1395; State's Exhibit P-33). Mr. Ennis said she danced twice in front of him and the video of her dancing did not record everything, consistent with a similar statement from Ms. Beaver. (1RP 1357, 1393-1395). After dancing,

[K.S.] sat down, and she sat down right in front of me on the floor leaning back against the chair. And she was kind of leaned up against my legs. She had an arm wrapped around the legs, my legs, and she had her head kind of laying on my legs.... I kind of moved away from her a little bit.

(1RP 1395). Mr. Ennis said the contact surprised him but it made him feel good: "I'm a 45-year-old guy, she's a good-looking 25-year-old girl, and she was showing me a lot of attention. I—I kind of liked it." (1RP 1395).

To Mr. Ennis, K.S. did not appear to be stumbling or slurring her speech before everyone got into the hot tub. (1RP 1397-1398). K.S. sat next to Mr. Ennis in the hot tub and she danced at times in the middle. (1RP 1401-1402). Mr. Ennis testified he had no physical contact with K.S. at that time. (1RP 1402). After awhile, everyone got out of the hot tub. (1RP 1405-1406).

Mr. Ennis went into the guest bedroom where K.S. was to gather his dry clothes so he could change. (1RP 1408). K.S. saw him and pulled him closer and said his name. (1RP 1408-1409). Because K.S. would not

let Mr. Ennis leave, he stayed in the room in a wet swimsuit with towel until she finally fell asleep. (1RP 1410). Mr. Ennis and the other guests left the room where K.S. was sleeping. (1RP 1410). Not long after, Ms. Watkins complained K.S. had wandered into her room, and that K.S. wanted Mr. Ennis again. (1RP 1413). Mr. Ennis went to the guest bedroom again and sat down next to K.S. (1RP 1414). K.S. grabbed Mr. Ennis' hand and arm and K.S. eventually again fell back asleep while Mr. Ennis and Ms. Roseland conversed. (1RP 1414).

Mr. Ennis testified the same as Mr. and Mrs. Strosahl did about events later that evening—that three of them went to the guest room to tease K.S. about getting sick. (1RP 1420). Mr. Ennis also observed that when the light was turned on, K.S.'s eyes opened, she pushed herself up onto her elbow and blinked, and responded to comments from the group. (1RP 1422).

Next, Mr. Ennis said K.S. walked into the kitchen soon after where the group was. (1RP 1424). He said she “walked over to me and she put her arms up around my neck and gave me another hug and put her neck—or her face down into my neck, rested her head on my chest.” (1RP 1424). Mr. Ennis believed this hug was different. (1RP 1425-1426). The hug lasted for several seconds, and “she kept an arm around [him] after the initial hug and kept her head on [his] chest and on [his] shoulder.” (1RP

1425). Mr. Strosahl wanted to go to bed and started to leave the kitchen. (1RP 1425). K.S. then pulled on Mr. Ennis' waist toward the guest room and they walked down the hallway together. (1RP 1425). K.S. was not stumbling, swaying, or slurring her words. (1RP 1426).

When Mr. Ennis and K.S. were about halfway down the hallway, Mr. Ennis testified K.S. "stopped and leaned against the wall . . . [a]nd she grabbed me around the—the butt, and she pulled my hips in close to her and embraced me. And she put her neck, or her face, I'm sorry, into my neck again and kind of nuzzled into me." (1RP 1426, 1457, 1459). Mr. Ennis embraced her back. (1RP 1426, 1457, 1459).

Mr. Ennis and K.S. continued to the bedroom and K.S. laid down on the bed and Mr. Ennis sat next to her. (1RP 1426). The door was open. (1RP 1427). K.S. pulled her legs around Mr. Ennis and stroked his thigh. (1RP 1427). Mr. Ennis stroked K.S.'s back and shoulder area, and then down her back, buttocks, and thigh. (1RP 1427-1428). K.S. was awake and talking with Mr. Ennis. (1RP 1428). Mr. Ennis stroked K.S.'s hip, and K.S. rolled onto her back, and he stroked in the inside of her thigh. (1RP 1428). He began to rub her vagina through the outside of her sweatpants. (1RP 1428). K.S. pushed down her pants and grabbed Mr. Ennis by the wrist and moved his hand between her legs. (1RP 1429). He kept rubbing her vagina and then inserted a finger. (1RP 1429, 1447).

The pair continued to engage in intimate contact for a while longer. (1RP 1429).

When asked what he was thinking at the time, Mr. Ennis said, “I don’t know what I’m thinking. I’m flattered that this 25-year-old girl is hitting on me. I’m 45. She’s attractive. I’m—I like it.” (1RP 1429, 1445-1446).

However, Mr. Ennis said he had a reality check soon after. (1RP 1430). He stated:

It seemed like this was moving towards sex, full sex, and I was realizing the implications that this could have, already probably had with my personal life and the powerful implications it could have with my professional life.”

(1RP 1430). He stopped the contact, telling K.S. they could not do this and he needed to go home. (1RP 1430). Mr. Ennis said K.S. wanted him to stay, but he kept telling her he could not. (1RP 1430). K.S. pulled up her sweatpants and her demeanor changed. (1RP 1430). Mr. Ennis told her it was not her fault and if she wanted to talk about it they could at work. (1RP 1430). He finally said, “I’ve just got to go.” (1RP 1431). K.S. was awake during the entire encounter and was not sleeping. (1RP 1433). Mr. Ennis said they were both under the influence of alcohol. (1RP 1434, 1439). She never appeared incoherent. (1RP 1434). Mr. Ennis noted the sexual contact he had with K.S. was around 2:45 a.m.,

which would have been at least two hours since she had been seen throwing up by other guests. (1RP 1464-1465).

Mr. Ennis learned of the criminal investigation a few days later and knew a DNA sample would be procured, and made himself available for collection. (1RP 1432, 1467). He denied cutting his fingernails short in preparation for the meeting and said he had cut them a few days prior. (1RP 1433). He offered to clip his fingernails for law enforcement during the DNA collection meeting, which was declined. (1RP 1467).

The court would not allow Mr. Ennis to testify whether the sexual contact he had with K.S. was consensual. (1RP 1433).

The State called rebuttal witness Detective Armstrong. (1RP 1471-1472). Detective Armstrong testified he did not recall whether Mr. Ennis offered to cut his fingernails during the DNA collection meeting. (1RP 1472). The State also asked:

Q. Did you indicate in your report that he remained silent during the contact and conversations?

A. I indeed did.

(1RP 1472). Defense counsel did not object. (1RP 1472).

On defense surrebuttal, the defense investigator, Shirley Vanning, testified she was present for the DNA collection meeting with Mr. Ennis. (1RP 1474). She testified Mr. Ennis offered to clip his nails for DNA collection. (1RP 1474).

After the State and defense rested, defense counsel admitted he still had not completed research on the jury instructions in the case, despite the State's proposed instructions having been filed in June of 2017. (CP 80-96; 1RP 1476-1477). In fact, the court had to inform defense counsel there was one instruction proposed by the State which was not a standard WPIC:

THE COURT: How do you want to handle jury instructions? Do you want to—

MR. COSSEY: We were just talking about it. Your Honor, I—to be honest with the Court, I haven't had a chance to finish my research. These are WPIC's. I'm obviously not going to have any issues with these at all.

THE COURT: Well, there's one that's a non-WPIC, so...

MR. COSSEY: Okay.

THE COURT: You take—take the afternoon and then we'll meet at 9:00 tomorrow morning—

MR. COSSEY: Perfect.

THE COURT: --to deal with jury instructions. I'm presuming you're not presenting any, Mr. Cossey?

MR. COSSEY: I'm not sure of that yet, Judge. I'm going to finish my research this afternoon, and I will forward them to counsel.

THE COURT: Well, I need them.

MR. COSSEY: I'll forward them to you too.

...

THE COURT: I need them—I need them pretty quick.

MR. COSSEY: Okay. I'll look into that and get them to you early this afternoon.

(1RP 1476-1477). The next day, a very brief discussion of the jury instructions revealed defense counsel proposed the “reasonable belief” defense instruction and did not take exception to any others. (1RP 1478-1479).

During closing argument, the State made five separate statements regarding K.S.'s truthful testimony:

[K.S.] never stopped Officer Heuett from making that report, *because she knew the truth*. And [K.S.] *has abided by that truth* for two years and four months.

(1RP 1513) (emphasis added).

...

[K.S.] refused to give up on a job she loves, and *she has abided by the truth in this courtroom under oath in front of each of you and everyone else here*.

(1RP1514) (emphasis added).

...

And ladies and gentlemen, *when you find [K.S.]'s credibility to be such that her statement to you is nothing more and everything that includes the truth, you will realize under the law that the state has met its burden...*

(1RP 1543) (emphasis added).

...

[T]he defendant in his—in his statement suggested to you that this was a woman that had an agenda; that she was so jilted by this experience and her sexual aggressiveness being stopped by a defendant that she began a vendetta; *that she stayed with that for two years and four months; that she, committed to a profession that supposed to be about the truth, stayed with that truth*.

(1RP 1543) (emphasis added).

...

[W]hen you look at the facts in this case... *the truth and the reality of what occurred will be clear.* Not based on emotion, not based on games by the state, *not based on anything else than the truthful word of [K.S.].*

(1RP 1543-1544) (emphasis added).

Defense counsel never objected to any of them. (1RP 1513-1514, 1543-1544).

The State also made statements regarding Mr. Ennis's silence during closing argument:

Part of what you will do in this case is to look at the testimony and examine it. *We heard the defendant's statement for the first time yesterday when he took the stand.* The defendant is presumed innocent He is not presumed credible.

(1RP 1496) (emphasis added).

...

And again, this applies equally to the defendant's statement. *You can look at the timing and accuracy of a statement,* and you can also consider how someone testifies and what motive or bias they may have.

(1RP 1497) (emphasis added).

...

You can look *at the timing of statements in this case* and the testimony that contradicts not only the claim by the defendant that Kelsey Scott was flirting, but also that by the time this occurred she had suddenly been ridden all of the effects of being intoxicated.

(1RP 1499) (emphasis added).

...

The defendant spoke to you the other day after having two years and four months and access to reports and being seated in the courtroom throughout this, and he gave you a version of events that you must analyze.

(1RP 1500).

...

That took away some options from the defendant as to what he would testify to. His testimony was full of justifications, not taking responsibility. Ladies and gentlemen, actions can speak louder than words.

(1RP 1510) (emphasis added).

(1RP 1496-1497, 1499, 1500, 1510). Defense counsel did not object.

(1RP 1496-1497, 1499, 1500, 1510).

Throughout much of closing argument, defense counsel stated the defense of the allegations against Mr. Ennis was based on the consent of K.S. to the sexual contact. (1RP 1515-1537). Defense counsel also stated the following in closing:

I believe there are certain jury instructions that are going to be important. And one of them goes—it's No. 11, and Judge Moreno read it. And it's the one that says, "If the defendant reasonably believed that [K.S.] was not mentally incapacitated or physically helpless," if he had that reasonable belief, given everything we've shown you, everything you've seen, the video, the pictures, everything you've heard, that if more likely than not that you believe he reasonably believed she was capable of consent, then that is another prong that you have to consider in your deliberations. But I don't believe you need to do that,

because here's why. They're telling you his story doesn't make sense. There was two people there. Only those two people know what happened. Go through the timeline. Go through the testimony. You will make the decision that [K.S.]'s version of what happened that night does not make sense. We know what her reasons are. She told you those. She told you her motivation.

(1RP 1535).

Defense counsel did not talk about Instruction No. 11 at any other point in closing argument. (1RP 1515-1537).

The State also made several comments during direct questioning of K.S., expressing K.S. had been "assaulted" or "sexually assaulted." (1RP 862, 866, 867, 869, 876, 877, 879-880, 933-934). Defense counsel ultimately objected. (1RP 933-934).

Review of the State's proposed jury instructions and the Court's Instructions to the Jury reveals it is likely, though unclear, that the defense instruction to second degree rape, Instruction No. 11, was proposed by defense counsel. (CP 80-96, 312-326; 1RP 1480-1489).

The jury was instructed on the crime of second degree rape for Count 1. (CP 321, Instruction No. 7; 1RP 1486). The to-convict instruction was as follows:

To convict the defendant of the crime of rape in the second degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 25, 2015, the defendant engaged in sexual intercourse with [K.S.];

(2) That the sexual intercourse occurred when [K.S.] was incapable of consent by reason of being physically helpless or mentally incapacitated; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of evidence, you have a reasonable doubt as to any one of these elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

(CP 321, Instruction No. 7; 1RP 1486).

The jury was also instructed: “In order to convict a person of second degree rape, it shall not be necessary that the testimony of the alleged victim be corroborated.” (CP 324, Instruction No. 10; 1RP 1487).

The jury was instructed as to a potential defense to the crime of second degree rape:

It is a defense to a charge of rape in the second degree that at the time of the act the defendant reasonably believed that [K.S.] was not mentally incapacitated or physically helpless.

(CP 325, Instruction No. 11; 1RP 1487-1488).

The jury found Mr. Ennis guilty of rape in the second degree. (CP 328; 1RP 1546-1548).

Post-conviction and New Trial

After trial Juror No. 37—the same alternate juror defense counsel unsuccessfully challenged for cause because she read extensively about the case in the media prior to being seated as an alternate—sent a letter to the trial judge. (CP 1058-1059). The alternate juror wrote, in part:

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).

After trial, Mr. Strosahl's prior attorney, Mr. Bugbee, filed a declaration regarding his past communications with Mr. Cossey. (CP 517-518). Therein Mr. Bugbee admitted he met with Mr. Cossey to discuss

... mutual matters of concern that I believed could have an impact on my investigation and potential defense of my client as well as of Mr. Cossey's client....

I was given assurances of confidentiality from Mr. Cossey that the discussion would be kept confidential and privileged as to both clients. I was mindful of both the evidentiary and ethics rules that govern this type of discussion....

I then asked Mr. Cossey a hypothetical question and we considered whether there were points of mutual interest. Within a short period of time there was no need for further communications. I considered the terms of Mr. Cossey's and my discussions to continue under the joint defense

doctrine. Recently Mr. Cossey repeated to me his assurance of confidentiality after he withdraw from the case.

(CP 517-518). Mr. Bugbee's declaration continued:

I selected by wording and the question in order to make no assertion of fact to Mr. Cossey and my client has not adopted any portion of my question to Mr. Cossey as a statement....

I was careful to create no discoverable opportunity for the State to pierce any client confidences and not to create evidence that would be admissible in any proceeding against Defendant or Mr. Strosahl.

(CP 518). For the first time, Mr. Bugbee represented he and Mr. Cossey had a joint defense agreement. (CP 468-474; 1RP 1569-1605).

After trial, Mr. Ennis' new defense counsel, Mark Vovos, filed a motion for new trial on several grounds, some of which are raised herein. (CP 340, 410-463; 1RP 1684-1750, 1761-1767). The court denied the motion. (CP 1149-1168; 1RP 1769-1782).

Mr. Ennis timely appealed. (CP 1268-1269).

E. ARGUMENT

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.

At the close of evidence, the trial court instructed the jury on the elements of second degree rape. (CP 321, Instruction No. 7; 1RP 1486).

The trial court further instructed the jury that K.S.'s testimony need not be corroborated to find the defendant guilty of second degree rape, and that it was a defense to this charge if Mr. Ennis reasonably believed K.S. was not incapacitated at the time of the act. (CP 324-325, Instruction Nos. 10 & 11; 1RP 1487-1488). Yet the trial court erred by issuing both Instructions 10 and 11 together. Because Mr. Ennis's defense and version of events was just as relevant to the jury's determination, his constitutional right to present a defense and ability to argue his theory of the case was violated. These instructions combined diluted the defense instruction and were misleading. The case must be reversed.

Both the United States and Washington Constitutions guarantee the right to present a defense. U.S. Const. amend. VI; Wash. Const. art. I, §22.

A challenged jury instruction is reviewed de novo for errors of law. *State v. O'Donnell*, 142 Wn. App. 314, 321, 174 P.3d 1205 (2007) (citation omitted). In general, objections to jury instructions may not be raised for the first time on appeal unless it relates to a "manifest error affecting a constitutional right." *Id.* (citing RAP 2.5(a)(3) (other citation omitted). If the reviewing court determines the error is "truly of constitutional magnitude", then it must examine the error's effect for harmless error. *O'Donnell*, 142 Wn. App. at 322 (quotations & citations omitted). *See State v. Clark-El*, 196 Wn. App. 614, 620, 384 P.3d 627 (2016) (in general, harmless error occurs

when the reviewing court concludes beyond a reasonable doubt the jury verdict would have been the same absent the error).

“Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied.” *O’Donnell*, 142 Wn. App. at 321 (citation omitted). To comply with due process, jury instructions must also “fully instruct the jury on the defense theory” and “give the jury discretion to decide questions of fact.” *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).

Under Article IV, section 16 of the Washington State Constitution, a judge “shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const., art. IV, sec. 16. Improper judicial comments are presumed to be prejudicial. *State v. Sivins*, 138 Wn. App. 52, 60-61, 155 P.3d 982 (2007).

A person may be found guilty of second degree rape when “the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.” RCW 9A.44.050(1)(b). Second degree rape falls under the scope of Chapter RCW 9A.44. RCW 9A 44.050 (second degree rape). It is a defense to second degree rape if the defendant proves by a preponderance of the evidence he or she “reasonably believed that the victim was not mentally incapacitated and/or physically helpless.” RCW

9A.44.030(1) (reasonable belief defense); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 19.03 (4th Ed. 2016).

By law, a complaining witness's version of events is not required to be corroborated in order for the jury to find a defendant guilty of second degree rape. RCW 9A.44.020(1) provides: "In order to convict a person of any crime defined in this chapter [RCW 9A.44 sex crimes,] it shall not be necessary that the testimony of the alleged victim be corroborated." RCW 9A.44.020(1); *see also* 11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 45.02 (4th Ed. 2016). However, WPIC 45.02 does not contain proposed pattern jury instruction language for noncorroboration testimony. 11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 45.02 (4th Ed. 2016). Specifically, while WPIC 45.02 cites to RCW 9A.44.020(1), the comment on the instruction recommends against the giving of a noncorroboration instruction:

RCW 9A.44.020(1) states that it is not necessary for the testimony of an alleged rape victim to be corroborated. That statute made no change in the law. Since 1913 the law of Washington has followed the common law rule that no corroboration is necessary. *State v. Thomas*, 52 Wn.2d 255, 324 P.2d 821 (1958).

The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

[Current as of December 2015.]

Courts have often lamented the use of the “noncorroboration instruction,” and defendants have challenged it by arguing the instruction is a court’s improper comment on the evidence. *State v. Chenoweth*, 188 Wn. App. 521, 535-538, 354 P.3d 13 (2015) (Becker, J., concurring, but expressing concern over case precedent); *State v. Zimmerman*, 130 Wn. App. 170, 180-183, 121 P.3d 1216 (2005) (expressing “misgivings” because the court was bound to follow precedent finding noncorroboration instruction proper); *see State v. Johnson*, 152 Wn. App. 924, 936-937, 219 P.3d 958 (2009).

In *Johnson*, the court commented that “[w]hen giving this instruction . . . trial courts should consider instructing the jury that it is to decide all questions of witness credibility as part of the instruction. Without this specific inclusion, the instruction stating that no corroboration is required may be an impermissible comment on the alleged victim's credibility.” *Id.* at 936-937. In *Chenoweth*, Judge Becker concurred with the majority opinion holding the noncorroboration instruction was not an impermissible judicial comment on the evidence in violation of the State constitution. *Chenoweth*, 188 Wn. App. at 538. However, the judge’s concurrence expressed its own concern over the giving of such instruction, stating:

If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction. I agree with the committee on pattern jury instructions that the matter of corroboration is really a matter of sufficiency of the evidence. Many correct statements of the law are not appropriate to give as instructions. But we are bound by *State v. Clayton*, 32 Wash.2d 571, 202 P.2d 922 (1949), to hold that the giving of such an instruction is not reversible error. *State v. Zimmerman*, 130 Wash.App. 170, 182–83, 121 P.3d 1216 (2005). Accordingly, I must concur.

Id. (emphasis added).

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

The federal and Washington State constitutions guarantee a defendant “a meaningful opportunity to present a defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citations omitted); U.S. Const. amends. VI; XIV; Const. art. I, sec. 22. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A basic tenet of our jurisprudence is a defendant’s right to the opportunity for his defense to be heard, including the right to question witnesses and offer testimony. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

In this case, the court's noncorroboration instruction was misleading and affected Mr. Ennis's defense, and interfered with the reasonable belief defense instruction.⁴ (CP 325, Instruction No. 11; 1RP 1487-1488). The court's instruction that K.S.'s testimony need not be corroborated interfered with Mr. Ennis' ability to present a defense because it placed special emphasis on K.S.'s testimony but detracted from Mr. Ennis' testimony in defense. (CP 324, Instruction No. 10; 1RP 1487). Here, Mr. Ennis's lawyer's defense rested on consent, and/or, whether he reasonably believed K.S. was not mentally or physically incapacitated. (CP 325, Instruction No. 11; 1RP 1426-1429). But because the court instructed the jury that K.S.'s testimony need not be corroborated in order to convict Mr. Ennis of second degree rape, the court's silence as to Mr. Ennis's opposing testimony interfered with his constitutional right to present a defense. U.S. Const. amends. VI; XIV; Const. art. I, sec. 22. This is because the noncorroboration instruction interfered his right to a "fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294.

For instance, it would have been just as equal to the parties to issue a counterpart instruction stating the following: "In order to find the

⁴ Appellant recognizes he does not believe defense counsel properly set forth the reasonable belief instruction as should have been argued. Appellant raises the issue of ineffective assistance of counsel for this reason in his opening brief herein. *See Issue 3*.

defendant reasonably believed K.S. was not mentally incapacitated or physically helpless, it shall not be necessary that the testimony of the defendant be corroborated.” (See CP 324, Instruction No. 10). This instruction would not have been error, nor would it have been contrary to law to give such an instruction. See RCW 9A.44.020(1) (noncorroboration of alleged victim); and RCW 9A.44.030(1) (reasonable belief defense). Mr. Ennis was permitted by statute to present a defense of reasonable belief, and his version of events did not require corroboration, either. Thus, the court’s instruction was a comment on the evidence, which, when combined with the reasonable belief defense instruction, interfered with Mr. Ennis’ constitutional right to present a defense.

The court’s use of the noncorroboration instruction had a chilling effect on Mr. Ennis’s defense. The noncorroboration instruction misled the jury because the instructions, taken as a whole, did not properly inform the jury of the law since Mr. Ennis’s version of events also need not have been corroborated in order to prove his defense of consent or reasonable belief of capacity.⁵ *O’Donnell*, 142 Wn. App. at 321; (CP 325, Instruction No. 11). The court’s error in instructing the jury with the noncorroboration instruction was a manifest error affecting a constitutional right—Mr. Ennis’s right to present a defense. When the

⁵ See fn. 4.

instructions were taken as a whole, including the reasonable belief defense instruction, they misled the jury and interfered with Mr. Ennis's right to present a defense.

Also, looking at the court's instructions, the burden of proof, and the instructions as a whole, the noncorroboration instruction was confusing. The instruction did not contain the language reminding the jury it has the sole power to determine credibility and the burden of proof is on the State to prove every element of the charge beyond a reasonable doubt. *Johnson*, 152 Wn. App. at 936-937. In the case of *State v. Clayton*, which relied on *State v. Johnson*, 152 Wn. App. 924, the court cautioned whether additional language is necessary, and stated: "However, the court cautioned trial courts should consider giving the additional language and omission of that language may be an impermissible comment on the alleged victim's credibility." That is exactly the case here. Looking at the court's instructions and the standard of proof and the instructions as a whole, the noncorroboration instruction without mentioning the necessary language telling the jury that they decide credibility, and the standard of proof is on the prosecution to prove every element of the charge beyond a reasonable doubt of the offense, was confusing. The nature and manner to Instruction No. 10 is not reasonably inferable, it is an incomplete statement concerning credibility and the

standard of proof, and as such, goes to the heart of the case that the court tells the jury that the testimony of K.S. does not have to be corroborated, rather it can be uncorroborated. And that is the problem in this case, and it goes into the entire argument of the prosecutor. The nature and manner of the noncorroboration instruction given in this case was an incomplete statement concerning credibility and the standard of proof. As such, the instruction goes to the heart of the case—credibility.

The error was not harmless. *Clark-El*, 196 Wn. App. at 620. Due to the importance of credibility in this case—the version of events depended solely on the witness credibility of K.S. and Mr. Ennis—the jury’s verdict may have been different absent the error. *Id.* The evidence was not overwhelming and without the instructional error this Court could not find the verdict would have been the same beyond a reasonable doubt. *Id.*

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

b. Whether the giving of the noncorroboration instruction was an improper court comment on the evidence, and whether case precedent stating otherwise should be abrogated for being incorrect and harmful.

The noncorroboration instruction given to the jury in this case constituted an improper comment on the evidence under Article IV, sec.

16, of the Washington State Constitution. Const. Art. IV, sec. 16; (CP 324, Instruction No. 10; 1RP 1487). The Washington Pattern Jury Instruction Committee and appellate courts have expressed reservations and misgivings regarding the State Supreme Court precedent from 1949 in *State v. Clayton*, holding trial courts may give the noncorroboration instruction. Because the noncorroboration instruction is an impermissible judicial comment on the evidence in violation of Art. IV, sec. 16, of the State Constitution, Mr. Ennis respectfully requests this Court overrule *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949), as being outdated and inapplicable to the facts and because the precedent is incorrect and harmful.

The doctrine of stare decisis provides stability and clarity in the law and gives parties a clear standard with which to determine rights. *State v. Stalker*, 152 Wn. App. 805, 810-811, 219 P.3d 722 (2009). But the doctrine is “not an absolute impediment to change.” *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). The courts can and will reject prior holdings “upon a clear showing that an established rule is incorrect and harmful.” *Id.* (citation omitted); *Stalker* 152 Wn. App. at 810-812. The State Supreme Court recognizes there are occasions “when a court should eschew prior precedent in deference to intervening authority where the legal underpinnings of our precedent have changed or

disappeared altogether.” *Id.* at 678 (internal quotations & citations omitted).

The courts do not take an invitation for a change in precedent lightly. *Otton*, 185 Wn.2d at 678 (citation omitted). The decision to change precedent is not based on whether the court would rule in the same way if the issue was a matter of first impression. *Id.* Rather, “the question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent—promoting the evenhanded, predictable, and consistent development of legal principles, fostering reliance on judicial decisions, and contributing to the actual and perceived integrity of the judicial process.” *Otton*, 185 Wn.2d at 678 (citing *Keen v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) and *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)) (internal quotations & brackets omitted).

Since *State v. Clayton* was decided in 1949, much has changed. *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949). The “MeToo” movement has exploded, a righteous women’s movement which prior defense counsel knew nothing about.⁶ (IRP 35). Judicial decisions have since recognized that an instruction which “could lead the jury to infer that the trial court believed or disbelieved a witness constitutes a judicial

⁶ <https://www.cnn.com/2017/10/30/health/metoo-legacy/index.html>

comment on the evidence.” *State v. Allen*, 161 Wn. App. 727, 742, 255 P.3d 784 (2011) (citing *State v. Faucett*, 22 Wn. App. 869, 876, 593 P.2d 559 (1979)). Also, the abolishment of prior state law requiring witness corroboration in rape cases occurred in 1913—over 100 years ago. *Chenoweth*, 188 Wn. App. at 537, n. 49 (citations omitted). While it made sense years ago to inform jurors victim corroboration was no longer required to find a suspect guilty of a sex crime, the time for that historical basis has since passed. *See Chenoweth*, 188 Wn. App. at 537 (claiming historical basis for instructing a jury on corroboration in sex cases).

And since *Clayton* was issued, the legislature has provided a statutory defense to second degree rape due to mental or physical incapacity. RCW 9A.44.030. RCW 9A.44.030 is a defense to second degree rape, and recognizes there may be instances when an alleged victim does not remember a sexual encounter due to drug or alcohol use, but the alleged perpetrator reasonably believed the victim was not incapacitated or physically helpless. RCW 9A.44.030; *see State v. Jones*, 168 Wn.2d 713, 719-721, 230 P.3d 576 (2010) (trial court erred in barring defendant from testifying alleged victim consent to sex during an “all-night drug-induced sex party”). RCW 9A.44.030, the reasonable belief defense, appears to have been first passed into law in 1988. RCW 9A.44.030(1) (1988). The statute states:

In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's 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).

Also, since the decision in *Clayton*, several appellate courts have lamented the use of the noncorroboration instruction at trial. *State v. Chenoweth*, 188 Wn. App. 521, 535-538, 354 P.3d 13 (2015) (Becker, J., concurring, but expressing concern over case precedent); *State v. Zimmerman*, 130 Wn. App. 170, 180-183, 121 P.3d 1216 (2005) (expressing “misgivings” because the court was bound to follow precedent finding noncorroboration instruction proper); *State v. Johnson*, 152 Wn. App. 924, 936-937, 219 P.3d 958 (2009) (noting the noncorroboration instruction may be a comment on the evidence without modification, but relying upon case precedent from the State Supreme Court).

Finally, since the *Clayton* decision, the Washington State Supreme Court Committee on Jury Instructions has expressly recommended against the giving of the noncorroboration instruction, stating:

The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. *Whether a jury can or should accept the uncorroborated testimony of*

the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 45.02 (4th Ed. 2016)

(Comment) (emphasis added).

Here, the jury was instructed that “[i]n order to convict a person of second degree rape, it shall not be necessary that the testimony of the alleged victim be corroborated.” (CP 324, Instruction No. 10; 1RP 1487).

In contrast, the *Clayton* Court considered a much lengthier, more explanatory instruction. 32 Wn.2d at 572. The instruction reviewed and approved in that case stated:

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.

32 Wn.2d at 572. In *Clayton*, the Court recognized the instruction set forth the correct law of the state that an alleged victim’s testimony need not be corroborated for a defendant to be found guilty of a sex crime. 32 Wn.2d at 572-573 (citations omitted). The Court rejected the appellant’s argument that the instruction given above was a comment on the evidence in violation of Article IV, sec. 16, of the state constitution. *Id.* at 573-574

(citing Const. Art. IV, sec. 16). Yet even the *Clayton* court recognized the instruction did appear to place emphasis on the alleged victim's testimony, stating: "*It is true that, in the instruction of which complaint is here made, the trial court in a sense singled out the testimony of the prosecutrix.*" *Id.* at 574 (emphasis). But ultimately the Court added that because the instruction stated "a defendant *may* be convicted upon such testimony alone, provided the jury should believe from the evidence, and should be satisfied beyond a reasonable doubt, that the defendant was guilty of the crime charged." *Id.*

The precedent set forth by *Clayton* is incorrect. 32 Wn.2d at 573-578. The *Clayton* decision is "so problematic that it *must* be rejected" *Otton*, 185 Wn.2d at 678 (citations omitted). As noted herein, several cases have lamented the use of the noncorroboration instruction, the Washington State Supreme Court Committee on Jury Instructions does not recommend giving the instruction, and the law and society have changed greatly since. Although it is a correct statement of the law, that does not mean it does not comment on the evidence: "Many correct statements of the law are not appropriate to give as instructions." *Chenoweth*, 188 Wn. App. at 538 (Becker, J., concurring).

The precedent set forth by *Clayton* is also harmful. Post-*Clayton*, the appellate courts have recognized that an instruction that can lead a jury

to infer a trial court's thoughts on a witness's credibility are improper. *Allen*, 161 Wn. App. at 742 (citing *Faucett*, 22 Wn. App. at 876). Moreover, one can imagine how the noncorroboration instruction places undue emphasis on the victim's testimony when combined with a reasonable belief defense instruction. RCW 9A.44.020(1), RCW 9A.44.030(1). When a jury is instructed the alleged victim's testimony need not be corroborated to find the defendant guilty, yet the defendant is attempting to set forth his theory of the case that he reasonably believed the victim was not mentally or physically incapacitated, a harmful inference results because the jury may imply the defendant's version of events must be corroborated to be true. *Id.*

More specifically, here, where Mr. Ennis' reasonable belief defense instruction rested on whether he reasonably believed K.S. was not incapacitated,⁷ it would have been just as equal to the parties to issue an instruction stating the following: "In order to find the defendant reasonably believed K.S. was not mentally incapacitated or physically helpless, it shall not be necessary that the testimony of the defendant be corroborated." (*See* CP 324, Instruction Nos. 10 & 11). But the giving of only one instruction—that K.S.'s testimony need not be corroborated—harmed Mr. Ennis's right to present a defense and theory of the case under

⁷ *See* fn. 4

the Sixth Amendment. *O'Donnell*, 142 Wn. App. at 321 (“[j]ury instructions are sufficient if they allow the parties to argue their theories of the case”). The noncorroboration instruction also interferes with a jury’s “discretion to decide questions of fact.” *Koch*, 157 Wn. App. at 33 (due process requires jury instructions allow the jury decide questions of fact).

While the language of the noncorroboration instruction is in compliance with the statute, RCW 9A.44.020(1), the giving of the instruction itself is an improper judicial comment on the evidence. *Chenoweth*, 188 Wn. App. at 535-538. The problem lies in case precedent. *Id.* (Becker, J., indicating the court is bound to follow precedent in allowing the noncorroboration instruction, but expressing misgivings) (citing *State v. Clayton*, 32 Wn. 2d 571, 202 P.2d 922 (1949)).

Because the stare decisis in *Clayton* is incorrect and harmful, Mr. Ennis respectfully requests this Court overrule *Clayton* and hold it is an incorrect and harmful statement of the law. The noncorroboration instruction is a comment on the evidence in violation of Article IV, section 16, of the Washington Constitution. The error was not harmless. The incident alleged was based upon the credibility of two people: K.S. and Mr. Ennis. Mr. Ennis’ reasonable perceptions were a main component of his plausible defense and the noncorroboration instruction interfered with his defense. No court could conclude beyond a reasonable doubt that the

jury verdict would have been the same absent the error. *Clark-El*, 196 Wn. App. at 620 (harmless error standard).

The case must be reversed.

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.

Throughout the trial, the State committed prosecutorial misconduct in a variety of ways. Sometimes defense counsel objected, but the majority of the time no defense objections were made. Due to the numerous errors resulting from the State’s misconduct, the case should be reversed and remanded for a new trial.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor’s statements are improper.”). To prove prejudice, there

must be a substantial likelihood the misconduct affected the jury's verdict.
Emery, 174 Wn.2d at 760.

If the defendant fails to properly object to the misconduct, “a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered.” *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (quoting *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). “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.’” *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). “Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

Repetitive and prejudicial prosecutorial misconduct can have a cumulative effect as to be so flagrant that “no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (internal quotations & citations omitted).

The cumulative effect of the State's varying and multiple instances of misconduct prejudiced Mr. Ennis. *See Emery*, 174 Wn.2d at 761 (quoting

Thorgerson, 172 Wn.2d at 455); *Lindsay*, 180 Wn.d at 443 (finding cumulative error). This case was a credibility contest between K.S. and Mr. Ennis. When a case is largely a credibility contest, a prosecutor's improper arguments can easily serve as the deciding factor. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011). Further, "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 83 Wn. App. 209 (1996).

a. The State committed misconduct by eliciting improper testimony regarding defendant's constitutional right to silence and commenting on the defendant's constitutional right to silence in closing argument.

At trial the State improperly elicited testimony on Mr. Ennis's silence, despite the fact he was given *Miranda* warnings, his counsel represented he would not yet make a statement, and the silence was during law enforcement's collection of his DNA pursuant to a warrant. (1RP 1021, 1171, 1232-1247, 1472); (*RAP 9.11 Motion to Accept Add'l Evidence & Decl. of Counsel*, Ex. A at pgs. 7-8). The State also improperly commented on Mr. Ennis' silence during its closing argument, using such argument to persuade the jury of Mr. Ennis's guilt. (1RP 1496-1497, 1500). Because the State's conduct was a violation of his state and federal right to remain silent, and the comment was not harmless error, the case must be reversed and remanded.

When the State makes an improper argument which indirectly touches upon a constitutional right, the courts generally review based on whether the State's argument "is so flagrant and ill-intentioned as to create incurable prejudice." *State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (citations omitted). The defendant must establish the State's conduct was improper and prejudicial. *Id.*

Failure to object to the State's improper remarks on a defendant's constitutional right to silence does not waive the issue on appeal when the remark amounts to manifest error. *State v. Dixon*, 150 Wn. App. 46, 57, 207 P.3d 459 (2009) (citing RAP 2.5(a)(3)). If the State's misconduct directly violates a constitutional right, it is subject to constitutional harmless error. *State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000). The State bears the burden of proving a constitutional error was harmless, and constitutional error is harmless only if the reviewing court is "convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error . . . and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (citations omitted); *State v. Terry*, 181 Wn. App. 880, 894, 328 P.3d 932 (2014).

The Fifth Amendment to the United States Constitution and Article I, section 9, of the Washington State Constitution both state that a person shall not be compelled in any criminal case to give evidence against himself. *State*

v. Pinson, 183 Wn. App. 411, 416-417, 333 P.3d 528 (2014) (citations omitted); U.S. Const. Amend. V; Const. Art. I, sec. 9. Both constitutions guarantee the same protection; neither constitution provides greater protection of this right than the other. *State v. Terry*, 181 Wn. App. 880, 889 (2014) (citations omitted). Thus, a defendant has the right to be free from self-incrimination, which includes the right to silence. *Pinson*, 183 Wn. App. at 417 (citation omitted).

A comment on post-arrest silence raises due process concerns. *Terry*, 181 Wn. App. at 889. “Warnings under *Miranda* given upon arrest constitute and implicit assurance to the defendant that silence in the face of the State’s accusations carries no penalty, making it fundamentally unfair to then penalize the defendant by offering his silence as evidence of guilt.” *Id.* at 889 (citing *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996)) (international quotations & other citations omitted). The government’s comments on post-arrest silence breaks the promises of *Miranda* and violates due process of law. *Id.* (citations omitted); *Easter*, 130 Wn.2d at 236.

Pre-arrest silence also is recognized as protected under the Fifth Amendment in Washington State. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). In *Easter*, our State Supreme Court rejected the government’s argument that an accused has a right to silence only when the accused is advised of his right to silence during arrest. 130 Wn.2d at 239. The Court

disagreed, stating “no special set of words is necessary to invoke the right [to silence].” *Id.* at 239. The Court explicitly stated:

In fact, an accused’s silence in the face of police questioning is quite expressive as to the person’s intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence *after* arrest is “insolubly ambiguous” . . . it is equally so *before* an arrest.

Id. at 239 (emphasis in original). This is because it is the State’s burden—not the defendant’s—to produce the evidence needed to secure a conviction. *Id.* at 241. The Court then went on to point out several federal courts have recognized that evidence of pre-arrest silence cannot be used in the government’s case in chief. *Id.* at 239 (citations omitted); *see also Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (due process of the Fourteenth Amendment prohibits impeachment for silence post-*Miranda*, even when defendant testifies at trial). “It is settled that the State may not, consistent with due process, use post-arrest silence following *Miranda* warnings to impeach a defendant's testimony at trial.” *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174 (1988) (citing *Doyle*, 426 U.S. 610).

At trial “the State may not elicit comments from witnesses or make closing arguments relating to a defendant’s silence to infer guilt from such silence.” *Easter*, 130 Wn.2d at 236. This is because a defendant’s “Fifth Amendment right to silence can be circumvented by the State just as effectively by questioning the arresting officer or commenting in closing

argument as by questioning the defendant himself.” *Id.* at 236 (citation omitted). “The implication is that suspects who invoke their right to silence do so because they know they have done something wrong.” *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Two exceptions excuse invocation of the Fifth Amendment privilege. *Pinson*, 183 Wn. App. at 418 (citing *Salinas v. Texas*, 570 U.S. 178, 183-185, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013)). First, it is unnecessary for a defendant to assert the privilege at his trial. Second, “a defendant subject to a custodial interrogation or other governmental coercion need not invoke the privilege.” *Id.* at 418 (citing *Salinas*, 570 U.S. at 186-188).

In *Pinson*, the court found *Salinas* did not apply. *Pinson*, 183 Wn. App. at 418 (citing *Salinas*, 570 U.S. 178). The court stated the requirement of an express invocation of the Fifth Amendment to protect the defendant’s pre-arrest silence did not apply because although the defendant allowed “officers to talk with him, [the defendant] testified that at the time of the interview he had been handcuffed and taken to the front porch . . . and his interrogation was custodial rather than voluntary.” *Id.* at 418 (citing *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004)). “[A] suspect is in custody when a reasonable person in the suspect’s position would feel his freedom was curtailed to the degree associated with a formal arrest.” *Id.* And “a suspect who is subjected to the inherently compelling pressures of an unwarned custodial interrogation need not invoke the privilege.” *Id.* at 419

(internal quotations omitted) (citing *Salinas*, 133 S. Ct. at 2180). *See also* *State v. Dennis*, 16 Wn. App. 417, 421-422, 558 P.2d 297 (1976) (defendant should have been advised of *Miranda*, as he did not feel “free to leave” despite not being placed under arrest, being in his own apartment, and officer’s assurance defendant could leave at any time; officer’s insistent presence to monitor the location quelled the defendant’s freedom).

Similarly, in *State v. Terry*, Division III found *Salinas* distinguishable, because the defendant’s pre-arrest silence and reaction to his arrest fell under the category of post-arrest silence. *State v. Terry*, 181 Wn. App. 880, 889-890, 328 P.3d 932 (2014). Essentially, the jury wanted to know whether the defendant knew why he was being arrested, and this Court determined there was no “meaningful prearrest period to which the juror’s questions could have been directed.” *Id.* at 890. The *Terry* court recognized “no ritualistic formula is necessary to invoke the privilege against self-incrimination.” *Id.* at 888 (citing *Salinas*, 133 S.Ct. at 2178) (internal brackets & quotations omitted). And this Court added “courts faced with the admissibility of *prearrest* silence after *Salinas* have examined the defendant’s conduct to see if an invocation of the Fifth Amendment rights was either express or implied.” *Id.* at 889 (citing *United States v. Okatan*, 728 F.3d 111 (2d Cir. 2013) (defendant’s expression of desire to speak with lawyer invoked Fifth Amendment privilege); *see also State v. Burke*, 163 Wn.2d at 221 (invocation of the right to silence requires “no magic words”; and finding

improper the State's use of invocation of right to counsel as evidence of guilty silence) (citations omitted).

When the State does address a defendant's silence, courts will consider whether the State made a comment on the silence or a reference to it. *Terry*, 181 Wn. App. at 891. A comment on silence occurs when the State uses silence as substantive evidence or as an admission of guilt, and it constitutes constitutional error. *Id.* at 891 (citations omitted). If the comment is not direct, the court asks three questions to determine whether the State was "seeking to capitalize on an *inference* of guilt" in violation of the defendant's rights:

First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? Third, was the indirect comment exploited by the State during the course of the trial including argument, in an apparent attempt to prejudice the defense offered by the defendant?

Terry, 181 Wn. App. at 891 (emphasis in original) (citation omitted). If any of the questions is answered in the affirmative, the indirect comment is an error of constitutional proportions. *Id.* (citation omitted).

Here, Mr. Ennis was with his defense counsel, in his defense counsel's office, and provided DNA pursuant to a warrant where all sorts of

evidence was collected: pictures of Mr. Ennis's hands, jewelry from his person, swabs of his hands, a buccal swab, and other items. (1RP 1021, 1232-1247). Though Mr. Ennis was not under arrest at the time of the DNA collection, he was certainly not in a position where he was free to leave. *Dennis*, 16 Wn. App. at 421-422 (defendant not "free to leave"). Mr. Ennis was advised of his *Miranda* rights and per counsel chose not to give a statement to law enforcement during the DNA collection. (*RAP 9.11 Motion to Accept Add'l Evidence & Decl. of Counsel*, Ex. A at pgs. 7-8). Mr. Ennis's right to silence was expressly invoked by being present with counsel, being *Mirandized* pursuant to a warrant for DNA collection, and declining the opportunity to make a statement in counsel's office. Thus, the post-arrest silence protections recognized by Washington courts must apply to any of the State's improper comments about his silence. *Terry*, 181 Wn. App. at 889; *Easter*, 130 Wn.2d at 236; *see Burke*, 163 Wn.2d 204 (State violated right to silence by commenting on defendant's invocation of right to counsel and subsequent silence; investigative officer presumed request for counsel also was an invocation of silence). Washington Courts have recognized that no one specific or "ritualistic formula" is required for invocation of silence to occur. *Terry*, 181 Wn. App. at 888-890; *Pinson*, 183 Wn. App. at 418; *Burke*, 163 Wn.2d at 219-221.

During trial the State objected to defense counsel's redirect examination of Mr. Ennis, wherein defense counsel asked whether Mr. Ennis

was cooperative during the DNA collection process and throughout the investigation. (1RP 1465). The State objected, arguing it was an improper question:

[STATE]: Your Honor, it's an improper question, because I cannot respond with the fact that he took the Fifth. That's not cooperation Mr. Ennis asserted his Fifth Amendment rights and said nothing.

[DEFENSE COUNSEL]: They didn't even try to interview him there. We didn't assert any rights. They came for DNA....

...

[THE COURT]: ... Are you suggesting that he was asked if he wanted to answer questions and he took—just took the Fifth?

[STATE]: Well, your Honor, what I'm suggesting is that counsel's asking a question and making an inference that I cannot rebut . . . without violating, commenting on the defendant's Fifth Amendment right. And given that I can't rebut it, it's improper to get into it.

...

[DEFENSE COUNSEL]: The detective testified [Mr. Ennis] was cooperative.

(1RP 1465-1467).

The trial court's suggestion to the parties was inaudible, but it appears in essence the court requested defense counsel to rephrase his questions. (1RP 1465-1466). Not long after, the State asked Detective Armstrong whether Mr. Ennis "remained silent during the [DNA collection] contact and

conversations” (1RP 1472). The detective replied Mr. Ennis did, in fact, remain silent. (1RP 1472).

The State elicited a direct comment from a witness about Mr. Ennis’ right to silence, and this occurred right after the State acknowledged such a tactic would be a violation of Mr. Ennis’ Fifth Amendment rights and the State itself represented Mr. Ennis had invoked those rights. (1RP 1465-1467); *see also* (RAP 9.11 Motion to Accept Add’l Evid. & Decl. of Counsel, Ex. A, pgs. 7-8). Moreover, this question was completely unnecessary because Detective Armstrong had just testified he did not remember Mr. Ennis offering to cut his own fingernails for the DNA collection. (1RP 1472). The State did not need to go as far as it did in asking that final question, well-knowing it was violating Mr. Ennis’ Fifth Amendment rights. Even more, this was the last bit of testimony the jury heard in the State’s case. (1RP 1472). The State’s choice to elicit this direct comment on Mr. Ennis’ silence was misconduct and is “automatic constitutional error.” *Terry*, 181 Wn. App. at 891 (recognizing direct comments as such).

Finally, and repeatedly, the State made comments and references to Mr. Ennis’s silence when it made the following statements during closing argument:

Part of what you will do in this case is to look at the testimony and examine it. *We heard the defendant’s statement for the first time yesterday when he took the stand.* The defendant is presumed innocent He is not presumed credible.

(1RP 1496) (emphasis added).

...

And again, this applies equally to the defendant's statement. *You can look at the timing and accuracy of a statement*, and you can also consider how someone testifies and what motive or bias they may have.

(1RP 1497) (emphasis added).

...

You can look *at the timing of statements in this case* and the testimony that contradicts not only the claim by the defendant that Kelsey Scott was flirting, but also that by the time this occurred she had suddenly been ridden all of the effects of being intoxicated.

(1RP 1499) (emphasis added).

...

The defendant spoke to you the other day after having two years and four months and access to reports and being seated in the courtroom throughout this, and he gave you a version of events that you must analyze.

(1RP 1500).

...

That took away some options from the defendant as to what he would testify to. His testimony was full of justifications, not taking responsibility. Ladies and gentlemen, actions can speak louder than words.

(1RP 1510) (emphasis added).

Thus, after the State elicited a direct comment on Mr. Ennis's silence, it further argued his silence was indicative of guilt in closing. The State's

comments reminded the jury that Mr. Ennis had been silent throughout the investigation and trial—that he had more than two years to remain silent, inferring he used that time to make sure his story comported with police reports and trial testimony. (1RP 1496, 1497, 1500). These comments were used by the State to capitalize on an inference of guilt. *Terry*, 181 Wn. App at 891.

Furthermore, the comments were improper indirect comments on silence. The comments on silence “could reasonably be considered purposeful, meaning responsive to the State’s questioning, with even slight inferable prejudice to the defendant’s claim of silence....” *Terry*, 181 Wn. App. at 891 (first question of three-part inquiry). The comments have the undertone of calling into question Mr. Ennis’s silence, which is definitely more than a “slight inferable prejudice.” *Id.* Moreover, the third question in the *Terry* inquiry is also met, wherein the reviewing court asks: “[W]as the indirect comment exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant?” *Id.* at 891. The answer is yes. *Terry*, 181 Wn. App. at 891 (if the answer is “yes” to any of the questions, then “the indirect comment is an error of constitutional proportions”).

The State sought to take Mr. Ennis’s testimony regarding his cooperative demeanor and flip it over into a comment on silence. The

State was intent on finding a way to rebut Mr. Ennis’s statement that he had been cooperative—despite the State also presenting the same such testimony previously. (1RP 1037, 1172, 1296, 1465-1467). Mr. Ennis alleges the State’s closing arguments were direct comments on his silence. Furthermore, they are improper indirect references to Mr. Ennis’s silence and meet two of the three questions posed by *Terry*, 181 Wn. App. at 891.

Whether direct or indirect, the State’s elicitation of testimony and closing argument were comments on Mr. Ennis’ silence. This subjects those errors to a constitutional harmless error analysis. *Terry*, 181 Wn. App. at 894. Given the varying testimony regarding K.S.’s version of events and Mr. Ennis’s, credibility was the most important factor in this case for determining whether the sexual contact was consensual and K.S. was not incapacitated, or whether Mr. Ennis reasonably believed it was consensual.⁸ The trial boiled down to whether the jury believed or disbelieved Mr. Ennis or K.S., and the comments on Mr. Ennis’s silence undermined his credibility as a witness as well as improperly presented substantive evidence of guilt for the jury to consider. *Easter*, 130 Wn.2d

⁸ Because Mr. Ennis challenges in this opening brief his defense counsel’s representation for failure to advance the “reasonable belief” defense, he requests this Court consider this defense as a possible theory of the case which should have been argued at trial. *See Issue 3*; fn. 4. There is no record of whether the jury considered the “reasonable belief” defense, though it is unlikely due to defense counsel’s deficiency. *See Issue 3*.

at 236. Mr. Ennis' credibility was under a microscope because the only two people who witnessed what occurred were K.S. and Mr. Ennis. The remaining untainted evidence was not overwhelming.

i. When viewed in context, the comments by the State during final argument invited the jury to draw an inference of guilt from the defendant's silence and adherence to his constitutional rights.

In opposing Mr. Ennis's argument on silence, the State may argue that the Court should consider its argument within the "context of the trial" and then presented a few assertions regarding the conduct of defense counsel during trial and the testimony of the defendant. Relying on these assertions, the State might also argue that it was proper to present a "tailoring argument" at the close of the defendant's trial.

As should be clear from reviewing Mr. Ennis's complete testimony, the defendant never once suggested (nor even intimated) that he had relied upon the testimony of other witnesses when answering the attorney's questions. (1RP 1367-1470). The State's arguments regarding the defendant's silence—such as the argument that "[w]e heard the defendant's statement for the first time yesterday" and that the defendant testified "after two years and four months and access to reports and being seated in the courtroom"—was very clearly improper.

ii. The State’s argument was a clear violation of Art. I, sec. 22.

Article I, Section 22 of the Washington State Constitution guarantees every defendant’s rights “to appear and defend in person” and “to testify in his own behalf.” Significantly, our Supreme Court has confirmed that the State Constitution granted broader rights than the United States Constitution. *See State v. Martin*, 171 Wn.2d 521, 528-529, 252 P.3d 852 (2011). “The State can take no action which will unnecessarily ‘chill’ or penalize the assertion of a constitutional right and the State may not draw inferences from the exercise of constitutional right.” *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (citation omitted). A comment is improper where it “naturally and necessarily” causes the jury to focus on the defendant’s exercise of a constitutional right. *See e.g., State v. Ramirez*, 49 Wn. App. 332, 336-337, 742 P.2d. 726 (1987). Comments “naturally and necessarily” focus on the exercise of a constitutional right when they explicitly or implicitly direct the jury’s attention to the defendant’s actions that are a result of the exercise of that right. *Id.*

Nevertheless, relying on *Martin*, the State may argue that it was permitted to present “tailoring” arguments to the jury. This argument is unavailing. Unlike the situation in *Martin*, the State’s arguments were an

improper comment upon Mr. Ennis's Fifth Amendment right to remain silent, as well as his State constitutional rights under Art. I, section 22.

First, and as a threshold matter, the *Martin* decision did not consider a prosecutor's argument. Rather, it examined whether the Constitution prohibited a prosecutor from suggesting in cross-examination that a defendant tailored his testimony. *See Martin*, 171 Wn.2d at 533-534. A majority of the court reasoned that tailoring is a permissible topic for cross-examination because it is during cross-examination, not closing argument, when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness.

Here, the State did not discuss tailoring at any point during her cross-examination of the defendant. (1RP 1367-1470). Rather, the prosecutor raised this topic during closing argument—on several occasions—in violation of Article I, section 22. *See State v. Wallin*, 166 Wn. App. 364, 371, 269 P.3d 1072 (2012) (noting that the ruling in *Martin* does not apply to the prosecutor's closing argument). *Cf. State v. Berube*, 171 Wn. App. 103, 114-119, 286 P.3d. 482 (2012).

In this case, by contrast, Mr. Ennis did nothing to open the door to this type of cross-examination. He answered questions based on his own recollection of the facts. Simply put, there is nothing in the record to suggest that he had relied upon any reports or previous trial testimony

when he offered his own testimony regarding these events. It is not considered “tailoring” for a defendant to not agree with every question that is asked. And, likewise, it is not considered “tailoring” for a defendant to agree with a statement on cross-examination when it conforms to his thought process and memory. It is not tailoring if you do not rely on pictures, videos, photographs, or other matters to give your substantive testimony. Moreover, it is not considered tailoring to offer answers that are not supported by the other State’s witnesses.

It should be noted, the trial court found no tailoring in occurred in this case when it ruled on the motion for new trial. (IRP 1781).

The State’s improper elicitation of testimony and closing argument comments on silence burdened Mr. Ennis’s constitutional right under the Fifth Amendment. The evidence was not overwhelming, and without the taint this Court cannot be convinced beyond a reasonable doubt the jury would have reached the same result absent the error.

For all of these reasons, the case must be reversed and remanded for a new trial. *Burke*, 163 Wn.2d at 223 (setting forth this remedy).

b. The State’s repeated vouching for the “truthfulness” and credibility of the victim witness during closing argument warrants reversal for prosecutorial misconduct.

Improper vouching for a witness’ credibility occurs “if a prosecutor expresses his or her personal belief as to the veracity of the

witness” *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). “It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citations omitted); see also *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). A prosecutor improperly vouches for the credibility of a witness by arguing that a witness is telling the truth. *State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011) (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they “were just telling you what they saw and they are not being anything less than 100 percent candid.”).

“Whether a witness has testified truthfully is entirely for the jury to determine.” *Ish* at 196 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). “A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated.” *Ramos*, 164 Wn. App. at 333 (citation omitted).

During closing argument and rebuttal closing, the State vouched for the credibility of K.S. five times, at times directly stating K.S. was telling the truth. (1RP 1513-1514, 1543-1544). The State’s improper comments are as follows:

[K.S.] never stopped Officer Heuett from making that report, *because she knew the truth*. And [K.S.] *has abided by that truth* for two years and four months.

(1RP 1513) (emphasis added).

...

[K.S.] refused to give up on a job she loves, and *she has abided by the truth in this courtroom under oath in front of each of you and everyone else here.*

(1RP1514) (emphasis added).

...

And ladies and gentlemen, *when you find [K.S.]'s credibility to be such that her statement to you is nothing more and everything that includes the truth, you will realize under the law that the state has met its burden....*

(1RP 1543) (emphasis added).

...

[T]he defendant in his—in his statement suggested to you that this was a woman that had an agenda; that she was so jilted by this experience and her sexual aggressiveness being stopped by a defendant that she began a vendetta; *that she stayed with that for two years and four months; that she, committed to a profession that supposed to be about the truth, stayed with that truth.*

(1RP 1543) (emphasis added).

...

[W]hen you look at the facts in this case... *the truth and the reality of what occurred will be clear. Not based on emotion, not based on games by the state, not based on anything else than the truthful word of [K.S.].*

(1RP 1543-1544) (emphasis added).

Defense counsel never objected. (1RP 1513-1514, 1543-1544).

Yet the State's conduct was so flagrant and ill-intentioned, so numerous and so pervasive, that the jury was tainted. (1RP 1513-1514, 1543-1544). It is improper for a prosecutor to vouch for the credibility of a witness, and yet here the State vouched for K.S.'s truthfulness not once, not twice, but *five* times. (1RP 1513-1514, 1543-1544); *Ish*, 170 Wn.2d at 196. Because the conduct was so pervasive and the comments on K.S.'s credibility were so direct, the statements were flagrant and ill-intentioned.

Moreover, the statements were prejudicial because the trial was solely about credibility and who the jury could believe—K.S. or Mr. Ennis—the only two people who could testify about what really happened that morning. Witnesses testified K.S. was not “cognitively impaired” earlier in the evening and was walking around not long before the incident. (1RP 652-654, 664-665, 667-668, 733, 1333-1334, 1424). But K.S. claimed memory lapses throughout the evening. (1RP 842, 848, 922-923). The differences in testimony lead to a credibility contest and the State's vouching improperly influenced how the jury viewed different witness's testimony, causing prejudice.

No curative instruction would have fixed the error due to the importance of credibility in this case. *O'Donnell*, 142 Wn. App. at 328. The State's misconduct had a substantial likelihood of affecting the jury verdict. *Emery*, 174 Wn.2d at 761 (citation omitted).

Additionally, the court instructed the jury that in order to find Mr. Ennis was guilty, “it shall not be necessary that the testimony of the alleged victim be corroborated.” (CP 324, Instruction No. 10; 1RP 1487). The State emphasized this instruction during closing argument. (1RP 1542). Couple the noncorroboration instruction with the State’s flagrant vouching for K.S.’s truthfulness, and Mr. Ennis’s credibility never had a chance. When the court instructed the jury in such a way, it placed a special emphasis on K.S.’s credibility and testimony. Combining the noncorroboration instruction with the State’s vouching resulted in a substantial likelihood of the State’s misconduct affecting the jury’s verdict.

Finally, Mr. Ennis’s ability to present a defense was hampered by the vouching. (CP 325, Instruction No. II, 1RP 1487-1488). Mr. Ennis’s defenses of consent, and defense of reasonable belief of K.S.’s capacity,⁹ were based upon his credibility as well as the credibility of Mr. and Mrs. Strosahl, who saw K.S. walking and seemingly aware of her surroundings minutes before the alleged unwanted contact. This is another reason the State’s misconduct had a substantial likelihood of affecting the jury’s

⁹ See fn. 4. There is no record as to what the jury considered and whether there was consideration of the “reasonable belief” defense, though the jury was still provided the instruction.

verdict. The improper comments directly affected Mr. Ennis's credibility as well as other witnesses who testified to facts in his favor.

The State's improper vouching was flagrant and ill-intentioned. Because credibility was key to the jury's decision, a curative instruction would not have cured the prejudice resulting from the State constantly telling the jury that K.S. was telling the truth. Whether a witness is telling the truth is solely up to the jury. *Ish*, 170 Wn.2d at 196 (citations omitted). The case must be reversed and remanded.

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

A prosecutor may argue evidence does not support the defense's theory of the case. *State v. Lindsay*, 180 Wn.2d 423, 431-432, 326 P.3d 125 (2014). But a prosecutor may not impugn the integrity of defense counsel. *Id.* at 431-432 (citations omitted). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *Id.* at 432 (citation omitted). "[I]ncivility threatens the fairness of the trial, not to mention public respect for the courts." *Id.* at 432.

In *State v. Lindsay*, the Washington State Supreme Court found there was a substantial likelihood the State's improper comments impugning defense counsel influenced the jury's verdict. 180 Wn.2d at

442-443. The State labeled defense's closing arguments as a "crook," told the jury the defendant should not "lie" and stated the defendant's testimony was "the most ridiculous thing I've ever seen." *Id.* at 442-443. Defense counsel moved for a mistrial, preserving the issue for review. 441. Upon review the Court ordered reversal and remand for a new trial. *Id.* at 443-444.

It is also misconduct "for a prosecutor to express a personal opinion as to the credibility of a witness...." *Lindsay*, 180 Wn.2d at 437-438. This is misconduct because it "violates the advocate-witness rule, which 'prohibits an attorney from appearing as both a witness and an advocate in the same litigation.'" *Id.* at 437 (citation omitted). For example, "labeling testimony 'the most ridiculous thing *I've ever heard*' is an obvious expression of personal opinion as to credibility." *Id.* at 438 (finding the statement, in conjunction with others made by the State, was improper). And the State's expression as to its personal opinion about the defendant's guilt are improper. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009) (citation omitted). "To determine whether the prosecutor is expressing a personal opinion about the defendant's guilt, independent of the evidence, we view the challenged comments in context." *Id.* (citation omitted).

Here, the prosecutor both commented on the credibility of Ms. Beaver and impugned defense counsel with one comment. *Lindsay*, 180 Wn.2d at 438 (recognizing a prosecutor's comment was both an impermissible comment on the credibility of the defendant witness and defense counsel's closing argument). Whilst cross-examining Ms. Beaver, the State made the following commentary about her testimony:

No, that's fine. Mr. Cossey can clean that up, and you can explain why you're changing it now.

(1RP 1361). Defense counsel objected, and the court sustained. (1RP 1361). The comment impugned the integrity of defense counsel, suggesting defense counsel was sneaky and dishonest, and denigrated defense counsel's role in front of the jury. *See Lindsay*, 180 Wn.2d at 433. But also, the comment was a comment on the witness's credibility, claiming that Ms. Beaver was not being truthful in her testimony. (1RP 1361).

Though the terms "crock" and "bogus" were more overt than stating the defense counsel would "clean [] up" any testimony the State found to be lacking in credibility (1RP 1361), the State's comments regarding counsel were derogatory and demeaning of his professional status in much the same manner as in *Lindsay*. Though the court sustained defense counsel's objection to the comment, no curative instruction was given. (1RP 1361).

The State also impermissibly expressed an opinion on the defendant's guilt by stating nine times, during questioning, that K.S. had been sexually assaulted. (1RP 862, 866, 867, 869, 876, 877, 879-880, 933-934). Specifically:

[STATE]: Why didn't you tell him who had *assaulted* you?
(1RP 862) (during K.S. testimony) (emphasis added).

...

[STATE]: Had you at that point told him who *assaulted* you?
(1RP 866) (during K.S. testimony) (emphasis added).

...

[STATE]: So I want to take you to the point where you wake up *after you had been assaulted* and it's in the morning.
(1RP 867) (during K.S. testimony) (emphasis added).

...

[STATE]: Did you tell Callie at that point who had *assaulted* you?
(1RP 869) (during K.S. testimony) (emphasis added).

...

[STATE]: And did you tell him how you were being *assaulted*?
(1RP 876) (during K.S. testimony) (emphasis added).

...

[STATE]: And were those the clothes that you were wearing when you woke up being *sexually assaulted*?

(1RP 877) (during K.S. testimony) (emphasis added).

...

[STATE]: And can you tell me a little bit—at this point you've been sexually assaulted that—why would you shower?

(1RP 879-880) (during K.S. testimony) (emphasis added).

...

[STATE]: And so it was a couple of minutes almost immediately after that you report that *you were assaulted* to [Mr. Rassier]?

(1RP 933) (during K.S. testimony) (emphasis added).

Defense counsel eventually objected to these types of statements and questions:

[STATE]: Okay. You'd been up -- *you'd suffered a sexual assault*, been up until midnight --

MR. COSSEY: Judge, I'm going to object on that. She's doing it constantly. It's not appropriate. She's constantly making that statement. It's not appropriate.

[STATE]: Your Honor, *I'm stating the fact that there was an assault where fingers were placed inside this woman's vagina*. That's why we're here.

MR. COSSEY: It's an allegation, and she's making it as a fact that she's -- when she's asking questions.

(1RP 933-934) (emphasis added).

The trial court merely requested the prosecutor rephrase her question and no curative instruction was provided. (1RP 934).

There is a substantial likelihood the State's improper comments impugning defense counsel, commenting on the evidence, and expressing a personal conclusory opinion as to Mr. Ennis's guilt affected the jury's verdict, especially because the case was based solely on which witnesses were credible to the jury. Only two people—Mr. Ennis and K.S.—were present for the incident and their testimony hinged on credibility. For the State to comment on a defense witness's credibility as well as impugn defense counsel's integrity, it was especially damaging to a fair and just determination in the outcome of the trial. The statements severely hampered the defendant's opportunity to present his case. *Lindsay*, 180 Wn.2d at 432.

This Court must reverse the conviction and remand for a new trial. *Lindsay*, 180 Wn.2d at 443-44.

d. The State committed misconduct by violating a motion in limine regarding whether Mr. Strosahl believed K.S.'s story.

Prior to trial, the State moved to exclude any testimony from Mr. Strosahl as to why he did not report K.S.'s allegations the morning she told him. (4RP 85-90). The parties agreed, with the understanding if the State opened the door, the issue would be revisited by the court. (4RP 85-90). Yet the State violated the motion in limine because it opened the door, thereby committing prosecutorial misconduct. The State argued in

opening statement that Mr. Strosahl “did nothing” when K.S. reported the allegations to Mr. Strosahl and that he just left. (1RP 561). Also, during K.S.’s testimony, she testified Mr. Strosahl downplayed the allegation and left. (1RP 876-877). Ms. Roseland testified Mr. Strosahl did nothing but leave the room after K.S. spoke to him. (1RP 1092). Defense counsel did not object nor move for a sidebar as to the now-opened door. (1RP 561, 876-877, 1092).

Here, the State committed misconduct by directly violating a motion in limine agreed to by both parties. Though the State wanted to keep out Mr. Strosahl’s thoughts regarding the credibility of K.S.’s story—the reason he did not report it—the State directly violated that motion in limine and opened the door to possible additional testimony. (1RP 561, 876-877, 1092; 4RP 85-90). *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (“it is a sound general rule that, 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”). “To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.” *Gefeller*, 76 Wn.2d at 455.

This conduct was flagrant and ill-intentioned and had a substantial likelihood of affecting the jury's verdict. *O'Donnell*, 142 Wn. App. at 328; *Emery*, 174 Wn.2d at 761. A curative instruction would not have obviated the prejudicial effect because the State was using the information as if Mr. Strosahl had specifically avoided reporting the incident to make him look biased as a defense-friendly witness. (1RP 561, 876-877). This is because the testimony of Mr. Strosahl was helpful to Mr. Ennis: Mr. Strosahl observed K.S. was acting aware and in control of her faculties not long before the alleged incident. (1RP 1331-1334). But the State used the motion in limine to keep Mr. Strosahl from explaining why he did not report the incident, all the while using the same information to make Mr. Strosahl look like an unreliable witness and as if he covered up something for Mr. Ennis. (1RP 561, 876-877, 1092). Mr. Strosahl's testimony would have explained why he, as a law enforcement officer, did not report the incident—because he did not think K.S.'s story made sense. (1RP 85-90).

The State opened the door to defense counsel asking Mr. Strosahl why he did not report the incident. Unfortunately, defense counsel did not explore this opportunity, but the State knew it should not go down that path. By doing so violated it intentionally violated the motion in limine. (1RP 561, 876-877, 1092; 4RP 85-90). The State's conduct was flagrant

and ill-intentioned and the misconduct had a substantial likelihood of affected the verdict because witness credibility was key to the jury's determination of the case.

The case must be reversed and remanded.

e. The State committed misconduct by improperly arguing impeachment evidence as substantive evidence.

It is impermissible for the State to use impeachment “as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible” because there is a concern the prosecution will take advantage of the jury's inability to distinguish between the two. *State v. Clinkenbeard*, 130 Wn. App. 552, 569-570, 123 P.3d 872 (2005). In *Clinkenbeard*, the State used prior inconsistent statements to impeach the victim. 130 Wn. App. at 570-71. However, in closing argument, the State asserted the impeachment evidence was substantive proof of criminal conduct. *Id.* at 570-71. The court determined the prosecution's use of impeachment testimony as substantive evidence was improper. *Id.* at 571.

Here, the State argued impeachment evidence as substantive evidence in closing argument. (1RP 1494). In closing, the State represented that at around 2 a.m. Mrs. Strosahl was worried whether K.S. was alive and needed to check on her. (1RP 1494). Yet the State used impeachment evidence as substantive evidence to make this argument, and misrepresented the facts in closing. Mrs. Strosahl testified she was not

worried about K.S.—it was only a prior interview wherein the reporting officer stated she was worried. (1RP 599-600).

Defense counsel did not object. (1RP 1494). But the State's conduct was flagrant and ill-intentioned, and a curative instruction would not have obviated the prejudice. The case should be reversed for the misconduct.

f. Whether cumulative error applies when multiple instances of misconduct were so flagrant and ill intentioned no curative instruction would have obviated the prejudice.

Repetitive and prejudicial prosecutorial misconduct can have a cumulative effect as to be so flagrant that “no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (internal quotations & citations omitted).

The State's evidence was not overwhelming. Only K.S. and Mr. Ennis were present during the incident. Mr. and Mrs. Strosahl and Mr. Ennis testified K.S. was awake and interacting with them minutes before the alleged incident. (1RP 663-665, 667-668, 733, 1333-1334, 1424). Mr. Ennis testified K.S. initiated intimacy leading to what he believed was consensual sexual contact in the guest bedroom. (1RP 1425-1429, 1457, 1459). In addition, other party guests did not think K.S. was incoherent. (1RP 733, 787-788, 792). Therefore, the prosecutor's misconduct as a whole had a substantial likelihood of affecting the jury verdict.

The State's misconduct "was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *O'Donnell*, 142 Wn. App. at 328 (internal quotations & citation omitted); *see also Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). No curative instruction would have cured the multiple and varying instances of State misconduct raised herein, even had defense counsel consistently objected to them. *See Issue 2*. These errors were incurable, given the fact the case hinged upon the credibility of two eyewitnesses, Mr. Ennis and K.S, and the evidence of Mr. Ennis' guilt was not overwhelming.

This Court should reverse Mr. Ennis' conviction and remand 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.

Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when defense counsel [1] was not free from actual conflict and the conflict adversely affected representation, [2] failed to request a change of venue despite, [3] failed to advance and dismissed a legally valid defense to the charge of second degree rape by mental or physical incapacity, [4] failed to present exculpatory evidence, [5] failed to object to the majority of the State's

misconduct. The case should be remanded for a new trial as defense counsel's ineffectiveness prejudiced Mr. Ennis' right to a fair trial.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, Mr. Ennis must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

a. Whether Mr. Ennis was denied his Sixth Amendment right to conflict free representation, constituting ineffective assistance of counsel, where defense counsel's actual conflict adversely affected his representation of the defendant.

Before the first trial, Mr. Ennis's defense counsel, Mr. Cossey, represented to the court he had obtained information from Mr. Bugbee regarding an alternative suspect defense and Mr. Strosahl. (2RP 9-13, 15, 19; 4RP 39-40, 55-58, 66-67, 76-82). Mr. Cossey directly stated the information he had obtained from consulting with Mr. Bugbee was something he promised he would not disclose: "I gave my word to Mr. Bugbee I would not disclose that." (2RP 15). Mr. Cossey also assured the State and the trial court he would not be pursuing an alternative suspect defense theory. (4RP 79-82). After trial, Mr. Ennis's new counsel filed a motion for a new trial, citing Mr. Cossey's conflicted representation. (CP 410-463, 808-1018). Attached thereto was a declaration of Mr. Ennis and his wife. (CP 450-452, 454-456). The declaration stated Mr. Cossey had information from Mr. Bugbee that Mr. Strosahl had sexual contact with K.S. the night of the party. (CP 451). Mr. Ennis believed this information was going to be used in his defense, but nothing relating to this was ever brought forth during trial testimony. (CP 451-452).

After trial, Mr. Bugbee attempted, with counsel, to intervene in the case, claiming a "joint defense agreement" existed at the time Mr. Cossey and Mr. Bugbee conversed, and the Mr. Ennis's motion for new trial revealed confidential communications subject to that agreement, which should be sealed. (CP 468-

474). Post-trial, Mr. Cossey and Mr. Bugbee represented the information allegedly learned by Mr. Cossey was merely a “hypothetical” proposed between the two parties. (CP 517-518; 1RP 1584-1588, 1776). The trial court declined sealing the defendant’s motion for new trial. (CP 519; 1RP 1605).

The trial court denied Mr. Ennis’s motion for a new trial, but asked what information was not used that may have been detrimental to Mr. Ennis. (1RP 1736). Counsel noted the possibility that K.S. had sexual contact with another person that night was to the detriment of Mr. Ennis, and whether that showed another issue in regards to general promiscuity or flirtatiousness could have been an issue. (1RP 1736).

Because defense counsel owed a duty of loyalty and freedom from conflict to Mr. Ennis, the defendant was denied his right to effective assistance of counsel.

In general, the Rules of Professional Conduct require a “lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness.” RPC 3.7(a). Although some exceptions apply, none of those are applicable to the issue raised in this case. RPC 3.7(a)(1) – (3).

“Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.” *Strickland*, 466 U.S. at 688 (citation omitted). The right to effective assistance of counsel “includes the entitlement to representation that is free from conflicts of interest.” *State v.*

Regan, 143 Wn. App. 419, 425, 177 P.3d 783 (2008) (citations omitted); *see also State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001) (recognizing effective assistance also includes duty of loyalty) (citing *Strickland v. Washington*, 466 U.S. 668)). These basic duties are not an exhaustive list of counsel’s obligations to a client. *Strickland*, 466 U.S. at 688 (citation omitted).

But basic duties include:

...a duty of loyalty, a duty to avoid conflicts of interest[,] ... the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

State v. Lopez, 190 Wn.2d 104, 115-116, 410 P.3d 1117 (2018) (citations omitted).

It is the duty of the trial court to investigate potential conflicts between client and attorney if the court knows or reasonably should have known a potential conflict exists. *Regan*, 143 Wn. App. at 425-426. Reversal is required when the attorney or defendant “makes a timely objection because of a claimed conflict and the trial court fails to conduct an adequate inquiry.” *Regan*, 143 Wn. App. at 426 (citations omitted). However, “if the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict of interest that adversely affected the lawyer’s performance.” *Id.* (citation omitted). The actual conflict of interest must

be more than a “mere theoretical division of loyalties.” *State v. Dhaliwal*, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). No prejudice need be shown. *Regan*, 143 Wn. App. at 426 (citations omitted); *see also Dhaliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003) (recognizing this standard).

To demonstrate adverse effect a defendant need not show prejudice such that the outcome of the trial would have been different without the conflicted representation. *Regan*, 143 Wn. App. at 428. Rather, the defendant need only show “that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” *Id.* (internal quotations and citations omitted). The conflict of counsel either must cause a “lapse in representation contrary to the defendant’s interests” or “have likely affected particular aspects of counsel’s advocacy on behalf of the defendant.” *Id.* (internal quotations and citations omitted). “Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.” *State v. Robinson*, 79 Wn. App. 386, 394, 902 P.2d 652 (1995).

In *Regan*, the court held defense counsel’s conflict of interest required reversal. *Regan*, 143 Wn. App. at 430. The appellate court stated the trial court’s order compelling defense counsel to testify against his client put defense counsel in conflict. *Id.* As a result, the defendant did not need to show any prejudice because actual conflict existed. *Id.* 428-430.

Courts review conflicts of interest de novo. *Regan*, 143 Wn. App. at 428. A trial court's decision on a motion for a new trial is reviewed for abuse of discretion or an erroneous interpretation of the law. *Robinson*, 79 Wn. App. at 396.

Here, Mr. Cossey expressed to the trial court he made a promise to Mr. Bugbee he would not disclose information relating to an alternative suspect theory. (2RP 15, 4RP 79-82). Mr. Cossey made big deal out of the information he had, never once asserting or correcting the court about what he later claimed was just a discussion between himself and Mr. Bugbee about a "hypothetical" situation. (2RP 15, 3RP 24-26, 4RP 39-40, 55-58, 66-67, 76-82, 1584-1588, 1776). Notably, Mr. Strosahl obtained new counsel due to a sudden conflict of interest with Mr. Bugbee, and Mr. Bugbee obtained counsel to represent him so he could intervene in the case. (CP 468-474, 1569-1599; 3RP 2-3, 13). After all these suspicious things occurred—suddenly, after the conviction of Mr. Ennis—the information Mr. Cossey knew was only based on a "hypothetical." (CP 517-518; 1RP 1584-1588, 1776). The fact that defense counsel was not forthcoming from the start about the information he knew brings a cloud of suspicion over his representation. If the information defense counsel knew was so useless as to be a hypothetical, then it does not make sense for defense counsel to have made the representations he did to the trial court.

When the trial court asked whether Mr. Cossey believed there were some potential suspect issues with Mr. Strosahl, Mr. Cossey's response was: "I gave my word to Mr. Bugbee I would not disclose that." (2RP 15). If the information Mr. Cossey had was merely a hypothetical, then Mr. Cossey's answer would have been different. And when the trial court stated he assumed the information Mr. Cossey had was "a representation as to what the witness [Mr. Strosahl] would say as opposed to a general discussion about defenses or other things that maybe aren't statements," Mr. Cossey fell mute. (3RP 24-26). If the scenario really only involved a general discussion about possible defenses with Mr. Bugbee, then Mr. Cossey never said so. (3RP 24-26). Moreover, the "joint defense agreement" which allegedly existed between Mr. Bugbee and Mr. Cossey was never brought forth to the trial court until much later—and for the first time. (CP 468-474; 1RP 1569-1605).

Mr. Ennis's trial defense counsel was ineffective because he had an actual conflict of interest which adversely affected his representation of Mr. Ennis. Mr. Cossey had some information about sexual activity with another male at the party on the same night, which he never claimed was merely a hypothetically-related question until trial was over. (CP 517-518; 1RP 1584-1588, 1776). The conflict here is that Mr. Cossey promised to be loyal to Mr. Bugbee—and not Mr. Ennis. Because the information Mr. Cossey obtained had "some plausible alternative defense strategy or tactic might have been pursued but was not and that the

alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests" an actual conflict existed. *Regan*, 143 Wn. App at 428. Mr. Cossey's refusal to use or disclose whatever he knew about Mr. Strosahl adversely affected his representation of Mr. Ennis.

The case must be reversed and remanded for a new trial. *Regan*, 143 Wn. App. at 432 (setting forth this remedy).

b. Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to request a change of venue for the second trial.

During jury selection in the first trial, defense counsel successfully moved for mistrial based on pretrial publicity. (CP 269-270, 272, 275-80; 5RP 2-4). Thereafter, the State and defense filed a joint motion for change of venue. (CP 276-280; 5RP 2-4). With little to no explanation, defense counsel later reserved the motion, stating he would attempt to pick a jury in Spokane County. (1RP 10-12).

Defense counsel was ineffective for failing to seek a change of venue in the second trial. Failure to do so allowed several media-informed jurors to be seated in the jury, which could not have been a tactical decision. Defense counsel's deficient performance prejudiced the defendant.

A defendant "need only show a probability of unfairness or prejudice" to prevail on a change of venue motion. *State v. Munzanreder*, 199 Wn. App. 162, 180, 398 P.3d 1160 (2017) (citations omitted). "[A]dverse pretrial publicity can

create a presumption in a community that jurors' claims that they could be impartial should not be believed; and partly for this reason, the appellate court examines the totality of the circumstances in decision whether such a presumption arises." *Id.* at 180.

Courts review a list of nonexclusive factors to determine whether a trial court should grant a change of venue:

(1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

Id. at 181 (citation omitted).

“Simply because a juror claims he can lay aside a prior opinion and render a verdict based on the evidence does not make it so. Jurors may not fully appreciate or accurately state the nature of their own biases.”

Munzanreder, 199 Wash.App. at 182 (citations omitted) (internal brackets & quotations omitted).

Defense counsel should have moved to change the venue in this case and failure to do so was ineffective representation that prejudiced the defendant. Around 40 percent of the jury pool had prior media exposure.

(Exhibit C-2, Juror Questionnaires). Five of the seated jurors—to include one alternate juror—admitted to some form of exposure to pretrial publicity regarding the allegations in this case. (CP 304-309; 1RP 143-154, 192-197, 197-201, 206-209, 210-224). Though they all claimed they could be impartial, the statements from other potential jurors indicated a pervasive doubtfulness as to whether impartiality could be claimed. (1RP 143-154, 192-197, 197-201, 206-209, 210-224, 239, 249, 353-354). One juror, when asked whether he had already formed an opinion about the case, stated: “Well, I—I mean, yeah. I mean, I don’t—doesn’t everyone? I—yeah, I guess. I mean, you hear stuff and you form an opinion.” (1RP 249). Even a member of the public contacted the court to express his concern the trial should be moved out of the county due to pretrial publicity. (CP 275). In the midst of all this, defense counsel agreed to a State’s motion in limine to prohibit any voir dire on the subject of #MeToo: “Without showing my political naivete, I don’t even know what *MeToo* is.... I wouldn’t be able to ask that question with a straight face.” (1RP 35).

Defense counsel had the means to change the venue. The trial court would very likely have done so given the past mistrial, the State deferred to him, and defense counsel had successfully moved for mistrial in the first trial due to pretrial publicity. No tactical justification exists for defense counsel’s decision not to

request a change of venue in the second trial. Placing Mr. Ennis in the position of not being able to start with a clean slate—a jury pool untainted with the same media exposure which garnered a mistrial in the first trial—was deficient representation. The deficiency prejudiced Mr. Ennis because an impartial jury could not be had. Though many potential jurors undoubtedly thought they could be impartial, the pervasiveness of the pretrial publicity was a pernicious undercurrent which tainted the jury pool. *Munzanreder*, 199 Wash.App. at 182 (citations omitted) (a juror’s claims to impartiality may not be accurate).

The case must be reversed.

c. Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when counsel dismissed a defense and failed to advance a valid defense to the charge of second degree rape by mental or physical incapacity.

It is a defense to second degree rape of a physically helpless or mentally incapacitated person, “that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.” RCW 9A.44.050(1)(b)(second degree rape); RCW 9A.44.030(1)(defense). The defendant has the burden of proving the defense by a preponderance of the evidence. RCW 9A.44.030(1). The defendant need not prove the alleged victim was not physically helpless or mentally incapacitated—the defendant need only prove he reasonably believed the victim had capacity. *State v. Powell*, 150

Wn. App. 139,154-155, 206 P.3d 703 (2009). As noted herein, the Washington Pattern Jury Instruction 19.03 also sets forth an instruction for this defense. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 19.03 (4th Ed. 2016).

Failure to present the “reasonable belief” defense instruction when the evidence supports the giving of such instruction has resulted in reversal due to ineffective assistance of counsel. *Powell*, 150 Wn. App. at 152-158 (finding counsel’s failure to request the instruction was ineffective); *In re Hubert*, 138 Wn. App. 924,929-932, 158 P.3d 1282 (2007) (counsel’s failure to present and advance “reasonable belief” defense was reversible for deficient performance).

In *Powell*, a witness testified that not long before the incident the victim did not appear to be drunk, did not smell of alcohol, was walking, and did not have trouble standing. 150 Wn. App. at 144-145. On the other hand, the victim testified she did not remember a portion of her evening after going out for a few drinks with friends. *Id.* at 142-143. She did recall waking up in a motel room with a naked man performing oral sex on her, at which point she played along until she figured out a way to get him out of the room. *Id.* at 143. The defendant testified he did not think the victim was too impaired to willingly participate in sexual activity, did not receive any indication she did not want to participate, the

victim never told him to stop, she appeared to be enjoying herself, and she “did not do or say anything that caused him to think that she was too intoxicated or impaired to decide whether she wanted to have sex with him.” *Id.* at 149. The court stated that while some evidence may have shown the victim was highly incapacitated, that did not necessarily disprove she reasonably appeared to the defendant “to be less incapacitated than she was.” *Id.* at 154; *also Hubert*, 138 Wn. App. at 926-927 (defendant testified sexual contact was consensual and he believed victim was awake during act).

The *Powell* court determined, based on the facts, defense counsel’s failure to request a “reasonable belief” defense instruction was ineffective and not a tactical decision. 150 Wn. App. at 155. While it appeared to the court that defense counsel was aware of the “reasonable belief” defense, based on defense counsel’s closing arguments and the testimony elicited from witnesses, the court could find no tactical reason for counsel’s failure to request the instruction. *Id.* Failure to investigate relevant law is not a legitimate trial tactic and in *Hubert*, this failure also amounted to deficient performance. 138 Wn. App. at 929-930. “Counsel’s failure to discover and advance the [reasonable belief] defense was plainly deficient performance.” *Hubert*, 138 Wn. App. at 930.

Prejudice was found to exist in both *Powell* and *Hubert* for counsel's deficient performance. *Powell*, 150 Wn. App. 155-158; *Hubert* 138 Wn. App. at 930-932. "Where defense counsel fails to identify and present the *sole available defense* to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial." *Hubert*, 138 Wn. App. at 932 (emphasis added); *see also State v. Lozano*, 189 Wn. App. 117, 125-126 356 P.3d 219 (2015) (recognizing one viable defense to second degree rape by physical helplessness and/or mental incapacity). "[I]f the State proves beyond a reasonable doubt that a person cannot consent to sexual intercourse, the victim's words or conduct indicating freely given agreement to have sexual intercourse will not excuse the defendant's conduct." *Lozano*, 189 Wn. App. at 125 (citing *State v. Lough*, 70 Wn. App. 302, 329, 853 P.2d 920 (1993) (same principle)).

Here, defense counsel was deficient for failing to advance the "reasonable belief" defense and for dismissing the defense during closing argument. (1RP 1515-1537). During closing, defense counsel focused on arguing that K.S. consented to the sexual encounter. (1RP 1515-1537). And although the "reasonable belief" defense instruction had been given, defense counsel discarded the defense during closing argument, telling the jury not to consider it:

I believe there are certain jury instructions that are going to be important. And one of them goes—it's No. 11, and Judge Moreno read it. And it's the one that says, "If the defendant reasonably believed that [K.S.] was not mentally incapacitated or physically helpless," *if he had that reasonable belief, given everything we've shown you, everything you've seen, the video, the pictures, everything you've heard, that if more likely than not that you believe he reasonably believed she was capable of consent, then that is another prong that you have to consider in your deliberations. But I don't believe you need to do that, because here's why.* They're telling you his story doesn't make sense. There was two people there. Only those two people know what happened. Go through the timeline. Go through the testimony. You will make the decision that [K.S.]'s version of what happened that night does not make sense. We know what her reasons are. She told you those. She told you her motivation.

(1RP 1535) (emphasis added). Defense counsel's statement discarded a viable and strong defense: that Mr. Ennis reasonably believed K.S. was capable of consent. K.S. testified she could not remember portions of the evenings, but several people at the party indicated K.S. was walking around and was cognitively aware. There was no reasonable explanation for not pursuing the alternative and compatible "reasonable belief" defense. Once the State alleges and presents facts that K.S. was potentially incapacitated, the only defense to the crime was the "reasonable belief" defense. *See Lozano*, 189 Wn. App. at 125.

K.S. testified she blacked out and could not remember most of the night. (1RP 841-842, 844, 901, 903-904). Yet many others testified K.S. appeared to be cognitively aware, able to interact and speak with others,

and make a decision about where she was staying that night. (IRP 733, 787-788, 792). To Mr. and Mrs. Strosahl and Mr. Ennis, she appeared awake and responsive just within a 15 to 30 minute window of the alleged incident. Mr. Ennis believed K.S. was pursuing him, as she groped him and made physical advances. (IRP 1425-1429). K.S. may not remember what happened and may never remember—but defense counsel should have used that information to defend the case—and no tactical reason existed to discard the defense.

Defense counsel previously represented to the State he would use “consent” as a defense and in the criminal trial management joint report did not request any jury instructions indicating intention to use a “reasonable belief” defense instruction. (CP 76; IRP 29). Moreover, defense counsel admitted on the record to a lack of research regarding the jury instructions. (IRP 1476-1477). Right before closing arguments, defense counsel stated he had not finished researching them. (IRP 1476-1477). It is apparent defense counsel had not even decided whether he would be using the “reasonable belief” defense instruction yet—and this was after all of the evidence from both the State and defense had been presented. (CP 76; IRP 1476-1477). It was not until the eleventh hour that defense counsel presented the “reasonable belief” defense instruction. (IRP 1477-1479).

Defense counsel's cavalier disposal and failure to advance the "reasonable belief" defense was in no way reasonable. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (failure to consult with a client about the possibility of appeal is usually unreasonable)). Given the evidence showed K.S. was intoxicated, defense counsel could have argued to the jury that she was not incapacitated—but even if she were incapacitated—she reasonably appeared to have capacity. These two theories were not incompatible with one another and were reasonable given the evidence presented.

Defense counsel never gave an opening statement explaining the theory of defense, represented at the eleventh hour to the trial court he had yet to complete his jury instruction research, and during closing argument dismissed the "reasonable belief" instruction which was compatible with the other theory that K.S. was not incapacitated. These actions were not reasonable and the representation was deficient.

Alternate Juror No. 37's letter to the court illustrates the confusion the jury must have experienced in deliberation. Therein, the juror twice stated Mr. Ennis "confessed" on the stand to the crime he had been charged with. The juror's letter illustrates how defense counsel failed to

present a defense which the juror could understand. (CP 1058). While Mr. Ennis admitted to the sexual contact, he thought it was consensual due to K.S.'s actions.

Defense counsel should have advanced the "reasonable belief" defense and should not have discarded the instruction. It was not reasonable to do so, and counsel's deficiency prejudiced the outcome of the trial. There is a reasonable probability that if defense counsel had not dismissed the "reasonable belief" defense, the outcome of the trial would have been different.

The case must be reversed and remanded for a new trial.

d. Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to elicit exculpatory evidence.

At trial, Ms. Beaver and Ms. Weese's testimony as to their impressions regarding the relationship between K.S. and Mr. Ennis was limited. This is because defense counsel agreed with the State that such testimony as to the witness's impressions was not admissible. Because the information was exculpatory, defense counsel was deficient in seeking its admission and prejudice resulted.

The right to effective assistance of counsel includes the requirement that trial counsel investigate the case and interview witnesses. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Failure to call

witnesses “must have been unreasonable and must result in prejudice, or create a reasonable probability that, had the lawyer presented the witnesses, the outcome of the trial would be different.” *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

Witness “testimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993); *see also ER 701*. Testimony about another person’s demeanor or appearance is generally admissible, assuming personal knowledge. *State v. Magers*, 164 Wn.2d 174, 190, 189 P.3d 126 (2008) (officer’s testimony regarding victim’s demeanor, which stated he could tell something was “terribly wrong” and she seemed “traumatized” was admissible).

The Sixth Amendment guarantees defendants the right to confront and cross-examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). “[E]vidence tending to establish the defendant’s theory of the case, or to qualify or disprove the State’s theory, is normally relevant and admissible.” *State v. Sheets*, 128 Wn. App. 149, 156, 115 P.3d 1004 (2005) (citation omitted). Evidence of high probative value cannot be excluded “if doing so would deprive defendants of the ability to testify to their versions of the incident.” *Jones*, 168 Wn.2d at 721.

Here, defense counsel agreed that certain additional testimony of Ms. Weese and Ms. Beaver should be excluded. (1RP 740, 1308-1309). However, the testimony would have tended to show Ms. Weese and Ms. Beaver were suspicious of the relationship between Mr. Ennis and K.S. Ms. Beaver was never permitted to testify her impression that K.S. had a “puppy love” for Mr. Ennis. (1RP 798-799, 1364). Ms. Weese would have testified she thought Mr. Ennis and K.S. were a couple, but her testimony was limited, as well, by agreement of defense counsel. (1RP 739-741).

Both women noticed an unusual amount of energy K.S. placed upon her interactions with Mr. Ennis. While not all of those interactions were easy for those witnesses to describe, they were impressions which would have and should have been properly admissible. These impressions really were no different than Mr. Strosahl’s testimony regarding the nature of a hug that K.S. gave Mr. Ennis. Nor are the impressions different than others that have been commonly accepted as admissible at trial. The fact is the State was concerned about the admission of these statements and it had good reason to be: the statements from Ms. Beaver and Ms. Weese would have severely weakened the State’s case against Mr. Ennis.

Defense counsel was deficient for acquiescing with the State to keep out the exculpatory testimony from Ms. Beaver and Ms. Weese. The

witnesses could have testified to their impressions, especially because of the high probative value placed upon such testimony. The testimony would have supported Mr. Enns' defense theory and furthered his defense that K.S. wanted the sexual contact. As an example, defense counsel also seemed to struggle at one point with the agreed motion in limine when he attempted to question Ms. Beaver regarding the type of "hug" she observed between Mr. Ennis and K.S. (1RP 782-783). Defense counsel erred in agreeing to the limitation on her testimony. No reasonable explanation exists for defense counsel's acquiescence with the State not to bring up the evidence from Ms. Weese and Ms. Beaver. The decision was not tactical.

Also, the decision to jointly limit Ms. Beaver and Ms. Weese's testimony was extremely prejudicial. The entire case hinged on credibility and only K.S. and Mr. Ennis were witness to the incident. Defense counsel mistakenly assumed the rules of evidence were clear on the issue, forgetting or being unaware Mr. Ennis had a right to present highly probative evidence in support of his theory of the case. (1RP 798-799); *Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010); U.S. Const. amend. VI; Wash. Const. art. I, §22 (constitutional right to present a defense). In this case, the State sought to scrub clean Mr. Ennis' defense, yet Ms. Beaver and Ms. Weese's impressions of the interaction between K.S. and Mr.

Ennis were vital testimony for his defense. Because the case came down to a credibility contest, the information Ms. Beaver and Ms. Weese could have provided had a substantial likelihood of affecting the verdict. Defense counsel was ineffective for failing to pursue the exculpatory testimony of Ms. Weese and Ms. Beaver.

The case must be reversed.

e. Whether Mr. Ennis was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to object to most of the State's misconduct.

As noted herein (*Issue 2*, above), the State committed misconduct in several ways, and defense counsel did not object to most of them. Because these were instances of prosecutorial misconduct, defense counsel was ineffective for failing to object, and his failure to object prejudiced the outcome of the trial. But for defense counsel's deficiency, it is likely the outcome of the trial would be different.

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

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the prejudicial errors in this case warrants reversal. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (noting that several trial errors "standing alone may not be sufficient to justify reversal but when combined may

deny a defendant a fair trial”). “It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless.”

State v. Lopez, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

Constitutional error requires reversal unless the court is certain beyond a reasonable doubt a jury would have reached the same conclusion in absence of the error. *Id.* at 857. “Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” *Id.*

The cumulative effect of the errors herein were exceptionally harmful given that the State's case was dependent upon witness testimony. The errors individually and as a whole materially affected the outcome of the trial. *See Issues 1, 2, and 3.*

As noted several times herein, witnesses saw K.S. interacting, walking, not stumbling, and making decisions throughout the evening and even right up until the incident. Contrary to this, K.S. stated she could not remember these events. The credibility of the witnesses was the key to the case and a jury would have been easily swayed due to the multiple errors alleged herein. *See Issues 1, 2 and 3.*

Also, K.S. admitted to blacking out previously. (1RP 842). And she had law enforcement training and was working in a sexual assault unit.

(1RP 919, 926). K.S. should have been aware of evidence preservation after the incident, and the actions she took afterwards—showering, leaving evidence behind at the scene, waiting to report to the hospital—all indicate some question as to her story’s credibility. (1RP 877-880, 894). As a law enforcement she should have known how crucial it is to collect sexual assault evidence immediately after the incident, and it is suspect as to why she decided to wait to take those actions. (1RP 919, 927, 943).

Other portions of K.S.’s version of events are suspect. She did not tell Mr. Rassier who allegedly assaulted her. (1RP 862). K.S.’s text messages were not grammatically incorrect, which would have indicated whether she was incoherent. (1RP 1283-1285). She did not call 911, but her phone call with Mr. Rassier about the incident lasted for almost an hour. (1RP 863, 1290). These bits of information all point to potential credibility issues and show the case against Mr. Ennis was not solid.

The State also presented speculative testimony hinting Mr. Ennis’s nails had been freshly trimmed. (1RP 1172-1173). But in reviewing the pictures of Mr. Ennis’s hands, it reasonable to believe a lot of males would naturally keep their nails short. (State’s Exhibits P-25-P-30). And Mr. Ennis stated he trimmed his nails a few days prior. (1RP 1433).

The evidence was not overwhelming, and given the numerous errors raised in this brief which severely hampered Mr. Ennis' right to present a defense, he is entitled to a new trial.

Mr. Ennis respectfully requests this court reverse and remand for a new trial.

F. CONCLUSION

Mr. Ennis respectfully requests this Court reverse his conviction for second degree rape and remand for a new trial.

Respectfully submitted this 22nd day of May, 2019.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

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

I, Mark E. Vovos, counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 22, 2019, I served a copy on the Respondent at SCPAappeals@SpokaneCounty.org using the Washington State Appellate Courts' Portal.

Dated this 22nd day of May, 2019.

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