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JUN 25 2009

King County Prosecutor  
Appellate Unit

COA NO. 62268-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

TURGUT TARHAN,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JUN 25 PM 12:08

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

The Honorable Susan Craighead, Judge

BRIEF OF APPELLANT  
(CORRECTED)

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
Issues Pertaining to Assignments of Error.....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Procedural Facts</u> .....	3
2. <u>Trial</u> .....	4
C. <u>ARGUMENT</u> .....	10
1. THE ERRONEOUS EXCLUSION OF WASMER'S STATEMENT TO THE POLICE DEPRIVED TARHAN OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND CONFRONT HIS ACCUSER.....	10
a. <u>The Court Prohibited The Defense From Eliciting Probative Evidence Supporting The Defense Theory That The Sexual Encounter Was Consensual</u> .....	11
b. <u>No Compelling Interest Justified Exclusion Of Defense Evidence That Impeached The Accuser's Credibility</u> .....	16
c. <u>Exclusion Of Probative Defense Evidence Was Not Harmless Beyond A Reasonable Doubt</u> .....	25
2. PROSECUTORIAL COMMENT ON TARHAN'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER REQUIRES REVERSAL.....	28
a. <u>The Prosecutor Accused The Defense Of Victimizing Wasmer Through Cross Examination</u> .....	29

b.	<u>The Prosecutor's Disparagement Of Defense Counsel Constituted Improper Comment On The Exercise Of Tarhan's Constitutional Right To Confront The State's Chief Witness Against Him....</u>	31
c.	<u>In The Alternative, Reversal Is Required Because The Prosecutorial Misconduct Was Flagrant, Impervious To Curative Instruction, And Likely Affected The Verdict.....</u>	38
d.	<u>Reversal Is Alternatively Required Because Counsel Was Ineffective In Failing to Object To The Prosecutorial Misconduct And In Failing To Request A Curative Instruction.....</u>	40
3.	REVERSAL IS REQUIRED BECAUSE A COMBINATION OF ERRORS CUMULATIVELY PRODUCED AN UNFAIR TRIAL. ....	43
4.	THE LENGTH OF THE COMMUNITY CUSTODY TERM IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM.....	44
5.	THE SEXUAL ASSAULT PROTECTION ORDER ISSUED IN CONJUNCTION WITH TARHAN'S SENTENCE IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM TERM.....	48
D.	<u>CONCLUSION.....</u>	50

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

<u>In re Detention of Gaff,</u> 90 Wn. App. 834, 954 P.2d 943 (1998).....	36
<u>In re Marriage of Littlefield,</u> 133 Wn.2d 39, 940 P. 2d 1362 (1997).....	17
<u>In re Postsentence Review of Leach,</u> 161 Wn.2d 180, 163 P.3d 782 (2007).....	48
<u>In re Sentences of Jones,</u> 129 Wn. App. 626, 120 P.3d 84 (2005).....	45, 46
<u>Lamborn v. Phillips Pac. Chem. Co.,</u> 89 Wn.2d 701, 706, 575 P.2d 215 (1978).....	18
<u>State ex rel. Carroll v. Junker,</u> 79 Wn.2d 12, 482 P.2d 775 (1971).....	17
<u>State v. Aho,</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	41
<u>State v. Alexander,</u> 64 Wn. App. 147, 822 P.2d 1250 (1992).....	43
<u>State v. Ashcraft,</u> 71 Wn. App. 444, 859 P.2d 60 (1993).....	25
<u>State v. Bahl,</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	49
<u>State v. Balisok,</u> 123 Wn.2d 114, 866 P.2d 631 (1994).....	19
<u>State v. Barnett,</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	47

**TABLE OF AUTHORITIES** (CONT'D)

	Page
 <u>STATE CASES (CONT'D)</u>	
<u>State v. Belgarde,</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	39
<u>State v. Boyd,</u> 160 Wn.2d 424, 158 P.3d 54 (2007).....	43
<u>State v. Braun,</u> 82 Wn.2d 157, 509 P.2d 742 (1973).....	43
<u>State v. Brown,</u> 48 Wn. App. 654, 739 P.2d 1199 (1987).....	27
<u>State v. Carlson,</u> 61 Wn. App. 865, 812 P.2d 536 (1991).....	19
<u>State v. Case,</u> 49 Wn.2d 66, 298 P.2d 500 (1956).....	39
<u>State v. Charlton,</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	38, 39
<u>State v. Curtis,</u> 110 Wn. App. 6, 37 P.3d 1274 (2002).....	36
<u>State v. Darden,</u> 145 Wn.2d 612, 41 P.3d 1189 (2002).....	17, 18, 21, 24
<u>State v. Davenport,</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	38
<u>State v. Davis,</u> 146 Wn. App. 714, 192 P.3d 29 (2008).....	44
<u>State v. Ermert,</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	43

**TABLE OF AUTHORITIES** (CONT'D)

	Page
 <u>STATE CASES (CONT'D)</u>	
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	32
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	22
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	43
<u>State v. Gregory</u> , 158 Wn.2d 759, 807, 147 P.3d 1201 (2006).....	32, 33
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	25
<u>State v. Gutierrez</u> , 50 Wn. App. 583, 749 P.2d 213 (1988).....	26
<u>State v. Henderson</u> , 100 Wn. App. 794, 998 P.2d 907 (2000).....	39
<u>State v. Holmes</u> , 122 Wn. App. 438, 93 P.3d 212 (2004).....	26, 36
<u>State v. Horton</u> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	42
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	16, 18, 24, 31
<u>State v. Hudnall</u> , 116 Wn. App. 190, 64 P.3d 687 (2003).....	46

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>STATE CASES (CONT'D)</u>	
<u>State v. Jackson</u> , 87 Wn. App. 801, 944 P.2d 403 (1997), <u>aff'd</u> , 137 Wn.2d 712, 976 P.2d 1229 (1999).....	25
<u>State v. Jerrels</u> , 83 Wn. App. 503, 925 P.2d 209 (1996).....	39
<u>State v. Johnson</u> , 90 Wn. App. 54, 950 P.2d 981 (1998).....	43
<u>State v. Johnson</u> , 80 Wn. App. 337, 908 P.2d 900 (1996), <u>overruled on other grounds</u> , <u>State v. Miller</u> , 110 Wn. App. 283, 40 P.3d 692 (2002).....	35, 36
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993).....	37
<u>State v. Kroll</u> , 87 Wn.2d 829, 558 P.2d 173 (1976).....	20
<u>State v. Lord</u> , 161 Wn.2d 276, 165 P.3d 1251 (2007).....	22
<u>State v. McDaniel</u> , 83 Wn. App. 179, 920 P.2d 1218 (1996).....	25
<u>State v. Miles</u> , 73 Wn.2d 67, 436 P.2d 198 (1968).....	35
<u>State v. Mitchell</u> , 114 Wn. App. 713, 59 P.3d 717 (2002).....	44
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	17

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>STATE CASES (CONT'D)</u>	
<u>State v. Portnoy</u> , 43 Wn. App. 455, 718 P.2d 805 (1986).....	26
<u>State v. Pringle</u> , 83 Wn.2d 188, 517 P.2d 192 (1973).....	48
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008).....	22
<u>State v. Randecker</u> , 79 Wn.2d 512, 487 P.2d 1295 (1971).....	26
<u>State v. Reed</u> , 101 Wn. App. 704, 6 P.3d 43 (2000).....	18
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	38, 39
<u>State v. Romero</u> , 113 Wn. App. 779, 54 P.3d 1255 (2002).....	26
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	32
<u>State v. Spencer</u> , 111 Wn. App. 401, 45 P.3d 209 (2002).....	19
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 864 P.2d 426 (1994).....	39
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	40

**TABLE OF AUTHORITIES** (CONT'D)

	Page
 <u>STATE CASES (CONT'D)</u>	
<u>State v. Wittenbarger</u> , 124 Wn.2d 467, 880 P.2d 517 (1994).....	16
<u>Thomas v. French</u> , 99 Wn. 2d 95, 659 P.2d 1097 (1983).....	20
 <u>FEDERAL CASES</u>	
<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).....	38
<u>Bruno v. Rushen</u> , 721 F.2d 1193 (9th Cir. 1983) .....	34, 37
<u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).....	16, 17, 25
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974).....	17, 27
<u>Pennsylvania v. Ritchie</u> , 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).....	27
<u>Sizemore v. Fletcher</u> , 921 F.2d 667 (6th Cir. 1990) .....	37, 42
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	40
<u>United States v. McLain</u> , 823 F.2d 1457 (11th Cir. 1987). .....	40
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).....	16

**TABLE OF AUTHORITIES** (CONT'D)

	Page
 <u>STATE CASES</u>	
<u>Walker v. State,</u> 790 A.2d 1214 (Del. 2002).....	34, 37
 <u>RULES, STATUTES AND OTHERS</u>	
ER 401.....	18
ER 801(c).....	19
ER 803(a)(3) .....	19
Former RCW 9.94A.030.....	46
Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice ... § 607.12 (5th Ed.) .....	27
RAP 2.5(a). .....	37
RCW 7.90.150(6)(a) .....	48, 49
RCW 7.90.150(6)(c) .....	49
RCW 9.94A.030 .....	46, 47
RCW 9.94A.030(42)(a)(i).....	45
RCW 9.94A.545 .....	45
RCW 9.94A.545(1).....	45, 47
RCW 9.94A.850 .....	44

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<b><u>RULES, STATUTES AND OTHERS (CONT)</u></b>	
U.S. Const. amend. V .....	38, 43
U.S. Const. amend. VI .....	16, 31, 37, 38, 40
U.S. Const. amend. XIV .....	16, 38, 43
WAC 437-20-010 .....	44, 45
Wash. Const. art. I, § 3 .....	43
Wash. Const. art. I, § 22 .....	16, 31, 38, 40
Wash. Sentencing Guidelines Comm'n, Adult Sentencing Manual (2008) ... .....	45
WPIC 1.02 .....	22

A. ASSIGNMENTS OF ERROR

1. The court erred in excluding defense evidence probative of the accuser's credibility, thereby violating appellant's right to present a complete defense and confront the witnesses against him.

2. The prosecutor improperly commented on appellant's exercise of his constitutional right to confront the witnesses against him.

3. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.

4. Appellant received ineffective assistance of counsel.

5. Cumulative error denied appellant his constitutional due process right to a fair trial.

6. The court erred in imposing an illegal term of community custody.

7. The court erred in entering a sexual assault protection order issued in conjunction with appellant's sentence that exceeds the statutory maximum term.

Issues Related to Assignments of Error

1. The court barred appellant from eliciting evidence that the complaining witness told a police officer shortly after the alleged rape that she did not want her assailants to go to jail. This evidence was probative of the accuser's credibility and the State presented no compelling interest

for its exclusion. Is reversal required because the court's violation of appellant's constitutional rights to present a complete defense and confront the witnesses against him was not harmless beyond a reasonable doubt?

2. Is reversal required because the prosecutor, in criticizing the manner in which defense counsel cross examined the complaining witness, impermissibly commented on appellant's exercise of his constitutional right to confront the State's chief witness against him? Is reversal alternatively required because the misconduct was so flagrant and ill intentioned that no instruction was capable of protecting appellant's right to a fair trial?

3. Was defense counsel ineffective in failing to properly object to the prosecutor's comment on appellant's exercise of his constitutional right to confront witnesses and in failing to request a curative instruction where no legitimate tactic justified these failures and there is a reasonable probability the outcome was affected as a result?

4. Did cumulative error, in the form of wrongly excluded defense evidence, improper comment on the exercise of a constitutional right, prosecutorial misconduct, and ineffective assistance of counsel, deprive appellant of a fair trial?

5. Must the community custody portion of the sentence be vacated because the term of community custody was imposed without statutory authority?

6. The term of a sexual assault protection order issued in conjunction with a criminal prosecution may not exceed two years beyond the expiration of the associated sentence. Is the protection order illegal because it exceeds the term allowed by statute?

B. STATEMENT OF THE CASE

a. Procedural Facts

The State charged 23-year-old Turgut Tarhan with second degree rape based on an allegation that he, along with three others, had sexual intercourse with 21-year-old Heather Wasmer by forcible compulsion. CP 1; 10RP<sup>1</sup> 27, 21RP 19. Tarhan's co-defendants were his twin brother, Taner Tarhan, and their friends, Emir Beskurt and 22-year-old Samet Bideratan. CP 1; 19RP 38; 21RP 20-21. A jury convicted Tarhan and his co-defendants of the lesser offense of third degree rape based on lack of

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 6/23/08; 2RP - 6/24/08; 3RP - 6/25/08; 4RP - 6/26/08; 5RP - 6/30/08; 6RP - 7/1/08; 7RP - 7/2/08; 8RP - 7/8/08 (I); 9RP - 7/8/08 (II); 10RP - 7/9/08; 11RP - 7/10/08; 12RP - 7/14/08; 13RP - 7/15/08; 14RP - 7/16/08; 15RP - 7/17/08; 16RP - 7/21/08; 17RP - 7/22/08; 18RP - 7/23/08; 19RP - 7/24/08 (I); 20RP - 7/24/08 (II); 21RP - 7/28/08; 22RP - 7/29/08; 23RP - 7/30/08; 24RP - 9/4/08.

consent. CP 16; Supp CP \_\_ (sub no. 71, Jury Instructions, 6/15/09) (Instruction 19). The court sentenced Tarhan to 10 months confinement and 36 to 48 months of community custody. CP 24-25. This appeal follows. CP 19-20.

b. Trial

One summer evening, Wasmer and her best friend, Caroline Concepcion, saw three of the defendants in Beskurt's apartment from across the building courtyard. 10RP 38, 43, 56-57, 60; 18RP 8, 109-11; 21RP 30. Concepcion had socialized with Beskurt and Tarhan on previous occasions and Wasmer had briefly met or seen some of the men. 11RP 141; 18RP 13-17, 67-68. The women waved and invited the men up to their apartment for beer and music. 10RP 58-60; 11RP 137; 12RP 60; 18RP 70, 120. Wasmer danced in front of window and took her tank top off, leaving a bikini top underneath. 21RP 35.

Wasmer had the day off from school and work and felt like having a good time with friends and alcohol. 10RP 48-50; 11RP 101. Tarhan, his brother Taner,<sup>2</sup> and Wasmer were college students. 10RP 31; 21RP 23-24. The men arrived at Wasmer's apartment in response to the invitation and socialized. 10RP 69, 73-74. They all drank beer. 10RP 78, 18RP 26;

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<sup>2</sup> To avoid confusion, appellant Turgut Tarhan will be identified as "Tarhan" and his brother, Taner Tarhan, will be identified as "Taner."

19RP 49. Taner and Wasmer flirted. 21RP 8. At one point Bideratan saw Taner and Wasmer hugging in Wasmer's bedroom, and overheard Wasmer saying "not now." 19RP 52, 95; 20RP 58-59.

Wasmer and Concepcion decided to go down to the Beskurt's apartment. 10RP 80-81; 21RP 37. Spencer Crilly, with whom Wasmer had an intimate relationship, refused to join them. 10RP 35-36, 81-82. Wasmer was irritated that Crilly was aloof. 18RP 74, 82, 125-26.

The men and women continued friendly conversation in Beskurt's apartment. 10RP 83-85, 88-89. They went to buy more beer at a nearby grocery store. 11RP 142-45; 21RP 45. On the way to the grocery store, Wasmer said she liked to have sex when she drank beer. 21RP 47. Tarhan thought she was joking. 21RP 47. Upon returning to the apartment building, Wasmer encountered Crilly leaving. 19RP 56. Crilly offered an apology and Wasmer told him to "fuck off." 19RP 56. She had earlier told the men Crilly was not her boyfriend. 21RP 43-44.

A building resident saw Beskurt with his arm casually around Wasmer in the elevator. 16RP 192-94. Wasmer did not seem bothered or uncomfortable. 16RP 94. Wasmer grabbed Bideratan's butt in the elevator, laughing. 19RP 58-59; 21RP 49-50.

There was more drinking at the men's apartment. 10RP 101. Wasmer and Concepcion were having fun. 10RP 101. The men were

friendly and flirted with Wasmer. 18RP 35. Beskurt had his arm around Wasmer. 21RP 54. Concepcion saw Beskurt brush Wasmer's leg in a flirtatious way. 18RP 83-84, 138, 141-42. Wasmer did not seem uncomfortable. 18RP 168.

At trial, Wasmer maintained there had been no previous physical contact of any kind between her and the defendants until immediately before the intercourse took place. 10RP 106. She denied flirting with them. 10RP 106; 11RP 73, 117. She denied dancing in front of the window. 12RP 61. She said on cross examination that she did not remember someone putting his arm around her in the elevator on the way back from the grocery store of squeezing Beskurt's butt. 12RP 20-22, 71-72. She denied hugging Taner near the bedroom while they were in Wasmer's apartment. 12RP 32-33. She did not recall saying she became horny when she drank too much. 12RP 34.

The men took turns having oral sex and vaginal intercourse with Wasmer after Concepcion left to buy cigarettes. 10RP 116-17, 126; 13RP 5-10; 18RP 34, 37-38, 84. There was no dispute about this. The dispute was whether Wasmer consented to the intercourse.

According to Wasmer, she told them to stop. 10RP 111-15. They held her shoulders down "a little bit" when she tried to get up. 10RP 113, 119; 11RP 120-21, 127, 157; 13RP 8. She offered no other resistance.

11RP 158; 13RP 13. The men were not scary, aggressive, angry or threatening. 10RP 122; 13RP 13-14. Wasmer insisted on the stand that she did not scream, although she told a detective and hospital social worker a short time after the event that she did. 11RP 53, 64, 122-23, 159-61; 16RP 100. When asked to explain the inconsistency at trial, Wasmer replied she did not have a good answer and said she did not know "what was going on" when she talked to the social worker. 11RP 160.

The defense theory was that Wasmer consented to the intercourse but was overwhelmed by the experience. 22RP 138-43, 146-47. Bideratan and Tarhan, both of who testified at trial, described Wasmer as a willing participant. 19RP 63, 78; 21RP 10, 61, 89. No one held her or pushed her down and she appeared to enjoy the intercourse. 19RP 109; 21RP 9-10, 13-14, 65, 70, 89, 106.

According to Tarhan, Beskurt and Taner put their hands on Wasmer's legs after Concepcion left. 21RP 55-56. Wasmer asked where Concepcion went. 21RP 56. As Tarhan left to try to find Concepcion, he saw Wasmer was kissing Beskurt and rubbing Taner's leg. 21RP 56-58. When Tarhan returned, he saw Taner taking Wasmer's pants off as she lay on the futon. 21RP 60-61. She arched her back and did not resist. 21RP 61-62. The four men took turns having vaginal and oral intercourse with Wasmer. 19RP 62-66; 21RP 63-74, 98-99.

Upon hearing the first knock at the door, Wasmer told them not to answer it because she did not want to be seen in that position. 19RP 66; 21RP 75-76. Wasmer did not scream or yell out. 11RP 124; 12RP 40-41; 14RP 87-88. When Concepcion later knocked on the door and Taner announced her presence, Wasmer told Tarhan to stop the intercourse. 19RP 69; 20RP 28-29; 21RP 79-80. Tarhan stopped and she walked away. 19RP 69; 21RP 81. Wasmer answered the door without any clothes on. 18RP 38-40. She was crying and, according to Concepcion, seemed to be having a panic attack. 18RP 41, 64. The men did not try to prevent her from answering the door. 13RP 11.

Wasmer took Concepcion to the bathroom and said they had sex with her. 10RP 129-30. Wasmer got dressed and the two women left the apartment. 10RP 129-31. Wasmer cried on the staircase outside. 18RP 47. Wasmer testified she felt stressed, embarrassed and confused. 10RP 132. She did not understand what had just happened to her. 10RP 132. At trial, she described her reaction to having intercourse with the men as "awkward." 11RP 129. The men went to Bideretan's mother's house for dinner after the women left Beskurt's apartment. 19RP 77; 21RP 85.

Upon returning to Wasmer's apartment, Concepcion said "So they raped you?" and Wasmer nodded her head. 18RP 48, 150-51. Wasmer

did not respond when Concepcion told her she wanted to call the police. 10RP 134; 12RP 47-48. It was Concepcion's idea to call. 11RP 130.

Police officers arriving in response to the 911 call described Wasmer as crying and emotional. 9RP 60, 65, 71, 76, 126, 129, 132. An emergency medical technician described her as traumatized, scared, hyperventilating, shaking, crying, and withdrawn. 9RP 78-79, 85-86, 91.

Wasmer was taken to the hospital, where she was interviewed and examined for evidence of sexual assault. 9RP 73; 18RP 52. Wasmer asked Concepcion to call her ex-boyfriend, Zachary Morris, because she wanted him for comfort. 10RP 150-51; 18RP 54. Morris had moved out of her apartment earlier that day. 10RP 30, 32-35, 44-45; 11RP 101. Morris testified Wasmer was crying and upset. 16RP 18. A hospital social worker said Wasmer felt disgusted and looked overwhelmed. 11RP 36, 58, 61. Detective Greg Kizzier, who interviewed Wasmer at the hospital, said she was initially tearful and became more upset when describing the incident. 16RP 59-60, 68, 70.

The sexual assault nurse who examined Wasmer at the hospital testified Wasmer had no bruises. 15RP 20, 54. Tiny, superficial lacerations were consistent with both consensual and forced sex. 15RP 62-63, 65-66, 89, 119-21, 148.

Wasmer maintained she had only two or three beers. 10RP 140; 11RP 106-07; 12RP 16-19; 18RP 173, 183. She admitted to having a little "buzz" but denied being drunk. 10RP 140-41; 11RP 106, 108. A number of people who encountered Wasmer shortly after the incident testified she did not appear intoxicated. 9RP 89, 97, 137-38; 15RP 88-89, 11; 16RP 20-21, 73-74. But a urine sample taken at the hospital had a .16 alcohol concentration. 16RP 147, 155-56. She had not eaten dinner. 10RP 88; 11RP 108. Crilly told a detective shortly after the event that it was obvious Wasmer was drunk. 14RP 104-06.

C. ARGUMENT

1. THE ERRONEOUS EXCLUSION OF WASMER'S STATEMENT TO THE POLICE DEPRIVED TARHAN OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND CONFRONT HIS ACCUSER.

Evidence that Wasmer told the investigating officer shortly after the alleged rape that she did not want to see the men go to jail was relevant to Tarhan's consent defense and could have been used to impeach her credibility. The trial court undermined Tarhan's ability to defend himself by excluding Wasmer's statement. Reversal is required because this constitutional error was not harmless beyond a reasonable doubt.

a. The Court Prohibited The Defense From Eliciting Probative Evidence Supporting The Defense Theory That The Sexual Encounter Was Consensual.

Wasmer talked to Detective Kizzier while at the hospital. 1RP 88-89. The detective asked her what she would like to see happen. 1RP 89. She said something like she did not know how things worked, but she did not want to see the men and did not want to feel threatened in her apartment building. 1RP 89. She also said something to the effect that she did not want to see them go to jail. 1RP 89.

The State moved pre-trial to prohibit the defense from eliciting testimony that Wasmer told the detective that she did not want the men to go to jail. 1RP 88-89. The State maintained this evidence was irrelevant because the court, not the victim, determines punishment and the issue of possible punishment should not be presented to the jury. 1RP 89-90, 93. The State further suggested the evidence should be excluded because Wasmer was not legally sophisticated and thus did not know the true possibilities for punishment. 1RP 89.

The defense opposed the motion to exclude Wasmer's statement from coming into evidence. Taner's counsel argued Wasmer's remark was highly relevant because it showed the uncertainty in her own mind about what actually happened. 1RP 90-91. He disagreed with the prosecutor's characterization of how the jury would treat this evidence. 1RP 94-95.

He wanted the jury to consider this evidence in relation to the issue of whether a rape really occurred because "it if did happen, she'd want them in jail for the rest of their lives, but instead that's a very real concern of hers within a couple hours of the incident." 1RP 94-95. Tarhan's trial counsel agreed and joined in objecting to the State's motion. 1RP 92.

The court asked how to square Wasmer's statement that she did not want to feel threatened with the statement that she did not want them to go to jail. 1RP 95. Taner's counsel correctly responded that was for the jury to decide. 1RP 95. Beskurt's counsel pointed out the defense argument was not that the jury should be sympathetic to the defendants because they might be severely punished, but that Wasmer's statement was an expression of ambivalence about what occurred. 1RP 95-96.

The prosecutor then argued the evidence should be barred because it would be difficult for the State to rehabilitate Wasmer. 1RP 96. According to the prosecutor, Wasmer subsequently changed her mind about going forward with the prosecution and in order to present a complete picture of why she changed her mind, the State needed to delve into inappropriate topics like her evolving understanding of the punishment possibilities and her involvement in plea negotiations. 1RP 96-99.

The court recognized Wasmer's comments could be interpreted as a show of ambivalence about what should happen to the defendants and, by extension, her ambivalence about what had befallen her. 4RP 96. The court nevertheless banned the evidence, stating as follows:

I really have considered that the State has a really good argument that, by itself, the statement that the defense would want to elicit is misleading, and insofar as -- because of the circumstances, but also it would create the impression that the complaining witness doesn't really have a stake or doesn't really care what happens at this point, and that's, obviously, not true.

And when I imagine -- I've tried different scenarios in my mind about how could the State clarify the situation or rehabilitate the complaining witness about this, and every time I come up with a scenario it ends up getting into information about possible punishment or about pretrial negotiations or both, none of which should be considered by the jury.

And so I just do not see how I can allow that statement to come in, given that I would -- in order to be fair, have to allow the State to rehabilitate the witness on this point, and I just can't see how it can be done, so for that reason I'm going to exclude the statement about not being sure if the defendants should go to jail that night.

4RP 96-97.

After Wasmer testified at trial but before Detective Kizzier took the stand, Tarhan's counsel asked the court to reconsider its ruling. 16RP 30. He argued the State had dedicated significant testimony establishing how upset Wasmer was after the incident to corroborate the contention

that she was raped. 16RP 30-31. Her statement to the detective rebutted that contention. 16RP 31. Her ambivalence about wanting to see the defendants punished fit into the defense theory that she did not act like a rape victim in this respect, contrary to what the evidence presented by the State thus far had shown. 16RP 31.

The judge said she had been thinking about her ruling throughout the trial as she listened to the testimony and began to better understand why the defense was interested in admitting that statement into evidence. 16RP 31-32. The court, however, adhered to its previous reasons for excluding the evidence and identified a third reason: Wasmer would have to be brought back to testify to be rehabilitated or present a more complete picture about her views and "I don't think anybody really wants to put her through coming back again." 16RP 32.

The prosecutor, meanwhile, maintained for the first time that Wasmer's statements were hearsay. 16RP 33-34. Furthermore, in response to the court's query about how the detective would likely answer a question of whether Wasmer appeared ambivalent about prosecution, the prosecutor said the detective would testify that he asked every person who claims to have been raped the question of what the person would like to see happen to "evaluate their credibility." 16RP 33. The prosecutor intimated that admission of the statement would mean the detective would

need to give an opinion about Wasmer's credibility. 16RP 33-34. The judge said she did not "want to go down that road." 16RP 34.

Tarhan's counsel pointed out the fact that Wasmer later changed her position on punishment "is completely irrelevant to her state of mind that morning, which is what I believe is the key evidence." 16RP 35. Her statement, moreover, fell within the "state of mind" exception to the hearsay rule. 16RP 35. The State put Wasmer's state of mind into issue by eliciting evidence of how upset she appeared after the event. 16RP 36. Wasmer's later change of mind long after the event was a collateral matter. 16RP 36. Wasmer's statement showed she did not react in a way that a rape victim could be expected to react, which was an important aspect of the defense theory of what happened that night. 16RP 39.

The court maintained its original ruling, contending admission of the statement would be particularly prejudicial to the State because Wasmer had already testified. 16RP 39-40. Beskurt's counsel expressed frustration that the defense was being prevented from presenting evidence that tested Wasmer's credibility. 16RP 40. He further expressed incredulity that "we can't ask that question because it might inconvenience Ms. Wasmer from coming back later on in recall." 16RP 40-41. The judge then said "But then we start getting into the detective's assessment of her credibility. We don't want to go there." 16RP 41. Tarhan's

counsel responded that concern over the detective expressing an opinion on Wasmer's credibility was "a complete red herring." 16RP 41.

b. No Compelling Interest Justified Exclusion Of Defense Evidence That Impeached The Accuser's Credibility.

Due process requires an accused be given "a meaningful opportunity to present a complete defense." State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. 6, 14; Wash. Const. art. 1, § 22. "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Criminal defendants also have a right under the Sixth Amendment and Article I, section 22 of the Washington Constitution to confront the witnesses against them. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Defense counsel exercises a defendant's right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). Absent a valid justification, excluding

relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane, 476 U.S. at 689-690.

A trial court's ruling on the admissibility of evidence and limitation on the scope of cross-examination is reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Defense evidence need only be relevant to be admissible. Darden, 145 Wn.2d at 622. If relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Id.; Hudlow, 99 Wn.2d at 15-16. That is, the State must demonstrate a compelling state interest to

exclude a defendant's relevant evidence. Hudlow, 99 Wn.2d at 15-16; Darden, 145 Wn.2d at 621. Even so, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000). The Supreme Court has stated no State interest can be compelling enough to preclude introduction of highly probative evidence. Hudlow, 99 Wn.2d at 16.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978). The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. Darden, 145 Wn.2d at 621.

The court here did not exclude Wasmer's statement based on lack of relevance. Indeed, the court recognized the importance of this piece of evidence as part of the defense theory of the case. Wasmer's statement that she did not want the men to go to jail was inconsistent with her allegation that they had just raped her. This ambivalence cast doubt on the accuracy of her testimony about what happened to her.

The prosecutor herself recognized "it doesn't take a rocket scientist on the jury to figure out that jail time is a pretty decent possibility here." 1RP 93. That is why the jury should have heard evidence tending to cast doubt on Wasmer's allegations. Jurors are expected to bring common sense and deductive reasoning into deliberations to determine the truth from the evidence. State v. Balisok, 123 Wn.2d 114, 119, 866 P.2d 631 (1994); State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). It is common sense that a woman who has just been raped by four men she hardly knows ordinarily wants to see them jailed for their crime.

Wasmer's statement was relevant. And as recognized by defense counsel, her statement also constituted an exception to the hearsay rule under the "state of mind" exception.<sup>3</sup> ER 803(a)(3) states in relevant part that even when the declarant is available as a witness, a statement is not excluded by the hearsay rule when it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition." Statements offered to show state of mind, rather than the truth of the matter asserted, are not hearsay. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002) (statement to police should not have been excluded because it was offered to show witnesses' state of mind regarding her

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<sup>3</sup> Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

statement to the police). A limiting instruction could easily have prevented the jury from considering this statement for any other purpose and we must presume the jury would have followed such instruction. Thomas v. French, 99 Wn. 2d 95, 104, 659 P.2d 1097 (1983); State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

The State did not have a compelling reason to prevent admission of evidence relevant to Tarhan's defense. The idea that the evidence was inadmissible because the State would need to rehabilitate Wasmer by delving into why she later changed her mind about prosecution does not satisfy this demanding standard.

First, Wasmer's statement was only relevant for the limited purpose of showing her state of mind at the time she made it. Whether her understanding of the potential punishment faced by the defendants was accurate at the time she made the statement is irrelevant because the statement was not being offered to prove her state of mind, not the truth of the matter asserted. Her different state of mind weeks or months later is irrelevant to the purpose for which the evidence should have been admitted.

Even if her later state of mind was relevant, the fact that she willingly testified against the defendants speaks for itself. The trial judge herself recognized Wasmer "obviously" cared what happened by the time

of trial. 4RP 97. Wasmer needed no rehabilitation. Her change of heart was evident to anyone who heard the testimony.

Moreover, the idea that the State needed to laboriously present the minutiae surrounding Wasmer's eventual change of heart must be rejected as fanciful. Assuming rehabilitation was necessary, it could be accomplished simply by having Wasmer testify that she had changed her mind since talking to the detective about wanting to see the defendants prosecuted and punished. Nothing more was necessary. In fact, the court suggested this means of rehabilitation, but the State insisted it did not fully paint "what her position has been all along," as if that trumped the defendants' constitutional right to present a complete defense. 1RP 97.

Relevant defense evidence is inadmissible only if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. Darden, 145 Wn.2d at 621. The defense evidence here was not prejudicial or inflammatory. Neither the State nor the court made any such contention. This is important. The test for admissibility is whether the evidence sought to be admitted by *the defense* would be so improper as to call into question the integrity of the trial process.

Admissibility of relevant defense evidence does not depend on whether the State wants to present arguably inadmissible evidence in rebuttal. But the court adopted this rationale and thereby deprived Tarhan

of his constitutional right to present a complete defense and confront his accuser. A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007); State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Even if such a rule for admission were proper, the defense evidence should still not have been excluded. The evidence sought to be elicited by the State in response to the defense evidence was neither prejudicial nor inflammatory. It is not as if the State would have been introducing such evidence to arouse sympathy for the defendants. Rather, the State would have offered the rebuttal evidence for the limited purpose of showing Wasmer's state of mind. A simple limiting instruction would have prevented the jury from considering the State's rebuttal evidence for an improper purpose.<sup>4</sup>

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<sup>4</sup> In fact, the court gave a preventive instruction based on WPIC 1.02 to properly guide jury deliberations on the issue of punishment. Supp CP \_\_\_ (sub no.71, supra). Instruction 1 stated "You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful."

Exploration of Wasmer's change of heart and the reasons for it may have made for a longer trial, but such rehabilitation evidence would not have disrupted the fairness of the fact-finding process. Neither the prosecutor nor the court explained how forcing the State to present a more complete picture of the victim's state of mind for the jury would impede the search for truth.

The irony is that the court, in excluding the defense evidence, allowed the State to present a one-sided, distorted picture to the jury about how Wasmer reacted to having sex with the defendants. The picture presented by the State was that Wasmer's reaction was entirely consistent with a woman who had just been raped. The jury was entitled to consider evidence that Wasmer's reaction was not so clear-cut. The jury also deserved to hear the defense theory regarding the significance of Wasmer's statement.

In considering defense counsel's request for reconsideration of the pre-trial ruling, the judge suggested she adhered to her prior ruling in part because she did not want to bring Warmer back to testify. This is an improper basis for denying Tarhan his constitutional rights. There is no authority for the proposition that witness inconvenience or mere discomfort at having to testify trumps the constitutional rights of the accused to confront a witness against him.

Finally, the court's suggestion that the detective would need to give an opinion on Wasmer's credibility if her statement were admitted is spurious. There is no logical connection. The reason why the detective asked her what she wanted to see happen is irrelevant. Her response is what is relevant. More fundamentally, any police opinion on witness credibility is irrelevant. The defense certainly would not have elicited any such opinion testimony and there is no authority for the proposition that a police officer must, in fairness to the State, be allowed to give opinion testimony on a witness's credibility to establish why the police asked that witness a question during the course of investigation.

In Hudlow, minimally relevant evidence of the victim's prior sexual history evidence was properly excluded because it would prejudice the truth-finding function of the trial. Hudlow, 99 Wn.2d at 16. In this case, the evidence was much more than minimally relevant and there was no reason why its introduction would impair the truth-finding function of the trial. On the contrary, the purpose of cross-examination is to test the perception, memory, and credibility of witnesses. Darden, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Id. The court erred in excluding probative defense evidence without a compelling interest.

c. Exclusion Of Probative Defense Evidence Was Not Harmless Beyond A Reasonable Doubt.

The denial of the right to present a defense and the right to confront witnesses is constitutional error. Crane, 476 U.S. at 690; State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). The reviewing court "decides whether the actual guilty verdict was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical [trier of fact] faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999).

This case was a credibility contest. The prosecutor accordingly told the jury during closing argument that "what this case really comes down to is do you believe Heather Wasmer, or do you believe the story the

defendants have told you." 22RP 25. Wasmer claimed rape. The defendants claimed consent. Admission of Wasmer's statement would have impeached her credibility. Cf. State v. Portnoy, 43 Wn. App. 455, 462-63, 718 P.2d 805 (1986) (denial of right to confront and cross examine harmless beyond a reasonable doubt in part because defendant's version of events and victims version were largely the same and thus excluded evidence would not have impeached victim's credibility).

It cannot be said beyond a reasonable doubt the error was harmless. "The jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses." State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). "Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable.'" State v. Holmes, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (quoting State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)); see also State v. Romero, 113 Wn. App. 779, 795, 54 P.3d 1255 (2002) (constitutional error not harmless beyond a reasonable doubt where verdict ultimately turned on the testimony of one eyewitness and the case came down to a credibility contest). As sole judges of witness credibility, jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment regarding the believability of

Wasmer's accusation. Davis, 415 U.S. at 317. Criminal defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). This Court cannot determine the jury would necessarily have reached the same result if the jury had heard evidence tending to impeach Wasmer's believability.

Moreover, evidence of guilt was not otherwise overwhelming and there were reasons to doubt Wasmer's story. There was evidence that Wasmer was drunk. Decreased inhibition is one of the effects of alcohol. 16RP 152. Intoxication may have affected her memory of the events. See Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 607.12 (5th Ed.) ("A witness's use of alcohol or other drugs at the time of the events in question is admissible to show that the witness may not remember the events accurately."); State v. Brown, 48 Wn. App. 654, 657-60, 739 P.2d 1199 (1987) (in rape prosecution, trial court erred in excluding evidence that victim admitted being high on LSD at time of incident, where evidence offered to explain why victim might not remember consenting or why she erroneously believed she was resisting).

In addition, Wasmer conveniently could not remember anything that tended to support the defense theory that she engaged in consensual intercourse, such as flirting with the men beforehand, hugging Taner in

her bedroom, grabbing Bideratan's butt in the elevator, and allowing Beskurt to put his arm around her in the elevator. At the same time, the jury heard evidence of how upset she became after the event, which supported the State's theory of the case. Had the jury been allowed to hear evidence showing Wasmer's reaction to possible punishment for her assailants was not that of a typical rape victim, the result may have been different. The State cannot overcome the presumption that exclusion of probative evidence regarding the accuser's credibility was prejudicial.

Cross-examination eliciting Wasmer's statement to the detective would have tested the truth of Wasmer's allegation. Instead of constricting the scope of Tarhan's cross-examination, the trial court should have allowed the wide latitude mandated by due process and the right to confrontation. The denial of these constitutional rights corrupted and distorted the fact-finding process. Reversal is required.

2. PROSECUTORIAL COMMENT ON TARHAN'S  
CONSTITUTIONAL RIGHT TO CONFRONT HIS  
ACCUSER REQUIRES REVERSAL.

In closing and rebuttal argument, the prosecutor criticized the manner in which the defense cross examined Wasmer and accused counsel of treating Wasmer as if she were the one on trial. Reversal is required because this unwarranted disparagement of defense counsel undermined

Tarhan's right to confront the witnesses against him and otherwise violated his due process right to a fair trial.

a. The Prosecutor Accused The Defense Of  
Victimizing Wasmer Through Cross Examination.

The following exchange place in the beginning of the State's redirect examination of Wasmer:

Q. Good morning, Heather.

A. Good morning.

Q. Heather, you're here for your fourth day to testify. What has this experience of testifying been like for you?

MR. MCFARLAND: Objection, relevance.

THE COURT: Overruled.

A. It's been horrendous.

Q. (BY MR. KEATING) It's been horrendous?

A. It's affecting everything.

Q. And when you say it's been affecting everything, can you describe for us a little more what you mean by that?

MR. MCFARLAND: Your Honor, I'm going to renew my objection. Further inquiry into this has no probative matter value in this matter.

THE COURT: Sustained.

Q. (BY MR. KEATING) Heather, how has this been horrendous?

MR. MCFARLAND: Same objection, relevance.

THE COURT: Overruled.

A. I'm missing a lot of work and I can't sleep, and I'm having a lot of nightmares about all of this. I haven't had nightmares in months about any of this. I can't sleep.

MR. SAVAGE: Your Honor, I can't understand what the witness said.

Q. (BY MR. KEATING) Heather, and I know this is difficult, but, both, so that everyone can hear and so that the court reporter can get your words down, can you repeat what you just said?

A. I said I can't sleep and that I've been having nightmares again. I haven't had nightmares in months over any of this, and I'm missing work. I can't afford to miss work. It's embarrassing to be here every day.

13RP 15-16.

In closing argument, the prosecutor told jurors that Wasmer had no idea "that the events of that evening would end up over a year later in this courtroom, where what was taken from her and how it was taken would be analyzed in excruciating detail, in front of a room full of strangers. *She had no idea that she would be questioned about that evening as if she were the one on trial . . .*" 22RP 24 (emphasis added). The prosecutor later contended Wasmer "was clearly terrified and overwhelmed by what she endured in this courtroom, who, despite that, came back, day after day after day after day, and told you what happened to her, with a great deal of poise and resilience." 22RP 30.

In rebuttal argument, the prosecutor started off by stating "There's a saying in the courthouse, when you have the facts on your side, pound the facts, when you have the law on your side, pound the law, and when you don't have either one, pound the victim, and ladies and gentlemen, yesterday afternoon and this morning, that is exactly what you have seen happen." 23RP 12-13. She described some of the questions asked of Wasmer as bordering on the offensive. 23RP 13. The prosecutor accused

Bideratan's attorney of bullying Wasmer with his questions. 23RP15. She later reiterated, "when you don't have the facts and you don't have the law, you pound the victim." 23RP 19. In attempting to explain why Wasmer's answers to questions changed and became more certain over the course of her testimony, the prosecutor argued:

Perhaps it was because over the weekend she finally got some sleep, or perhaps it was because *the questions -- questions themselves and the bullying manner in which they were asked* were designed to elicit just those types of responses from Heather, designed to confuse her, designed to make her think she'd given a different answer before, designed to get her to say, either, yes -- anything is possible, or to dig in her heels. *To be frank, I'm not even sure I could have withstood some of the questioning that was posed by defense, and why was that? Why were those questions asked of Heather in that way? Perhaps so that defense counsel could get right here in closing argument and tell you Heather is not to be believed.*

23RP 27.

There was no objection to any of these comments during the argument portion of the trial and Tarhan was convicted of raping Wasmer.

- b. The Prosecutor's Disparagement Of Defense Counsel Constituted Improper Comment On The Exercise Of Tarhan's Constitutional Right To Confront The State's Chief Witness Against Him.

Criminal defendants have a right under the Sixth Amendment and Article I, section 22 of the Washington Constitution to confront the witnesses against them. Hudlow, 99 Wn.2d at 14-15. Defense counsel

exercises a defendant's right to confrontation primarily through the cross-examination of the State's witnesses. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). The State is prohibited from commenting on the exercise of a defendant's constitutional right by inviting the jury to draw adverse inferences from its exercise. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); State v. Gregory, 158 Wn.2d 759, 807, 147 P.3d 1201 (2006). The State may therefore not invite the jury to draw a negative inference from the defendant's exercise of his right to cross-examine witnesses. Gregory, 158 Wn.2d at 806.

The prosecutor's comments during the argument phase were, in and of themselves, improper comment on the exercise of Tarhan's constitutional right to confrontation. The exchange between the prosecutor and Wasmer quoted above was not improper if considered in isolation. Gregory, 158 Wn.2d at 805-06. But considered in context, the questioning was improper because it was intended, at least in part, to malign defense counsel. The prosecutor's comments during closing and rebuttal argument make this point clear.

Comparison with Gregory illustrates the point. The prosecutor in that rape case asked a similar question and received a similar response from the witness. Gregory, 158 Wn.2d at 805-06. In closing, the prosecutor read back the answer to the jury and argued the complainant

would not have put herself through the ordeal of trial merely to avenge a broken condom, which was Gregory's theory. Id. at 780, 806.

On appeal, Gregory contended the prosecutor chilled his constitutional confrontation rights by asking how the complainant felt about cross-examination. Id. at 806. The Court rejected this argument, concluding the questioning and argument "were not improper because they did not focus on Gregory's exercise of his constitutional rights to trial and to confront witnesses. Instead they focused on the credibility of the victim as compared to the credibility of the accused." Id. at 808. Significantly, the State's actions in that case did not rise to the level of improper comment on the exercise of a constitutional right because the State did not specifically criticize the defense's cross-examination of the witness or suggest Gregory should have spared her the unpleasantness of going through trial. Id. at 807.

Tarhan's case is different from Gregory. The prosecutor in Tarhan's case commented on the right to confrontation because she followed up on the Wasmer's answer by pointedly and repeatedly criticizing defense counsel's method of cross examination in closing argument. The prosecutor's questioning of Wasmer regarding how she felt about testifying provided the springboard for later improper argument that defense counsel unfairly cross examined Wasmer. Unlike in Gregory, the

prosecutor did not merely discuss how the victim felt about testifying to support the victim's credibility. The prosecutor went further in maligning the manner in which defense counsel cross-examined the victim.

"In our adversarial system, defense counsel is not only permitted but is expected to be a zealous advocate for the defendant." Walker v. State, 790 A.2d 1214, 1218 (Del. 2002). Disparaging defense counsel therefore constitutes misconduct. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983); Walker, 790 A.2d at 1220. "Even though such prosecutorial expressions of belief are only intended ultimately to impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury." Bruno, 721 F.2d at 1195.

In Walker, the prosecutor criticized defense counsel's method of cross-examining the alleged victim in several ways, including that counsel tried to intimidate and confuse the victim and that he treated the victim without respect. Walker, 790 A.2d at 1218. The Delaware Supreme Court recognized the prosecutor must not employ argument to denigrate the role of defense counsel by injecting her personal frustration with defense tactics into the trial. Id. at 1219.

In criticizing defense counsel's cross examination of Wasmer as bullying and unduly harsh, the prosecutor commented on Tarhan's

constitutional right to confrontation and denigrated his counsel for exercising that right to confront the State's primary witness. Id. at 1219-20. "A prosecutor is prohibited . . . from arguing unfavorable inferences from the exercise of a constitutional right and may not argue a case in a manner which would chill a defendant's exercise of such a right." State v. Johnson, 80 Wn. App. 337, 339-40, 908 P.2d 900 (1996), overruled on other grounds, State v. Miller, 110 Wn. App. 283, 40 P.3d 692 (2002).

The prosecutor's remarks in Tarhan's case, taken in context, convey a grievous misconception of defense counsel's role in the justice system. Defense counsel was only doing his job in vigorously cross examining the State's key witness. A prosecutor is free to criticize the merits of defense theory of the case in closing argument, but she is not free denigrate defense counsel in the process. The prosecutor's comments about pounding the victim, putting the victim on trial and bullying her with offensive questions were designed to align the jury against Tarhan through his legal representative.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prosecutor's criticisms of defense counsel fall squarely into this category. Whether a victim has been treated fairly by defense counsel is

irrelevant to whether the State proved each element of the alleged offense. Inviting the jury to consider defense counsel's treatment of Wasmer during cross examination was an unmistakable invitation to decide the case, not simply on the evidence or the credibility of the witnesses, but also on the moral culpability of defense counsel. The jury should only consider the evidence in reaching a verdict. "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998).

Improper comment on the exercise of a constitutional right puts the defense in a difficult position. Holmes, 122 Wn. App. at 446. "Counsel must gamble on whether to object and ask for a curative instruction - a course of action which frequently does more harm than good - or to leave the comment alone." State v. Curtis, 110 Wn. App. 6, 15, 37 P.3d 1274 (2002). Either way, the damage is done. In this case, defense counsel did not object to the improper comments made during argument. But the prosecutor's comment on the exercise of Tarhan's constitutional right is an error of constitutional magnitude that may be raised for the first time on appeal.

The constitutional harmless error standard applies to prosecutorial comment on a defendant's exercise of constitutional rights. Johnson, 80 Wn. App. at 341 (comment on Sixth Amendment right to be present at

trial and confront witnesses); State v. Jones, 71 Wn. App. 798, 809-10, 863 P.2d 85 (1993) (analyzing comment on constitutional right to confront under RAP 2.5(a) for manifest error). No prosecutor may employ language that "limits the fundamental due process right of an accused to present a vigorous defense." Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990); accord Walker, 790 A.2d at 1219. Disparagement of defense counsel is constitutional error because it "is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice." Bruno, 721 F.2d at 1195. "The danger underlying such statements is that they invite the jury to 'punish the [defendant] for making the [alleged] victim of the crime go through the ordeal of cross-examination, which the [defendant] has every right to do.'" Walker, 790 A.2d at 1219.

The danger is fully realized here. The prosecutor's vilification of defense counsel and condemnation of how counsel cross examined Wasmer was a comment on the exercise of Tarhan's right to confrontation. As set forth in section 1. c., supra, the evidence against Tarhan was not so overwhelming that the improper argument necessarily had no effect on the verdict. In deciding between competing versions of events, the improper comments may have tipped the scale in favor of conviction.

c. In The Alternative, Reversal Is Required Because The Prosecutorial Misconduct Was Flagrant, Impervious To Curative Instruction, And Likely Affected The Verdict.

The prosecutor, as an officer of the court, has a duty to see an accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).

Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A defendant's due process right to a fair trial and the right to be tried by an impartial jury is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. 5, 6 and 14; Wash. Const. art. 1, § 22.

Defense counsel did not object to the prosecutor's improper comments made during closing and rebuttal argument. Even in the absence of objection, appellate review is not precluded if the prosecutorial

misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice produced by the misconduct. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Id. at 508.

Statements made during closing argument are presumably intended to influence the jury. Reed, 102 Wn.2d at 146. Otherwise, there would be no point in making them. The remarks were not accidental and were designed to make the defense look bad in the eyes of the jury.

To determine whether there is a substantial likelihood that misconduct affected the verdict, the court considers its prejudicial nature and its cumulative effect on the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). The cumulative effect of repetitive misconduct may be so flagrant that no instruction can erase their combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000).

Such is the case here. The misconduct here does not involve an isolated remark capable of being ignored by the jury. The prosecutor repeatedly maligned defense counsel in arguing for conviction. "To discredit defense counsel in front of the jury is improper, and even

subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant of a fair trial." United States v. McLain, 823 F.2d 1457, 1462 (11th Cir. 1987). The repeated remarks were incurable and, for the reasons set forth in the preceding argument, there is a substantial likelihood they affected the verdict. See 1. c., supra.

d. Reversal Is Alternatively Required Because Counsel Was Ineffective In Failing to Object To The Prosecutorial Misconduct And In Failing To Request A Curative Instruction.

In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Id. at 226. Prejudice

exists when there is a reasonable probability that, but for counsel's performance, the result would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). There was no legitimate reason not to object given the prejudicial nature of the prosecutor's improper closing argument in combination with her questioning of Wasmer. Tarhan derived no benefit from letting the jury consider that argument as it deliberated on his fate.

The failure to properly object may not be deemed a legitimate trial tactic. This is not a case where reasonably competent counsel chose to stand silent because he wanted to avoid unduly drawing the jury's attention to the prosecutor's improper argument. There was no ignoring the argument because it was repeated in various ways and comprised a theme designed to win conviction.

Further, if this Court rules a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in the

juror's minds without instruction from the court that these improper arguments should be disregarded and play no role in their deliberations.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). The lack of curative instruction here resulted from defense counsel's failure to ask for one.

The trial process is distorted when the prosecutor criticizes defense counsel for putting the State's chief witness through the ordeal of rigorous cross-examination. See Sizemore, 921 F.2d at 671 ("when a prosecutor has made repeated and deliberate statements clearly designed to inflame the jury and prejudice the rights of the accused, and the court has not offered appropriate admonishments to the jury, we cannot allow a conviction so tainted to stand."). There is a reasonable probability counsel's failure affected the verdict for this reason and those set forth above. See l. c., supra.

3. REVERSAL IS REQUIRED BECAUSE A COMBINATION OF ERRORS CUMULATIVELY PRODUCED AN UNFAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial under Article 1, section 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

As set forth above, two errors occurred at trial: (1) the court wrongly excluded defense evidence casting doubt on the complaining

witness's version of events; and (2) the prosecutor wrongly commented on the exercise of Tarhan's right to confront the complaining witness and, in the event such error was waived, defense counsel provided ineffective assistance in failing to properly respond. Even if one of these errors, standing alone, did not affect the outcome of Tarhan's trial, there is a reasonable probability their cumulative force influenced deliberations for the reasons set forth above.

4. THE LENGTH OF THE COMMUNITY CUSTODY TERM IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM.

The trial court erred in imposing a standard range community custody term of 36 to 48 months for a sex offense in which Tarhan received less than a year in confinement. CP 25. The lawful maximum term of community custody is 12 months.

The Sentencing Guidelines Commission (SGC) established community custody ranges according to offense category. WAC 437-20-010; RCW 9.94A.850; State v. Davis, 146 Wn. App. 714, 726, 192 P.3d 29 (2008); State v. Mitchell, 114 Wn. App. 713, 715 n.2, 59 P.3d 717 (2002). "The length of the term depends on the crime of conviction and type of sentence. For some offenses, the term of community custody is set by statute. Other offenses are subject to a community custody range established by the Sentencing Guidelines Commission. RCW

9.94A.850(5); Chapter 437-20 WAC." Wash. Sentencing Guidelines Comm'n, Adult Sentencing Manual I-43 (2008).

Third degree rape, which qualifies as a sex offense, is generally subject to 36 to 48 months of community custody. WAC 437-20-010;

RCW 9.94A.030(42)(a)(i). RCW 9.94A.545(1), however, states:

Except as provided in RCW 9.94A.650 and in subsection (2) of this section, on *all sentences of confinement for one year or less, in which the offender is convicted of a sex offense . . .* the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720.

(emphasis added).

Tarhan was sentenced to 10 months of confinement for a sex offense. By its plain terms, RCW 9.94A.545(1) authorizes a maximum of one year of community custody for such a sentence.<sup>5</sup> See In re Sentences of Jones, 129 Wn. App. 626, 630, 120 P.3d 84 (2005) (holding "RCW 9.94A.545 is clear on its face and unambiguously limits the court's authority to impose community custody in sentences for 12 months or less to the offenses listed in the statute."). The SGC accordingly recognizes 12 months is the maximum term of community custody that can be imposed for sex offenses such as third degree rape where the term of confinement is less than a year. Wash. Sentencing Guidelines Comm'n, Adult

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<sup>5</sup> The statutory exceptions are inapplicable to Tarhan.

Sentencing Manual I-44 (2008). The statutory provision indicates a legislative intent to limit the expenditure of DOC's community supervision resources to more serious offenders. Jones, 129 Wn. App. at 631.

While a trial court has authority to impose an exceptional term of community custody,<sup>6</sup> nothing in the record shows this was the court's intention here. On the contrary, the record shows the court and all parties were concerned only with the correct standard range.

When the court at sentencing asked the prosecutor to clarify the period of community custody, the prosecutor responded 36 to 48 months was the statutorily required range. 24RP 17. Tarhan's trial attorney objected that the community custody term was 12 months. 24RP 17-18. The prosecutor insisted that the community custody range for "any sex offense" was 36 to 48 months and that she "can provide the Court with the statute." 24RP 17-18. Defense counsel asked the court to confirm whether community custody was 12 months. 24RP 35.

The prosecutor cited the definition of "sex offense" in former RCW 9.94A.030 as authority. 24RP 38, 41-42. The judge stated she wanted "to make sure about the community custody issue" because the

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<sup>6</sup> See, e.g., State v. Hudnall, 116 Wn. App. 190, 196-97, 64 P.3d 687 (2003) (trial court has statutory authority to impose exceptional term of community custody if it finds substantial and compelling reasons for doing so).

State's citation to RCW 9.94A.030 did not resolve the issue. 24RP 41. The prosecutor became confused and said "I don't know what to tell the Court other than I've never sentenced anyone for a sex offense where the period of community custody was less than 36 to 48 months." 24RP 47. The prosecutor requested, "if we can determine or if counsel can determine that that is incorrect, I would certainly sign off on an order modifying the judgment and sentence." 24RP 47. The court responded, "I think that makes sense. I would be happy to reduce the amount of community custody time if I have some sort of authority for doing so. But I know that most sexual deviancy treatment lasts for three years, so it does not make sense to me that the legislature would have anticipated only twelve months." 24RP 47.

Neither the trial court nor the prosecutor cited what authority it relied on to impose 36 to 48 months of community custody. The trial court put the cart before the horse in requiring defense counsel to show why the court did not have authority to impose this range. A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999).

No one could identify what authority allowed the court to impose the 36 to 48 month range because there is none. Whether 12 months is long enough to engage in sexual deviancy treatment is irrelevant. RCW

9.94A.545(1) unambiguously authorizes only 12 months of community custody. This Court should remand for imposition of the lawful term of community custody applicable to Tarhan's offense.

5. THE SEXUAL ASSAULT PROTECTION ORDER ISSUED IN CONJUNCTION WITH TARHAN'S SENTENCE IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM TERM.

The trial court erred in setting an expiration date of August 1, 2015 for the sexual assault protection order. CP 52. This Court should vacate the order and remand for determination of a lawful expiration date.

A trial court's authority to impose conditions of sentence is limited to the authority provided by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Sentencing provisions outside the authority of the trial court are illegal. State v. Pringle, 83 Wn.2d 188, 193-94, 517 P.2d 192 (1973).

When an offender is found guilty of a sex offense, any sentencing condition that restricts an offender's ability to contact the victim is referred to as a "sexual assault protection order." RCW 7.90.150(6)(a). By the statute's plain language, "[a] final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of

imprisonment and subsequent period of community supervision, conditional release, probation, or parole." RCW 7.90.150(6)(c).

Because Tarhan was convicted of a sex offense and the resulting sentence precludes contact with the victim, it was appropriate for the trial court to enter a sexual assault protection order. RCW 7.90.150(6)(a). The term of such an order issued in conjunction with a sentence, however, may not exceed expiration of the sentence by more than two years. RCW 7.90.150(6)(c).

The trial court entered a sexual assault protection order set to expire on August 1, 2015. CP 52-54. Following conviction, Tarhan was remanded into the custody of King County Jail on August 1, 2008. CP 31. He was sentenced on September 4, 2008. CP 26. His term of confinement was 10 months and is lawfully subject to 12 months of community custody. CP 24. The protection order must expire two years after the expiration of Tarhan's period of community custody. The maximum expiration date falls well before the August 1, 2015 date set by the court.

Sentencing errors can be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This Court should therefore vacate the sexual assault protection order and remand for imposition of an order that contains a lawful expiration date.

D. CONCLUSION

For the reasons stated, this Court should reverse conviction and remand for a new trial. In the event this Court declines to reverse conviction, the illegal portions of the sentence should be vacated and the case remanded for resentencing.

DATED this 25<sup>th</sup> day of June 2009.

Respectfully submitted

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,                    )  
  )  
  Respondent,                    )  
  )  
  v.    )  
  )  
TURGUT TARHAN,                         )  
  )  
  Appellant.                         )

COA NO. 62268-4-I

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2009 JUN 25 PM 4:08

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF JUNE, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT (CORRECTED)** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     TURGUT TARHAN  
          2308 188<sup>TH</sup> PLACE SW  
          LYNNWOOD, WA 98036

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF JUNE, 2009.

x Patrick Mayovsky