No. 44031-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Patrick McAllister,

Appellant.

Jefferson County Superior Court Cause No. 11-1-00141-1

The Honorable Judge Craddock Verser

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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3. The prosecutor improperly "testified" to "facts" that had not been introduced into evidence.

4. The prosecutor committed misconduct by improperly shifting the burden of proof.

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11. Mr. McAllister was prejudiced by the cumulative effect of numerous instances of ineffective assistance.

12. Mr. McAllister's convictions were entered in violation of his Sixth and Fourteenth Amendment right to confrontation, to present a defense, and to a fair trial.

13. The trial court erroneously allowed the prosecution to introduce inadmissible evidence that prejudiced Mr. McAllister.

14. The trial court erroneously excluded admissible evidence that was relevant to establish Lorega's bias and motive for testifying.

15. Mr. McAllister's conviction of count 18 infringed his Fourteenth Amendment right to due process because the evidence was insufficient for conviction.

16. The prosecution failed to prove penetration with regard to count 18.

17. The trial court improperly allowed the jury to consider an inapplicable aggravating factor with regard to each count of third-degree rape.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor may not rely on "facts" that have not been introduced into evidence. Here, the prosecutor made numerous and misleading references to "facts" not in evidence. Did the prosecutor violate Mr. McAllister's Fourteenth Amendment right to a fair trial by committing prejudicial misconduct that was flagrant and ill-intentioned?

2. A prosecutor may not shift the burden of the proof, and commits misconduct by making a missing witness (or missing evidence) argument except in certain limited circumstances. Here, the state faulted Mr. McAllister for failing to corroborate his testimony with medical evidence and for failing to introduce certain evidence over which the defense had no control. Did the prosecutor violate Mr. McAllister's right to due process by improperly shifting the burden of proof in closing?

3. A prosecutor commits misconduct by appealing to the passions and prejudices of the jury. Here, the state's attorney referenced juror statements about domestic violence that were made in *voir dire* and that were not part of the evidence introduced at trial. Did the prosecutor commit misconduct that was flagrant and ill-intentioned by appealing to the jurors' passions and prejudices instead of asking them to focus on the evidence?

4. The Sixth and Fourteenth Amendments guarantee the effective assistance of counsel. Here, defense counsel failed to introduce evidence that would have significantly bolstered Mr. McAllister's defense. Was Mr. McAllister deprived of the effective assistance of counsel?

5. Defense counsel generally provides ineffective assistance by failing to object to prosecutorial misconduct. Here, defense counsel unreasonably failed to object to numerous instances of egregious misconduct. Did counsel's failure to object to prosecutorial misconduct prejudice Mr. McAllister?

6. Failure to make an offer of proof can deprive an accused person of the effective assistance of counsel. Here, defense counsel had evidence that Lorega was involved in threats aimed at preventing a defense witness from testifying on Mr. McAllister's behalf. Was defense counsel ineffective for failing to make an offer of proof and neglecting to explain the issue to the court until after conviction?

7. Defense counsel provides ineffective assistance by failing to object to inadmissible evidence that prejudices the accused person, in the absence of some reasonable trial strategy. Here, defense counsel failed to object to inadmissible evidence that prejudiced Mr. McAllister. Did counsel's failure to object deprive Mr. McAllister of the effective assistance of counsel?

8. A trial court's evidentiary rulings may violate an accused person's constitutional rights. Here, the trial court erroneously admitted hearsay and prejudicial testimony that should have been excluded under ER 402, ER 403, and ER 404(b). Did the erroneous admission of evidence violate Mr. McAllister's due process right to a fair trial?

9. An accused person has the constitutional right to introduce relevant admissible evidence. Here, the trial court erroneously excluded evidence relevant to establish Lorega's bias and her motive for testifying. Did the erroneous evidentiary rulings

violate Mr. McAllister's Sixth and Fourteenth Amendment rights to confrontation, to present a defense, and to a fair trial?

10. To obtain a conviction for second-degree rape as charged in count two, the prosecutor was required to prove penetration by forcible compulsion. Here, the evidence as to count 18 showed only that Mr. McAllister took medication that made "his penis strong and he just attacked" Lorega. Did the conviction on count 18 violate Mr. McAllister's Fourteenth Amendment right to due process because the evidence was insufficient for conviction?

11. The domestic violence aggravating factors in RCW 9.94A.535 apply only to domestic violence offenses defined in RCW 10.99.020. Mr. McAllister was convicted of 11 counts of third-degree rape, which is not a domestic violence offense under RCW 10.99.020. Did the trial court violate Mr. McAllister's Fourteenth Amendment right to due process by allowing jurors to return special verdicts finding a domestic violence aggravator in connection with Mr. McAllister's third-degree rape charges?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Patrick McAllister lived alone in a house he owned in Brinnon, Washington. RP 263, 512. His friend Temur Perkins had met and married a woman from the Philippines. RP 198-200, 231-233, 247.

During his visits to Temur and Rosemarie Perkins' home, Mr. McAllister struck up a friendship over the phone with Rosemarie's sister, Sherilyn Lorega. Both of the Perkins encouraged their relationship. RP 202-203, 222, 235-239, 297, 513. Even though Lorega had grown up speaking Waray-Waray and Tagalog, she knew enough English to communicate with Mr. McAllister. RP 278, 293, 298.

Their relationship grew over the next two years. They spoke on the phone several times a day and planned a future together. RP 238, 298, 514-517, 520, 526.

In May of 2008, Mr. McAllister traveled to Lorega's village on Leyte Island in the Philippines to meet Lorega and her family. RP 240, 300, 518-519. The family home had two bedrooms, a packed dirt floor and a thatched roof; the house lacked running water. RP 251-252, 522. Lorega had eight siblings. Only her older sister—Rosemarie Perkins—had moved from the area. RP 293-294. During the visit, Mr. McAllister

and Lorega took sightseeing drives, visited resorts, and went swimming. While he was there, Mr. McAllister fell in love. RP 303-305, 524.

Mr. McAllister proposed marriage, and Lorega accepted. RP 306.

Arranging Lorega's travel to the United States proved challenging and time-consuming. RP 419, 526-528. Lorega moved to Manila for a time, and stayed with the relative of a friend of Mr. McAllister's. RP 347-348, 426-428, 528. During this time, Gerardo Sabiniano went with her to the US embassy to help her get a fiancée visa. RP 348. On one visit to the embassy, Lorega left her phone with Sabiniano. RP 447-448. When it rang, he answered it. The man on the other end of the line identified himself as Lorega's boyfriend. Lorega later confirmed this, and told Sabiniano that she was in love with her Filipino boyfriend. She explained that she was marrying Mr. McAllister to help her family financially. RP 448-450, 452.

Lorega arrived in the US on March 14, 2010. RP 350, 530. Mr. McAllister picked her up at the airport with flowers. He took her to see a friend and then to his home in Brinnon, where a "welcome" banner and gifts awaited her. RP 350, 430, 530. Over the next week, Mr. McAllister took her sightseeing and shopping; they met with friends, and traveled to Oregon to meet his mother. RP 350-352, 396, 402, 410, 461-468, 503, 531-534, 538-540.

Lorega saw her sister while staying with Mr. McAllister, and Ms. Perkins gave Lorega a phone. RP 206-207. The Perkinses picked up Lorega from Mr. McAllister's home on April 26, 2010. RP 210-212, 224, 551-53. When Lorega left the home that day, police had been summoned for a "civil standby", a procedure where officers simply observe a person who is removing their property from the home. RP 263, 271, 553. One officer asked Lorega if she had been assaulted. She said she had not. RP 266, 578.

After staying at her sister's home for several days, Lorega decided to call the police and make a report that Mr. McAllister had been raping her repeatedly since she arrived in the US. RP 214, 244. She also met with an immigration attorney. RP 224, 244-245.

The state charged Mr. McAllister with 17 counts of Rape in the Second Degree, and 11 counts of Rape in the Third Degree. Each of these charges also carried an allegation that the offense was a domestic violence crime committed with deliberate cruelty. The state also charged Mr. McAllister with 10 counts of Assault in the Fourth Degree. CP 1-12.[1] Mr. McAllister denied all of the allegations.

[1] The state dismissed Count 39, an assault charge, on the first day of trial. RP 40-41; CP 12.

At the start of trial, the defense asked the court to suppress testimony from a nurse who had examined Lorega. The examination did not result in any findings. The defense argued that the nurse's title—"Sexual Assault Nurse Examiner"— would unfairly bolster Lorega's story. RP 35-39; Defense Motions in Limine, Supp. CP. The court denied the motion, and allowed the state to use that nurse's title in front of the jury. RP 36, 39, 386-387.

Nurse Practitioner White did not remember Lorega, but testified from her notes. She said her notes indicated she saw Lorega on June 18, 2010. RP 371, 373, 378. This was seven and a half weeks after Lorega had departed Mr. McAllister's home. RP 210-212, 224, 551-53. At the time of the examination, Lorega had black and blue bruising that was "commensurate with some sort of sexual abuse". The defense did not object to Nurse White's testimony. RP 371, 373, 378. White also said that her notes reflected Lorega's statement that she was not assaulted at any time in the last year. RP 375.

The defense also moved to prevent any mention that Lorega had stayed temporarily at "Dove House", apparently a domestic violence and crime victim shelter in Port Townsend. Defense Motions in Limine, Supp. CP. The court granted the motion. RP 40. Despite this, Temur Perkins told the jury that Lorega received assistance from Dove House and another

"domestic violence" center. RP 244. When the defense objection was sustained, Perkins repeated the testimony about Dove House. RP 245. After a second objection was sustained, he referred to the "unsayable word" in place of "Dove House." RP 245. Later in his testimony, he made reference to the "unmentionable name" center twice. RP 249. Defense counsel did not object to any of these indirect references to Dove House. RP 245, 249.

Lead investigator Detective Garrett acknowledged that Lorega's version of events changed significantly over time. RP 286-288. At first, Lorega said there were five times she had sex with Mr. McAllister that she "did not enjoy". She later gave an account describing dozens of instances of forcible rapes and assaults. RP 287, 290.

Lorega testified from a calendar she'd made at the prosecutor's behest. RP 312-313, 344. She alleged that Mr. McAllister kicked her above her knee while she was standing upright. She demonstrated the movement he made. RP 316, 318, 319, 320, 322, 324, 326, 330, 331, 334-335, 354, 357.

With respect to count 18,[2] she testified that Mr. McAllister took medication to make his penis "strong," and claimed that he "attacked" her,

[2] Count 18 charged Rape 2. CP 6.

but offered no information on the nature of this attack. RP 325. The prosecution introduced no other evidence to prove penetration with respect to count 18.

Before testimony began, the defense had obtained a ruling excluding reference to Lorega's request for a restraining order against Mr. McAllister. RP 32. During the state's redirect examination of Lorega, the prosecutor brought up the hearing on the restraining order. RP 363-364. The trial judge overruled a defense objection, and Lorega gave information about what she had said during that hearing. RP 364.

The court dismissed five counts of Rape 2 and two counts of assault after the state rested. RP 392-394.

The defense theory at trial was that Lorega and Perkins fabricated the allegations so that Lorega could stay in the country. Lorega acknowledged that among the items she didn't take with her when she left Mr. McAllister's home was a letter she had written in Tagalog to her "husband" in the Philippines. RP 359-361.

Mr. McAllister presented the testimony of immigration attorney Elizabeth Li. RP 474-501. Li explained how fiancée visas work. A person with a fiancée visa has 90 days to get married. If the person does not marry, she or he must leave the country. The only exceptions are for victims of human trafficking and crime victims who cooperate with the

prosecution. Visas granted to crime victims are called U-visas. A cooperating crime victim can stay in the U.S. for up to three years and then will be eligible to apply for permanent residency. RP 482.

Li said that information on obtaining a crime victim visa is readily available on the internet. RP 484-487. The defense offered information printed from the government immigration website, but the court sustained the state's relevance objection. RP 485-487; Exhibit 18, Supp. CP. Li further testified that she had reviewed Lorega's immigration status. She said Lorega had come on a fiancée visa, and then applied for a crime victim visa. RP 488-489. She was asked if there were other ways for Lorega to stay:

> Q: In the case of a situation where a person comes to the United States on a fiancée visa and the engagement breaks off, that person, the only legal options that person has would be to either go home to where they were from, or to claim that they were the victim of some sort of crime if they wanted to stay in the United States?
> A: Yes.
> RP 490.

During the state's cross-examination of Li, the prosecutor did not ask any further questions on other ways Lorega could stay in the US. RP 490-498.

Gerardo Sabiniano came to the trial from the Philippines to testify about his contact with Lorega in Manila. RP 4, 10, 447, 453. Sabiniano had been threatened by members of Lorega's family who did not want him

to testify at trial. The defense had evidence linking this threat to Lorega herself.[3] Defendant's Sentencing Memorandum, Supp. CP. When the defense attorney attempted to ask him about these threats, the court sustained the state's objections. RP 452-453. Sabiniano was only permitted to tell the jury about the call he answered from Lorega's boyfriend in the Philippines. RP 448-452.

Mr. McAllister testified and denied all of Lorega's allegations. He also explained to the jury that he had injuries that made him unable to kick Lorega as she claimed. RP 512. Specifically, he had a shattered ankle and an artificial knee that did not work correctly after two surgeries. RP 512-513.

In response, the state recalled Temur Perkins. He said that Mr. McAllister did not limp at the 2010 hearing for a restraining order. A defense objection was overruled. RP 581-582. During cross examination, the defense asked Perkins if he knew Mr. McAllister was unable to work:

> Q: You're familiar with the fact that Mr. McAllister, among the reasons that he didn't work and doesn't work is a Labor & Industries Disability, correct?
> A: He was seeking to scam that, yes.

[3] At trial, Mr. McAllister's counsel did not make an offer of proof regarding the threats. RP 452-459. Instead, counsel presented additional information regarding the threat at sentencing. Defendant's Sentencing Memorandum, Supp. CP. Defense counsel's sentencing memo referred to an attachment (Exhibit 3), a Manila police report regarding the threats. However, counsel neglected to attach the report to the memorandum, and the court clerk has confirmed that Exhibit 3 was never filed with the court.

> Q: Okay. So your answer is that yes, you are familiar that he's on Labor & Industries Disability?
> A: No. I was aware that he was seeking to deceive them.
> Q: Seeking at the time?
> A: Yes.
> RP 584.

Lorega was recalled and said that Mr. McAllister could walk fine and used exercise equipment in the garage. RP 603. When asked if Mr. McAllister might have been doing physical therapy, she said she did not know. RP 604.

The defense had obtained medical records regarding Mr. McAllister's ability to walk and kick. Defendant's Sentencing Memorandum, Supp. CP. Even after jurors heard Mr. Perkins' claim that Mr. McAllister was "scamming" the Department of Labor and Industries, defense counsel did not present any additional information regarding the injuries. RP 613.

The prosecutor argued in closing that Mr. McAllister's behavior was that of a domestic violence abuser:

> And he becomes physically abusive (inaudible). Because that's what happens in a domestic violence situation. You've got that mental abuse, mental abuse and physical abuse to go ahead and keep that person in line. You control them by fear and by intimidation. "I'm afraid of what you're going to do next" Or, "I'm intimidated. I don't want to do anything to displease you," or whatever. And you dehumanize that person and you devalue that person. Like, you know, "I didn't want to do it. I don't want to do anything to upset or make you mad." And I hear her say that at one point. She said, "What have I done? What do I need to do differently?" "Why are you mad at me?" "Don't worry about it. You'll be fine." Okay.
> RP 648.

> We talked about it in voir dire. Some people talk about how either they or a loved one just took it and took it and took it for years and years and years before they finally told somebody. It's just, if it's never happened to you it's hard to fathom that it could happen to somebody, somebody else. But, it does and it did.
> RP 657-658.

During his rebuttal closing, the prosecutor returned to this theme:

> So, you know, it's just part of that control and it's one of those things that we've seen in our personal experience. It's what I-- you know, I mean, I've had friends that were Catholics that were miserable in their marriage but because they were good solid Catholics, I'm sorry, I can't get divorced. (inaudible) husband died on her because she was, you know (inaudible). They got divorced but she wouldn't remarry as long as he was alive. And she didn't get remarried until after her husband, her ex-husband died. To some people it's just like, well once you're married, you know, you're married for life. You know, that kind of thing. So, it's all part of that control thing.
> RP 687.

Defense counsel did not object to any of these arguments.

The prosecutor also discussed his own interpretation of immigration law with the jury:

> [Prosecutor]: … And I'll, and then they, they talk about her incentive to lie. Well, she has an incentive to lie because she wants to stay here. This is all part of her, her very, very clever plan to get here and stay. Well, you know, that's okay except there's a little problem with that. Her sister is a United States citizen. She came from the Philippines. She told you she took the test. She said she had to study in English all the things about our country that probably some of us don't even know, or have forgotten. Her sister could sponsor her, you know? Ms. Li didn't tell you that, you know? So that's another one.
>
> [Defense Attorney]: Objection, Your Honor. This is outside of anything in evidence in this case and it's untrue.

[Prosecutor]: Well, because…

COURT: Ladies and gentlemen of the jury, I'll remind you, the attorney's remarks, statements and arguments are not evidence.

[Prosecutor]: Well, I'll say (inaudible). We'll get to that part where they're talking about Ms. Li. How Ms. Li on the stand told you all the ways she could legally stay in this country. But she didn't tell you about the other way.
RP 687-688.

[Prosecutor]: But she didn't tell us about how many people do come to this country through normal channels. They apply for entry into the United States. They're sponsored by family members. People who are other citizens. She didn't tell us that. She said, you know, the question to her was, you know, how do they come here and what are their options? What are their options?
RP 694.

[Prosecutor]: Well, I'm pretty sure that's probably taken care of at the U.S. Embassy before they even granted her a K visa to come over here. They're just not going to allow somebody to come into the country that may have some sort of contagious disease. So I think that was already taken care of.
RP 694-695.

[Prosecutor]: And Li even said, Ms. Li even said, that Sherilyn doesn't need to stay to get a conviction in order for her to stay here on this new visa. So, you know, she could refuse to cooperate. She could refuse to testify. She could say, you know, I just can't do this. Please don't make me testify. Please don't make me do this. I don't want to get up in front of a room full of strangers and tell them this stuff. I just can't do it. And that happens all the time in courtrooms around this country.
RP 697.

The state's attorney argued that the absence of medical corroboration of Mr. McAllister's injuries should be held against him:

> [Prosecutor]: But let's talk about those medical records. Oh, wait, there are no medical records. Wouldn't you expect there to be medical records? Who controls the medical records? I don't control the medical records. No testimony from the defendant as to what he was operated on. He told you, "I've had a knee replacement." Did he tell you the date? Was it last year? Was it six months ago? Was it six years ago? He didn't tell you that. Who controls that information? Not me.
>
> No doctor to come testify about his mobility. Oh, yes. I was the doctor treating Mr. McAllister back in 2010 and I'm here to testify and tell you as his doctor…
>
> [DEFENSE]: Your Honor I have to object to the burden shifting arguments that are contrary to our state constitution.
>
> COURT: Once again ladies and gentlemen of the jury, the attorneys' remarks, statements and arguments (inaudible) to apply the facts and understand the law.
>
> [PROSECUTOR]: When, uh, when Mr. Hester is asking Mr. McAllister on the stand, on the direct, I mean he is his witness. And they're talking about this injury. I don't recall any questions from Mr. Hester, when did you have this operation?
> RP 689-690.

The government's attorney went on to highlight other evidence the defense should have brought:

> And they talk about, well, you know, the letter, the letters that she left behind. Remember what Sherilyn had said, you know? Well, there were other letters. There were other letters. Where are the other letters? Who controls this? Who controls those letters? Where are they? You know, that's called (inaudible), you know? And in some people who have been through an experience like this, they have to write that stuff down to express their thoughts or their feelings, okay? And when she, she writes all these things down and flees, and leaves with only the clothes that she came in a garbage bag, and leaves that behind. Well, they find the one letter.

> But like she asked you, where are the other letters? Who controls that? I don't control that. I don't control that.
> RP 691.

The jury voted to convict on all remaining charges, and they endorsed each alleged aggravator. RP 705-715.

Mr. McAllister's attorneys moved for a new trial based on prosecutorial misconduct, alleging that the state unlawfully shifted the burden to the defense during its closing argument. RP 723-731; Revised Motion and Memorandum for New Trial, Supp. CP. The court denied the motion. RP 731. Motion to File for New Trial, Supp. CP; Motion and Affidavit for New Trial, Supp. CP; Memorandum in Support of New Trial, Supp. CP; State's Response, Supp. CP; Revised Motion and Memorandum for New Trial, Supp. CP.

Mr. McAllister had no criminal history. CP 13-28. After noting a basis for an exceptional sentence, the court imposed a standard range prison term of 250 months. RP 749; CP 13-28.

Mr. McAllister timely appealed. CP 32-33.

ARGUMENT

I. MULTIPLE INCIDENTS OF PROSECUTORIAL MISCONDUCT DEPRIVED MR. MCALLISTER OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

A. Standard of Review.

Prosecutorial misconduct requires reversal if it is both improper and prejudicial. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Prejudice occurs whenever there is a "substantial likelihood the misconduct affected the jury verdict." *Id.* Misconduct that is flagrant and ill-intentioned requires reversal even in the absence of an objection at trial.[4] *Id.* at 704.

B. The prosecutor committed misconduct by arguing facts not in evidence, shifting the burden of proof onto Mr. McAllister, and making references to the personal experience of the jurors.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04. A reviewing court should examine the prejudicial nature and cumulative effect of the misconduct. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Improper arguments are particularly likely to be prejudicial when the case is a pure

[4] Prosecutorial misconduct can also be raised for the first time on review if it creates a manifest error affecting a constitutional right. RAP 2.5(a)(3). Furthermore, the appellate court has discretion to review any issue raised for the first time on appeal, including nonconstitutional errors and constitutional errors that are not manifest.

credibility contest. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011).

A prosecutor's statements during closing argument are reviewed in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

1. The prosecutor committed misconduct by "testifying" during closing to "facts" that had not been introduced into evidence.

A prosecutor commits misconduct by stating "facts" that have not been introduced into evidence. *Boehning*, 127 Wn. App. at 519. It is a long-standing rule that "consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant may have been prejudiced." *Glasmann*, 175 Wn.2d at 704. When a case turns on witness credibility, improper reference to "facts" not in evidence are more likely to prejudice the accused person. *Boehning*, 127 Wn. App. at 523.

In Mr. McAllister's case, the prosecutor "testified" in closing to general "facts" about domestic violence situations:

> Because that's what happens in a domestic violence situation. You've got that mental abuse, mental abuse and physical abuse to go ahead and keep that person in line. You control them by fear and intimidation. "I'm afraid of what you're going to do next," or "I'm intimidated. I don't want to do anything to displease you," or whatever. And you dehumanize that person and you devalue that person.
> RP 648.

No expert had testified regarding the "typical" domestic violence situation. Neither Lorega nor any other witness provided any evidence establishing the prosecutor's claims regarding typical domestic violence relationships.

The prosecutor also "testified" that Lorega's sister could have sponsored her for a visa to remain in the U.S. legally:

> Ms. Li on the stand told you all the ways [Lorega] could legally stay in this country. But she didn't tell you about the other way. RP 688.[5]
>
> [Ms. Li] didn't tell us about how many people do come to this country through normal channels. They apply for entry to the United States. They're sponsored by family members. People who are other citizens.
> RP 694.

Nothing in the record established that Lorega had other options for obtaining a visa when her fiancée visa expired. *See* RP *generally.* When cross-examining Li, the prosecutor did not ask any questions about the possibility of Lorega gaining immigration status through her sister. *See generally* RP 490-498, 500-501.

In addition to providing facts not in evidence, this statement was highly misleading. The US Citizenship and Immigration Service visa

[5] Mr. McAllister objected to this statement, but the judge did not rule on the objection, responding only that "the attorney's remarks, statements and arguments are not evidence." RP 688.

bulletin from June 2013 shows a significant delay for visa applicants from the Philippines. Filipino siblings of US citizens who filed for visas in November of 1989 are currently becoming eligible for a visa this year.[6] In short, it would have taken Lorega approximately 24 years to obtain immigration status by filing an application through her sister. No evidence in the record supports the prosecutor's misleading arguments about obtaining immigration status through a sibling.

Next, the prosecutor argued that Mr. McAllister's witnesses lied about the motivation for Lorega's medical exam upon her arrival in the US:

> And they talk about, you know, well, you know, taking her to the doctor to make sure that she's clean to that we can go on with this wedding ceremony. Well, I'm pretty sure that's probably taken care of at the U.S. Embassy before they even granted her a K visa to come over here. They've just not going to allow somebody to come into the country that may have some sort of a contagious disease. So I think that was already taken care of.
> RP 394-95.

Nothing in the record suggested that Lorega was required to have a medical exam for immigration purposes upon her arrival in the country. When cross-examining Li (the immigration law expert), the prosecutor

[6] The June 2013 visa bulletin is available on the state department's website at http://www.travel.state.gov/visa/bulletin/bulletin_5953.html. The "F4" preference category applies to adult brothers and sisters of United States citizens. Visa Bulletin for June 2013, Department of State Publication 9514 (May 9, 2013).

chose not to broach the subject. *See generally* RP 490-498, 500-501. There was no evidence to support the argument that Mr. McAllister had lied about the reason for Lorega's doctor appointment.

Finally, the prosecutor provided "facts" not in evidence when he argued that Lorega's crime victim visa application did not require her continued participation in Mr. McAllister's prosecution:

> And Li even said, Ms. Li even said, that [Lorega] doesn't need to stay to get a conviction in order for her to stay here on this new visa. So, you know, she could refuse to cooperate. She could refuse to testify. She could say, you know, I just can't do this. Please don't make me testify. Please don't make me do this. I don't want to get up in front of a room full of strangers and tell them this stuff. I just can't do it. And that happens all the time in courtrooms around this country.
> RP 697.

This argument was not supported by the record. It is also misleading.

Although Li testified that a U-visa remains valid even in the absence of a conviction, she did not suggest that Lorega could stop cooperating and maintain her immigration status. RP 500. In fact, the government may rescind certification for a U-visa if the applicant refuses to cooperate.[7] The prosecutor's argument that Lorega could have

[7] Department of Homeland Security U Visa Certification Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, *available at:* http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf.

withdrawn her cooperation at any time was not supported by the evidence at trial and was an inaccurate statement of the law.[8]

The prosecutor's argument about typical domestic violence situations encouraged the jury to reason based on facts not in evidence and circumstances outside of Mr. McAllister's case. The misleading "testimony" regarding Lorega's immigration prospects was directly relevant to the defense theory that she had motivation to lie in order to get a visa. Mr. McAllister was prejudiced by this prosecutorial misconduct because there is a substantial likelihood that the prosecutor's repeated "testimony" to "facts" not in evidence affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed misconduct on multiple occasions by "testifying" to "facts" that had not been established at trial. The misconduct was flagrant and ill-intentioned. It prejudiced Mr. McAllister. *Glasmann*, 175 Wn.2d at 704. Mr. McAllister's convictions must be reversed. *Id.*

2. The prosecutor committed misconduct by shifting the burden of proof in closing.

[8] It is also prosecutorial misconduct to misstate the law in closing argument. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010).

Because the accused has no duty to present evidence, a prosecutor generally cannot comment on the lack of defense evidence. *State v. McCreven*, 170 Wn. App. 444, 470-71, 284 P.3d 793 (2012) *review denied* 176 Wn.2d 1015, 297 P.3d 708 (2013) (*citing State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011)). It is misconduct for a prosecutor to point out an accused person's failure to call a witness unless the missing witness rule applies. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009).

The missing witness rule only applies in limited circumstances. *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). A prosecutor may not make a missing witness argument unless (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of the accused, (3) the witness's absence is not satisfactorily explained, (4) the argument does not shift the burden of proof, and (5) the argument was "raised early enough in the proceedings to provide an opportunity for rebuttal or explanation." *Id.,* at 598-599.

Only when these criteria are met may the prosecutor ask jurors to infer that the absent witness's testimony would have been unfavorable to the accused person. *Id.* Furthermore, the missing witness rule applies only when "the defendant's testimony unequivocally implies the uncalled

witness's ability to corroborate his theory of the case." *Dixon*, 150 Wn. App. at 55. Finally, the missing witness rule also does not apply to privileged testimony. *State v. Blair,* 117 Wn.2d 479, 490, 816 P.2d 718 (1991).

The limits of the missing witness rule "are particularly important when…the doctrine is applied against a criminal defendant." *Montgomery*, 163 Wn.2d at 598.

In Mr. McAllister's case, the prosecutor argued—over Mr. McAllister's objection[9]— that the absence of medical records or testimony from a medical expert implied that Mr. McAllister had been lying about his leg injuries:

> But let's talk about those medical records. Oh, wait, there are no medical records. Wouldn't you expect there to be medical records? Who controls the medical records? I don't control the medical records… No doctor to come testify about his mobility. Oh, yes. I was the doctor treating Mr. McAllister back in 2010 and I am here to testify and tell you as his doctor…
> RP 689-90.

The argument was improper for several reasons. First, any medical records or testimony would have fallen within the physician-patient evidentiary privilege, and thus been exempt from the missing witness rule.

[9] The court did not rule on Mr. McAllister's objection to this argument, stating only that "the attorneys' remarks, statements and argument (inaudible) to apply the facts and to understand the law." RP 690.

Blair, 117 Wn.2d at 490; RCW 5.60.060(4). Second, the prosecutor did not raise the missing witness argument early enough to give Mr. McAllister an opportunity to explain or rebut. *Montgomery* 163 Wn.2d at 599. Instead of requesting a jury instruction on the missing witness doctrine, the prosecutor simply chose to surprise Mr. McAllister with this argument in closing. RP 689-90.

The prosecutor also commented on Mr. McAllister's failure to procure letters that Lorega had written about being in love with a man in the Philippines:

> Where are the other letters? Who controls this? Who controls those letters? Where are they?
> RP 691.

The state introduced no evidence that letters written by Lorega were under Mr. McAllister's control. Accordingly, Mr. McAllister's failure to produce the letters did not fit within the missing witness rule. *Montgomery*, 163 Wn.2d at 598. As with the prosecutor's improper argument about medical evidence, the argument regarding the letters was not "raised early enough in the proceedings to provide an opportunity for rebuttal or explanation." *Id.,* at 598-599.

Mr. McAllister was prejudiced by the prosecutor's improper arguments. The state sought to shift the burden of proof onto Mr. McAllister to present documentary evidence in support of his defense

theory. Additionally, each attack was directly relevant to Mr. McAllister's credibility, which was vital to his defense. There is a substantial likelihood that the prosecutor's impermissible burden shifting arguments affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed prejudicial misconduct by shifting the burden of proof. The prosecutor's missing witness/missing evidence arguments improperly suggested that Mr. McAllister had failed to prove his defense through adequate evidence. *Dixon*, 150 Wn. App. at 56-57.

3. The prosecutor committed misconduct by improperly referencing the personal experiences of jurors during closing argument.

It is misconduct for a prosecutor to appeal to the passion and prejudice of jurors or to seek to "inflame jurors' emotions." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); *State v. Ramos*, 164 Wn. App. 327, 339, 263 P.3d 1268 (2011). A prosecutor, likewise, violates his duty to "ensure a verdict free of prejudice and based on reason" when he employs emotional facts that have not been admitted into evidence. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) *review denied*, 175 Wn.2d 1025, 291 P.3d 253 (2012).

During closing argument in Mr. McAllister's trial, the prosecutor referred to the jurors' own experiences with domestic violence. Although these experiences were discussed during *voir dire,* they were not part of

the evidence introduced at trial. Through this argument, the prosecutor attempted to appeal to jurors' emotions, and asked them to generalize their experiences and feelings to the facts of the case:

> We talked about it in voir dire. Some people talk about how either they or a loved one just took it and took it and took it for years and years and years before they finally told somebody. It's just, if it's never happened to you it's hard to fathom that it could happen to somebody, somebody else. But it does, and it did.
> RP 657-68.

> So, you know, it's just part of that control and it's one of those things that we've seen in our personal experience.
> RP 687.

The improper references to the jurors' own experience with domestic violence constituted misconduct: the argument was a flagrant and ill-intentioned attempt to encourage the jurors to rely on their own emotional experiences rather than the facts of the case. The allegations in Mr. McAllister's case were already emotionally-charged and the prosecutor's encouragement of the jurors to focus specifically on their own experiences likely affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant and ill-intentioned misconduct when he sought to inflame the juror's emotions by raising their personal experiences with domestic violence during closing and rebuttal. *Ramos*, 164 Wn. App. at 339.

4. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. McAllister's convictions.

Even if each instance of prosecutorial misconduct in a case would be harmless, the cumulative effect of multiple instances may require reversal. *Jones*, 144 Wn. App. at 301.

Throughout closing arguments, the prosecutor "testified" to numerous "facts" that had not been admitted into evidence, shifted the burden of proof by pointing out Mr. McAllister's failure to present certain evidence (even though prohibited by the missing witness rule), and sought to inflame the emotions of the jurors by urging them to consider their own experiences and feelings rather than to focus on the facts of the case. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. McAllister's convictions. *Jones*, 144 Wn. App. at 301.

II. MR. MCALLISTER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Reversal is required if defense counsel provides deficient performance and the accused is prejudiced. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Ineffective assistance

of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

B. Defense counsel's deficient performance prejudiced Mr. McAllister.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI; XIV; Wash. Const. art. I, § 22; *Strickland*, 466 U.S. 668. Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness and (2) cannot be justified as a tactical decision. *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

1. Defense counsel provided ineffective assistance by failing to object to numerous instances of prosecutorial misconduct.

Failure to object to prosecutorial misconduct can waive the claim for appeal unless the misconduct is flagrant and ill-intentioned. *Johnson*, 158 Wn. App. at 685. Waiver of valid appellate issues constitutes ineffective assistance of counsel. *In re Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012).[10]

[10] Although *Morris* addressed waiver of issues by appellate counsel, the reasoning and holding apply equally here, where counsel may have foreclosed a colorable claim on appeal.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

> At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge v. Hurley, 426 F.3d 368, 386 (6th Cir., 2005).

In Mr. McAllister's case, the prosecutor committed numerous instances of misconduct in closing and rebuttal arguments. The prosecutor improperly "testified" to "facts" that had not been established at trial. These "facts" included information regarding typical "domestic violence situation[s]" as well as misleading information about the immigration issues that were central to Mr. McAllister's defense. RP 648, 688, 694-95, 697. Defense counsel objected only once. RP 688.

The prosecutor also made improper "missing evidence" arguments, which shifted the burdens of proof and production onto the defense. RP 689-91; *Montgomery*, 163 Wn.2d at 598-99. Defense counsel objected to the first instance of this misconduct, but not the second. RP 689-90.

Finally, the prosecutor referred to the jurors' personal experiences, which were elicited during *voir dire* but which were not part of the

evidence at trial, in a bald attempt to encourage the jurors to rely on their emotions rather than the facts of the case. RP 657-58, 687, *Fisher*, 165 Wn.2d at 747. Defense counsel did not object. RP 657-58, 687.

Substantial authority "clearly warned against the conduct here,"[11] and defense counsel should have been aware of the authority. *See e.g. Boehning*, 127 Wn. App. at 519; *Glasmann*, 175 Wn.2d at 704; *McCreven*, 170 Wn. App. at 470-71; *Montgomery*, 163 Wn.2d at 598; *Fisher*, 165 Wn.2d at 747.

Defense counsel's failure to object constituted deficient performance. *Morris*, 176 Wn.2d at 167-68. Furthermore, counsel's failure cannot be characterized as a valid tactical decision. This is so because there is no indication that counsel was actually pursuing a strategy that involved allowing the prosecutor to commit misconduct. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (Hendrickson I) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.") The lack of a tactical benefit is further illustrated by counsel's decision to object to some of the misconduct. RP 688-90.

[11] *Glasmann*, 175 Wn.2d at 707.

Mr. McAllister's case, in which the state presented no direct physical evidence, was a pure credibility contest. Mr. McAllister was prejudiced by his counsel's failure to insulate him from the prosecutor's impermissible arguments. His convictions must be reversed. *Kyllo*, 166 Wn.2d at 871.

2. Defense counsel provided ineffective assistance by failing to offer Mr. McAllister's medical records to rebut the claim that he had fabricated his medical problems.

Failure to investigate and argue available defenses can comprise ineffective assistance of counsel. *See e.g. State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *In re Hubert*, 138 Wn. App. 924, 932, 158 P.3d 1282 (2007). In this case, defense counsel should have introduced testimony and evidence from medical experts establishing Mr. McAllister's medical problems.

Each assault charge in Mr. McAllister's case was based on an allegation that he kicked Lorega. CP 1-12; RP 316, 318-320, 322, 324, 326, 330-31. Available evidence showed that Mr. McAllister was unable to kick due to severe arthritis, failed knee replacement surgery, and a shattered ankle. Defendant's Sentencing Memorandum, Supp CP. Defense counsel may have had a valid tactical reason for withholding Mr. McAllister's medical records during the defense case-in-chief—there were allegations that he had been malingering at one point. Defendant's

Sentencing Memorandum, Supp CP. However, during the state's case-in-rebuttal, Perkins testified that Mr. McAllister had "scammed" the Department of Labor and Industries in order to gain benefits. RP 584. The prosecution also introduced testimony suggesting Mr. McAllister did not limp. RP 581.

Defense counsel should have rebutted this claim with some of the evidence demonstrating that Mr. McAllister had legitimate medical conditions related to the use of his legs. Defendant's Sentencing Memorandum, Supp CP. The tactical reason to withhold the medical testimony disappeared once evidence was introduced suggesting that Mr. McAllister was malingering. Despite this, defense counsel did not adjust his strategy, and the jury never learned that Mr. McAllister did have arthritis, a shattered ankle, and an artificial knee. Nor did they discover that he'd been subjected to several unsuccessful knee surgeries. Defendant's Sentencing Memorandum, Supp CP.

This case was a pure credibility contest with no physical evidence. In this context, defense counsel's failure to rebut a substantial attack on Mr. McAllister's credibility with readily available evidence prejudiced Mr. McAllister and cannot be justified as a tactical decision. *Kyllo*, 166 Wn.2d at 862.

Mr. McAllister was denied the effective assistance of counsel when his attorney failed to offer his medical records to rebut the suggestion that he had fabricated his medical conditions. *Id.*

3. Defense counsel provided ineffective assistance when he failed to make an offer of proof regarding critical impeachment evidence at trial.

The right to confrontation includes the right to impeach adverse witnesses with evidence of bias. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *Davis v. Alaska*, 415 U.S. 308, 326-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). An accused person may establish bias through independent evidence, and not merely through cross-examination. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002).

Failure to make an offer of proof can constitute ineffective assistance of counsel. *Heckelsmiller v. State*, 2004 ND 191, 687 N.W.2d 454, 458 (2004). Here, defense counsel provided ineffective assistance by failing to make an offer of proof regarding independent evidence of Lorega's bias.

Defense counsel had information tending to show that Mr. Sabiniano had been threatened with harm if he testified in Mr. McAllister's favor. Defendant's Sentencing Memorandum, Supp CP. The

threats were traceable to Lorega.[12] This information would have called Lorega's credibility into question. Lorega's testimony was crucial to the prosecution's case, and her credibility was central at trial. Nonetheless, when the court sustained an objection to defense counsel's questions regarding the threats, counsel failed to make an offer of proof demonstrating the relevance and admissibility of the testimony. RP 452-53. Instead, defense counsel merely presented the evidence as part of a sentencing memo after Mr. McAllister's conviction. Defendant's Sentencing Memorandum, Supp CP.

Defense counsel's failure to inform the court of the reason for his questions constituted deficient performance, which prejudiced Mr. McAllister. *Heckelsmiller*, 2004 N.D. 191. The evidence defense counsel was attempting to elicit was admissible and an offer of proof would have demonstrated as much to the court. *Spencer*, 111 Wn. App. at 408. Counsel's failure to pursue admission of the threats deprived Mr. McAllister's of his right to introduce evidence of witness bias. *Id.* Because Lorega's credibility was central to the case, this deficient performance prejudiced Mr. McAllister.

[12] The person who threatened Mr. Sabiniano in an attempt to prevent his testimony was in possession of a card Sabiniano had provided to Lorega bearing his address. Defendant's Sentencing Memorandum, Supp CP.

Defense counsel provided ineffective assistance when he failed to make an offer of proof regarding the admissibility of critical defense evidence. *Heckelsmiller*, 2004 N.D. 191. Mr. McAllister's convictions must be reversed. *Kyllo*, 166 Wn.2d at 871.

4. Defense counsel provided ineffective assistance when he failed to object to inadmissible evidence.

Out-of-court statements offered for their truth are inadmissible hearsay. ER 801, 802. Likewise, opinion testimony on the accused person's guilt of the accused is inadmissible. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). The job title of a sexual assault nurse should not be admitted if it is irrelevant under ER 402 and ER 403. ER 402, 403. Finally, references to excluded evidence are improper and prejudicial. *People v. Navarrete*, 181 Cal.App.4th 828, 104 Cal.Rptr.3d 666 (2010); *see also State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993).

Failure to object to inadmissible evidence constitutes ineffective assistance of counsel when there is no valid tactical reason for the failure. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007) (Hendrickson II). In this case, defense counsel failed to object to testimony that was prejudicial and inadmissible.

First, defense counsel failed to object to prejudicial hearsay. RP 276, 341. Defense counsel did not object when Detective Garrett testified

that Mr. Perkins had told her that Lorega had told his wife that Mr. McAllister had raped her. RP 276. This testimony was inadmissible as triple hearsay and an opinion on Mr. McAllister's guilt. ER 801, 802; *Hudson*, 150 Wn. App. at 652. Defense counsel did not object when Lorega testified that her sister told her that her vagina did not appear normal. RP 341. This hearsay testimony presented one of the few allusions to physical evidence in Mr. McAllister's case. Mr. McAllister was prejudiced by each instance of defense counsel's failure to object to inadmissible hearsay.

Defense counsel, likewise, did not object when Nurse Culbertson identified herself as the coordinator of a sexual assault nurse practitioner program. RP 387. Defense counsel attempted to exclude Nurse Culbertson's job title in a motion *in limine*, which was denied. Defendant's Motions in Limine, Supp CP; RP 38-39. Defense counsel's subsequent failure to object to that testimony may have waived the issue for appeal. *State v. Koch,* 126 Wn. App. 589, 597, 103 P.3d 1280 (2005) ("A party who loses a motion *in limine* has a standing objection that preserves the issue for appeal. But in the absence of any unusual circumstance that makes it impossible to avoid the prejudicial impact of the inadmissible evidence, the complaining party still must object to preserve the issue for appeal"). Nurse Culbertson's identifying herself as

a sexual assault nurse was inadmissible because it was more prejudicial than probative. ER 403. Mr. McAllister was prejudiced by the nurse's job title because it likely sounded to the jury as though the hospital had concluded that Lorega had been sexually assaulted.

Second, defense counsel did not object when Perkins repeatedly violated an order *in limine* precluding reference to "Dove House," the domestic violence program at which Lorega had received assistance. RP 39-40, 245, 249 (two instances). Although objections to the phrase "Dove House" were sustained, counsel failed to object to Perkins's subsequent references to the program as "the unsayable word" and "the unmentionable name." RP 245, 249. As demonstrated by Mr. McAllister's motion *in limine* excluding reference to Dove House, there was not valid tactical reason for defense counsel's failure to object. *Hendrickson II*, 138 Wn. App. at 833. Perkins's repeated references to the "unmentionable" place merely called additional attention to the program as well as the fact that Mr. McAllister did not want it mentioned. Mr. McAllister was prejudiced by defense counsels' failure to object. *Id.*

C. The cumulative effect of counsel's numerous failures to provide effective assistance prejudiced Mr. McAllister.

The cumulative effect of defense counsel's errors can require reversal even if each act of deficient performance, standing alone, would not. *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001).

Defense counsel provided ineffective assistance when he failed to offer Mr. McAllister's medical records into evidence to rebut a claim that he had lied about his conditions with his legs, failed to object to numerous instances of prosecutorial misconduct, failed to make an offer of proof regarding witness intimidation, and failed to object to inadmissible evidence. *Kyllo*, 166 Wn.2d at 862. Mr. McAllister was prejudiced by each instance of counsel's deficient performance. *Id.* His convictions must be reversed. *Kyllo*, 166 Wn.2d at 871.

III. THE TRIAL COURT VIOLATED MR. MCALLISTER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION, TO PRESENT A DEFENSE, AND TO A FAIR TRIAL.

A. Standard of Review.

Constitutional claims are reviewed *de novo*. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,[13] this discretion

[13] *See Fisher*, 165 Wn.2d at 745. A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842,

is subject to the requirements of the constitution. A court necessarily abuses its discretion by denying an accused person her or his constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); *see also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992). Accordingly, where the appellant makes a constitutional argument regarding the admission or exclusion of certain evidence, review is *de novo*. *Iniguez,* 167 Wn.2d at 280-281[14]. An evidentiary ruling that violates an accused person's constitutional rights requires reversal unless it is harmless beyond a reasonable doubt. *Spencer*, 111 Wn. App. at 408.

B. The trial judge allowed the prosecution to place inadmissible evidence before the jury.

With limited exceptions, an out-of-court statement offered for its truth is hearsay. ER 801. This is true even if the out-of-court statement was made by the testifying witness. ER 801.

Here, Lorega's sister testified that she told Lorega to go back to the Philippines because she would not be happy in the U.S. RP 215. The court overruled the defense objection, explaining, "She's saying what she

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858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or an erroneous view of the law. *Hudson*, 150 Wn. App. at 652.

[14]*See also United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010) (Where a "limitation of cross-examination directly implicates the values protected by the Confrontation Clause of the Sixth Amendment," review is *de novo*).

told her." RP 215. The testimony included an out-of-court statement offered for its truth. ER 801, 802. Accordingly, it was inadmissible hearsay that should have been excluded. ER 802. The testimony also violated the court's order *in limine* excluding victim impact evidence. Defendant's Motions in Limine, Supp CP; RP 31. This testimony prejudiced Mr. McAllister because it encouraged the jury to rely on the emotional impact of the alleged offenses rather than the facts of the case.

The court also overruled Mr. McAllister's objection to Mr. Perkins's testimony regarding a restraining order hearing. RP. 582. The court had previously granted Mr. McAllister's motion *in limine* to exclude any reference to restraining orders or hearings regarding them. Defendant's Motions in Limine, Supp CP; RP 31. The court abused its discretion when it admitted evidence of the restraining order, in violation of the order *in limine*. The allusion to a restraining order prejudiced Mr. McAllister because it suggested to jurors that a court had already concluded he posed a danger to Lorega.

C. The trial judge erroneously excluded relevant and admissible evidence.

Due process guarantees an accused person a meaningful opportunity to present a complete defense. U.S. Const. Amend. XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164

L.Ed.2d 503 (2006). This includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible.[15] *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

The Sixth and Fourteenth Amendments protect an accused person's right to expose the bias of adverse witnesses through independent evidence. *Spencer*, 111 Wn. App. at 408. Here, the court erroneously excluded independent evidence of Lorega's bias.[16] The defense had evidence linking Lorega to threats against Sabiniano, made in an attempt to induce him not to testify on Mr. McAllister's behalf. The court precluded the defense from asking about the evidence:

> **Defense counsel:** Okay. Did anybody ever suggest one way or the other whether you should come and testify in the United States?
> **State:** And objection, Your Honor as to relevance. He's here and he's testifying.
> **Court:** Sustained.
> **Defense Counsel:** Mr. Sabiniano, did you ever feel, or did anybody ever try to make you feel that you should not testify?
> **State**: Objection. Relevance.
> **Court**: Sustained…

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[15] ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[16] If this issue is not preserved for review, then defense counsel's failure to make an offer of proof deprived Mr. McAllister of the effective assistance of counsel, as argued elsewhere in this brief.

RP 452-53.

By excluding evidence linking Lorega to these attempts to influence Mr. Sabiniano, the court violated Mr. McAllister's right to present independent evidence of witness bias. *Spencer*, 111 Wn. App. at 408. Because credibility was central to his defense, Mr. McAllister was prejudiced by the court's refusal to admit the evidence that Mr. Sabiniano had been threatened.

The court also violated Mr. McAllister's right to confront and his right to a fair trial by excluding evidence that was relevant to the defense theory. At trial, Mr. McAllister sought to show that Lorego had fabricated allegations so that she could remain in the U.S. under a crime victim visa. Mr. McAllister attempted to introduce evidence showing that information about such visas was readily available through the U.S. Citizenship and Immigration Enforcement website. RP 485-87. The proffered evidence was at least minimally relevant, because it showed that Lorega could easily have discovered the requirements for a crime victim visa. The evidence had some "tendency to make the existence of [a] fact that is of consequence to the determination of the action more probable… than it would be without the evidence." ER 401. The evidence should have been admitted.

D. The cumulative effect of the trial court's errors prejudiced Mr. McAllister.

The cumulative effect of erroneous rulings can deny the accused of a fair trial even if each error standing alone would not require reversal. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). In this case, the cumulative effect of the court's erroneous rulings violated Mr. McAllister's Sixth and Fourteenth Amendment rights, and deprived him of a fair trial. *Venegas*, 155 Wn. App. at 520. His convictions must be reversed. *Id.*

IV. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. MCALLISTER OF SECOND-DEGREE RAPE AS CHARGED IN COUNT 18.

A. Standard of Review.

A conviction must be overturned for insufficient evidence if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found each element of the offense beyond a reasonable doubt. *In re Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (*quoting Jackson v. Virginia*, 443 US 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

B. No rational trier of fact could have found Mr. McAllister guilty of count 18 beyond a reasonable doubt.

A conviction based on insufficient evidence violates due process. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Jackson,* 443 U.S. at 316; *Martinez*, 171 Wn.2d at 364. The remedy is reversal and dismissal with prejudice. *State v. Brown*, 137 Wn. App. 587, 592, 154 P.3d 302 (2007).

In order to obtain a conviction for second degree rape, the state must prove beyond a reasonable doubt that sexual intercourse took place. RCW 9A.44.050. Sexual intercourse:

> (a) has its ordinary meaning and occurs upon any penetration, however slight, and
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex. RCW 9A.44.010(1).

In count 18, the prosecution charged Mr. McAllister with second degree rape on or about April 3, 2010. CP 5. Regarding that date, however, Lorega testified only that Mr. McAllister's "penis was strong and he attacked [her]." RP 325. The state presented no other evidence in support of charge 18.

Lorega did not testify that sexual intercourse occurred on April 3, 2010. No rational trier of fact could have found beyond a reasonable doubt that Mr. McAllister was guilty of second degree rape as charged in count 18. *Martinez*, 171 Wn.2d at 364. Mr. McAllister's conviction must be reversed and the charge dismissed with prejudice. *Brown*, 137 Wn. App. at 592.

V. THE TRIAL COURT IMPROPERLY ALLOWED THE JURY TO CONSIDER AN INAPPLICABLE AGGRAVATING FACTOR WITH REGARD TO EACH COUNT OF THIRD-DEGREE RAPE.

A. Standard of Review.

Issues of law are reviewed *de novo*. *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012).

B. The domestic violence/deliberate cruelty aggravating factor charged in this case applies only to crimes of domestic violence defined in RCW 10.99.020.

For each rape charge, the prosecution alleged the aggravating factor set forth in RCW 9.94A.535(h)(iii). That provision requires proof that

> The current offense involved domestic violence, as defined in RCW 10.99.020, and…(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

RCW 9.94A.535(h). By its plain terms, the "ongoing pattern" aggravating factor applies only to "domestic violence, as defined in RCW 10.99.020." Third-degree rape is not a crime of domestic violence under that statute. *See* RCW 10.99.020.

Accordingly, the "deliberate cruelty" aggravating factor cannot be applied to Mr. McAllister's conviction. RCW 10.99.020.

CONCLUSION

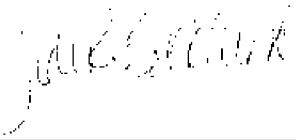
Mr. McAllister was denied his due process right to a fair trial when the prosecutor committed multiple instances of misconduct. Defense counsel provided deficient performance, which prejudiced Mr. McAllister and violated his Sixth and Fourteenth Amendment right to the effective assistance of counsel. The trial court violated Mr. McAllister's Sixth and Fourteenth Amendment rights by erroneously admitting certain evidence and excluding other evidence that should have been admitted. The evidence was insufficient to prove rape as charged in count 18, because no rational trier of fact could have found Mr. McAllister guilty of that charge beyond a reasonable doubt. Finally, the court erred by submitting inapplicable aggravating factors to the jury.

Mr. McAllister's convictions must be reversed. Count 18 must be dismissed with prejudice, and the remaining charges must be remanded for

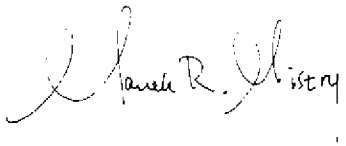
a new trial. Upon retrial, the jury should not be permitted to consider the domestic violence/deliberate cruelty aggravating factor in connection with the third-degree rape charges.

Respectfully submitted on June 27, 2013,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Patrick McAllister, DOC #360256
Airway Heights Correctional Center
11919 Sprague Avenue
Airway Heights, WA 99001

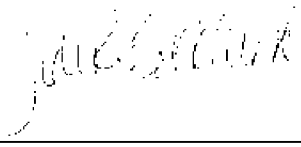
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Jefferson County Prosecuting Attorney
prosecutors@co.jefferson.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 27, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

June 27, 2013 - 2:53 PM

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