

65536-1

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NO. 65536-1-I

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

STATE OF WASHINGTON,
Respondent,
v.
ANJUM NAWAZ KHAN,
Appellant.

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
The Honorable Helen Halpert, Judge

AMENDED OPENING BRIEF OF APPELLANT

JOHN HENRY BROWNE
Attorney for Appellant

THE LAW OFFICES OF JOHN HENRY BROWNE
821 Second Avenue, Ste. 2100
Seattle, WA 98104
(206) 388-0777

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
C. STATEMENT OF THE CASE	4
1. Procedural facts	4
2. In limine ruling	4
3. Trial evidence	6
4. Opinion evidence as to guilt	13
5. Evidence that a prosecutor and judge had already determined that the crime had been committed.	15
6. Evidence that Mr. Khan was booked into jail	16
7. The prosecutor’s closing argument	16
8. Motion for Arrest of Judgment and to Reconsider.	17
D. ARGUMENT	18
1. OPINION EVIDENCE AS TO GUILT FROM THE SEXUAL ASSAULT NURSE DENIED MR. KHAN A CONSTITUTIONALLY FAIR TRIAL	18

TABLE OF CONTENTS - cont'd

Page

2.	EVIDENCE THAT A PROSECUTOR AND JUDGE HAD ALREADY DETERMINED GUILT DENIED MR. KHAN HIS CONSTITUTIONAL RIGHTS TO A TRIAL BEFORE A FAIR AND IMPARTIAL JURY. . . .	22
3.	EVIDENCE THAT MR. KHAN WAS BOOKED INTO JAIL DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE	25
4.	THE PROSECUTOR COMMITTED MISCONDUCT IN ELICITING OPINION EVIDENCE AS TO GUILT, EVIDENCE THAT A PROSECUTOR AND JUDGE HAD ALREADY DETERMINED GUILT AND THAT MR. KHAN HAD BEEN BOOKED INTO JAIL.	27
5.	THE TRIAL COURT SHOULD HAVE GRANTED THE MOTION FOR NEW TRIAL BECAUSE MR. KHAN WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO CALL WITNESSES AND PRESENT A DEFENSE	28
6.	CUMULATIVE ERROR DENIED MR. KHAN A FAIR TRIAL.	31
E.	CONCLUSION.	32

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Begarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988)	28
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987)	19
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	31
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	29
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001)	20
<u>State v. Florczak</u> , 76 Wn. App. 55, 882 P.2d 199 (1994)	21
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <u>cert. denied</u> , 475 U.S. 1020 (1986)	25
<u>State v. Henderson</u> , 100 Wn. App. 794, 998 P.2d 907 (2000)	26
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010)	17, 28, 29
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007)	120
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992)	21

TABLE OF AUTHORITIES -- cont'd

	Page
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008)	19, 20
<u>State v. Newton</u> , 42 Wn. App. 718, 714 P.2d 684, <u>rev. denied</u> , 105 Wn.2d 1018 (1986)	26
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992)	120
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert. denied</u> , 523 U.S. 1008 (1998)	27
<u>State v. Stevens</u> , 35 Wn. App. 68, 665 P.2d 426 (1983)	25
<u>State v. Stevens</u> , 58 Wn. App. 478, 794 P.2d 38, <u>rev. denied</u> , 115 Wn.2d 1025 (1990)	26
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993)	22
<u>State v. Torres</u> , 16 Wn. App. 254, 554 P.2d 1069 (1976)	26
<u>State v. Wilber</u> , 55 Wn. App. 294, 777 P.2d 36 (1989)	120
 <u>FEDERAL CASES</u>	
<u>Duckett v. Godinez</u> , 67 F.3d 734 (9th Cir. 1995)	27

TABLE OF AUTHORITIES -- cont'd

	Page
<u>Estelle v. Williams</u> , 425 U.S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691, <u>reh'g denied</u> , 426 U.S. 954 (1976)	25
<u>Holbrook v. Flynn</u> , 475 U.S. 560, 567, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986)	26
<u>Illinois v. Allen</u> , 397 U.S. 337, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970)	27
<u>Mak v. Blodgett</u> , 970 F.2d 614 (9th Cir. 1992)	31
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 809 L. Ed. 2d 674 (1984)	30
<u>United States v. Brook</u> , 508 F.3d 1205 (9th Cir. 2007).	23, 24
<u>United States v. Cunningham</u> , 462 F.3d 708 (9th Cir. 2006)	23, 24
<u>United States v. Fosher</u> , 568 F.2d 207 (1st Cir. 1978))	26
<u>United States v. Gambert</u> , 410 F.2d 383 (4th Cir. 1969)	23
<u>United States v. Lockett</u> , 919 F.2d 585 (9th Cir. 1990)	120
<u>United States v. Pearson</u> , 746 F. 2d 789 (11th Cir. 1984)	31

TABLE OF AUTHORITIES -- cont'd

	Page
<u>United States v. Preciado Cordobas</u> , 981 F.2d 1206 (11th Cir. 1993)	31
<u>United States v. Roberts</u> , 618 F.2d 530 (9th Cir. 1980)	23
<u>United States v. Spaulding</u> , 293 U.S. 498, 55 S. Ct. 273, 79 L. Ed. 2d 617 (1935)	120
<u>United States v. Sullivan</u> , 919 F.2d 1403 (10th Cir. 1990)	23
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)	29

OTHER JURISDICTIONS

<u>State v. Thomas</u> , 287 S.C. 411, 339 S.E.2d 129 (1986)	23
<u>State v. Woodward</u> , 21 Ariz. App. 133, 516 P.2d 589 (1973)	24

RULES, STATUTES AND OTHERS

Const. article 1, section 21	19
Fourteenth Amendment, U.S. Constitution	27
Sixth Amendment, U.S. Constitution	2, 28

A. ASSIGNMENTS OF ERROR

1. Opinion evidence as to guilt from the sexual assault nurse denied Mr. Khan his state and federal constitutional right to a trial before a fair and impartial jury.

2. Evidence that a prosecutor and judge had already determined guilt denied Mr. Khan his state and federal constitutional right to a trial before a fair and impartial jury.

3. Evidence that Mr. Khan was booked into jail denied him his state and federal constitutional rights to the presumption of innocence and a guilt determined by probative evidence.

4. Prosecutorial misconduct in eliciting opinion evidence as to guilt and informing the jury that Mr. Khan was booked into jail denied him his state and federal constitutional right to the presumption of innocence and a fair and impartial trial.

5. The trial court erred in denying Mr. Khan's Motion for Arrest of Judgment based on the improper exclusion of evidence to support his theory of the case and rebut the state's case in violation of his state and federal constitutional rights to appear and defend at trial and to present witnesses in his own behalf.

6. The trial court erred in denying Mr. Khan's Motion for Arrest of Judgment based on ineffective assistance of counsel denied him his rights under the state constitution and the Sixth Amendment.

7. The trial court erred in denying Mr. Khan's Motion to Reconsider the denial of his Motion for Arrest of Judgment.

8. Cumulative error denied Mr. Khan a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Khan denied his right to a fair and impartial jury where the sexual assault nurse gave her opinion that Mr. Khan was guilty by testifying that the alleged victim would not have to pay for her examination because she was a victim of a crime and that she had the right to stop the examination at any point so that she would not be "re-traumatized"?

2. Was Mr. Khan denied his right to trial before a fair and impartial jury where a police detective testified that a prosecutor and judge had reviewed the search warrant affidavit and gave permission for the search because they determined that there was reason to believe a crime had been committed and evidence of the crime would be found at Mr. Khan's apartment?

3. Was Mr. Khan denied his right to the presumption of innocence by testimony that he was booked into jail?

4. Was the prosecutor's misconduct in eliciting the opinion as to guilt, the testimony that a prosecutor and judge had determined guilt and that Mr. Khan was booked into jail so flagrant and ill-intentioned and so prejudicial that Mr. Khan was denied a fair trial?

5. Was Mr. Khan denied a fair trial and the effective assistance of counsel where his trial attorney wrongly conceded that present sexual conduct was excluded under the rape shield statute, and where evidence contradicting the alleged victim's trial testimony and impeaching her testimony that she feared Mr. Khan after the incident was not admitted at trial?

6. The trial court erred in entering conclusions of law: (a) that the defense did not include a "consent" component, (b) that K.D's relationship with Granger was irrelevant, (c) that Mr. Khan sought to introduce of the alleged victim's general reputation for sexual promiscuity, (d) that the question of whether the victim was aware the defendant worked at Club Vertigo when she apparently appeared at the Club several weeks after the alleged rape is "of dubious relevance" and "collateral to issues at trial, (e) that "the victim's inability to remember who initiated MySpace contact has no relevance," and (f) that "the failure to elicit the MySpace information did not influence the result of trial." CP 156-159

6. Did cumulative error deny Mr. Khan a fair trial?

C. STATEMENT OF THE CASE

1. Procedural facts

The King County Prosecutor's Office charged appellant Anjum Khan by amended information with rape in the second degree and rape in the third degree in separate counts with the intent that if convicted of both the convictions would merge. CP 5-6; 1RP 2-3.¹

The jury returned guilty verdicts for both counts after trial before the Honorable Helen Halpert. CP 50. Judge Halpert subsequently denied Mr. Khan's Motion for Arrest of Judgment and denied reconsideration of the denial of the motion. CP 72-73, 156-159. On May 10, 2010, Judge Halpert entered judgment and sentence for rape in the second degree, imposing a minimum term at the low end the standard range. CP 97-106. Khan subsequently filed a timely notice of appeal. C) 131-141.

2. In limine ruling

In responding to the state's motions in limine, defense counsel agreed that the defense was "not allowed to inquire into her past or present sexual behavior. I think that's good standing law," and that testimony about "her alleged promiscuity or reputation for that, that's the same thing." 1RP

¹ The verbatim report of proceedings is designated as follows: 3/15/10 is designated 1RP; 3/22/10 is designated 2RP; 3/23/10 is 3RP; 3/24/10 is 4RP; 3/25/10 is 5RP; 3/26/10 is 6RP; 5/10/10 is 7RP.

6-7. Counsel reserved a "caveat" -- that when the alleged victim said, "I am a good girl," and "I don't sleep with people on the first date. . . she's opening the door." 1RP 7. Counsel agreed, however, that if statements were limited to what she said to Mr. Khan at the time of the incident, counsel would not go further; but if "she is asserting a statement of her morals and sexual mores, then the defense should be entitled to impeach her." 1RP 10.

During the course of the trial, the prosecutor agreed not to offer the statement to the special sexual assault nurse, "I am not shy. It's against my morals," but to elicit instead her statement to the nurse that "I told him that I was a good girl and I didn't feel comfortable doing that." 2RP 114.

At the close of the evidence, defense counsel argued in response to the state's request to admit a picture of Mr. Khan to show his appearance at the time. 5RP 111. Counsel argued:

Recall that we had some pictures of her taken a couple of weeks afterwards that we weren't allowed to get in because it wasn't relevant. It was showing her at a club and partying at the same club where he [Mr. Khan] was, and we weren't allowed to go into that arena. I would love to have gotten a picture of her where she looks quite a bit different.

The parties -- or the jury saw who the parties are. For anyone to look at Mr. Khan and wonder if he would be able to be strong and need a picture to help corroborate that is stretching it. They have got him in here. The pose is not a favorable one. He certainly looks like a player, he looks like some sort of dude stud or whatever.

They have got a driver's license picture with information on it. I think that's in evidence. That should be good enough.

5RP 111-112. The Court nonetheless admitted the picture. 6RP 2.

3. Trial evidence

It was undisputed at trial that on Sunday, December 14, 2008, in the middle of a snowstorm, K.D. sent a text message to Anjum Khan and he responded by calling her; they arranged for her to come to his apartment in Bellevue. 2RP 23; 3RP 56-57, 60-62, 148, 150, 154; 5RP 32, 35. K.D. and Mr. Khan had mutual friends and she had posted a comment, "you are so gorgeous" on his MySpace page, but they had never met in person before that Sunday. 3RP 53-55; 5RP 32, 35. In particular, they had a mutual friend named Granger Lam whom K.D. said she had dated during their six-month association and remained romantically interested in. 3RP 55, 56-58.

K.D. arrived at Mr. Khan's apartment shortly before 4:00 p.m. 3RP 75. They ordered pizza and a sandwich and ate together in the living room; when they talked about porn during this time, K.D. agreed that she liked it. 3RP 75, 155-159. After they ate, they went into Mr. Khan's bedroom, where there was a working DVD player, to watch a movie. 3RP 75-77; 5RP 37. They were on the bed, and after K.D. went and got some gum for her "pizza breath," they kissed one another. 3RP 78-82; 5RP 38-

38. Mr. Khan "rubbed her butt" outside her pants, and that K.D. would testify at trial did not bother her. 3RP 176. When Mr. Khan put his hand down her shirt, K.D. protested and Mr. Khan stopped and slept for some amount of time before the two resumed kissing. 3RP 82-86; 5RP 39-40. The disputed issues at trial were whether they continued to engage in mutually consensual sexual activity or whether there was sexual intercourse at all.

Mr. Khan explained that by the time he and K.D. went into the bedroom to watch a movie, they had already been kissing on the couch in the living room and had viewed some pornography on K.D.'s iPhone. 5RP 37-38. He recalled that when he put his hand down her shirt while they were kissing on the bed, she said "No. Not right now," and he stopped and soon fell asleep. 5RP 39. He woke to her rubbing his chest and leg. 5RP 40. He began kissing her and she touched his penis with her hand. 5RP 40-41. At some point, she turned to her side with her back to him and he rubbed his penis against her buttocks until he ejaculated. 5RP 40-412.

Mr. Khan further explained that K.D. was upset about having his sperm on her and became even more upset when he would not go and get a towel for her from the bathroom. 5RP 43-44. She called him a "player" and "asshole" and he responded by calling her a "whore." 5RP 44. She left. 5RP 44. He called her a short time later to let her know that she had

left her bracelet at his apartment. 5RP 44. On cross-examination he said that he did not believe that he had put his penis between K.D.'s legs, but that it was possible that he had done so. 5RP 107.

K.D. agreed that she did not try to stop Mr. Khan from kissing her, although she told him, "no, I'm a good girl," when he tried to put his hand down her shirt and pants. 3RP 79-80, 82-85. When Mr. Khan said he was going to sleep, she rolled onto her stomach and grabbed her purse; her phone was on the floor. 3RP 86, 89-91. She testified that she knew then that she needed to leave and that Mr. Khan would not stop trying. 3RP 86, 89-91. Then, according to K.D. in her trial testimony, twenty seconds after Mr. Khan said he was going to sleep and before she had time to get off the bed, he got on top of her, grabbed her hands, pulled down her pants and underwear and ignored her when she said that she was a good girl and had not slept with that many people. 3RP 91-98. She testified that he put his penis inside her vagina and did not stop until he had ejaculated inside her. 3RP 98-101. She said, "I can't believe you did this," grabbed her things and left. 3RP 101.

K.D. had told the police and the special sexual assault nurse who she saw later that evening that Mr. Khan was asleep for about five minutes rather than only 20 seconds; she agreed that her memory was more accurate at those earlier times. 3RP 173-174.

K.D.'s version of events was presented to the jury throughout the trial through the testimony of other witnesses under the excited utterance, hue and cry, res geste and statements for purposes of medical diagnosis exceptions to the hearsay rules. 2RP 43, 106-111, 5RP 7-9, 25.

Once outside in her car, K.D. had started calling people she knew until she reached Ashley Stephenson who worked in The Body Shop at Southcenter where K.D. was the store manager. 3RP 102, 114-115. Ms. Stephenson and Allyson Neudeck, another person who worked under K.D. at The Body Shop, each testified that K.D. was crying and upset when she called them after leaving Mr. Khan's apartment and that her hair and makeup were a mess when they saw her in person several hours later at The Body Shop in Tacoma Mall where Ms. Neudeck was working that day.² 2RP 30-33, 36, 44-48-50, 100, 104-105, 117. Ms. Dillasaw told them that she had been raped. 2RP 44, 116. Ms. Neudeck's husband, Dustin Neudeck, testified that he also came to The Body Shop to meet with K.D. and described her demeanor and allegations that Mr. Khan had raped her. 5RP 7, 9. Mr. Neudeck further testified that he took the telephone from K.D. when Mr. Khan called her. 2RP 53-55, 116; 5RP 7. According to Mr. Neudeck, Mr. Khan, whom he described as calm and polite, at first

² K.D. testified that she was not wearing makeup at all that day. 3RP 65-66.

denied that any sex had taken place but, after Mr. Neudeck told him they were taking K.D. to the hospital for DNA testing, said they had consensual sex.³ 2RP 120-123; 5RP 12-14.

Mr. Neudeck, Allyson Neudeck and Ms. Stephenson testified that when Mr. Khan called her at The Body Shop she talked to him until Mr. Neudeck took the phone from her. 2RP 52-54,120, 5RP 7. K.D. testified inconsistently that Mr. Neudeck answered her phone and she did not speak to Mr. Khan at all. 3RP 119-120.

K.D.'s friend and district manager Pam Rager testified that when K.D. called her she did not say "rape," "assault" or "sexual violation." 5RP 23-25. The Bellevue police officer who contacted K.D. at the hospital where she was taken to be examined by her friends testified that he went in response to an alleged rape and that he got Mr. Khan's name, address and phone number from K.D.. 2RP 83-88. The officer described K.D.'s demeanor as upset and sullen. 2RP 93-94.

Nichole Albery, the sexual assault nurse who examined K.D., repeated in detail K.D.'s statement about what had happened. 2RP 156-158. Nurse Albery explained that as part of her examination she took oral

³ Mr. Khan explained in his testimony that he denied raping K.D. and never agreed that they had sex, only that they "messed around." 5RP 90-92.

and vaginal swabs and swabs from outside the anal area and perineal [area from the vagina to the anus]. 2RP 189-190. She explained that she examined K.D. thoroughly and documented a number of small bruises from one centimeter by one centimeter to two centimeters by four centimeters.⁴ 2RP 170-174. K.D., however, reported zero pain to her; and and Nurse Albery noted no bruising on K.D.'s wrists. 2RP 167; 171-174.

Further, the nursing notes from K.D.'s initial examination by emergency room staff had noted no sign of injuries or bruising or abrasions on her back. 3RP 25, 48.

On examination of the swabs taken by Ms. Albery, no spermatazoa were found in the vaginal or oral swabs, one sperm was found in the perineal wash and 40 sperms in the anal swab. 4RP 26-25. The "P-30" test for the presence of semen was positive for the vaginal swab, but since some few females produced positive P-30 results it was not conclusive. 4RP 29.

The state introduced K.D.'s phone records for December 14 and 15, 2008, and the record of her text messages during this period. Ex. 12, 13, 14; 3RP 104-105; 6RP 30. These records showed that K.D. had placed calls to her friends Granger, Mike and Ashley Stephenson between 1:25

⁴ 1 centimeter = 0.3937 inches.

a.m. and 1:49 a.m. in the early morning of December 14, 2008. Ex. 12; 3RP 110, 137-138; 6RP 30. Ashley Stephenson called her back. Ex. 12; 6RP 31. K.D. had called Mr. Khan outside his apartment at 3:55 p.m. and attempted to call her friend Mike when she returned to her car at 6:11 p.m. Ex. 12; 3RP 114-115, 160. She reached Ms. Stephenson at 6:12 p.m. and they spoke for a brief two minutes. Ex. 12; 3RP 115; 6RP 31. After speaking with Ms. Stephenson, she received a call from Mr. Khan and they spoke for four minutes. Ex. 12; 3RP 115-116; 6RP 32. K.D. also spoke for nine minutes on the phone to a friend named Kim Miller after leaving Mr. Khan's apartment. Ex. 12; 6RP 33. Mike called her back at 6:20 p.m. and they talked for six minutes.⁵ Ex. 12; 6RP 32. She called Pam Rager at 7:21 p.m. and they spoke for six minutes. Ex. 13; 3RP 110; 6RP 33. Mr. Khan called her at 7:44 p.m. and they spoke for sixteen minutes. Ex. 13; 6RP 34. Interestingly, K.D. had sent a text message to him at 7:32 p.m. Ex. 14; 6RP 34.

Ms. Stephenson had sent numerous text messages to K.D. between 3:06 p.m. and 4:38 p.m. that afternoon and received text message in return at 5:05, 5:08 and 5:12 p.m., although Ms. Stephenson did not remember

⁵ Neither Kim Miller nor Mike were called by the state as witnesses at trial.

these texting exchanges. 2RP 68-69. The record shows that K.D. had first "texted" Mr. Khan that Sunday shortly before 10:00 a.m. 3RP 147.

A good friend of Mr. Khan's, Diana Dieve, was called as a state's witness to testify that Mr. Khan told her that there was no sex and that they "made out" and each touched each other's private parts. 4RP 60-67. Mr. Khan's cousin, Sherhryar Khan, with whom he shared the apartment, was also called as a state's witness to testify that Mr. Khan told him that they did not have sex, but that they messed around and she "jerked him off." 4RP 100-112. Detective Gerry Johnson repeated what Sherhryar Khan said Mr. Kahn had told him. 4RP 146-147.

4. Opinion evidence as to guilt

During the direct examination of the sexual assault nurse Nichole Alberty, the prosecutor asked her about "the notion of obtaining consent to perform an examination" and followed up with a question about the crime victims' compensation, thus eliciting:

- A. The State of Washington has a fund set aside called crime victims' compensation, and so anyone in the State of Washington who is a victim of a crime is entitled to apply for these benefits. And what that means is that the emergency room visit is automatically covered, the screening exam -- the medical screening exam here, as well as my portion of the exam, the actual evidence collection.

Q. So in other words, you are not paying out-of-pocket medical expenses --

A. No.

Q. -- because you happen to be a victim of a crime?

A. No.

2RP 147-149. The prosecutor continued questioning about whether the person being examined could stop at any point, and elicited:

A. . . . This process of doing this examination is pretty invasive. Especially after being in a sexual assault, the patient is traumatized at that point already, And then to have a stranger, me, look at her body, every single inch of it, take pictures of it, document it, for her to tell me what happened, it's traumatic.

So the last thing that I want to do is retraumatize her all over again.

2RP 149.

5. **Evidence that a prosecutor and judge had already determined that the crime had been committed.**

The state elicited from one of the officers who participated in the serving of a search warrant for Mr. Khan's apartment that the search warrant was a "permission slip" from a judge based on his determination that evidence of a crime would be found at a particular location:

Q. You have mentioned this term of art, a warrant or a search warrant a couple of times. Lieutenant, tell us just as a general

matter, what is a search warrant, and what authority does a search warrant give you, and from whom do you get that authority?

A. Sure. A search warrant is a document that is approved by -- usually by a King County prosecutor and then submitted to a judge in person, basically outlining the elements of a crime that we believe has occurred, the location that we believe either evidence will be found, which is usually the location where the crime occurred, the type of evidence that we believe will be found there, and it requests permission to go to that location and collect evidence.

Q. And this permission slip, if you will, from a judge to go to a particular location, you need that obviously before you go to the location to search it.

A. Yes. It gives us the authority to break and enter if nobody shall be home so we can go in there and do what we need to do to collect evidence.

2RP 75-76.

6. Evidence that Mr. Khan was booked into jail

The state asked lead Detective Jerry Johnson: "And did you obtain for purposes of documenting in booking, if you will, of the defendant, did you obtain his name -- full name and date of birth." 4RP 165. Detective Johnson responded, "Yes" and provided Mr. Khan's full name and date of birth. 4RP 165.

7. The prosecutor's closing argument

During closing argument, the prosecutor emphasized that K.D.:

is a young professional woman, twenty-something, in her early twenties. She has this responsibility of managing a staff of people. And weren't you left with the impression about Kristy that she takes her work seriously and takes great pride in her work. . . . This young woman cared about her professional life.

. . . . But the reason why I bring up the fact that Kristy is a professional young woman, that she cares about her job and her responsibilities and the like, is doesn't it make sense that she would recount to you on the witness stand how that really shook her to the core, that she couldn't control anything? Doesn't that just make sense. Isn't that a reason to believe Kristy?

6RP 11-12.⁶

The prosecutor asked the jurors to look at Exhibit 82-A, the picture defense counsel objected to admitting, and emphasized Mr. Khan's "bulk and size." 6RP 8.⁷ The prosecutor referred to him as "Mr. Gorgeous Guy." 6RP 10.

8. Motion for Arrest of Judgment and to Reconsider.

In the defense Motion for Arrest of Judgment, counsel for Mr. Khan submitted an Offer of Proof asserting that: (1) trial counsel was ineffective

⁶ Mr. Khan was also a professional person and business owner. 3RP 70; 4RP 99-101; 5RP 30-31

⁷ In opening statement, the prosecutor twice referred to K.D. as being tall and thin. 2RP 9, 11. Pictures of K.D. are attached to the Motion to Reconsider Motion for New Trial, CP 74-94.

for conceding that the rape shield statute excludes the alleged victim's present sexual behavior; (2) that the court erred in excluding material testimony regarding K.D.'s disclosure of the incident and the fact that she was seen at the Club Vertigo where Mr. Khan worked days after the alleged incident; and (3) that the state improperly elicited that a judge and prosecutor authorized a search warrant for Mr. Khan's residence. CP 60-62, 74. Counsel cited the case of State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), in which the Washington Supreme Court held that the rape shield law "applies only to past sexual behavior."

In the Motion to Reconsider the denial of the Motion, counsel for Mr. Khan submitted MySpace messages in which K.D. initiated contact with him by stating that he is "absolutely GOOORRGGEEEOOUUSSS." CP 75. The MySpace messages also established that although K.D. knew Mr. Khan worked at Club Vertigo and spent his weekends there; that she was not dating Granger; she "hung out once" with Granger; and she "woke up in [Granger's] bed Friday morning." CP 74-94. Counsel also submitted photographs of K.D. partying at Vertigo just days after the incident and even though she has written in her messages before the incident that she had never been there before. CP 74-94.

In denying reconsideration, the trial court ruled that "the victim's past sexual conduct" is not admissible where the defense is that "penetration did not occur"; that general reputation for sexual promiscuity is irrelevant; and that even assuming the MySpace Pages were authenticated, the evidence would not justify a new trial because it was not newly discovered evidence and that trial counsel was not ineffective for failing to "elicit the MySpace information." CP156-159.

C. ARGUMENT

1. OPINION EVIDENCE AS TO GUILT FROM THE SEXUAL ASSAULT NURSE DENIED MR. KHAN A CONSTITUTIONALLY FAIR TRIAL.

Twice, the prosecutor deliberately elicited from the sexual assault nurse, Nichole Albery, testimony from which the jury would infer Ms. Albery's opinion that K.D. was a rape victim. First, the prosecutor elicited from Ms. Albery that the crime victim's compensation fund would pay for the medical examination she performed on K.D. because victims do not have to pay for medical expenses occurring as a result of being sexually assaulted. 2RP 147-149. Second, the prosecutor elicited that the people Ms. Albery examined, like K.D., could stop the examination at any point because "the last thing she wanted was to re-traumatize her all over again." 2RP 149. This testimony not only conveyed Ms. Albery's opinion that

K.D. was a victim, it conveyed her absolute conviction that K.D. had been raped, as she claimed, by Mr. Khan.

Neither the crime victims' compensation fund nor the right of a person to terminate an examination was relevant to any legitimate issue at trial; the prosecutor's sole purpose in asking the questions was to convey to the jury the sexual assault nurse's opinion that K.D. was a victim and Mr. Khan guilty of assaulting her. Ms. Albery's testimony was improper opinion testimony as to guilt and denied Mr. Khan his right to trial before a fair and impartial jury.

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008) (opinions of guilt are improper whether made directly or by inference). As noted in State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), "[s]uch an opinion violates the defendant's right to a trial by an impartial jury and her right to have the jury make an independent evaluation of the facts." (citing State v. Wilber, 55 Wn. App. 294, 777 P.2d 36 (1989)).

Improper opinion evidence of guilt violates article 1, section 21 of the Washington Constitution. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007). It is also inadmissible as a matter of federal common

law, United States v. Spaulding, 293 U.S. 498, 507, 55 S. Ct. 273, 79 L. Ed. 2d 617 (1935), and as an exception to the provision in Fed.R.Evid. 704 that experts may testify on the ultimate issue. United States v. Lockett, 919 F.2d 585, 590 (9th Cir. 1990) (commentary to the rule that "opinions which would merely tell the jury what result to reach" remain excluded).

"Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." State v. Montgomery, 163 Wn.2d at 491 (quoting State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Opinion testimony is testimony based on one's belief rather than direct knowledge of the facts or issues. Demery, 144 Wn.2d at 760.

Ms. Albery testified as an expert witness, her testimony clearly conveyed her opinion that K.D. had been raped; the defense was denial of penetration and that the sexual conduct that did occur was consensual; and there was no conclusive physical evidence of vaginal penetration. Ms. Albery's opinion was simply that and not based on her direct knowledge of the facts of what happened between K.D. and Mr. Khan.

A challenge to impermissible opinion testimony can be raised for the first time on appeal where it is a manifest constitutional error that has

"practical and identifiable consequences in the trial of the case." State v. Florczak, 76 Wn. App. 55, 73-74, 882 P.2d 199 (1994) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). In Florczak, the court held that expert testimony that the post traumatic stress syndrome suffered by the victim was secondary, in that case, to the victim's sexual abuse was held to be an opinion as to guilt that could be raised for the first time on appeal. Florczak, at 74.

Here, Mr. Khan testified at trial and his credibility and the credibility of K.D. were central issues at trial. The state was permitted to reinforce and reiterate K.D.'s testimony through the testimony of her friends and of nurse Alerby as well as the police officer who interviewed her at the hospital. Under these circumstances, the opinion as to guilt testimony of Ms. Albery-- an expert on sexual assault--where the physical evidence supported Mr. Khan's testimony as well as K.D.'s, was overwhelmingly and unfairly prejudicial. The issue can be raised for the first time on appeal and should result in the reversal of Mr. Khan's convictions.

2. EVIDENCE THAT A PROSECUTOR AND JUDGE HAD ALREADY DETERMINED GUILT DENIED MR. KHAN HIS CONSTITUTIONAL RIGHTS TO A TRIAL BEFORE A FAIR AND IMPARTIAL JURY.

The state deliberately elicited from one of the officers who participated in serving the search warrant for Mr. Khan's apartment that before the search warrant was issued, both a prosecutor and a judge had to determine that a crime has been committed and that further evidence of the crime might be found at the the residence. 2RP 75-76. This testimony improperly conveyed to the jury both that the prosecutor's office and the judge had reviewed the evidence and found it to be sufficient to establish the elements of a crime. As the court held in State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993), this is "tantamount to arguing that guilt had already been determined."

It is error to convey to the jury that a judge has independently determined that there is sufficient evidence to support a guilty verdict. United States v. Sullivan, 919 F.2d 1403, 1424 (10th Cir. 1990); United States v. Gambert, 410 F.2d 383 (4th Cir. 1969) (reversible error to suggest that the judge found the defendant guilty because the government had to prove the indictment before the charge could go to the jury); State v. Thomas, 287 S.C. 411, 339 S.E.2d 129 (1986) (error to inform jury

that probable cause had been found by a grand jury and in a preliminary hearing).

Telling the jury that the court, U.S. Attorney's Office and Drug Enforcement Administration officers have found probable cause to authorize a wiretap constitutes improper vouching. United States v. Brook, 508 F.3d 1205 (9th Cir. 2007); United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980) (vouching occurs when "the prosecution . . . places the prestige of the government behind the witness"). Specifically, testimony about how agents obtain permission to use wiretaps, and obtain search warrants is irrelevant, prejudicial and can constitute reversible error. United States v. Cunningham, 462 F.3d 708, 712-713 (9th Cir. 2006):

The procedures used and opinions obtained in gaining authority for the use of the wiretaps were wholly unrelated to the defendants' guilt or innocence -- and not necessary to be established to prove the case against the defendants.

The obvious purpose of the evidence was to show the jury there were several senior government attorneys and agents who all believed there was probable cause . . . and, indirectly, that they all believed, in their professional judgment, the defendants were in fact committing drug-related crimes.

As the defendants see things, and we agree, the jury was infected by the opinions of these unnamed government attorneys and agents.

Telling the jury that the judge had found probable cause to issue a warrant not only conveys to the jury that guilt has already been proven,

it may imply to the jurors that they have not heard all of the evidence available when a search warrant was obtained. State v. Woodward, 21 Ariz. App. 133, 516 P.2d 589 (1973).

Here, as in Cunningham and Brooks, the prosecutor elicited irrelevant and unfairly prejudicial information about the search warrant process so that the jury would hear and understand that before the warrant granting permission to search Mr. Khan's apartment had been issued, both the prosecutor's office and a judge had reviewed the facts and found sufficient evidence that a crime had been committed and evidence of the crime would be found at the apartment. This was error and should require reversal of Mr. Khan's conviction. It constituted improper vouching, implied to the jurors that they may not have heard all of the evidence and denied Mr. Khan a fair trial based on the evidence.

This error is constitutional because it denies the accused the presumption of innocence and the right to a trial based on probative evidence introduced at trial, and not harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

3. EVIDENCE THAT MR. KHAN WAS BOOKED INTO JAIL DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE.

The state asked lead Detective Jerry Johnson: "And did you obtain for purposes of documenting in booking, if you will, of the defendant, did you obtain his name -- full name and date of birth. 4RP 165. Detective Johnson responded, "Yes" and provided Mr. Khan's full name and date of birth. 4RP 165.

The United States Supreme Court has recognized that a criminal defendant may be deprived of two fundamental components of a fair trial where the jury is aware of the defendant's in-custody status during trial: (1) the presumption of innocence; and (2) the right to have guilt established by probative evidence. Estelle v. Williams, 425 U.S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691, reh'g denied, 426 U.S. 954 (1976) (denial of due process to compel a defendant to appear at trial in jail attire, recognizable by the jury as such); State v. Stevens, 35 Wn. App. 68, 665 P.2d 426 (1983) (recognizing the rule).

Courts have also recognized that a "mug shot" of the defendant is similarly prejudicial because of the association with jails and criminality and should not generally be admitted. State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000); United States v. Fosher, 568 F.2d 207,

213 (1st Cir. 1978); State v. Newton, 42 Wn. App. 718, 726 n.4, 714 P.2d 684, rev. denied, 105 Wn.2d 1018 (1986); State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976) (reference to the police having a photograph of the defendant on hand improperly suggested a previous arrest or conviction on another charge). see also State v. Stevens, 58 Wn. App. 478, 794 P.2d 38, rev. denied, 115 Wn.2d 1025 (1990) (to be admissible a "mug shot" photograph must be "probative evidence tending to prove an element of the crime that is at issue").

Central to the right to a fair trial, as guaranteed by the state and federal constitutions, is the principle that a person accused of a crime is entitled to have his guilt or innocence determined solely on evidence introduced at trial. Holbrook v. Flynn, 475 U.S. 560, 567, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986). Information that the defendant is in custody or is considered to represent a danger to others can impact the jury's impression of his or her guilt and can destroy the presumption of innocence. Illinois v. Allen, 397 U.S. 337, 344, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970) (shackling or gagging a defendant can destroy the presumption of innocence); Duckett v. Godinez, 67 F.3d 734, 747-748 (9th Cir. 1995)(shackling impairs the presumption of innocence);

This error was constitutional because it destroyed the state and federal constitutional rights to the presumption of innocence and to have

guilt established by probative evidence. The error was not harmless beyond a reasonable doubt and should require reversal of Mr. Khan's convictions.

4. THE PROSECUTOR COMMITTED MISCONDUCT IN ELICITING OPINION EVIDENCE AS TO GUILT, EVIDENCE THAT A PROSECUTOR AND JUDGE HAD ALREADY DETERMINED GUILT AND THAT MR. KHAN HAD BEEN BOOKED INTO JAIL.

Here, the opinion testimony as to guilt, the testimony that a prosecutor and judge had already determined probable cause to believe a crime had been committed and testimony that Mr. Khan had been booked into jail were all specifically and deliberately elicited by the prosecutor. This was not only error, it was prosecutorial misconduct.

A claim of prosecutorial misconduct is established where the conduct complained of is both improper and prejudicial. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Where misconduct is flagrant and ill-intentioned, it can be challenged for the first time on appeal; and where there is a substantial likelihood that the misconduct affected the jury, the defendant is deprived of the fair trial guaranteed by the Fourteenth Amendment. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Here the testimony elicited by the prosecutor from the state's witnesses violated Mr. Khan's rights to the presumption of innocence, the right to a fair and impartial jury, and the right to have a jury determine

guilt or innocence based on probative evidence introduced at trial and was not legitimately relevant to any issue at trial. Under these circumstances the prosecutor's deliberately eliciting the testimony was flagrant and ill-intentioned and there is a substantial likelihood that the testimony affected the jury's verdict. Mr. Khan's judgment and sentence should be reversed because of the prosecutor's misconduct.

5. **THE TRIAL COURT SHOULD HAVE GRANTED THE MOTION FOR NEW TRIAL BECAUSE MR. KHAN WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO CALL WITNESSES AND PRESENT A DEFENSE.**

As new counsel for Mr. Khan set out in motions for arrest of judgment or new trial, trial counsel improperly conceded that the rape shield statute excludes present as well as past sexual behavior. 1RP 6-7; CP 74-94. In State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), the Supreme Court clarified that the rape shield statute "applies only to past sexual behavior." Further, the Jones Court held that the statute must be construed in light of "the right to confront and cross-examine witnesses . . . guaranteed by both the federal and state constitutions." Jones, 168 Wn.2d at 719 (citing State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) and Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). "Even if the rape shield statute did apply, it cannot

be used to bar evidence of high probative value per the Sixth Amendment."

Jones, 168 Wn.2d at 722.

Contrary to the ruling of the trial court, the MySpace messages were material and admissible evidence of present sexual behavior relevant to the circumstances surround the incident. K.D. initiated contact with Mr. Khan via a MySpace message telling him he was "gorgeous." CP 74-94. The MySpace messages established that she knew Mr. Khan worked at Club Vertigo on weekends and established her willingness to share with him that she had "hung out" with Granger, a mutual friend, and ended up in Granger's bed. This evidence supported Mr. Khan's testimony and theory of the case -- that there was no actual sexual intercourse, but that, in any event, whatever happened between them was consensual. The pictures taken by Jarod Iverson shortly after the alleged incident in which K.D. is obviously having a good time partying at the Club where Mr. Khan worked furthers the defense theory as well. Indeed these pictures were certainly more relevant than the picture of Mr. Khan showing him looking like a "player," (5RP 111-112) which the trial court admitted over defense objection and which the prosecutor relied on in closing to argue that he was not credible while K.D. was (6RP 8, 10).

The MySpace messages and the Club Vertigo pictures also specifically contradict K.D.'s testimony that she thought Mr. Khan

contacted her first and asked her what she was doing (3RP 60), that she had previously been in a relationship with a mutual friend named Granger (3RP 58), that she did not know that Mr. Khan worked at Club Vertigo (3RP 154-157), and that she was devastated by the incident (3RP 101, 114). These details were important components of K.D.'s description of the incident and her credibility.

By ruling that the evidence was inadmissible in spite of Jones and in spite of its relevance, the trial court denied Mr. Khan his state and federal constitutional rights to confrontation of witnesses.

By ruling that trial counsel's erroneous concession that evidence of present sexual behavior, and therefore the pictures and MySpace messages, were inadmissible was not deficient or prejudicial to Mr. Khan, the trial court denied him his constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 809 L. Ed. 2d 674 (1984).

K.D.'s testimony was repeated by and supported by a number of witnesses, including her friends, a police officer and the sexual assault nurse. Mr. Khan was unfairly denied the opportunity to fully confront and cross-examine K.D. and support his own testimony and theory of defense. The trial court erred in denying his Motions for Arrest of Judgment and To Reconsider Denial of Motion for New Trial. He should now be granted

a new trial in which he is allowed to confront and cross-examine the witnesses against him and to put on a defense challenging the state's evidence.

6. CUMULATIVE ERROR DENIED MR. KHAN A FAIR TRIAL.

The combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

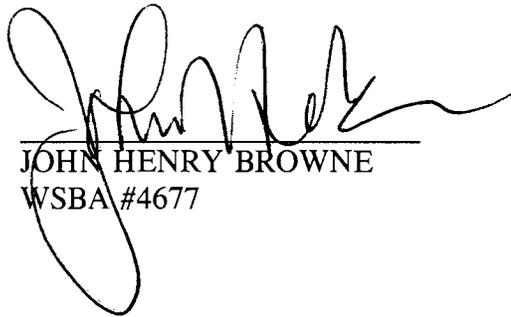
Here the errors individually should require reversal. The cumulative impact of the errors, however, overwhelmingly demonstrate that Mr. Khan was denied a fair trial. The errors combined to give the impression that a sexual assault expert, the prosecutor's office and a judge believed Mr. Khan was guilty and to associate him with jail -- at the same time that he was denied the right to fully cross examine and confront the witnesses against him. The case was a credibility case with the physical evidence consistent with Mr. Khan's testimony. Cumulative error, as well as the errors individually, denied him a fair trial.

E. CONCLUSION

Appellant respectfully submits that his conviction should be reversed and remanded for retrial.

DATED this 28 day of January 2011

Respectfully submitted,



JOHN HENRY BROWNE
WSBA #4677