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A. ASSIGNMENTS OF ERROR

1. Thomas was denied due process when trial court erred by limiting defense cross-examination of a state's witness.
2. The prosecutor committed prejudicial misconduct.
3. The trial court misapplied RCW 9A.44.020(3), to prevent introduction of testimony necessary for the defense theory of the case.

Issues Presented on Appeal

1. Was denied due process when trial court erred by limiting defense cross-examination of a state's witness?
2. Did the prosecutor commit prejudicial misconduct.
3. Did the trial court misapplied RCW 9A.44.020(3), to prevent introduction of testimony necessary for the defense theory of the case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Thomas Elliot was charged with rape in the second degree and indecent liberties when he was nineteen years old. CP 1-2. The state amended and corrected the information but did not change the charges. CP 14-15, 17-18. Thomas moved pursuant to RCW 9A.44.020 for a hearing to determine admissibility of evidence related to the defendant and complainant's past

relationship. CP 11-13. The trial court denied the motion to admit complainant's mother's testimony regarding her daughter Brittany's behavior towards Thomas leading up to the incident. RP 27, 29.

Following a jury trial, judge Kitty Ann van Doornink presiding, Thomas was found guilty of the lesser offense of attempted rape in the second degree and indecent liberties. CP 59-63. Over the objections of Brittany, Judge Van Doornink imposed 210 months incarceration, the high end of the standard range. RP 99-114. This timely appeal follows. 122-138, 243.

2. SUBSTANTIVE FACTS

Brittany Williams accused Thomas Elliott of trying to look at her through a hole in the bathroom door while she was taking a shower. RP 49. Brittany told her mother that Thomas followed her into her bedroom, took off her towel, put her on the bed and groped her breasts and vaginal area but never penetrated her. RP 68-69. Brittany told her mother and the police that Thomas got up when Brittany's four year old brother entered the room. RP 70.

Thomas admitted to following Brittany into her room, but denied trying to look at her through the bathroom or trying to rape Brittany. RP Thomas stated that Brittany left the shower and came to the room where he was sitting and called him a "fag". RP 145. Upset, he went to Brittany's

room, took off her towel, put her on the bed and tried to seduce her by kissing her and fondling her breasts and vaginal are- without any sort of penetration. RP 145, 147. Both Brittany and Thomas agreed that Thomas kept asking for sex and Brittany kept saying no. RP 68, 69, 146, 147.

Brittany and Thomas started dating in high school and had a relationship for 18 months. Both were 19 years old at the time of this incident. RP 47. Brittany broke up with Thomas. RP 63. Thomas and his mother lived with Brittany and her family and both worked for Brittany's mother, who had a cleaning business. RP 78-80.

Brittany never called the police even though her mother told her to do so. RP 68-69. Brittany did not tell her mother about the incident until several weeks after it occurred when she was mad at Thomas. RP 71, 87. In April, several months after the initial incident, Brittany told her mother that she had been watching TV and Thomas had been sitting on a different couch. RP 55. When Brittany got up, Thomas hugged her and tried to do a dance grind into her with his pelvis. Brittany hit Thomas hard and he stopped. RP 55-56. When Brittany told her mother, her mother told her to confront Thomas, who did not deny the accusations. RP 58. The next day at work, Brittany told her manager and her manager told her to call the police. Brittany called the police and told the police about the January incident, but changed her story and

added that Thomas had penetrated her with his finger and told the police about the humping incident. RP 58-59, 73.

Kathleen Belsha's Testimony Suppressed

The defense moved to introduce evidence of the nature of the relationship between Brittany and Thomas to demonstrate that Brittany was not straight forward with Thomas and that Thomas never intended to rape Brittany. The testimony would have indicated that Thomas and Brittany had a "love/hate" relationship", that Brittany led Thomas on by being very friendly one day and hostile the next. That their relationship was very confusing and difficult to understand and that Thomas and Brittany knew each other very

C. ARGUMENT

1. APPELLANT WAS DENIED HIS
CONSTITUTIONAL RIGHT TO PRESENT A
DEFENSE.

The Sixth and Fourteenth Amendments to the United States Constitution¹, and article 1, § 22 of the Washington Constitution, guarantee the

¹ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide criminal defendants a meaningful opportunity to present a complete defense. *State v. Cheatam*, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). The right to present a defense is a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Recently, the United States Supreme Court reiterated that a defendant is denied the right to present a defense if evidence is excluded under rules that are arbitrary or disproportionate to the purposes they are designed to serve. *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006), citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998).

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The right to confrontation includes the right to cross examine a witness to show bias, prejudice, or interest. *State v. Buss*, 76 Wn. App. 780-787, 887 P.2d 20 (1995); *State v. Whyde*, 30 Wn. App. 162, 166-67, 632 P.2d 913 (1981). The possible biases, prejudices, or ulterior motives of a witness that relate directly to issues in the case are always relevant to discredit the witness and affect the weight of his testimony. *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974).

A defendant is allowed to present even minimally relevant evidence unless the State can demonstrate a compelling interest for excluding the evidence. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). However, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." *State v. Reed*, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) (citing *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983)).

Thomas proffered evidence from the complainant's mother regarding the nature of the complainant's relation with Thomas and her inconsistent and peculiar behavior toward Thomas during the time period leading to the incident at issue, including but not limited to "[leading] the defendant on" RP 27, 89-94. The trial court ruled that the testimony was not relevant and not helpful to the jury. RP 94. The court ruled that it was excluding testimony regarding the relationship between Brittany and Thomas but only referenced the fact that "there is no issue about Brittany at least believing that he still had feelings for her... and that's going to come in either through the officer or through himself." RP 94. In her oral ruling, the court did not address the actual statements regarding Brittany's behavior toward Thomas.

Relevant evidence is evidence tending to make the existence of any significant fact more or less probable than it would be without the evidence. ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d at 621.

Under ER 702, a witness who is not testifying as an expert may offer opinion testimony. Testimony that is not a direct comment on the defendant's

2 ER 701 states, "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b)

guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

Under *Heatley*, 70 Wn. App. at 579, before opinion testimony is offered, the trial court must determine its admissibility. The court must consider the circumstances of the case, including the following factors: "(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. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), (quoting *Heatley*, 70 Wn. App. at 579).

In Thomas's case, the only contested issues at trial were penetration (the jury rejected this) or attempted penetration and consent. Ms. Belsha's opinion that her daughter's behavior was "weird", "confusing" "a love/hate relationship" "your still my friend" was more than minimally relevant to the penetration issue because it would have established that Thomas would not have penetrated Brittany without her consent --it went to the heart of these issue. The mother's opinion was not a comment on guilt or the veracity of another witness. And, it was based on the evidence that she observed in the

helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

time frame leading up to the incident, so it was a rationale inference based on the evidence. The testimony met all the Heatley criteria.

Ms. Belsha's testimony was necessary and relevant testimony to rebut the element of penetration and issue of forcible compulsion. It provided an insight into Thomas's state-of-mind and supported his very consistent testimony that he was trying to get Brittany's consent and did not penetrate her, a point the jury agreed on, or attempt to penetrate her.

The court's conclusion the Ms. Belsha's testimony was irrelevant was wrong. The testimony was proper opinion testimony and was relevant to rebut the only issues at trial.

Necessity of Ms. Belsha's Testimony

Ms. Belsha's testimony that her daughter was inconsistent with Thomas, running hot and cold in a "weird" and "confusing" manner was also relevant to the issue of Brittany's lack of credibility and motive to fabricate.

The defense theory was simple: Thomas was in love with Brittany and wanted to have sex with her. Brittany, according to her mother led Thomas on, was very, very close to him and hostile towards him. RP 27, 90-92. Part of the defense theory was that Brittany changed her story and exaggerated the incident. When asked specifically by her mother if Thomas penetrated her Brittany stated "no". RP 68-69. Weeks later she changed her story and told the police that Thomas had penetrated her. RP 59, 73. Brittany also told the police that she saw Thomas looking at her through the hole in the bathroom door even though it is not possible to determine who if anyone was looking through the

door. RP49, 81, 82. Brittany also failed to mention that she called Thomas a “fag” as she left the bathroom. The anticipated testimony would have discredited Brittany’s testimony and further supported Thomas’s testimony which was entirely consistent with his candid recitation to the police during the investigation. RP 90-92.

The court's reason for not allowing Thomas to cross examine Ms. Belsha on that issue, because it was “ not relevant” "not helpful” and because “that’s going to come either through the officer or through himself” is wrong and not supported by the record. RP 27, 94. The judge perseverated on the wrong facts: that Thomas had feelings for Brittany, rather than the fact that Brittany led him on. RP 94. It was error for the court not to allow the evidence to be elicited. The denial of a defendant's right to cross-examine a witness adequately as to relevant matters tending to show bias or motive violates his right of confrontation. *State v. Buss*, 76 Wn. App. at 788-89. The court violated Thomas’s right to confrontation and ultimately his right to present his defense when it refused to allow him to ask Ms. Belsha about Brittany’s behavior towards Thomas, which the prosecutor characterized as “leading him on”. RP .

The Errors were not Harmless

Constitutional error is presumed prejudicial and the State bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); *State v. Spotted Elk*, 109 Wn. App. 253, 261, 34 P.2d 906 (2001). Non-constitutional error warrants

reversal if there is a reasonable probability that the error affected the jury's verdict. *State v. Floreck*, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002).

Taken together, the improper limitations the court imposed on Mr. Elliott's cross examination of Ms. Belsha denied him the right to present a defense. The State can not prove the error was harmless beyond a reasonable doubt. Even if the errors are analyzed under the non-constitutional error standard, there is a reasonable probability the jury's verdict was affected.

Credibility, bias and motive to fabricate were the underpinning of the issues of penetration. The issue and the case hinged on Thomas' the credibility. Ms. Belsha's testimony would have undermined her daughter's credibility by revealing the pattern of inconsistent statements and treatment of Thomas. Because there was no eyewitness testimony, Ms. Belsha's testimony would have cut to the heart of the state's case and further undermined the jury's weakened belief in Brittany's testimony (rejecting rape in the second for attempted rape in the second degree). This testimony could not have been more relevant to the defense theory. The jury rejected the charge of rape in the second degree and found attempted rape in the second degree. It is impossible to know with any certainty why the jury was unable to reach a verdict on the case as charged, but the jury certainly would have been more impacted by testimony that further undermined the complaining witness' testimony. It is therefore logical to infer that the excluded evidence likely affected the verdict.

2. CITING THE RAPE SHIELD STATUTE
THE TRIAL COURT DENIED

APPELLANT HIS SIXTH AMENDMENT
RIGHT TO CONFRONTATION WHEN SHE
REFUSED TO PERMIT CROSS-
EXAMINATION OF A WITNESS
REGARDING THE COMPLAINANT'S
BEHAVIOR TOWARDS APPELLANT.

The trial court committed reversible error by improperly denying admission of relevant evidence based on her misapplication of the rape shield statute which did not apply to bar admission of evidence of the complainant's behavior towards Thomas leading up to the incident. RP 93, 94. The appellate courts review alleged violations of the confrontation clause de novo. *State v. Larry*, 108 Wn. App. 894, 901-02, 34 P.3d 241 (2001) (citing *United States v. Mayfield*, 189 F.3d 895, 899 (9th Cir.1999)).

RCW 9A.44.020(3), the rape shield statute provides in relevant part:

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and **is admissible on the issue of consent only pursuant to the following procedure:**

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(Emphasis added). The defendant sought to admit evidence regarding the complainant's provocative behavior towards him leading up to the incident to explain the nature of their relationship and feelings for each other. RP 93. This was expressly permissible under 9A.44.020(3). Applying the rape shield law, the court exercises discretion as to relevant evidence by weighing the probative value of the evidence against the probability that it will cause undue prejudice. *State v. Mounsey*, 31 Wn. App. 511, 520, 643 P.2d 892, *review denied*, 97 Wn.2d 1028 (1982), RCW 9A.44.020(3).

Out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible as hearsay unless they fall under a recognized exception to the hearsay rule. ER 801, 802. A trial court's decision to admit the evidence is reviewed for abuse of discretion. Such decisions will be overturned when the discretion is manifestly unreasonable or based upon untenable grounds. *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007), citing, *State v. Powell*, 126 Wn..2d 244, 258, 893 P.2d 615 (1995). When the defendant puts his relationship with the complainant into issue as part of his theory of the case, both the defendant and the state are entitled to introduce statements under the state of mind exception to the hearsay rule. *Athan*, 160 Wn2d at 383.3

The exception to the hearsay rule applies because “the defendant made the victim's feelings toward him a relevant issue.” *Id.* In *Athan*, the defendant in a murder rape case put into issue the victim’s state-of-mind to argue that he had consensual sex with the victim before her murder and that he was not responsible for the murder. *Id.* The defendant suggested a relationship between himself and the victim, thus he made her statements concerning her feelings toward the defendant “**relevant**” *Id.* The defense

3 A limiting instruction on such evidence is generally required, but the failure of a court to give a limiting instruction is not error when no instruction was requested. *Athan*, 160 Wn.2d at 383, citing, *Myers*, 133 Wash.2d at 36, 941 P.2d 1102

objected to the introduction of evidence by state's witnesses regarding the victim's statements about the defendant's feelings for her. *Athan*, 160 Wn. 2d at 380.

The Supreme Court in *Athan* held that when the defense raises the issue of state of mind in a rape or murder case, both the defense and state are entitled to introduce testimony regarding the relationship between the defendant and victim to establish complainant's or defendant's state of mind. *Athan*, 160 Wn. 2d at 382-83..

Athan is directly on point and provides controlling authority. In Thomas's case as in *Athan*, Thomas put the complainant's state of mind into issue. The complainant's mother testified during an offer of proof that was rejected and not presented to the jury that Thomas was still in love with the complainant and that Brittany and Thomas had a "love/hate" relationship. RP 90. One day the complainant would tell Thomas that she hated his guts and the next day she would tell her mother they "would be laughing their butts off". RP 90-91. Brittany's mother during voir dire testified that "they knew each other very well. . . and spent a lot of time together". RP 92.

If permitted, the Brittany's mother would have been able to testify to these relevant facts. *Id.* The testimony was relevant because as in *Athan*, Thomas's theory of his case was that he was not trying to force Brittany to

have sex with him; rather he was trying to get her to consent. Thomas's and Brittany's state-of-mind were relevant to Thomas's perception of the impact of his behavior. *Mounsey*, 31 Wn. App. at 523. The only difference between *Athan* and Thomas' case is that in *Athan*, the state wanted the state-of-mind testimony admitted and in Thomas's case, the defense wanted the evidence admitted. RP 28.

In Thomas's case, the trial court abused her discretion when she denied the defense motion to introduce the testimony, ruling incorrectly that it was not relevant. RP 29, *Athan*, 160 Wn. 2d at 383. The trial court's ruling was not harmless error because it prejudicially affected the outcome of the case.

In *Mounsey*, the defendant sought to introduce statements a friend made to him about the complainant. The Court held that the evidence would have been admissible.

The testimony would have been proper pursuant to ER 801 and would not have been hearsay because it would have been intended to go to Mounsey's state of mind and not to stand for the truth of the matter stated, nor was it intended to prove the complainant's conduct pursuant to ER 404. For purposes of showing Mounsey's state of mind, it would not have mattered if the testimony was false, so long as it tended to prove what Mounsey was told.

Mounsey, 31 Wn. App. at 523. In *Mounsey*, the Court ultimately held that

because the information was admitted there was no error. “Thus, while it would have been error to suppress such evidence based upon the rape shield statute, the record indicates no such suppression occurred and no prejudice has inured to Mounsey.” *Mounsey*, 31 Wn. App. at 523.

Based on *Mounsey* and *Athan*, the trial court abused her discretion when she suppressed the nature of the ongoing relationship between Thomas and the complainant. The ruling was prejudicial because the probative was outweighed by the probability that denial of the admission of the evidence it would create a “substantial danger of undue prejudice,” *Mounsey*, 31 Wn. App. at 521.

The jury rejected the charge of rape in the second degree in favor of attempted rape in the second degree. It is likely that had the jury been provided the complainant’s mother’s testimony, it would have rejected the attempted rape charge as well in favor of indecent liberties. For this reason the error was not harmless. The remedy is to reverse and remand for a new trial.

3. THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED PREJUDICIAL MISCONDUCT BY SHIFITING THE BURDEN OF PROOF TO THE DEFENDANT WHEN SHE INFERRED TO THE JURY THAT THE ONLY WAY TO ACQUIT WAS TO FIND THAT THE

COMPLAINANT WAS NOT TELLING THE
TRUTH.

In Thomas's case, the prosecutor in closing argument improperly shifted the burden of proof to the defense. She did this by repeatedly informing the jury that Brittany has no reason to lie and could only tell the truth and that Thomas was not being truthful.

The Courts of Appeal have repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant the jury must find that the State's witnesses are either lying or mistaken. *State v. Flemming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1986); *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying"), *review denied*, 118 Wash.2d 1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214, *review denied* 127 Wn.2d 1010, 902 P.2d 163 (1995)4; *State v. Barrow*, 60 Wn. App. 869, 874-75, 809 P.2d 209, *review denied* 118 Wn.2d 1007, 822 P.2d 288 (1991). "[C]losing argument which . . . express[es] a personal opinion of witness veracity are improper." *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

In *Flemming*, the "prosecutor's argument misstated the law and

4 Superseded on other grounds by RCW 9.94A.400 (1)(a).

misrepresented both the role of the jury and the burden of proof. “ *Flemming*, 83 Wn. App at 213. The prosecutor argued:

[T]here is absolutely no evidence ... that [D.S.] has fabricated any of this or that in any way she's confused about the fundamental acts that occurred upon her back in that bedroom. *And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.*

Flemming, 83 Wn. App at 214. Based on these comments, the Court in *Flemming*, held the prosecutor committed misconduct by “telling the jury that it could only acquit if it found that the complaining witness lied or was confused. Next, the prosecutor argued that there was no reasonable doubt because there was no evidence that the witness was lying or confused, and if there had been any such evidence, the defendants would have presented it”. *Flemming*, 83 Wn. App. at 214.

The Court in *Flemming*, further held that the misconduct was flagrant and ill-intentioned because it came over two years after the decision in *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991), which explicitly held improper any argument that acquittal could only occur if the state’ witnesses were lying. Id

In Thomas’s case, during closing argument the prosecutor committed the same flagrant and ill-intentioned misconduct and shifted the burden of

proof by arguing as follows:

Brittany said she got out of the shower looked over and she saw the defendant looking at her.

Now, he denies that. Does it really ultimately matter in the long run? Not a heck of a lot, but Brittany told you what happened. Brittany doesn't really have any reason to make that fact up in light of the other things she told you that the defendant has corroborated. But what does it do with the defendant? It makes him look just a little bit creepier.

RP 201. The prosecutor continued by telling the jury that the defendant's testimony "does not matter" that Thomas said he gently placed Brittany on the bed, because "Brittany told you what happened" . . . "he pushed her on the bed with both hands". RP 202-03. The prosecutor continued:

Why would Brittany make any of these facts up? [penetration, force] Why would she make up additional facts? And the simple answer is that she's not making these additional facts up. It is what happened. It's the defendant who has a motivation to minimize his behavior.

RP 204.

The defendant is obviously backing off on things he said earlier.⁵ The defendant is saying, "well, no I didn't admit that I raped her, but I knew what I was doing was wrong." And that doesn't make a whole lot of sense. So he's minimizing his behavior to make himself look a little better, in hope you will not convict him of Rape in the Second Degree, which is in fact, what he is guilty of. . . . She has no incentive to elaborate on what has happened. She's got absolutely no

⁵ According to the officer Thomas admitted that he knew what he did was rape. Thomas denied his vehemently but admitted that he knew what he did was wrong. RP 109, 147, 172.

incentive to say anything that's not true, and she hasn't.

...

He denies the most serious allegation against him. Well, he's got every reason in the world to deny it, but denying it doesn't mean it didn't happen, because it did.

It wasn't any of her physical resistance that stopped the attack. It was her little brother who walked in, and that is it. Her little brother walked in. And the defendant told you today, "Well, I stopped because I didn't want her little brother to get worried or to get the wrong idea," Well, he just didn't want a witness to the rape that he was perpetrating on Brittany because, obviously, what he was doing was rape.

RP 205, 206, 207.

During rebuttal closing, the prosecutor continued to impermissibly argue that the defense theory was "just ridiculous". RP 222.

Doesn't matter that he was trying to seduce her. That is just ridiculous, It is just ridiculous for him to say, well, for two to four minutes when I was kissing her and she was yelling "no" and fighting me, I was trying to remind her of our relationship and I was trying to get her consent.

RP 222. The prosecutor continued during rebuttal to bolster Brittany's testimony and attempted to impugn the veracity of her mother's testimony as well as Thomas's. The prosecutor admitted that there were inconsistencies between the mother's and daughter's testimony, but attributed this to the mother having a "strange dynamic going on there", meaning the fact that the

mother continued to permit her good friend, and employee, the defendant's mother to live with her. RP 223. Again, the prosecutor informed the jury that Brittany could not lie when she told her mother that Thomas never penetrated her. RP 224.

Well, why would Brittany make something up? And if she was going to make something up, why wouldn't she make up something just a little worse than him and his finger?"

The simple fact is she told you exactly what happened, you know. . . . I submit to you that there's not even just doubt here about whether or not there was a little bit of penetration. Brittany was unequivocal.

RP 225.

The prosecutor continued her argument by arguing that if the jury believed in the charges, they were required to convict Thomas. "Beyond a reasonable doubt is, do you have an abiding belief in these charges?" RP 210. This was a misstatement of the law.

In Thomas's case as in *Flemming*, the prosecutor misstated the law and shifted the burden of proof. She did this by repeatedly telling the jury that Brittany could not and did not lie and because Brittany said Thomas penetrated her (after denying this to her mother), the state met its burden of proof. RP 201-07, 222-225. This argument constituted misconduct because it misstated the law and impermissibly shifted the burden of proof to the

defense by informing and the jury that to acquit, the defense must establish that the state's witnesses were lying. *Flemming*, 83 Wn. App at 214.

In *Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994), the Court reversed the conviction where the prosecutor impermissibly misrepresented the testimony of witnesses in order to create a conflict which did not exist to demonstrate that the only way to acquit was if the state's witnesses were lying. *Id.* The prosecutor did not ask the defendant if the state's witnesses were lying, but rather attacked his credibility as an Hispanic. The Court held that even without an objection from the defense, the comments were so flagrant and ill-intentioned that they could not have been cured by an instruction. *Suarez-Bravo*, 72 Wn. App at 367-68.

In *Stith*, the Court reiterated that in closing argument, a prosecutor may not comment on a witness's veracity based on his or her personal opinion. *Stith*, 71 Wn. App. at 21, citing, *State v. Stover*, 67 Wn. App. 228, 230, 232, 834 P.2d 671 (1992), *review denied*, 120 Wash.2d 1025, 847 P.2d 480 (1993). In *Stith* the prosecutor in response to the defense attorney stating that the police were not being truthful, argued that the defense attorney was lying. The Court held this to be improper argument. *Stith*, 71 Wn. App. at 21. The Court did not reverse on this issue because the argument was in response to the defense argument and the defense did not object. *Id.*

The Court reversed the trial court because of other misconduct which involved the prosecutor vouching for the reliability of the system and for telling the jury that Mr. Stith was out dealing again, a violation of a motion in limine. *Stith*, 71 Wn. App. at 21-22.

The second comment concerning “incredible safeguards” and the court's prior determination of probable cause not only constituted “testimony” as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court. This was tantamount to arguing that guilt had already been determined. Clearly, both comments were flagrantly improper.

Id.

In Thomas's case, the prosecutor argued that there was no doubt about Thomas's guilt because Brittany told the jury what happened and she would not lie. These arguments are similarly improper to those in *Stith* and require reversal as in *Stith*. In Thomas' case the prosecutor told the jury that there was no question of Thomas's guilt because Brittany told them the truth and would not lie; and the prosecutor argued, “[b]eyond a reasonable doubt is, do you have an abiding belief in these charges?” RP 210. The prosecutor implied that because the state brought the charges and Brittany would not and could not lie, there was no question of Thomas's guilty. These comments were equally as egregious as those in *Stith* and equally designed to invade the province of the jury and undermine the outcome of the proceedings.

Even though the defense in *Stith* objected many times to the improper arguments, and notwithstanding the presumption that juries follow the court's direction, it was impossible for the Court in *Stith* to find that the prosecutor's remarks did not result in prejudice. "Prosecutorial misconduct can be so prejudicial that it *cannot* be cured by objection and/or instruction." *Stith*, 71 Wn. App. at 23, citing, *State v. Guizzotti*, 60 Wn. App. 289, 296, 803 P.2d 808, *review denied*, 116 Wn.2d 1026, 812 P.2d 102 (1991).

In *Stith*, the prosecutor's comments "clearly reflect the prosecutor's personal assurances to the jury as to the defendant's guilt." . . . "Such comments strike at the very heart of a defendant's right to a fair trial before an impartial jury. Once made, such remarks cannot be cured." *Stith*, 71 Wn. App. at 23; *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), *aff'd*, 119 Wash.2d 711, 837 P.2d 599 (1992). (wherein the Supreme Court overturned a conviction for prosecutorial misconduct, the "remarks were flagrant, highly prejudicial and introduced 'facts' not in evidence.").

In Thomas's case as in *Stith*, the prosecutor vouched for the credibility of its star witness and for the system of charging defendants. The prosecutor told the jury that: there was no doubt about Thomas's guilt; Brittany did not and could not lie; Thomas had reason to lie and his testimony should be ignored because it was ridiculous; Brittany's mother was not trustworthy; and

“reasonable doubt is an abiding belief in the charges”. RP 201, 204, 205-207, 222, 223. This was flagrant and ill-intentioned misconduct which could not be cured with an instruction. In sum, the prosecutor told the jury that Thomas was guilty because Brittany said he was and the state so charged him, leaving the remainder of the trial, including Brittany’s mother and Thomas’s testimony to be unimportant and to be ignored; the trial no more than a formality.

Flemmig, and Stith, supra are on point and control the outcome of Thomas’s case. In *Flemmig*, as in Thomas’s case, the Court reversed the conviction where the prosecutor impermissibly informed the jury that it could only acquit if it believed the complaining witness or other state witnesses lied. The same occurred in Thomas’s case. *Flemmig*, 83 Wn. App at 213. In *Stith*, as in Thomas’s case, the prosecutor told the jury that the case would not have been brought before the jury if there was any doubt about the charges and the witness’ singular ability to tell the truth. The same occurred in Thomas’s case. “The mandatory remedy is a mistrial.” *Stith*, 71 Wn. App, at 23; *Flemmig*, 83 Wn. App. at 216.

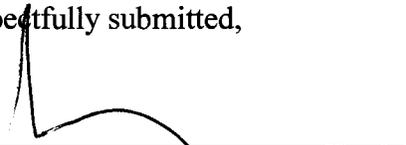
D. CONCLUSION

Thomas respectfully requests this Court reverse his convictions for attempted rape in the second degree and indecent liberties based on denial of

due process violations of his right to present a defense, to confrontation and due to prosecutorial misconduct.

DATED this 24th day of September 2009.

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Thomas Elliott DOC# 318672 S.C.C.C. 191 Constantine Way Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed, on September 24, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

BY
SERIES
COUNTY CLERK
SEP 24 2009
TACOMA WA 98402