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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON  
BY cm  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS LEE ELLIOTT, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kitty-Ann van Doorninck

No. 08-1-01996-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly exercised its discretion by excluding irrelevant opinion evidence from a witness.
2. Whether the excluded evidence constituted an improper opinion on the defendant's guilt.
3. Whether the excluded evidence impeached the credibility of the victim.
4. Whether the excluded evidence falls within the state of mind hearsay exception when there were no hearsay statements for the trial court to consider.
5. Whether the trial court properly applied the rape shield statute when it excluded evidence of the victim's prior sexual relationship.
6. Whether the defendant failed to show prosecutorial misconduct in closing argument where the prosecutor properly argued inferences from the evidence and correctly stated the law.

B. STATEMENT OF THE CASE.

1. Procedure

On April 24, 2008, the State charged Thomas Elliott, hereinafter defendant, with one count of rape in the second degree, and in the alternative indecent liberties by forcible compulsion, and one count of

indecent liberties by forcible compulsion. CP 1-2. On March 9, 2009, the case was assigned to the Honorable Kitty-Ann van Doorninck for trial.

RP 1. The jury found the defendant guilty of attempted rape in the second degree and indecent liberties by forcible compulsion. CP 60, 63. On May 1, 2009, the defendant was sentenced pursuant to RCW 9.94A.712 to a minimum prison term of 210 months, with a maximum term of life in prison. CP 119-121. The defendant timely filed a notice of appeal on May 7, 2009. CP 122.

## 2. Facts

B.W. met the defendant at Harbor Ridge Middle School when they were both in seventh grade. RP 46. B.W. and the defendant began dating during tenth grade, when both attended Peninsula High School. RP 47. They dated for approximately 18 months, with the relationship ending in June 2006. RP 47. B.W. decided to end the relationship. RP 63. The defendant and his mother were evicted from their home in January 2008, and both moved into B.W.'s residence. RP 46, 48. B.W. knew that the defendant still had romantic feelings for her. RP 62-63, 66.

At some point between February 14, 2008, and March 15, 2008, the defendant sexually assaulted B.W. CP 14-15. B.W. got out of her shower to discover the defendant looking at her through the door hole. RP 49, 66. At this time, the only other person at home was B.W.'s 4 year-old brother. RP 49, 52. B.W. put on a towel, yelled at the defendant, and then

went into her bedroom. RP 49-50, 67. The defendant entered B.W.'s bedroom about a minute later. RP 50, 68. B.W. asked him, "What the hell are you doing in here." RP 50. The defendant ripped B.W.'s towel off and pushed her onto the bed. RP 50, 68. The defendant asked B.W. if she wanted to have sex. RP 50, 68. B.W. unequivocally told the defendant no, and told him to get off her. RP 50, 68.

Despite her refusal, the defendant pinned B.W.'s arms with his right hand, put his knees between her legs, and touched her vagina. RP 50, 51. At trial, B.W. had tremendous difficulty describing this incident. RP 51-52. She was initially unable to describe the incident using anatomical terms. RP 51-52. B.W. finally described the defendant penetrating her vagina with his finger for approximately thirty seconds. RP 52. B.W. physically resisted the defendant but she was unable to stop him. RP 51. B.W. fought with the defendant until her four-year-old brother walked in the room to see what was happening. RP 52. The defendant then stopped. RP 53.

B.W. did not tell anybody what occurred until two weeks later when she told her mother, Kathleen Belsha. RP 53, 69. When B.W. told her mother about the incident, she did not include the penetration because she "didn't want her to know." RP 53. Belsha confronted the defendant and told both the defendant and B.W. they could not be in the house

unsupervised. RP 54, 83. The defendant did not deny the incident to Belsha. RP 83.

Shortly after this incident, a second assault occurred. CP 14-15. On April 21, 2008, the defendant and B.W. were sitting on separate couches, watching television in the family room. RP 55, 70. When B.W. got up and began walking to the kitchen, the defendant grabbed her and “dry-humped her.” RP 55. B.W. described the “dry-humping” as the defendant rubbing his semi-erect penis against her body. RP 55-57. B.W. asked the defendant to stop twice but he did not comply. RP 55, 75. The defendant continued rubbing his genitals against her for thirty seconds and did not stop until B.W. struck the defendant. RP 55, 57, 74-75.

B.W. eventually told her mother what happened. RP 58, 72. B.W. confronted the defendant in front of Belsha and he again did not deny what happened. RP 58, 84-85, 88. B.W. did not call the police at that time. RP 58

On April 23, 2008, B.W. decided to report the incidents after her boss encouraged her to do so. RP 58-59, 71. B.W. spoke with a police officer. RP 59. B.W. also disclosed to her mother that the defendant had penetrated her. RP 97.

Detective Mike Cabacungan interviewed the defendant on the same day. RP 102. The defendant was properly advised of his Miranda

rights<sup>1</sup> prior to giving both an oral and written statement. RP 103, 111. During the interview, the defendant admitted he pulled B.W.'s towel off, picked her up, and placed her on the bed. RP 107. The defendant told the detective B.W. continually stated "no," but that he was "really horny." RP 107, 110. The defendant described lying on top of B.W. and holding both of B.W.'s hands over her head with his left hand. RP 108. According to the defendant, after B.W.'s hands were immobilized, he "massaged her vagina." RP 108. He admitted B.W. physically resisted him throughout but she was unable to get him off. RP 108-109. The detective would later testify that the "defendant admitted that it was rape. He knew it was rape. . . And he admitted that it was wrong in his mind, but he was really horny." RP 109-10. During the interview, the defendant also described the second sexual assault. RP 110. The defendant stated he tried to "dry hump" B.W. RP 110.

The defendant provided a five-page handwritten statement to Detective Cabacungan. RP 111-112. In it he wrote:

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[She] kept on telling me that she didn't want to have sex and I kept on persisting that we should. With my hands all over her, I touched her breasts. One of my hands was holding on to her wrist so she could hardly move it to hit or push me off of her. My other hand was massaging her vagina in a way but I never penetrated her . . . she continued trying to get me off but it was unsuccessful for her.

RP 113, 124, 136. The defendant also described the second sexual assault in the handwritten statement. RP 137.

The defendant testified at the trial. RP 141. During direct examination, he admitted he held B.W. down and tried to kiss her "to get her consent to have sex." RP 146. The defendant admitted that B.W. told him "no" about five or six times. RP 146-47. The defendant also admitted to touching B.W.'s vagina with his finger. RP 147. The defendant stated that he stopped only because B.W.'s little brother entered the room. RP 147-48. The defendant was still in love with B.W. at the time he raped her. RP 149.

When describing the second sexual assault, the defendant admitted to "bumping" against B.W. in order to "remind her of our past relationship." RP 150. The defendant denied telling Detective Cabacungan that what he did to B.W. was rape, but admitted he told the detective that what he did to B.W. was wrong. RP 153.

During cross-examination, the defendant admitted he ripped the towel off B.W. RP 161. He again admitted B.W. repeatedly told him to stop, that B.W. did not want “to be naked on her bed with [the defendant] on top of her.” RP 163-64. Although he initially denied forcing B.W. onto the bed, the defendant admitted B.W. did not voluntarily get onto her bed nor did she want to be on her bed. RP 165-66. During cross-examination, the following exchange occurred:

- Q. And when you touched her vagina, she didn't have any panties on?
- A. No.
- Q. So it was a direct finger to the vagina contact?
- A. Yes.
- Q. So, now, when you touched her breasts, she didn't want you to touch her breasts?
- A. No.
- Q. She didn't want you to touch her vagina?
- A. No.
- Q. She was asking you to stop?
- A. Yes.
- Q. But even when she asked you to stop, you didn't stop?
- A. No.
- Q. When she asked you to stop, you still touched her breasts?
- A. Yes.
- Q. When she asked you to stop, you still touched her vagina?
- A. Yes.
- Q. And she was trying to get you off, wasn't she?
- A. Trying to, yes.
- Q. And you claim that you were trying to get her consent, even though this entire time she's saying “no?”
- A. Yes.
- Q. She's saying “No” the entire time?
- A. Yes.
- Q. And you said 2 to 4 minutes during your testimony, but at no point did she want you anywhere near her?

- A. I don't believe so. . . Now aside from telling you to stop, she was struggling with you, wasn't she?
- A. Can you define struggling?
- Q. Well, struggling in that she didn't want you on top of her, right?
- A. Yes.
- Q. But you were holding her down with your right hand?
- A. Yes.
- Q. And so you already know that she said "no"? You already know she doesn't want you on top of her, but you're on top of her so she's bucking with her torso and her upper legs, trying to get you off, right?
- A. Yes.
- Q. And even though she's bucking, trying to get you off while simultaneously telling you "no," she's not able to do that, is she?
- A. No.
- Q. Because you're holding her down?
- A. Yes.
- Q. And you're holding her down against her will?
- A. Yes.

RP 168-70. The defendant also admitted that B.W. never gave her consent for sexual activity at any time. RP 178.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE OPINION EVIDENCE FROM B.W.'S MOTHER THAT WAS IRRELEVANT.

Criminal defendants have a constitutional right to present evidence helpful to their theory of the case that is not otherwise inadmissible. *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987), *Washington v. Texas*, 388 U.S. 14, 18, 23, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992);

(1992); *In re Twining*, 77 Wn. App. 882, 893, 894 P.2d 1331 (1995). The right to present evidence is not absolute, however, and must yield to the legitimate interest in excluding inherently irrelevant and unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L.Ed.2d 361 (1996) (stating that the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L.Ed.2d 798 (1988))). Similarly, the Supreme Court has stated that a defendant's right to present relevant evidence may be limited by compelling government purposes. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898 (1975). Nevertheless, the trial court still has discretion to control the scope of

cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); *State v. Kilgore*, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. at 162. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Id.* at 162.

Under ER 401, evidence is relevant if it has "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." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

The defendant asserts that it was error for the trial court to exclude Belsha's opinion that B.W. and the defendant had a strange relationship for three reasons: (1) it would have established that the defendant would

not have penetrated B.W. without her consent, (2) it impugned B.W.'s credibility, and (3) it was "state of mind" evidence. The defendant also argues that Belsha's opinion is admissible pursuant to ER 702. As will be discussed below, the defendant cannot support these arguments.

The defendant maintains in this appeal that the trial court improperly excluded testimony regarding Belsha's opinion that the relationship between the defendant and B.W. was "weird." Brief of Appellant 7-8. Pre-trial, the State moved in limine to exclude Belsha's statement to Detective Cabacugnan that B.W. "sometimes led the defendant on because B.W. allegedly knew the defendant was still in love with her." CP 8-9, 27. When questioned by the trial court, the defendant argued that Belsha's opinion was relevant because it showed B.W.'s awareness that the defendant still loved her. RP 28. The trial court pointed out that if B.W. admits she was aware of the defendant's feelings toward her, then Belsha's opinion was unnecessary. RP 28-29. The trial court granted the motion in limine subject to an offer of proof at trial. RP 29.

During cross-examination, B.W. admitted that she was aware the defendant was still in love with her at the time of the assaults. RP 66. Belsha testified after B.W. Belsha testified that she shared a close relationship with the defendant. RP 80-81. During cross-examination,

Belsha testified that following the second sexual assault, she told the defendant “I can’t trust this anymore. One day you’re friends; the next day these things are happening. I don’t know what’s going on.” RP 88.

During an offer of proof hearing conducted at the defendant’s request, Belsha testified that the defendant and victim had a love/hate relationship. RP 88, 90. Belsha also opined that the defendant still loved B.W. at the time of the sexual assaults. RP 90-91. When describing their relationship, Belsha said,

So, you know, I don’t know how to describe that friendship. It’s very hard to describe because it was never like - - it was never a situation, ‘I can’t stand you; get away from me,’ and really that’s it. It was, ‘I can’t stand you,’ and then the next day it was, ‘Hey, you know, we’re going to – we’re going to the mall.’”

RP 91-92. Following the proffer, the defendant argued the evidence was relevant to his state of mind and to B.W.’s credibility. RP 93. In denying the defendant’s motion, the trial court ruled that it was “not relevant or helpful to the jury at all in terms of what I understand to be the issues. There is no issue about [B.W.] at least believing that he still had feelings for her . . .” RP 94.

- a. The evidence was properly excluded as irrelevant under ER 401.

There is no logical relationship between Belsha's opinion that B.W. led the defendant on and any fact to be established. The State's pre-trial motion was very narrow – to exclude Belsha's statement to Detective Cabacugnan. CP 8-9. Based on this motion, the defendant sought to introduce both the statement to the detective and Belsha's opinion on B.W. and the defendant's relationship. CP 27. The trial court properly granted the State's pre-trial motion to exclude the statement to the detective, and properly denied the defendant's motion to admit Belsha's opinion.

What the defendant sought to establish with this evidence is how B.W. felt about the defendant. Whether B.W. loved or hated the defendant at the time of the assaults is irrelevant if B.W. said "no" to the defendant's sexual advances. The fact that B.W. said "no" is not in dispute. The evidence presented at trial, *by both the State and the defendant*, is that B.W. told the defendant "no" multiple times and physically resisted him. As such, B.W.'s feelings or attitude toward the defendant bear no relevance to the elements of second-degree rape or indecent liberties. The trial court did not abuse its discretion because this evidence is not relevant.

- b. Belsha's opinion that the defendant would not have penetrated B.W. without her consent is an improper opinion on the defendant's guilt.

The defendant argues that he would never have penetrated B.W. without her consent, and that Belsha's opinion would have supported that argument. Brief of Appellant 8. This argument is without merit because such evidence amounts to an inadmissible opinion on the defendant's guilt and is contrary to the evidence and testimony presented at trial.

Generally, no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (in a rape case, expert testimony that the victim suffered from rape trauma syndrome constituted "in essence" a statement that the defendant was guilty where the defense was consent); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *City of Seattle v. Heatley*, 70 Wn. App. 573, 577-79, 854 P.2d 658 (1993) (officer could give his opinion that defendant was intoxicated because it was based on the defendant's physical characteristics); *State v. Barr*, 123 Wn. App. 373, 383, 98 P.3d 518 (2004) (improper for an officer to testify that the defendant's statements and body language during questioning indicated his guilt). Such opinions are unfairly prejudicial because they invade the fact finder's exclusive province. *Black*, 109 Wn.2d at 348, 745 P.2d 12; *see*

also *State v. Kirkman*, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007) (opinion on defendant's guilt violates article I, section 21 of the Washington Constitution). However, if the testimony does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony. See *State v. Farr-Lenzini*, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (improper opinion on defendant's guilt invades jury's province).

The defendant argues that Belsha's opinion supports that he would not have penetrated B.W. absent consent. This opinion is an improper opinion on the defendant's guilt. Although the defendant does not provide a logical explanation for how Belsha's opinion supports his claim that he would never have penetrated B.W. without her consent, the argument must nevertheless fail because he would be using the opinion to suggest his innocence. An opinion on the guilt or innocence of any criminal defendant is strictly prohibited, from either the State or the defendant. The State could never ask Belsha if she believed the defendant was guilty or innocent. Eliciting Belsha's opinion that B.W. and the defendant had the type of relationship wherein the defendant would not have penetrated B.W. without consent is a circuitous way of saying she thinks the defendant is not guilty. Such an opinion is wholly improper.

Additionally, the defendant fails to explain how Belsha's opinion accurately demonstrates the defendant's state of mind at the time of both attacks. The defendant is unable to cite to the record any examples showing Belsha accurately understood the defendant's state of mind. Belsha is not clairvoyant, nor does she possess any type of expertise that could enable her to render such an opinion. Even if she could, such opinion is still improper.

Furthermore, the defense at trial was not consent. It is undisputed that B.W. never consented to any sexual contact with the defendant. As discussed previously, the defendant admitted during the investigation and at trial that he wanted to have sex with BOW., and in the process of reaching that goal, forcibly held her down and ignored her pleas for him to stop. The defendant does not explain how Belsha's opinion on the dynamics of his relationship with B.W. supports his position. The jury was free to reject the defendant's "theory" that the defendant's actions were merely those of an individual attempting to gain consent from B.W. The verdict demonstrates that the jury rejected the defendant's claim that he was merely trying to gain B.W.'s consent. The defendant fails to demonstrate the logical nexus between Belsha's opinion as to whether the

defendant would penetrate B.W. without her consent is an improper opinion on the defendant's guilt and lacks foundation. As such, this argument fails.

- c. The evidence does not impeach B.W.'s credibility.

Belsha's opinion that the defendant and B.W. had a love/hate relationship does not impeach B.W.'s credibility, as B.W. never denied she and the defendant shared a love/hate relationship. Given the absence of this question, there was nothing to impeach. Even if the question had been asked and denied, it would still be subject to objections on grounds of relevance and that such evidence is not impeachment evidence because it would not qualify as a specific instance of conduct that attacks a witness' credibility. ER 401, 608. Tactical considerations suggest that accusing a rape victim of leading her attacker on is a poor strategy when a defendant has already confessed to law enforcement, in both an oral and written statement, to at the very least, attempted rape in the second degree. To suggest that B.W. somehow invited the sexual assault would undoubtedly inflame the jury.

- d. The excluded evidence does not qualify under the “state of mind” hearsay exception because it is not hearsay.

ER 803(a)(3) provides that a declarant’s statements indicating a “then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)” are not hearsay. For example, the Washington Supreme Court held that the trial court did not abuse its discretion in a prosecution for murder when it admitted statements from the victim's friends regarding the victim's impressions of defendant in murder trial, under state-of-mind exception to the hearsay rule, where defendant placed the issue of victim's state of mind into issue by suggesting that he had a relationship with victim and that sex between them was consensual. *State v. Athan*, 160 Wn.2d 354, 382-83, 158 P.3d 27 (2007) (emphasis added). A hearsay statement constituting a statement of the declarant's then existing state of mind must also be relevant to be admissible. *State v. Stubsjoen*, 48 Wn. App. 139, 146, 738 P.2d 306 (1987). Under ER 803(a)(3), a declarant's statements regarding his intentions are admissible to infer that he acted in accordance with those intentions, and that he acted with the person mentioned; although state of mind evidence used to prove subsequent conduct of the declarant and a third party is not foolproof, any

unreliability goes to the weight of the evidence rather than to its admissibility. *State v. Terrovona*, 105 Wn.2d 632, 637, 716 P.2d 295 (1986).

The trial court properly exercised its discretion when it excluded the nature of the relationship between B.W. and defendant. The defendant argues that Balsa's testimony that the defendant and victim shared a "love/hate relationship," and that they "knew each other very well . . . and spent a lot of time together" qualifies as hearsay statements under the "state of mind" hearsay exception.<sup>2</sup> Although trial counsel never specifically argued under ER 803(a)(3), and this evidence rule is being cited for the first time on appeal, trial counsel argued during pre-trial and the subsequent offer of proof that this evidence was relevant to the defendant's state of mind. However, the proffered evidence shows, at best, Belsha's state of mind, not statements illuminating the defendant's state of mind. As such, there are no statements for this court to consider, nor does the defendant identify any statements for this court to consider. As such, ER 803(a)(3) has no application here and this argument is without merit.

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<sup>2</sup> The defendant places this argument in section D of his brief. As this issue has nothing to do with the rape shield statute, the State includes it under section C.

- e. The defendant did not properly preserve the issue of whether Belsha's opinion is admissible pursuant to ER 702 because that argument was not raised at trial.

With limited exceptions, the rule in Washington is that “a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). A party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *State v. Davis*, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). If the issue is advanced, giving the trial court an opportunity to rule on relevant authority, it may not be necessary to object in order to preserve the issue for appeal. *State v. Sullivan*, 69 Wn. App. 167, 170, 847 P.2d 953 (1993). Issues affecting constitutional rights may be considered for the first time on appeal. *State v. Sauve*, 100 Wn.2d 84, 86-87, 666 P.2d 894 (1983); *State v. Regan* 97 Wn.2d 47, 50, 640 P.2d 725 (1982) (considering whether Washington's obscenity statute is overbroad is an issue of constitutional magnitude).

The defendant argues for the first time on appeal that Belsha's opinion is admissible under ER 702. This argument is without merit because it was not properly reserved. At no time during pre-trial or trial did the defendant move to admit Belsha's opinion pursuant to ER 702. Furthermore, exclusion of this testimony is not an issue affecting the defendant's constitutional rights. As has already been discussed, exclusion of testimony is reviewed by the courts for abuse of discretion. The trial court did not abuse its discretion when it excluded Belsha's opinion and any argument that her opinion was proper under ER 702 was not raised below and as such, should not be considered here.

- f. If the trial court's decision to exclude the evidence is an abuse of discretion, the error is at best, harmless error.

Harmless error is premised on the notion that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1838, 144 L.Ed.2d 35 (1999) (internal quotation omitted). "[A] defendant

is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 232 (1973) (internal quotation omitted). Providing for harmless error promotes public respect for the criminal process by ensuring a defendant gets a fair trial, but not requiring a trial that is error-free. *Rose*, 478 U.S. at 577. It cannot be disputed that errors at trial are inevitable. Thus, this doctrine permits the court to affirm a conviction when it can determine that the error did not contribute to the verdict. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accuser's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

Even if this Court were to find that it was an abuse of discretion to exclude Belsha's testimony, any error is at best, harmless error. The evidence of guilt in this case is overwhelming.

The jury was presented evidence that the defendant described what he did to B.W. as "rape" during his interview with Detective Cabacugnan. RP 109. The jury also heard the defendant testify that he (1) ripped the towel off B.W., (2) forced her onto the bed, (3) used force to physically hold her on the bed, (4) wanted to have sex with her, (5) she repeatedly told the defendant "no," (6) she physically resisted the defendant, and (7) the only reason the defendant stopped the sexual assault was because

B.W.'s younger brother entered the room. Taken together, these admissions amount to attempted second-degree rape, from the defendant himself.

The defendant also overlooks the fact that B.W. was cross-examined and admitted she knew the defendant was still in love with her. RP 62-63, 66. This exchange occurred after the trial court denied the defendant's pre-trial motion to introduce Belsha's opinion. RP 29, 66.

When considering the defendant's admissions during the investigation, the trial testimony of B.W., her mother, the detective, and the defendant's admissions during trial, the jury was only faced with one question in relation to count one – to convict on rape in the second degree, or attempted rape in the second degree. Although the jury would have been well within its right to convict the defendant as charged, it ultimately convicted the defendant on the charge that he admitted to being guilty of during the trial – attempted rape in the second degree. It is not logical to conclude that had the jury heard testimony from Belsha that B.W. and the defendant had a love/hate relationship, that the verdict would be different. For this reason, if this court finds it was an abuse of discretion to exclude Belsha's opinion, the error is harmless.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING AS IRRELEVANT THE PRIOR CONSENSUAL SEXUAL RELATIONSHIP BETWEEN THE DEFENDANT AND B.W.

Washington's Rape Shield Statute reads in relevant part:

. . . (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation from promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section. . . . (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 behavior . . . is not admissible if offered to attack the credibility of B.W. and is admissible on the issue of consent only . . .

RCW 9A.44.020. Evidence of a prior sexual relationship between B.W. and defendant is only admissible when the trial court determines that the probative value of such evidence outweighs the probability it will create a substantial danger of undue prejudice, either to B.W. or the defendant. *State v. Kalamrski*, 27 Wn. App. 787, 789, 620 P.2d 1017 (1980). In considering such evidence, "the remoteness in time of the prior act is one factor in determining its relevance." *Id.* The Rape Shield Statute is not intended to establish a blanket exclusion of evidence or prior sexual behavior where the evidence offered is highly relevant to other issues.

*State v. Summers*, 70 Wn. App. 424, 434, 853 P.2d 953 (1993); *State v. Cosden*, 18 Wn. App. 213, 218, 568 P.2d 802 (1977). A trial court's decision to exclude evidence under the rape shield statute is reviewed for abuse of discretion. *State v. Hudlow*, 99 Wn.2d 1, 17-18, 659 P.2d 514 (1983).

- a. The evidence addressed during pre-trial motions was properly excluded because the defense was not consent.

The State moved in limine, pursuant to the rape shield statute, to exclude evidence relating to the prior consensual sexual relationship between the defendant and B.W. while they were dating. CP 7-8. The prior sexual relationship ended 20 months prior to the two sexual assaults. RP 23-29. The defendant argued that the prior consensual sexual relationship was relevant to the defendant's state of mind even though the defense at trial was not "consent." CP 24-25. The trial court granted the State's motion after reviewing both the defendant's handwritten statement and the rape shield statute. RCW 9A.44.020. RP 27.

The trial court properly applied the rape shield statute when it excluded evidence of the prior sexual relationship. The prior sexual history between the defendant and B.W. in this case was irrelevant as to whether B.W. consented to the attack because the defense was not consent. The defendant's theory that he was attempting to gain B.W.'s

consent by forcibly holding her naked down on a bed and ignoring her physical and verbal resistance is different than a trial theory that B.W. consented to the sexual encounter. As discussed previously, no evidence was presented at trial that B.W. consented to the defendant's actions, and the jury was free to reject the theory that he was merely trying to gain B.W.'s consent with his actions.

- b. The trial court could not have abused its discretion in excluding evidence of B.W.'s provocative behavior because the defendant never sought to introduce such evidence.

The defendant argues that he "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." Brief of Appellant 13. The State's motion in limine dealt only with the prior sexual relationship. CP 6-7. That motion was properly granted by the trial court. Now, for the first time on appeal, the defendant argues that the trial court abused its discretion when it excluded evidence of B.W.'s provocative behavior toward him. Essentially, the defendant is using the narrow motion in limine regarding the prior sexual relationship and twisting it into a broader question never considered by the trial court.

The prior sexual relationship between B.W. and the defendant does not prove B.W. behaved provocatively. The defendant's one citation to the record in support of this argument does not support the proposition that he sought to admit this evidence because at no time did the defendant seek to introduce any evidence that B.W. behaved provocatively. The defendant is unable to cite to any point on the record supporting his argument that he sought to introduce evidence of B.W.'s "provocative behavior." The only issue before the trial court was whether evidence of the prior sexual relationship between B.W. and the defendant was relevant. The trial court properly applied the rape shield statute and excluded this evidence. The trial court was never asked to consider the question of B.W.'s alleged provocative behavior, and as such, this issue was not properly preserved for appeal and should be disregarded.

3. THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL CONDUCT DURING CLOSING ARGUMENT BECAUSE THE ARGUMENT DID NOT SHIFT THE BURDEN OF PROOF TO THE DEFENDANT AND DID NOT MISSTATE THE LAW.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d

570 (1995). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 W. App. 284, 293-294, 902 P.2d 673 (1995), *overruled in part by*, *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 972 (2002). Where there is no objection to the State's questioning, misconduct is reversible error only if it is material to the trial's outcome and could not have been remedied. *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996), citing *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994)(emphasis added). The misconduct must have been so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice. *Id.* In order to determine whether the misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect. *Id.*

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952). In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); *State v. Weber*,

99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities and will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

A prosecutor may not invite the jury to consider facts not in evidence or give a personal opinion on witness credibility. *State v. Smith*, 67 Wn.App. 838, 844, 841 P.2d 76 (1992); *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). Prejudicial error does not occur, however, unless it is clear and unmistakable in light of the total argument that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion. *State v. La Porte*, 58 Wn.2d 816, 821-22, 365 P.2d 24 (1961). A prosecutor is permitted to argue inferences from the record as to a witness's credibility. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

A prosecutor may commit misconduct in closing argument by suggesting that the defendant did not present witnesses, did not explain the

factual basis of the charges, or by stating that the jury should find the defendant guilty simply because he did not present evidence supporting his theory. *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009); *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996); *State v. Traweck*, 43 Wn. App. 99, 106-07, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). The mere mention, however, that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. *Jackson*, 150 Wn. App. 886; *See Fleming*, 83 Wn. App. at 215, 921 P.2d 1076; *Traweck*, 43 Wn. App. at 106-07, 715 P.2d 1148. It is not misconduct “for a prosecutor to argue that the evidence does not support the defense theory.” *State v. Russell*, 125 Wn.2d at 87; *Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990); *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

Additionally, because the prosecutor functions as an advocate, it is wholly appropriate to make a fair response to the arguments of defense counsel. *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir.1978).

- a. The State did not shift its burden of proof by arguing that B.W. was telling the truth at trial and that the defendant was minimizing his behavior.

There were no objections during either the States' closing argument or its rebuttal argument. The defendant argues that the State impermissibly bolstered the credibility of B.W. by arguing B.W. was telling the truth. Brief of Appellant. 21-22. The State is allowed to argue its theory of the case and any proper inferences from the testimony, including witness credibility. Here, the State appropriately argued that B.W. was telling the truth. RP 201, 202, 203, 205, 206. At no point in closing argument did the State personally vouch for B.W.'s credibility, nor does the defendant point to any point in the record where such impermissible vouching occurred. The State's argument that B.W. was telling the truth is a proper argument.

Moreover, the State's argument did not shift the burden of proof to the defendant. Though the defendant states that this argument shifted the burden of proof, there is no analysis on how it does so. Arguing that B.W. was telling the truth is not similar to the improper arguments made in *Fleming*. The State's argument was proper.

- b. The State's rebuttal argument was an appropriate response to trial counsel's closing argument and did not shift the burden of proof.

The defendant also assigns error to the State's rebuttal argument concerning B.W.'s credibility. Brief of Appellant 22. The cited arguments again address B.W.'s lack of motive to fabricate or lie about the incident. RP 224-25. Standing alone, this argument is appropriate as the State is entitled to argue its theory of the case. In rebuttal closing argument however, this position is further bolstered by the defendant highlighting B.W.'s different versions of events in his closing argument. RP 215-16, 218. The defendant went so far as to suggest that B.W.'s mother added elements to the narrative due to lack of police response. RP 216. The State is entitled to rebut arguments with evidence that was actually introduced at trial and did so without objection. The State is entitled to address defense theories that do not make sense because as stated above, the prosecutor functions as an advocate.

Moreover, these arguments did not shift the burden of proof to the defendant. At no point did the State argue that in order for the jury to acquit the defendant, the defense must establish that B.W. lied during her testimony.

Throughout its closing argument, the State argued that the defendant minimized his behavior when he denied penetrating B.W. RP 199, 203-206. The defendant denied what was arguably the most serious fact – penetration. The jury is the sole judge of credibility. WPIC 1.02. As such, the State is entitled to argue inferences from the evidence as to why the defendant would deny penetrating B.W. Given the inconsistencies existing between the defendant’s statements to law enforcement and the defendant’s trial testimony, the State is entitled to argue its theory on why such inconsistencies exist in the same way the defendant is entitled to argue that B.W. lacks credibility based on her differing statements.

c. The State did not misstate the law during its rebuttal argument.

During rebuttal argument the State argued,

Beyond a reasonable doubt is, do you have an abiding belief in the truth of these charges? And all that asks you is not ‘all’ doubt, not ‘beyond all doubt,’ not to an absolutely certainty, but has the State proved each and every element of the crimes charged? And the State has met its burden. The State embraced its burden, and we have met our burden of proving that the defendant is guilty both of Rape in the Second Degree and Indecent Liberties.

RP at 210. WPIC 4.01 is the instruction on reasonable doubt. It reads in relevant portion,

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*

WPIC 4.01 (emphasis added). The prosecutor's argument was a correct statement of the law.

D. CONCLUSION.

The trial court properly excluded irrelevant testimony from B.W.'s mother that would not have changed the verdict given the overwhelming evidence of the defendant's guilt. The closing arguments of the prosecutor in this case were appropriate arguments. The State respectfully requests that the defendant's convictions be affirmed.

DATED: January 8, 2010.

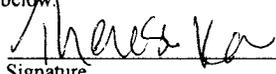
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-8-10   
Date Signature