

NO. 47432-8-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE DIESE,

Appellant.

---

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

The Honorable Suzan Clark, Judge

AMENDED BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. The trial court's refusal to instruct the jury on third degree rape as an inferior degree offense violated appellant Lawrence Diese's constitutional right to present his theory of the case.
2. The trial court violated the Privacy Act by admitting a CD that contained a recording of Mr. Diese's private conversation recorded by the complaining witness N.B. where Mr. Diese did not consent to the recording.
3. The trial court erred in admitting evidence of Mr. Diese's alleged prior sexual misconduct and two alleged incidents of physical misconduct under Evidence Rule 404(b).
4. The trial court's admission of propensity evidence under ER 404(b) violated appellant's right to a fair trial.
5. The trial court erred when it ruled that a series of text messages referring to sexual matters and depicting explicit nudity and sex acts sent by N.B. both before and after February 23, 2014—the date of the alleged offense—including a reference to her use of an insertable sexual device with another person, images of her vagina, and a false claim made to another individual that she was pregnant, were inadmissible under Washington's Rape Shield Statute, in violation of Mr. Diese's constitutional right to present a defense and cross-examine witnesses.
6. The trial court erred in denying the motion for a mistrial following introduction of evidence that Mr. Diese had been held in jail following

the alleged offense.

7. The trial court erred by permitting the State—over defense objection—to twice replay to the jury during deliberation the audio tape of the recording made by N.B. of the alleged offense.

8. Mr. Diese's right to a fair and impartial jury was violated when the court instructed the jury on a Friday to continue deliberations, and to return the following Tuesday, even though the jury notified the court on Friday at approximately 4:30 p.m. that they were deadlocked.

9. Mr. Diese was denied his constitutional right to effective representation when defense counsel failed to move for a mistrial or move for a new trial following a trial irregularity in which a juror revealed that he was unable to hear all of an audio recording.

10. Cumulative error deprived Mr. Diese of a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Mr. Diese was charged with second degree rape, and the defense proposed instructions on third degree rape. Where the defense presented affirmative evidence from which the jury could infer the intercourse was nonconsensual but without forcible compulsion, does the court's failure to instruct the jury on the lesser offense require reversal? Assignment of Error 1.

2. When parties to a conversation manifest a reasonable expectation of privacy in the content of the conversation and there is no evidence that any third parties could overhear the conversation, is such a

conversation private thereby making the nonconsensual recording of the conversation unlawful under the Privacy Act? Assignment of Error 2.

3. Did the trial court err by admitting evidence of Mr. Diese's alleged prior sexual misconduct and two instances of physical abuse misconduct was erroneously admitted under ER 404(b)? Assignments of Error 5 and 6.

4. Whether the trial court erred in admitting evidence that Mr. Diese committed sexual misconduct in 2008 and 2009 to show "lustful disposition" and "a common scheme or plan" by Mr. Diese to offend against N.B.? Assignments of Error 3 and 4.

5. Did the trial court violate the appellant's constitutional rights to present a defense and to confront the complaining witness when it excluded relevant evidence that supported the defense theory that N.B. fabricated the rape claim, where the excluded evidence included text messages indicating that she engaged in sexual activity including insertion of her fingers into her vagina and insertion of a sexual device into her vagina that could have resulted in a one millimeter hematoma that was found during an examination by a SANE nurse, that the texts following the incident were of a highly sexual nature and sent to several individuals and gave no indication that N.B. was horrified and traumatized by the alleged rape as she claimed, and showed that the complaining witness lied about being pregnant? Assignment of Error 5.

6. Whether the trial court erred in denying the defense motion for a mistrial where the prosecutor elicited from a witness testimony that the defendant

was in jail custody? Assignment of Error 6.

7. Did the trial court's decision to allow the State to replay to the jury twice during deliberation the audio recording made by N.B. of the alleged offense, and did replaying the CD violate Mr. Diese's right to due process and a fair trial by an impartial jury? Assignment of Error 7.

8. The Due Process Clause of the Fourteenth Amendment guarantees the right to trial by a fair and impartial jury, including the right to have each juror reach a verdict uninfluenced by judicial coercion. When, in response to the jury's note that it was deadlocked, the court determined that the jurors were deadlocked on Friday afternoon but subsequently ordered the jurors to return the following Tuesday morning day to continue deliberations, did the court impermissibly coerce the jurors into returning a guilty verdict shortly after resuming deliberations the following Tuesday? Assignment of Error 8.

9. A criminal defendant has the constitutional right to a fair and impartial jury and to be convicted only if that jury is unanimously convinced of guilt beyond a reasonable doubt. If a juror cannot hear the evidence, the juror cannot be presumed to be fair under the law. If a juror cannot hear evidence, he or she cannot be expected to meaningfully participate in deliberations, and therefore jury unanimity is impossible. Did Mr. Diese receive ineffective assistance of counsel where counsel failed to move for mistrial or move for a new trial where Juror No. 3 was unable to hear all of the recorded evidence played to the jury, necessitating that it be played two times to the jury during

deliberation? Assignment of Error 9.

10. Even where no single error standing alone may merit reversal, an appellate court may nonetheless find a defendant was denied a fair trial where cumulative errors created a reasonable probability that the jury's verdict would have been different had the errors not occurred. In light of the above errors, does the cumulative error doctrine require reversal of Mr. Diese's conviction? Assignment of Error 10.

**C. STATEMENT OF THE CASE**

**1. Procedural facts:**

Lawrence Diese was charged in Thurston County Superior Court by amended information with Rape in the Second Degree—Domestic Violence, alleging that Mr. Diese engaged in sexual intercourse by forcible compulsion with N.B. on or about February 23, 2014, and that she was a family or household member. RCW 9A.44.050(1)(a) and RCW 10.99.020. The State alleged as an aggravating factor that the offense occurred as part of an ongoing pattern of abuse. RCW 9.94A.535(3)(h). Clerk's Papers (CP) 106.

**a. RCW 9.73.030 suppression hearing**

Prior to trial, the trial court presided over a suppression hearing on November 6, 2014 pursuant to defense counsel's motion challenging the legality of a conversation with Mr. Diese that N.B. recorded using her cell

phone. 1Report of Proceedings<sup>1</sup> (RP) at 32-57. Specifically, Mr. Diese argued the recording was inadmissible because it recorded a private conversation without his consent in violation of the Privacy Act. 1RP at 37-44; CP 31. The State played the recording for the court, which was reported in relevant part as follows:

MR. DIESE: (inaudible). Drop them. Let's go. (Inaudible).

N.B.: I don't want to.

N.B.: Okay. Well, I'll leave because I ain't doing that. You're my mom's boyfriend. You should be doing that with Mom, not me.

MR. DIESE: I can do whatever I want how I want.

N.B.: Not with me.

MR. DIESE: So I got to tell your mom now (inaudible) and get you out of here?

N.B.: I guess, because I'm not (inaudible).

MR. DIESE: We shall see. You know you have nowhere to go. You have no one to help you.

N.B.: (Inaudible).

MR. DIESE: Say again? Stand up.

N.B.: No.

MR. DIESE: Come on. Get up. Let's go. Your pants are already halfway off. Let's go. Right now. Stand up. Come on. (Inaudible). Come on. (Inaudible). Come on. I'll hold your hand. Let's go. (Inaudible).

N.B.: (Inaudible).

MR. DIESE: I'm going to count to three. One, two.

Come on (Inaudible).

1RP at 34-36

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<sup>1</sup>The record of proceedings consists of ten volumes, which are designated as follows: 1RP March 7, 2014, March 20, 2014, April 8, 2014, April 15, 2014, June 2, 2014, July 30, 2014, October 7, 2014, November 6, 2014 (RCW 9.73.030 suppression hearing), December 4, 2014, January 8, 2015, January 23, 2015, February 3, 2015, and February 6, 2015; 2RP February 9, 2015, (jury trial); 3RP February 10, 2015, (CrR 3.5 suppression hearing, jury trial); 4RP February 10, 2015, (jury trial); 5RP February 11, 2015, (jury trial); 6RP February 11, 2015, (jury trial); 7RP February 12, 2015, (jury trial); 8RP February 12, 2015, (jury trial); 9RP February 13, 2015, (jury trial); February 17, 2015, (jury trial);

The State argued that the exception contained in RCW 9.73.030 is applicable and that the recording contains threats or unlawful demands that N.B. would be homeless if she did not comply with Mr. Diese's demand, and that N.B. had seen her mother physically thrown out of his house in 2009 and therefore was afraid that he would physically harm her. 1RP at 46-48. The State argued that the recording contained that phrase "[d]rop them," which referred to a demand by Mr. Diese that N.B. drop her pants and comply with his unstated demand for sex, and that if she did not comply, Mr. Diese's statements implied a threat that she would be homeless or that he would physically evict her, as she had witnessed him do in 2009. 1RP at 47-49.<sup>2</sup> After hearing argument, the trial court admitted the recording. 1RP at 55.

**b. ER 404(b) rulings regarding alleged sexual assaults of N.B. and two assaults, including a "fat lip."**

The State moved pretrial to admit allegations of sexual misconduct Mr. Diese allegedly committed in 2008 and 2009 as evidence of lustful disposition toward N.B. and as evidence of a common scheme or plan pursuant to ER 404(b). Specifically, the State alleged that in 2008 and 2009, when he allowed N.B.'s mother Juline Dual and N.B. to live with him, Mr. Diese sexually assaulted N.B. at his house. CP 61. The State alleged that Mr. Diese

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and April 3, 2015 (sentencing).

<sup>2</sup>Mr. Diese testified that N.B. was on a couch in the living room holding a cat, and that he wanted her to get up to do chores including cleaning the cat litter box, and he told her to drop the cat. 8RP at 824.

would wait for Ms. Dual to leave the house to be alone with N.B., and then once alone he would direct her to a private area of the house to assault her. The State alleged that he would suggest that she deserved to be raped because N.B. had gotten in trouble and that rapes were a form of punishment. CP at 62.

The State also alleged that Mr. Diese assaulted N.B. and Ms. Dual when he kicked both of them out of his house on May 21, 2009. CP 55, 57, 61-62. The State argued that the assaults were relevant to show that N.B. was placed in fear by Mr. Diese's recorded statements to her on February 23, 2014 in order to force her to comply with his intent to rape her. CP 63-64.

After hearing argument on January 15, 2015, the court permitted testimony regarding allegations of rapes by Mr. Diese in 2008 and 2009 to show lustful disposition and common plan or scheme. 2RP at 202. Following the court's ruling permitting testimony regarding several alleged prior rapes, the State asked for clarification of the court's ER 404(b) ruling regarding admissibility of an allegation that Mr. Diese threw N.B. against a wall, giving her a "fat lip." 1RP at 90-93. N.B. stated that Mr. Diese told her to go upstairs to her room and then he came up to her grabbed her and threw her against the wall, giving her a fat lip. The State's intent was to prove "forcible compulsion" by use of fear that he was "going to rape her again," and that it was relevant because it put N.B. in reasonable fear of further physical injury at the time of the alleged offense in 2014. 3RP at 198, 199. Defense counsel argued that there was no physical evidence of the alleged incident, no corroborating

testimony and it was based entirely on the allegation of N.B., and that it would be construed as propensity evidence. 3RP at 200.

Pursuant to the State's request for clarification of its ruling, the court decided that in addition to the alleged sexual assaults, evidence of N.B.'s fat lip was admissible under ER 404(b), and that the prejudicial effect could be controlled by use of a limiting instruction. 3RP at 204.

**c. N.B.'s "sexting" consisting of messages and photos.**

Defense counsel moved to introduce what it characterized as "character evidence" that N.B. described herself to others, including members of law enforcement, as a "pathological liar." 2RP at 102-03. The court denied the motion, stating that it was not reputation evidence and therefore not admissible under ER 404(a). 2RP at 106-07. Defense counsel also moved to introduce evidence a series of texts made by N.B. during the period before and after the alleged assault showing sexual behavior by N.B., which rebutted her assertion that she was not sexually active at the time of the incident and also showing possible causes for a one millimeter hematoma described by SANE nurse Chaleen Destephano. 6RP at 537. The relevant texts were described in defense counsel's motion as the following:

- A text dated January 11, from N.B. to "Adam" that states, "Got bad news, i am pregnet, which was determined to be a false claim. 2RP at 114-16, 119; CP 169.
- A text from N.B. on January 12 showing N.B., showing her

inserting her own figures into her vagina, a text from N.B. on January 13 showing a topless photo of N.B.,

- a photo sent on January 17 of N.B.'s vagina,
- a text sent January 19 to an individual named "Jordon" which states "it is ok me and my friend will have fun fucking one another with her two head bobb."<sup>3</sup> CP 169-70; 2RP at 112.

- a text by N.B. on January 21 to an individual named "Normen" that "we can make out and shit but I don't make the firsted move," in conjunction with a topless photo of herself,

- a text on February 16 is a topless photo of N.B. to "Chris" with a text stating "so horney",

- a text from N.B. to "Daniel" on February 18 that she likes him and she "always wanted to fuck u."

CP 170.

Texts obtained from N.B.'s cell phone showed that she continued "sexting" after the alleged rape on February 23, 2014. Mr. Diese sought admission of the following texts sent after the alleged offense:

- On February 25 she sent a topless photo to Kkharpole@outlook with a text message stating "Here u go baby."

- On February 25 she sent a text to "Colt" asking why he continued to talk to her, and he responded that she was "pretty full" of herself "for being the that wanted to be fuck buddys . . . ."

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<sup>3</sup>Defense counsel characterized the series of texts sent before and after the alleged rape as "sexting." 2RP at 112.

CP at 62.

The defense argued that the evidence was relevant because N.B. had a one millimeter hematoma in her vagina and that a witness would testify that a hematoma of that size would not be expected to be present four days after the alleged assault. 2RP at 112. Defense counsel also argued that the “sexting” was relevant because it showed that she was willing to lie about sexual matters—i.e. her claim to “Adam” that she was pregnant, and also relevant because some of the sexting occurred only days after her allegation of rape, which N.B. said was a “shocking, terrifying, horrific kind of experience.” 2RP at 112.

The court found that the defense’s proposed text regarding the “two headed” sex device “comes the closest” to admissibility because it would show penetration by an object that would cause the one millimeter hematoma, but nevertheless denied the motion for admission of the text messages and photos. 2RP at 124, 125.

**d. Motion for mistrial**

During Ms. Dual’s testimony regarding a letter and postcards that she received from Mr. Diese while he was in jail, she referred twice to receiving his correspondence from the jail. 4RP at 435. Defense counsel moved for mistrial, arguing that the prosecutor let the jury know that Mr. Diese was in jail when he sent the letter, which was contained in an envelope from “F Pod” in the jail. 4RP at 367. The court denied the motion for mistrial, and denied introduction

of the envelope which referred to the jail. 4RP at 373. The letter was redacted to remove mention of a “visiting list” at the jail. 4RP at 381.

**e. Jury inquiries, conviction, and sentencing:**

The matter came on for jury trial on February 10, 11, 12, 13, and 17, 2015, the Honorable Suzan L. Clark presiding.

At the close of evidence, the court denied defense counsel's requested instructions on third degree rape, finding that *State v. Jeremia*, 78 Wn.App. 746, 899 P.2d 16 (1995), review denied, 128 Wn.2d 1009 (1996) was persuasive authority to preclude the proposed instruction. 9RP at 897.

The jury began deliberation at 1:28 p.m. on Friday, February 13, 2014. Jurors submitted a written request at 1:50 p.m. asking if a transcript of the cell phone recording existed and if they could be provided with a copy. 9RP at 972; CP 212. After discussion with counsel, the judge responded in the negative to both parts of the question. 9RP at 976. The jury sent a second question at 2:10 p.m. asking to hear the recording again. 9RP at 976. The note stated:

We would like to hear the recording again. Jurors would like to be closer to the recording, we're missing words (jurors in the back row) & would like to be closer to the recording. Can we do this? Please?

CP 213. Without evaluation, the judge stated to counsel: “[s]o the case law says it’s admitted as evidence. I can’t give them unfettered access to them, but I can replay if for them.” 9RP at 976. Without defense objection, the court played the recording for the jury in the courtroom. 9RP at 982. The jury

submitted a third question at 4:15 p.m. which stated:

Does an undecided jury (divided, members on both sides who state they have made their decision & won't budge). Does a divided jury mean not guilty?

9RP at 982; CP 214. After discussion with counsel, the court responded "no."

9RP at 987.

After approximately thirty minutes the jury sent out another note asking "What are our options on a split jury?" 9RP at 987; CP 215. The jury was brought into the courtroom again at 4:54 p.m. and the court inquired if there was a reasonable probability of reaching a verdict. 9RP at 988. The presiding juror answered "I do not believe so." 9RP at 988. The jury was asked if they agreed or did not agree with that statement; two jurors agreed with the statement that additional time may be beneficial; ten agreed that there was not a reasonable probability of reaching a verdict. 9RP at 989.

Defense counsel requested a mistrial. 9RP at 989. The court denied the motion and instructed the jury to "continue to deliberate." 9RP at 990; CP 215.

At 6:00 p.m. the court received the following question:

Juror #3 states he has hearing issues and had difficulty hearing the audio. He states his hearing doesn't allow him to hear a good portion of the audio on the tape[.] Any possibility of providing him an amplified version or testing his ability to comprehend the audio?

9RP at 990; CP 216. After discussion with counsel, the jury was brought to the courtroom and the CD of the cell phone recording was played again, apparently via a courtroom amplification system. 9RP at 995. The jury deliberated until

6:56 p.m. and then was released and directed to return after President's Day on Tuesday, February 17, 2015. 9RP at 998. On February 17, the court reconvened and at 11:46 a.m. the jury announced that it had reached a verdict. Supp. CP 352, (Jury Trial Clerk's Minutes at 17).

The jury found Mr. Diese guilty of second degree rape as charged. 9RP at 998; CP 247. The jury found by special verdict that Mr. Diese and N.B. are members of the same family or household and that the offense was a part of an ongoing pattern of psychological, physical or sexual abuse manifested by multiple incidents of abuse over a prolonged period of time or that the conduct manifested deliberate cruelty or intimidation of the victim. 9RP at 999; CP 248, 249.

Mr. Diese had an offender score of "0" and a standard range of 78 to 102 months. 9RP at 1004. The State recommended an exceptional sentence of 129 months based on the finding of aggravating domestic violence offense. 9RP at 1003-04. Defense counsel requested a sentence of 78 months and an additional twelve months for the aggravating factor, for a total of 90 months. 9RP at 1004. The court accepted the State's recommendation and sentenced Mr. Diese to an exceptional sentence of 129 months. 9RP at 1014; CP 276.

Timely notice of appeal was filed on April 8, 2015. CP 207. This appeal follows.

## 2. Trial testimony:

Lawrence Diese met Juline Dual in 2008 when they were both working

at a Home Depot in Warrenton, Oregon. 4RP at 343. Ms. Dual and her daughter N.B. moved in with Mr. Diese in his house Vancouver, Washington in late 2008 or 2009, when N.B. was 14 years old. 4RP at 344, 345. Mr. Diese's daughter Kary Diese also lived in the house. 4RP at 344. The relationship was troubled and the couple argued frequently. 4RP at 346. The relationship seemingly came to an end when Mr. Diese, upset that Ms. Dual went through his phone messages, became angry with her. 4RP at 347. Ms. Dual stated that N.B. came downstairs and he "grabbed her by the scruff of the neck and threw her out the front door" and then returned and also physically threw Ms. Dual out the door. 4RP at 347. N.B. stated Mr. Diese and her mother had a fight and that she stepped between them and he grabbed the hood portion of N.B.'s jacket and threw her out of the house. 3RP at 231. Ms. Dual stated that she and N.B. stayed at her friend's house for a while and then moved to an apartment in Portland, Oregon, where they lived from 2009 through 2012. 3RP at 232, 4RP at 348, 5RP at 414. N.B. moved to Longview, Washington to live with her cousin and Ms. Dual moved to Notchlog Apartments in Vancouver. 5RP at 415. N.B. went to live with her father in California in 2012. Four to five months later Ms. Dual started to date Mr. Diese again. 3RP at 233, 234, 4RP at 350, 5RP at 415. She moved in with Mr. Diese in a house on Algona Drive in Vancouver, Washington in May, 2013. 4RP at 353.

N.B. returned to Washington from California. 5RP at 418. When N.B.

returned she was upset to discover that her mother had resumed her relationship with Mr. Diese. 3RP at 234, 4RP at 350. N.B. testified that she told her mother that he had raped her when they lived together, and stated that her mother did not believe her. 3RP at 235. In December, 2013, N.B. asked to move in with her mother and Mr. Diese. Ms. Dual stated that she asked Mr. Diese about her request, and he was “adamantly against it.” 4RP at 354. Ms. Dual stated she pushed to let N.B. stay with them and eventually Mr. Diese relinquished, but made it clear that it would be short term. N.B. moved into his duplex on Algona Drive with her mother and Mr. Diese in late December 2013 or early January in 2014. 3RP at 239, 4RP at 354.

Mr. Diese permitted N.B. to return to the house on the conditions that she pick up after herself and help with household chores, go to counseling for Attention Deficit Hyperactivity Disorder (ADHD), get a job, and when her mother was not home, she was not allowed to be in the house. 3RP at 238, 4RP at 354.

After she moved in with them, Mr. Diese made it clear that he did not want her there and told her that she needed to find a new place to live. 4RP at 356. On Sunday, February 23, 2014, Ms. Dual went horseback riding and received texts from Mr. Diese saying that he was “done” and that N.B. needed to leave. She also received texts from N.B. that Mr. Diese was going to dump her belongings at the house a friend. 4RP at 356, 358. Ms. Dual turned off her cell phone so that she could enjoy her horse ride. 4RP at 358. When Ms. Dual

returned she found N.B. outside the house waiting for her to come home. 4RP at 358. She stated that Mr. Diese talked with N.B. alone in the backyard, and when she returned she appeared to be upset. 4RP at 360. Ms. Dual went to a RedBox kiosk to rent movies and was gone for approximately thirty minutes. 4RP at 360, 361. When she returned, N.B. was in the living room watching television and Mr. Diese was in the kitchen doing dishes. 4RP at 361. She said that everyone went to bed that night and that Mr. Diese went to work the next day and that everything seemed normal. 4RP at 361.

Ms. Dual said that over the next few days she received texts from Mr. Diese saying that N.B. was not at home doing the chores that she agreed to do. 4RP at 362. Ms. Dual testified that when she returned from work on Wednesday, February 26, N.B. told her "I told you he was raping me." 4RP at 363. She said N.B. then played her recording that she made using her cell phone. 4RP at 363. N.B. had a counselling appointment already scheduled for the next morning at Columbia River Mental Health, so they went to the counselling appointment together. 4RP at 364. N.B. played the recording at her session and her counselor called the police. 4RP at 289, 290. After the appointment with the counsellor they were both taken to the Vancouver Police Department and then to the hospital. 4RP at 365.

N.B. testified that Mr. Diese sexually assaulted her when she and her mother lived with him in 2009. 2RP at 113. She stated that he would tell her to

take off her clothes while in her mother's bedroom and then would touch her breasts and digitally penetrate her vagina and then rape her and that this happened on many occasions. 3RP at 217, 218, 219. She stated that on one occasion she returned home and he told her that he could either call the police or go upstairs to her room. 3RP at 223. He told her to go to his room, and he came upstairs and spanked her with a spatula that he brought from the kitchen. She stated that he then threw her against the wall, giving her a fat lip. 3RP at 223, 224. She stated that she was afraid of him and that he was violent. 3RP at 225. She said that she did not tell her mother because she was afraid of him and she believed that if she did, she would talk to him and that the sexual abuse would get worse. 3RP at 225.

N.B stated that on February 23, 2014, she returned after riding horses and found her belongings were stacked outside. 3RP at 242. She packed her things and went to a park near the house and waited until her mother got off work. 3RP at 244. She stated that her mother texted her, telling her that she would have to move out of the house by March 25. 4RP at 323. She said that Mr. Diese told her to walk with him and that during the walk he said that in order for her to return she had to do everything he said without argument. 3RP at 245. When she and Mr. Diese returned to the house, Ms. Dual left to go to a Redbox kiosk to rent movies for the evening. 3RP at 246. N.B. testified that after her mother left she sat on the couch in the living room and turned on her phone and began recording because she was uncomfortable being alone in the

house with Mr. Diese. 3RP at 248. The State played the recording that N.B. made for the jury. 3RP at 270; Exhibit 1.

N.B. stated that Mr. Diese said that it was time for her to live up to her word, which she took to mean that she would do housework. 3RP at 248. She said that he grabbed her hand and that she was afraid that he would become violent and if she resisted. 3RP at 252, 253, 255. She got off the couch and he took her by one hand into the bathroom and then stood behind her and took her pants off. 3RP at 258, 259. She stated that he touched her vaginal area and then inserted his penis into her vagina. 3RP at 261.

N.B. testified that afterward she waited for her mother to return and was crying. 4RP at 281. She said that they ate dinner together and that she went to bed, but she did not tell her mother about the incident and said that she was afraid to call the police because “he was in the house.” 4RP at 282, 284.

On February 26, 2014—three days after the incident—she played the recording for her mother. 4RP at 286. She stated that she was no longer afraid because Mr. Diese was at work at the time. 4RP at 286. N.B. stayed in the house with her mother that night and then went to Columbia River Mental Health the following day and played the recording for her counselor, who called the police. 4RP at 289, 290.

Erik Anderson, a detective with the Vancouver Police Department, testified that he met with law enforcement at Columbia River Mental Health where he was dispatched pursuant to N.B.’s report of abuse on February 27,

2014. Prior to talking with her, he listened to the recording made by N.B. 7RP at 654. He stated that recognized one of the two voices in the recording as being N.B. 7RP at 657. After interviewing N.B. and Ms. Dual, he went to their house and collected articles of clothing that N.B. stated that she wore on February 23. 7RP at 663. That clothing was submitted the Washington State Patrol Crime Lab. 7RP at 664.

Detective Anderson provided N.B.'s cell phone to another officer, who made a recording of the original recording and transferred it to CD. 7RP at 691. The detective also looked at between five and ten text message threads on the phone around the date of the alleged offense, but did not view every message on the phone and did not view every message near the time period of February 23, 2014. 7RP at 720-21.

Detective Anderson testified that Mr. Diese was happy that the detective collected the DNA evidence and cooperated fully with the procedure. 8RP at 770.

Trevor Chowen of the Washington State Patrol Crime Lab examined articles of N.B.'s clothing for potential DNA evidence provided to him by Detective Anderson. 6RP at 579-81. He found no male DNA sample on the clothing and created no profile that could be compared to the sample taken from Mr. Diese. 6RP at 596-97, 602. A small amount of male DNA—the equivalent of two cells—was found in a rape kit obtained as part of the police investigation, but the amount was so small that a profile could not be

developed using the Y-STR amplification method. 6RP at 633-34, 635-36.

Chaleen Destephano, a sexual assault nurse examiner (SANE), evaluated N.B. on February 27, 2014. 6RP at 545. The result of the examination showed that she had a one millimeter hematoma near the entry to her vaginal opening. 6RP at 537.

Defense investigator Paul Prather interviewed N.B. on October 21, 2014, and testified that Ms. Dual stated that she did not receive any telephone calls when she was getting movies from Redbox. 8RP at 772. He stated that on the other hand, N.B. told him that she called her mother to tell her that she was alone with Mr. Diese that that Ms. Dual told her to stay in the house. 8RP at 773. He also testified that N.B. told him that she did not see Mr. Diese's penis and that she had her hands and arms over her face. 8RP at 773. He stated that when N.B. was questioned by the State's counsel, she provided contrary statements, telling them that she had seen his penis through her hands. 8RP at 774. Mr. Prather stated that Ms. Destephano stated it was unlikely that the hematoma would be present three days after the event. 8RP at 774.

Tyler Lobes lived with Mr. Diese, his daughter Kary Diese, Ms. Dual and N.B. in Vancouver, and stated that during that time there were frequent arguments between Ms. Dual and N.B., often over performing household chores. 7RP at 737. He stated that Ms. Dual would punish N.B., but that she would not follow through with performing her chores, which lead to more arguments and tension in the house. 7RP at 737. He stated that no one wanted

N.B. in the house because “she was always causing trouble.” 7RP at 737.

Kary Diese lived with N.B. and her mother and her father for approximately a year and a half, and stated that N.B. never alleged that her father raped N.B. in 2008 or 2009, as she later claimed. 8RP at 765.

Mr. Diese stated that after Ms. Dual’s house was burglarized she moved in with him in Vancouver. 8RP at 784. His daughter Kary, N.B. and her mother initially lived in the house, and later Tyler Lobes also moved in. 8RP at 785. The relationship was initially very good, however, after N.B. moved in he started to see constant conflict between N.B. and her mother and he started to isolate himself by staying in his room, working on cars, or working in the yard in order to avoid their arguments. 8RP at 788-89. He felt that was losing Ms. Dual because of N.B.’s behavior and also started to feel that Ms. Dual was going to choose N.B. and end her relationship with him. 8RP at 789, 790.

Their relationship ended in 2009, but resumed in 2012, and they moved into the duplex on Algona Drive in Vancouver in December, 2013. 8RP at 792, 793. He stated that after they resumed living with each other, Ms. Dual told him that N.B. had no place to go and asked if she could stay with them. 8RP at 794. He initially said no, but said that he loved Ms. Dual and did not want to lose her because of N.B., so he agreed to let N.B. stay in the house on a temporary basis. 8RP at 795. Despite the previous accusation that she made against him, he stated that he agreed but that he “did it against my better judgment.” 8RP at 795. Before she could move in, however, he wanted

certain conditions which included that she go back to counseling, that she get back on her medication, and that she help with household chores. 8RP at 795-96. He also stated that he refused to be in the house with her if no one else was there. 8RP at 796. Despite this, he still felt angry and resentful about her presence in the house. 8RP at 796. He stated that he would tell her to get the work done and sometimes yell at her and that because he has a military background he set "a tone" to get N.B. to live up her agreement to help around the house. 8RP at 799, 800. He said that she reacted by frequently crying and complaining that she had to do work around the house. 8RP at 800.

Mr. Diese acknowledged that he physically threw N.B. out of the house in 2009 by grabbing her by the back of her sweatshirt and that he grabbed Ms. Dual by the hair and threw her out. 8RP at 829. Mr. Diese stated that he learned in 2012 to 2013 from Ms. Dual that N.B. had accused him of raping her. 8RP at 829, 830. He said that N.B.'s accusation was designed to break up the relationship with her mother. 8RP at 793. He stated that he was horrified at the amount of "hate and how much she doesn't want me to be with her mom." 8RP at 793.

Mr. Diese denied that he raped N.B. 8RP at 827. He explained that he usually worked from 6 p.m. to 2 a.m. Monday through Friday. 8RP at 796. He stated that on February 23, 2014, he woke up after working his swing shift, came out of the room and saw once again that nothing had been done around the house. He said "I had enough. I couldn't do it anymore . . ." 8RP at 801.

He stated that he gathered N.B.'s things and found out where she was in order to drop them off, and that he was going to kick her out of the house. 8RP at 801. Mr. Diese took her belongings and "dumped the items off." 8RP at 803.

He had kicked her out of the house at least two other times. 8RP at 801. N.B. and Ms. Dual returned together at 3:00 or 4:00 p.m. and he told them that he had kicked N.B. out because she was not upholding her agreement. 8RP at 803. He stated that Ms. Dual yelled at N.B. and told her that she had one last chance and if she did not do her chores she would be out of the house by March 25. 8RP at 804. He said the Ms. Dual wanted him to have a private conversation with N.B. in order work things out between the two of them, so they went to the backyard to talk. 8RP at 804-05. He stated that the conversation with N.B. lasted three minutes. 8RP at 805. He stated that he was willing to try to work things out with N.B. because Ms. Dual said that she would leave if N.B. could not stay and that she was actually in the process of packing her things to leave. 8RP at 806. He and Ms. Dual went for a walk and she agreed to stay. 8RP at 806. After they returned from the walk, Ms. Dual went to a Redbox kiosk to rent two movies so they could have dinner, watch movies and have a Sunday 'family night' together. 8RP at 807. Ms. Dual went to the kiosk by herself and told Mr. Diese that she wanted some time alone. 8RP at 807.

Before Ms. Dual left, she told N.B. to get started on doing her chores. 8RP at 808. Mr. Diese then started laundry and then started to clean the

kitchen in order to get ready to make dinner. 8RP at 808. N.B. was in the living room lying on the couch. 8RP at 809. Her pants were low and exposing her rear, so he told her to pull them up, and then went to his bedroom to fold clothes. 8RP at 809. He came out of the bedroom to see if she was doing her household chores. 8RP at 809. Mr. Diese did not know that he was being recorded by N.B. on her phone. 8RP at 800.

N.B. still had not started doing her chores, so he said "let's see if you're a person of your word." 8RP at 810. He explained at trial that he meant for her to get up off the couch and starting doing her chores as she had agreed to do in the backyard and when her mother had told her before she left. 8RP at 810. He left the room to take laundry from the washing machine and N.B. went to the bathroom. 8RP at 810. He said that when he said "drop them," he was referring to a cat that N.B. had on her lap when she was on the couch. 8RP at 824. He noticed that her pants were hanging down again when she got up to go to the bathroom, and he told her "your pants are halfway down." 8RP at 810, 857. He stated that earlier he had told her to pull them up because they were sagging. 8RP at 857. He stated that he was frustrated that she still was not doing what she was supposed to do and went into what he called his "military tone" and started to count "one, two, three" to get her to do her chores. He said during their conversation she was in the living room or bathroom and the television set was on, and that he was moving between the kitchen, hallway and bedroom. 8RP at 811, 845, 849, 850. He stated that he did not go into the

bathroom with N.B., as she claimed. 8RP at 842, 843. He stated that she went to the bathroom by herself, apparently to clean the litter box, which was one of her chores. 8RP at 843, 852. He testified that N.B. cried frequently and would start crying when upset or when she did not want to do something, and that she was crying on the recording because she did not want to do the chores she had just said she would do in order to remain in the house. 8RP at 812.

Mr. Diese stated that he believed that N.B. made sexually provocative statements to him in the past because she thought he would tell Ms. Dual, which would lead to breaking them up, which he stated was N.B.'s goal. 8RP at 821. He said N.B. was jealous of her mother because she was provided for by Mr. Diese. 8RP at 821.

**D. ARGUMENT**

**1. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON THIRD DEGREE RAPE PRECLUDED MR. DIESE FROM PRESENTING A FULL DEFENSE**

**a. Standard of review**

The appellate court reviews a trial court's refusal to give an instruction based on the facts of the case for abuse of discretion. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). If the evidence would permit a jury to find the defendant guilty of the lesser offense and acquit him of the greater, the court abuses its discretion in refusing to instruct on the lesser offense. *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

**b. In order to instruct the jury on the offense of third degree rape, the State was required to show that the evidence supports an inference that Mr. Diese committed third degree rape instead of second degree rape.**

An accused is assured the right to fairly defend against the State's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The right to present a complete defense is protected by the Sixth and Fourteenth Amendments to the United States Constitution. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). These constitutional protections include the right to present one's own version of the facts and to argue one's theory of the case. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The State constitution protects these rights as well. Wash. Const. art. I, § 22; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

Here, the State charged Mr. Diese with the charge of rape in the second degree, alleging that he committed the offense by use of forcible compulsion. RCW 9A.44.050(1)(a). CP 106. After the close of evidence, defense moved for an additional jury instruction on rape in the third degree. 9RP at 895. In cases in which the State charges a defendant with a crime that is divided into degrees, the jury may find the defendant not guilty of the degree charged and guilty of any lesser degree of the offense. RCW 10.61.003. A defendant is entitled to have the jury instructed on an inferior degree of the offense charged if the evidence gives rise to an inference that the defendant committed the

lesser offense instead of the greater. *State v. Ieremia*, 78 Wn. App. 746, 754-55, 899 P.2d 16 (1995), review denied, 28 Wn.2d 1009 (1996). Rape in the third degree is not a lesser included offense of rape in the second degree because each element of third degree rape is not necessarily an element of second degree rape. *Ieremia*, 78 Wn. App. at 752. Third degree rape requires that the alleged victim not be married to the perpetrator and that the alleged victim clearly express a lack of consent by words or conduct. *Id.*

These elements are not required in order to prove a charge of second degree rape. In this case, to succeed on a charge of second degree rape, the State was required to prove that the sexual intercourse occurred by use of forcible compulsion. Under RCW 9A.44.010(6), forcible compulsion means:

physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

Defense counsel requested jury instructions on third degree rape. CP 132, 133. That offense requires proof of sexual intercourse with someone other than the accused's spouse, despite clearly expressed lack of consent. RCW 9A.44.060(1)(a). Third degree rape does not require proof of forcible compulsion. *Id.* Because there was affirmative evidence from which the jury could find Mr. Diese committed only third degree rape, he was entitled to have the jury instructed on that offense. See *Ieremia*, 78 Wn. App. at 754-55.

When determining whether the evidence at trial warranted instructions on a

lesser offense, the appellate court must view the evidence in the light most favorable to the party requesting the instructions. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The trial court based its decision to deny the proposed instruction on *State v. Ieremia*. 9RP at 897. In *Ieremia*, the defendant testified that he approached the victim and she agreed to go for a ride with him. He testified that they drove to a nearby park and engaged in consensual intercourse. He said he understood her to consent because she never cried out or said no, and she removed her own pants. They held hands, walked to a nearby park bench, and he asked her to have dinner with him. According to Ieremia, she agreed and he then drove her home. The victim testified that he approached her, grabbed her wrists, forced her into his car, took her to another nearby park, and raped her despite her struggles and attempts to scream. He then dropped her off near her home. *Ieremia*, 78 Wn. App. at 749, 750. Ieremia argued on appeal that the evidence supported mere non-consent because of the absence of injury. Division One upheld the trial court's denial of a lesser degree instruction because there was no affirmative evidence that the intercourse was unforced but still nonconsensual. *Ieremia*, 78 Wn. App. at 756.

The facts of this case are different from *Ieremia*. Here, N.B. testified that Mr. Diese told her go upstairs and implied that she would be kicked out of the house, but did not testify that Mr. Diese threatened to harm her and did not testify that she screamed, hit, or scratched Mr. Diese, nor did she say that he

held her down. 3RP at 248-259. She stated that he unbuttoned her pants and pulled them down, but she did not say that he used force to control her. 3RP at 260-62. Viewing the evidence in the light most favorable to the defense, the jury could find that there was no forcible compulsion, in that N.B. did not offer any resistance which was overcome by physical force, and there was no threat, express or implied, which placed her in fear other than a threat that she would be kicked out of the house. See RCW 9A.44.010(6).

The fact that N.B. testified she was afraid of him because of the assaults from 2009 when Mr. Diese kicked her and her mother out his house does not preclude an instruction on third degree rape. The question for the court in deciding whether to instruct on the lesser offense was not whether there was sufficient evidence of forcible compulsion. Rather, the question was whether there was evidence from which the jury could infer Mr. Diese was guilty of only third degree rape. See *Warden*, 133 Wn.2d at 563 (each side is entitled to instructions supporting theory of case where there is evidence to support that theory). Because the jury could infer from the evidence that Mr. Diese had sexual intercourse with N.B. without forcible compulsion but over her clearly expressed lack of consent, Mr. Diese was entitled to have the jury instructed on third degree rape. See RCW 9A.44.060(1)(a).

The trial court may not instruct the jury on third degree rape where the State's evidence supports only second degree rape, and the defense evidence supports only that no rape occurred. *State v. Wright*, 152 Wn.App. 64, 214 P.3d

968, 972-73 (2009). In *Wright*, two defendants were charged with second degree rape of the same victim. The victim testified she was raped by more than one person as she was held down on the bed, her clothing was removed, and she struggled to get free. One defendant testified he did not have sexual intercourse with the victim, while the other testified they had consensual sex. *Wright*, 214 P.3d at 970. This Court held that "the trial court erred by giving the third degree instruction because neither [the victim's] testimony nor the defendants' evidence supported an unforced, nonconsensual rape." *Wright*, 214 P.3d at 972. See also, *State v. Corey*, 81 Wn.App. 272, 325 P.3d 250 (2014). In support of its holding, this Court cited to *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995). In *Charles*, the victim testified that the defendant forced her to the ground, she struggled, and the defendant forced her to have sex. The defendant testified that they had consensual sex. If the jury believed the victim, the defendant was guilty of second degree rape. If it believed the defendant, he was not guilty of any rape. *Charles*, 126 Wn.2d at 355-56. The Supreme Court held that the trial court properly refused to instruct the jury on third degree rape because there was no affirmative evidence that the sexual intercourse was unforced but nonconsensual. *Charles*, 126 Wn.2d at 356.

Here, contrary to both *Wright* and *Charles*, there was affirmative evidence of nonconsensual but unforced intercourse. Mr. Diese denied that he had sex with N.B., whether consensual or nonconsensual. However, defense counsel also developed evidence through cross-examination of N.B. that

tended to show the absence of forcible compulsion, even if there was no consent. 3RP at 260-62. This affirmative evidence that the sexual intercourse was nonconsensual but without forcible compulsion required the court to give the instructions on third degree rape requested by the defense.

There was evidence to support both a defense of general denial and a defense that the sexual intercourse was nonconsensual but without forcible compulsion. Because there was evidence in the record to support an inference that Mr. Diese was guilty of only third degree rape, it was error for the court to refuse instructions on that offense.

Had the third degree rape instructions been given, the jury could have reasonably inferred from all the evidence that Mr. Diese was guilty of only the lesser offense. The court's error precluded the defense from presenting its theory of the case, and reversal is required. See *Warden*, 133 Wn.2d at 564.

2. **THE RECORDING OF MR. DIESE'S PRIVATE CONVERSATION BY N.B. VIOLATED HIS RIGHT TO PRIVACY UNDER THE PRIVACY ACT**

- a. **With some limited exceptions in Washington, private conversations cannot be recorded without the consent of all participants.**

Generally, it is unlawful to record any private conversation without the consent of all parties involved. When N.B. was on the couch she surreptitiously recorded their conversation using her cell phone. 3RP at 248. Mr. Diese did not consent to this recording. His lack of consent rendered the recording

inadmissible at trial. Because the admission of the recording into evidence was prejudicial error, this Court must reverse and remand for a new trial.

In Washington, generally speaking, private conversations cannot be lawfully recorded unless all of the participants in the conversation consent to the recording. "Washington's privacy act broadly protects individuals' privacy rights." *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183(2014). Indeed, "[i]t is one of the most restrictive electronic surveillance laws ever promulgated." *Id.*

The Privacy Act makes it unlawful

for any individual, partnership, corporation, [or] association . to intercept, or record any . . . (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1).

An exception permits the admission of recordings made of threatening communications, where one party consents to the recording. RCW 9.73.030(2)(b). The exception covers communications which "convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands..." RCW 9.73.030(2)(b). Such calls may be recorded with the consent of one party to the conversation. RCW 9.73.030(2). "Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any . . . criminal case in all courts of general . . . jurisdiction in this state" unless the crime jeopardizes national

security. RCW 9.73.050.

Washington courts consider four prongs of analysis to determine whether a violation of the privacy act has occurred: "There must have been (1) a private communication transmitted by a device, which was (2) intercepted or recorded by use of (3) a device designed to record and/or transmit (4) without the consent of all parties to the private communication." *Roden*, 179 Wn.2d at 899 (citing *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004)). In light of these factors, the record before this court reveals a violation of the privacy act necessitating reversal.

**b. The conversation with N.B. was intended to be private.**

While the term "private" is not defined in the Privacy Act, the Supreme Court has adopted the dictionary definition: "'belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.'" Webster's Third New International Dictionary (1969), *quoted in State v. Townsend*, 147 Wn.2d. 666, 673, 57 P.3d 255 (2002). As such, a communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is objectively reasonable. *Townsend*, 147 Wn.2d at 673. Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it is a question of law. *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996). To determine

whether a conversation is private, courts "consider the subjective intention of the parties and may also consider other factors that bear on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication, the location of the communication, and the presence of potential third parties." *Roden*, 179 Wn.2d at 900. See also, *Townsend*, 147 Wn.2d at 673. Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it is a question of law. *State v. Clark*, 129 Wn.2d at 225.

Here, Mr. Diese's conversation with N.B. was private. The conversation with N.B. took place after she had been kicked out of the house for not adhering to a series of conditions imposed by Mr. Diese and N.B.'s mother in order for her to be allowed to live there. After talking with her in the backyard, Mr. Diese agreed that N.B. could continue to live there. Ms. Dual wanted a reconciliation of the family and left to get movies from Redbox so they could talk. Mr. Diese talked to N.B. about doing her chores and when she continued to mangle, he relied on his military background, which he had used in the past, and counted to three to show that he was serious about her cleaning the cat box.

The conversation took place in Mr. Diese's private residence away from the presence of potential third parties. 9RP 47, 53, 84. Ms. Dual had left; there is no indication in the record that other persons were present or could have overheard the conversation. Moreover, the fact that both parties expected their conversation to be private is shown by the fact that N.B. was behaving

informally; she was relaxed and was on the couch with her phone, and her pants were partially down. This is not behavior that would be expected if both parties did not consider themselves to be in a private setting. Even if it could be argued that Ms. Dual could have returned from her errand during the conversation, the mere possibility of intrusion will not strip citizens of their privacy rights." *Roden*, 179 Wn.2d at 901; accord *Townsend*, 147 Wn.2d at 674; *State v. Faford*, 128 Wn.P.2d 476, 485, 910 P.2d 447 (1996). Based on Mr. Diese's subjective intention and location of the communication, Mr. Diese's conversation was unquestionably a private one.

**c. Mr. Diese's conversation was recorded by a device designed to perform a variety of functions including the ability to make an audio recording**

Turning to the second and third prongs of analysis, the cell phone used to record Mr. Diese's conversation is *a priori*, a device designed to record. The language of RCW 9.73.030(1) is broad and refers to devices "electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated . . . ." See *Townsend*, 147 Wn.2d at 674 (noting broad statutory language regarding such devices). The cellphone did record the conversation and is clearly a qualifying device under RCW 9.73.030.

**d. Mr. Diese did not consent to the recording**

It is uncontested that Mr. Diese did not know he was being recorded and could not have consented to the recording. The recording of the conversation without consent violated RCW 9.73.030(1). This violation

rendered the recording inadmissible under RCW 9.73.050. The trial court erred in concluding otherwise.

RCW 9.73.030(1) unambiguously states that it is unlawful to record a private conversation unless all parties consent to the recording. This Court should give effect to the unambiguous language of RCW 9.73.030(1) by holding that the recording of the conversation without consent was unlawful .

The trial court based its ruling on its finding that Mr. Diese's conversation contained veiled threats and were therefore admissible under RCW 9.73.030(2)(b). The trial court was mistaken. RCW 9.73.030(2)(b) allows conversations "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands" to "be recorded with the consent of one party to the conversation." Following the argument on the admissibility of the recorded conversation, the trial court found this exception persuasive in its decision to allow the recording into evidence. 1RP at 34-35. In its argument, the State relied extensively on the facts and holding of *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983). But *Caliguri* is distinguishable.

In *Caliguri*, the facts involved a conspiracy to commit first degree murder and first degree arson. The defendant took part in a plan to burn down a tavern. A federal agent taped conversations with Caliguri and others involved without their consent. During the recorded conversations, there was recognition by Caliguri that the tavern janitor was going to die in the fire and that others might be injured as well. *Caliguri*, 99 Wn.2d at 504. As the

conspiracy and underlying request was to commit murder, a crime involving bodily harm, any conversation "convey[ing]" the request is squarely within the scope of RCW 9.73.030(2)(b). *Caliguri*, 99 Wn.2d at 507.

In this case however, what was actually captured on the recording is not in any sense as stark as *Caliguri's* assurance that the janitor would die and others might die as well. Here, the court relied on the phrase "I'll leave because I ain't doing that." and "[y]ou're my mom's boyfriend. You should be doing that with mom, not me," and "[c]ome on, stand up, let's go, your pants are already halfway off." 1RP at 55. The court found that the statements taken as a whole, along with the fact that N.B. was crying on the recording, constitute extortion and a threat to make her homeless if she did not comply. 1RP at 55. To the contrary, Mr. Diese testified that he was angry with N.B. because he and her mother had just reached an agreement to let her return to the house under the condition that she performed her chores and within minutes of being allowed to return, she was refusing to do her chores. Mr. Diese stated that he was frustrated and resorted to his military training by counting to three. He stated that the reference to her pants are that she was on the couch with loose pants which were partially exposing her rear. He stated that this was something he had had to admonish her about in the past and he was upset by her behavior. He also stated that N.B. frequently cried, particularly when she did not want to do her housework, which explained her crying on the recording. He stated that the phrase "drop them" referred to cat

she was holding after she got up off the couch. 8RP at 824.

Moreover, threatening N.B. with eviction if she did not comply with her agreement to do chores cannot be construed as a threat of “bodily harm.” Eviction may mean inconvenience and financial hardship to N.B. while she secured a new place to live, but does not convey the “bodily harm” that is required by the statute.

Without proof that the recording captured a threat, the court erred in ruling that the recording was admissible. Mr. Diese did not know that he was being recorded and did not consent to the recording. Because he did not consent, the exception in RCW 9.73.030(2) does not apply. The recording of his private conversation with N.B. remains unlawful under RCW 9.73.030(1) and is therefore inadmissible under RCW 9.73.050. It was error for the trial court to admit the recorded conversation.

When a trial court errs in admitting evidence, reversal is required where, within reasonable probabilities, the admission of the evidence materially affected the outcome of trial. *State v. Ashurst*, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986).

In this case, it is probable that the admission of the recording affected the jury's verdict.

Jurors heard Mr. Diese's private conversation with N.B., which she asserted was a recording of the alleged rape. Needless to say, the recording—in conjunction with N.B.'s interpretation of what Mr. Diese's statements meant—was extremely prejudicial to Mr. Diese. The erroneous admission of this

extremely damaging evidence certainly affected the outcome of trial. The State seized on the opportunity to use the surreptitiously created recording, playing the recording for jurors during the trial and again during closing argument. 9RP at 932. The State's heavy focus on the recording throughout trial demonstrates that it strongly believed that it would materially affect the trial's outcome. Because it is almost certain that the admission of the recording affected the jury's verdict, this Court must reverse and remand for a new trial that excludes the recording.

3. THE TRIAL COURT ERRED BY ADMITTING IMPROPER PROPENSITY EVIDENCE UNDER ER 404(b)

Over defense counsel's objection, the court pursuant to ER 404(b), admitted evidence that Mr. Diese committed sexual misconduct against N.B. in 2008 and 2009 and that he assaulted her. Evidence of the alleged rapes were admitted to show "lustful disposition" toward N.B. and a "common scheme or plan." The evidence of assault was admitted to show forcible compulsion. CP 63.

The court admitted evidence that on more than five instances Mr. Diese touched her breasts and vaginal area, digitally penetrated her, and put his penis in her vagina. This occurred when she lived with Ms. Dual and Mr. Diese in his house in 2009 when she was approximately nine years old. 3RP at 215-18. N.B. also testified that Mr. Diese gave her a fat lip by throwing her against a

wall. 3RP at 223-24. She stated that this occurred when he returned home had he told her that she could either call the police or "go to the bedroom." 3RP at 223. She stated that she said that he could call the police because "I wasn't going to let him continue doing what he was doing to me." 3RP at 223. She said that he spanked her with a spatula and then got through her against a wall, and she received a fat lip. 3RP at 224.

Regarding the rapes, the court admitted this evidence inter alia, on grounds that it showed "lustful disposition" and "a common scheme or plan by the defendant to molest young females." CP 230 (Instruction No. 11). But this is merely another way of saying propensity to commit the crime charged. Propensity evidence is not admissible under ER 404(b). The court therefore erred in admitting N.B.'s allegations from 2009.

It is well settled the accused must be tried only for those offenses actually charged. *State v. Aho*, 137 Wn.2d 736, 744, 975 P.2d 512 (1999). Consistent with this rule, evidence of other bad acts must be excluded unless relevant to a material issue and more probative than prejudicial. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008); *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). ER 404(b) prohibits admission of prior acts evidence to prove the defendant's propensity to commit the charged offense. *State v. Mendoza*, 139 Wn.App. 693, 713, 162 P.3d 439 (2007), aff'd, 165 Wn.2d 913, 205 P.3d 113 (2009). In other words, evidence of other misconduct may not be admitted merely to show the accused is a criminal type.

*State v. Brown*, 132 Wn.2d 529, 570, 940 P. 2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). It is presumed, therefore, that evidence of prior bad acts is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Because of the high potential for risk of prejudice, the State must meet a substantial burden before evidence is admitted to show a common scheme or plan. *DeVincentis*, 50 Wn.2d at 17. The court must (1) find by a preponderance of the evidence the accused committed the prior acts; (2) identify the purpose for which the evidence is meant to be introduced; (3) decide whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 852, 889 P. 2d 487 (1995). See also, *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

The court must be particularly careful when completing steps (3) and (4) in a sex case, because the prejudice potential of prior [sexual] acts is at its highest. *Saltarelli*, 98 Wn.2d at 363. In close cases, the balance must be tipped in favor of the accused. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); *Wilson*, 144 Wn. App. at 177.

This Court reviews the trial court's interpretation of an evidentiary rule de novo. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). If the court correctly interprets the rule, its decision to admit or exclude the evidence is reviewed for an abuse of discretion. *DeVincentis*, 150 Wn.2d at 17.

Our Supreme Court "has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female." *State v. Ray*, 116 Wn.2d 531, 547 806 P.2d 1220 (1991); see also *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). A defendant's conduct is admissible under this theory only if it would naturally be interpreted as an expression of sexual desire, such as intercourse or other conduct which is indecent or otherwise improper. *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953).

Evidence of prior sexual misconduct is admissible if it shows a lustful disposition toward a specific victim, on the theory that such evidence makes it more probable the defendant committed the charged offense. *Ferguson*, 100 Wn.2d at 134. Before such evidence may be admitted, however, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is offered, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. *DeVincentis*, 150 Wn.2d at 21. Random similarities are not enough. *DeVincentis*, 150 Wn.2d at 18. To be admissible, the prior bad acts must show

a pattern or plan with marked similarities to the facts in the case before it, such that the various acts are naturally to be explained as caused by a general plan. *DeVincentis*, 150 Wn.2d at 13, 21. Sufficient repetition of complex common features leads to a logical inference that all of the acts are separate manifestations of the same overarching plan, scheme, or design. *State v. Burkins*, 94 Wn. App. 677, 689, 973 P.2d 15 (1999), *rev. denied*, 138 Wn.2d 1014 (1999).

Examples of a common scheme or plan are the cases of *Lough*, 125 Wn.2d 847, and *State v. Krause*, 82 Wn. App. 688, 919 P.2d 123 (1996), *rev. denied*, 131 Wn.2d 1007 (1997). But a review of the circumstances of *Lough* and *Krause* does not support application of the exception here. *See Lough*, 125 Wn.2d at 856 (the admissibility of prior misconduct to prove a common scheme or plan is largely dependent on the facts of each case). In *Lough*, the defendant was charged with attempted second-degree rape, indecent liberties, and first-degree burglary for allegedly drugging and raping a woman with whom he was personally acquainted. *Lough*, 125 Wn.2d at 849. *Lough* was a paramedic with special expertise with drugs. The trial court permitted testimony from four women who claimed while they had been in relationships with *Lough*, he slipped them drugs in drinks and raped them. *Lough*, 125 Wn.2d at 850.

*Lough* told three women they would not be believed if they reported the assaults. He told the fourth they engaged in consensual sex. *Lough*, 125

Wn.2d at 850-51. The Supreme Court found the evidence of these prior assaults admissible as showing a common scheme or plan. Specifically, the Court held Lough's actions evidenced a larger design to use his special expertise with drugs to render them unable to refuse consent to sexual intercourse. *Lough*, 125 Wn.2d at 861.

In *Krause*, the repetition of complex common features also established a common scheme or plan.. Krause was charged with one count of first-degree child rape and five counts of first-degree child molestation. *Krause*, 82 Wn. App. 690. Krause had a history of sexually molesting young boys. In each case, with five different boys, he gained the confidence of the adults who were in positions of trust over the boys. He then established a relationship with the boys by playing games and going on outings with them before molesting them over their protest. *Krause*, 82 Wn. App. at 692, 694-95.

Here, the testimony of the alleged prior acts should have been excluded due to the (1) the remoteness in time to the current allegation, and (2) the complete absence of any corroborating evidence to support N.B.'s allegation. See, e.g *Lough*, 125 Wn.2d at 860 (to be admissible, evidence of a defendant's prior sexual misconduct offered to show a common plan or scheme must be sufficiently similar to the crime with which the defendant is charged and not too remote in time); *State v. Irving*, 24 Wn. App. 370, 373-74, 601 P. 2d 954 (1979), *rev. denied*, 93 Wn.2d 1007 (1980) (holding that testimony concerning attempted rape in 1972 was inadmissible to show proof of a common scheme

or plan to commit rape five years later upon a different woman in a different location).

N.B. did not notify the police nor school officials, despite having five years in which to do so. She testified that she did not tell her mother until she returned from California because she was afraid that Mr. Diese would become violent. 3RP at 225. Notably, she did not immediately tell her mother about the alleged sexual abuse even after she and her mother were kicked out of Mr. Diese's house in 2009 and therefore no longer had contact with him. 3RP at 232.

Even if the trial court properly found the rapes and assaults as alleged by N.B. are relevant to show a common scheme or plan or lustful disposition, prior bad act evidence must be excluded unless its probative value clearly outweighs its prejudicial effect. *Lough*, 125 Wn.2d at 862; ER 403. The trial court erred in so finding here. The prejudicial potential of prior bad acts evidence is at its highest in sex abuse cases. *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). Once the accused has been characterized as a person of abnormal bent, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise. *Saltarelli*, 98 Wn.2d at 363. The risk of error in cases involving past domestic violence is also high. See, e.g. *Gunderson*, 181 Wn.2d at 924-25.

In *Lough*, the Court considered three factors in deciding the probative value of the testimony clearly outweighed its prejudicial effect. *Krause*, 82 Wn.App. at 696 (citing *Lough*, 125 Wn.2d at 864). First, the Court found the

evidence highly probative because it showed the same design or plan on a number of occasions. *Krause*, 82 Wn.App. at 696.

Finally, the Court believed the use of a limiting instruction prevented the evidence from being used to prove Lough's bad character. *Krause*, 82 Wn. App. at 696. Whether such an instruction minimizes prejudice to some extent, courts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction.. *Krause*, 82 Wn.App. at 696 (citing *Saltarelli*, 98 Wn.2d at 363; *State v. Parr*, 93 Wn.2d 95, 107, 606 P.2d 263 (1980)). It was too prejudicial here.

The court permitted a limiting instruction regarding use of the testimony of the rapes and two acts of physical abuse. CP 230 (Instruction No. 11). However, no limiting instruction could undo the resulting prejudice. Moreover, in this case, the State had what most be either a unique or at least extremely unusual piece of evidence: a recording of what the complaining witness purports to be the offense itself. The recording was apparently viewed as being compelling by the jury, who wished to hear replayed two times. In other words, given what the jurors accepted as compelling evidence, the State's need for the vague, unsupported and reported allegations of sexual abuse by N.B. was therefore further diminished. The trial court erred in finding otherwise.

Evidentiary error is grounds for reversal if it results in prejudice. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). An error is not harmless if, within reasonable probabilities, had the error not occurred, the outcome of the

trial would have been materially affected. *Smith*, 106 Wn.2d at 780.

Here, the outcome of Mr. Diese's trial was materially affected by evidence of his alleged misconduct in 2008 and 2009. There were reasons to doubt the current charge; the jury was divided and announced that they were deadlocked. The reasons to doubt the allegation are compelling; N.B. did not immediately report the offense and no dispositive DNA evidence was introduced, both which may have given jurors reason to doubt her allegation.

In light of N.B.'s allegations of prior abuse, which painted Mr. Diese as a violent, predatory deviant, jurors likely would have resolved any doubt against him and in favor of conviction. This Court should therefore reverse his conviction.

**4. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE RAPE SHIELD STATUTE PRECLUDED INTRODUCTION OF TEXT MESSAGES AND PHOTOS N.B. SENT ABOUT USE OF AN INSERTABLE SEXUAL DEVICE AND SHOWING DIGITAL PENETRATION OF HER VAGINA BECAUSE THE TEXT MESSAGES AND PHOTOS WERE RELEVANT ON ISSUES OTHER THAN HER CREDIBILITY.**

After N.B. alleged that she was raped, she provided her cell phone to police, who examined text message threads contained on phone. The texts reviewed by police were from the period of time immediately proceeding and following the alleged incident on February 23, 2014. Prior to trial Mr. Diese moved to admit texts from her phone of a sexual nature. Among these texts are a photo that N.B. sent that show her inserting her fingers into her vagina

and referring to the use of a “two headed bob” sexual device with another person in text messages sent approximately 30 days before the alleged rape. 2RP at 111, 114, 115. The text messages also included topless photos of N.B. (No. 12 and 16), a message to an individual named “Daniel” about wanting to have sex with him, a text message to an individual named “Adam,” in which she asserted that she was pregnant. “Adam” texted back: “Got bad news for you. I didn’t [ejaculate],” and N.B.’s responded that she “was joking.” 2RP at 119; CP 173.

The State objected to admission of texts and the texted photos on the grounds that they were prohibited by ER 403 and by the rape shield statute, RCW 9A.44.020. 2RP at 118-20, 123-24. The court denied the defense motion. 2RP at 124-25.

The proffered evidence would have shown that before and after the alleged rape on February 23, N.B. engaged in a pattern of “sexting” which included: topless photos, a text to a person named Daniel that she “always wanted to fuck” him, her false statement to a person named Adam that she was pregnant,” when he texted that he had not ejaculated, a photo of her vagina with fingers inserted, and texts referencing use of a insertable sexual device. 2RP at 116; CP 173.

The proffered evidence was relevant to the defense theory that the hematoma was inflicted by sexual activity that occurred before February 23-27, 2014. The texts are also notable because they contain no reference to the

alleged rape and shows no sense of being distraught or otherwise traumatized by the alleged rape, but instead shows a pattern of sexting with others that continued in the days after February 23.

N.B.'s credibility and her motive to lie and its relevancy outweighed any potential unfair prejudice under ER 403. Additionally, the evidence was not prohibited under RCW 9A.44.020, the rape shield statute. Excluding the alleged evidence or disallowing Mr. Diese the ability to cross examine N.B. about it denied Mr. Diese his constitutional rights to present a defense and to cross examination.

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *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. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Evidence is relevant if it tends to make the existence of any fact that is

of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence may only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn.App. 865, 872, 989 P.2d 553 (1999).

In mounting a defense, a defendant is also guaranteed the right to confront and cross-examine adverse witnesses. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Under the constitutional rights to confront and cross examine witnesses a defendant has the right to attack the credibility of a witness to reveal biases, prejudices, or ulterior motives of the witness. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, L.Ed.2d 347 (1974). The more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters. *Darden*, 145 Wn. P.2d at 619. Where a case stands or falls on the jury's belief of particular witnesses, credibility and motive is subject to close scrutiny. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). This is especially true in the prosecution of sex crimes. *State v. Peterson*, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970).

The defense was general denial and the defense theory was that N.B. was jealous of her mother, who received financial and emotional support from

Mr. Diese while N.B., suffering from untreated ADHD, struggled in most spheres of her life. Mr. Diese asserted that N.B. concocted the story to force him out of her mother's life so that she would receive her mother's full attention. 8RP at 945, 946. The record showed that N.B. had interfered with every relationship of her mother tried to develop, and that Mr. Diese, as her mother's fiancé, was not going to leave on his own and therefore she alleged that he raped her.

No DNA evidence supported the allegation other than two male cells, which were of such a small sample that the DNA could not be developed into a profile even by use of the Y-STR amplification method. The texts are probative because they support the defense that she fabricated her claim and rebut her statement that she was horrified and terrified by the rape, because it was unlikely that she would be sexting with several people within mere days of the incident. The texts regarding the photo of her vagina and the use of an insertable sexual device were probative in that they rebutted the assertion that the hematoma was inflicted by Mr. Diese, and that the one millimeter injury could have been inflicted by different methods—including digital penetration by N.B. herself or by use of the artificial phallus—after the date of the alleged rape.

The evidence was not inadmissible under RCW 9A.44.020, Washington's rape shield statute. The statute provides,

Evidence of the victim's past sexual behavior including but not

limited to the victim's marital history, divorce history, or general reputation for promiscuity, non-chastity, 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....

RCW 9A.44.020(2).

The purpose of the statute is "to encourage rape victims to prosecute, and to eliminate prejudicial evidence of prior sexual conduct of a victim which often has little, if any, relevance on the issues for which it is usually offered, namely, credibility or consent." *State v. Carver*, 37 Wn. App. 122, 124, 678 P.2d 842, *review denied*, 101 Wn. P.2d 1019 (1984). The statute, however, "was not intended to establish a blanket exclusion of evidence which is relevant to other issues which may arise in prosecutions for rape." *Carver*, 37 Wn. App. at 124, 678 P.2d 842 (citing *State v. Simmons*, 59 Wn.2d 381, 368 P.2d 378 (1962)). Past sexual behavior may be admitted if (1) it is relevant to the issue of the victim's consent, (2) its probative value is not substantially outweighed by a substantial danger of undue prejudice, and (3) its exclusion would result in denial of substantial justice to the defendant. RCW 9A.44.020(3)(d). In *Carver*, the court held that evidence that neither prejudices the victim nor discourages prosecution generally does not fall within the scope of the statutory prohibition. *Carver*, 37 Wn. App. at 126.

The proffered "sexting" evidence dealt with sexual activity that directly rebuts a significant allegation by the State: that the one millimeter hematoma was inflicted by Mr. Diese during the alleged rape. The sexts supported a the

logical inference that the sexual activity depicted and implied in the sexts created the hematoma. The texts also refuted several claims made by N.B. that she had not inserted objects in her vagina. Last, the texts rebutted her claim that she was horrified and terrified by the alleged rape.

The texts were not related to N.B.'s "past sexual behavior" or her reputation for "promiscuity, non-chastity, or sexual mores contrary to community standards," nor is it intended to show consent. *See* RCW 9A.44.020(2), (3). The admission of self-created texts does not discourage rape victims to prosecute a subsequent rape allegation and it is not prejudicial evidence of prior sexual conduct. Texts related to sexual activity—written by the complaining witness and voluntarily transmitted to others is not evidence the rape shield statute was intended to exclude. *See State v. Kilgore*, 107 Wn. App. 160, 177-179, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288 (2002); *State v. Carver*, 37 Wn.App. at 123-124. Because evidence of sexual activity after the alleged offense is not excluded under the rape shield statute, to the extent the court relied on the statute to exclude the texts, its decision was wrong as a matter of law.

In addition, N.B.'s allegation texted to "Adam" that she was pregnant was false and therefore relevant to her credibility. A majority of jurisdictions have held that the evidentiary rules preventing evidence of specific acts of untruthfulness must yield to the defendant's right of confrontation and right to present a full defense. These courts have held that evidence of prior false

accusations is admissible to attack the credibility of the complaining witness and as substantive evidence tending to prove the current offense did not occur. In *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980), the Washington Supreme Court recognized the rule in other jurisdictions that rape shield statutes do not bar evidence of prior false rape reports. *Id.* at 736.

Here, the proffered evidence showed N.B.'s short-lived claim that she was pregnant was false. The proffered evidence, however, was relevant and important to the defense case. The evidence supported the defense theory that N.B. was (1) seemingly unaffected by the rape and (2) was willing to make false accusations about sexual matters. Evidence that N.B. made a false allegation regarding a sexual matter, and wrote other sexts only days after the alleged rape was directly relevant on the issue of her credibility.

This Court cannot determine the jury would necessarily have reached the same result if the jury had heard evidence tending to impeach N.B.'s believability. "Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable.'" *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (quoting *State v. Gutierrez*, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)). As sole judges of witness credibility, jurors were entitled to have the benefit of the defense theory so that they could make an informed judgment regarding the believability of Palmer's accusation. *Davis*, 415 U. S. at 317.

Mr. Diese had the right to present evidence that might influence the

determination of guilt. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). The court improperly excluded the texts under either the rape shield statute or a finding the evidence was not relevant. The evidence was not offered to challenge N.B.'s character, or impeach her general credibility or embarrass her or harass her based on her texts. It should be noted that the proffered evidence is not derived from an investigator digging into personal sexual matters that N.B. intended to remain private; she wrote the texts and voluntarily published the photos and texts by transmitting them to other parties. The additional evidence of the circumstances of her willfully transmitting texts to various parties has little potential for undue or unfair prejudice by confusing or misleading the jury or by causing the jury to base its decision on an emotional response rather than reason. *See* ER 403. On the other hand, the evidence was extremely relevant to both the issue of N.B.'s credibility and as a logical explanation for the source of the hematoma.

The improper exclusion of evidence and the improper limitation on Mr. Diese's right to cross examine N.B. about the alleged rape violated his constitutional right to present a defense and cross examine witnesses. Reversal is required unless the State demonstrates the error was harmless beyond a reasonable doubt. *Kilgore*, 107 Wn. App. at 178. It cannot do so on these facts and therefore Mr. Diese's conviction should be reversed.

5. **THE TRIAL COURT ERRED IN DENYING  
THE DEFENSE MOTION FOR A MISTRIAL  
WHERE THE STATE ELICITED THAT THE**

**DEFENDANT WAS IN JAIL, VIOLATING HIS  
PRESUMPTION OF INNOCENCE**

The trial court must grant a mistrial where an irregularity occurs and as a result the defendant's right to a fair trial is "so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

Thus, where a mistrial motion is made for an irregularity, the court must determine whether the irregularity prejudiced the defendant's right to a fair trial. *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). Here, the defense moved for a mistrial when the prosecutor repeatedly elicited testimony from Ms. Dual that Mr. Diese was in jail custody. She testified that he sent her "some letters from jail" and identified one letter as "the first letter that he sent me from the jail." 4RP at 366. She stated the letter she received from him was sent from "F Pod," a reference to the jail. 4RP at 366-67. The defense objected. 4RP at 367. After a tangent regarding redaction of the letter, envelope, and postcard the State sought to admit, the court returned to the defense motion for mistrial, which was denied. 4RP at 373.

In assessing the degree of prejudice, a court should examine (1) the seriousness of the irregularity; (2) whether it was cumulative of properly admitted evidence; and (3) whether it could have been cured by an instruction. *State v. Escalona*, 49 Wn. App. 251, 254- 55, 742 P.2d 190 (1987) (new trial warranted where assault complainant testified that the defendant already has a

record and had stabbed someone"); *State v. Weber*, 99 Wn.2d at 165-66.

In addition, the inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. *State v. Weber*, 99 Wn.2d at 164.

Here, the principle at work is that every criminal defendant is entitled to a fair trial by an impartial jury. U.S. Const. amends. 6, 14; Wash. Const. art. I, 3, 21, 22. The right to a fair trial includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *State v. Gonzalez*, 129 Wn. App. 895, 901, 120 P.3d 645 (2005) (quoting *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)).

Here, in light of the trial court's duty to safeguard the presumption of innocence, the denial of the motion for a mistrial following the revelation that Mr. Diese had been in jail was an abuse of discretion. Where evidence is admitted that is inherently prejudicial and likely to permanently impress itself upon the minds of the jurors, even withdrawal of that evidence accompanied by an instruction to disregard may not remove the prejudicial impression created. *State v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

Applying the three-part *Escalona* test discussed above, the trial court

should have granted the defense mistrial motion. First, the violation was serious, as discussed above. *See Gonzalez*, 129 Wn. App. at 900-01, 905 (court's announcement to the jury that Gonzalez was in jail because he could not post bail, was being transported in restraints, and was under guard in the courtroom violated Gonzalez's rights to the presumption of innocence and to an impartial jury and reversal was required). Moreover, had Mr. Diese's presumption of innocence not been undermined, the jury would have been less likely to believe the claims of his wrongful conduct against the victim, or the claims of his prior misconduct. This was particularly damaging because of the testimony of N. B. and Ms. Dual, who characterized Mr. Diese as being violent.

Further, the improper revelation of Mr. Diese's incarceration was not cumulative or repetitive of any evidence properly admitted at trial. The presumption of innocence requires defendants sit before the court during trial while assumed to be innocent. *Gonzalez*, 129 Wn. App. at 901; *Finch*, 137 Wn.2d at 844. As for the third factor, a curative instruction was wisely declined by defense counsel because it would have reminded the jury of the prejudicial evidence, and in any case, no curative instruction could have cured the resulting prejudice. 4RP at 374. The witness's statements informing the jury that Mr. Diese was incarcerated were "irretrievably" prejudicial and required the trial court to grant a new trial. *Suleski*, 67 Wn.2d at 51.

6. THE TRIAL COURT'S SNAP DECISION TO ALLOW THE JURY DURING DELIBERATION TO REPLAY THE AUDIO CD OF THE

**RECORDING MADE BY N.B. VIOLATED MR.  
DIESE'S RIGHT TO DUE PROCESS AND A  
FAIR TRIAL BY AN IMPARTIAL JURY.**

**a. Standard of review**

Constitutional claims are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). Violation of the accused's Constitutional right to a fair and impartial trial requires reversal unless the State can show that the error was harmless beyond a reasonable doubt. *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011).

**b. The trial court erred when it permitted the State to replay the audio recording two times to the jury during deliberation**

A trial judge violates the rights to a fair trial and to an impartial jury by placing undue emphasis on one party's evidence. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Koontz*, 145 Wn.2d 650, 657-58, 41 P.3d 475 (2002). A judge may not replay a recording during jury deliberations without first considering whether doing so will be unduly prejudicial. *Koontz*, 145 Wn.2d at 657-58. See *State v. Frazier*, 99 Wn.2d 180, 189, 661 P.2d 126 (1983) (video and/or tape recorded statements that have been admitted as exhibits may be replayed only if, in the trial court's discretion, they bear directly on the charge and are not unduly prejudicial).

The trial court should be aware of the potential for overemphasizing the importance of such evidence and should prevent such exhibits from going to the jury if unduly prejudicial. *Frazier*, 99 Wn.2d at 190-91. Whether a tape is

unduly prejudicial turns on whether it was "likely to stimulate an emotional response rather than a rational decision[.]" *State v. Castellanos*, 132 Wn.2d 94, 100, 935 P.2d 1353 (1997) (quoting *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)).

In this case, the court decided to replay the recording during jury deliberations. 9RP at 976-982. The trial court did not consider the relationship between the contents of the CD recording and the accusation against Mr. Diese, or engage in any evaluation whatsoever, but instead immediately stated that "I can replay it for them," without soliciting argument from counsel. 9RP at 976.

The content of recorded material "bearing directly on the charge" that have been approved for replay in Washington include a defendant's taped confession to a police officer (*Frazier*, 99 Wn.2d at 189-91), taped drug purchases between a defendant and the "body wired" confidential informant (*Castellanos*, 132 Wn.2d at 98-100) and tapes of a defendant's confession and his interview with police. *State v. Elmore*, 139 Wn.2d 250, 295-97, 985 P.2d 289 (1999). Here, the CD of the audio recording made by N.B. on a cell phone, which she testified is an audio recording of the crime itself and therefore susceptible of undue emphasis if replayed for the jury once they have had the opportunity to hear it during the trial testimony. The jurors had already heard the recording and heard N.B.'s corroborating testimony and had the opportunity to compare those two things in open court. The re-playing of the tape placed undue emphasis on her courtroom testimony.

Nor did the trial court consider the unfair prejudice test set forth in *Castellanos*, which was "evidence ... likely to stimulate an emotional response rather than a rational decision ... ." *Castellanos*, 132 Wn.2d at 100. Sexual assault is abhorred by our society. A jury charged with determining whether a rape has occurred has a difficult decision to make, particularly if, as is the case here, the assault is flatly and emphatically denied. Replaying of the recording during deliberation not only provided repetition of previously played evidence, but also provided the jurors with a final glimpse of N.B.'s demeanor. The recording is especially prejudicial because, as noted by the court during the suppression hearing, N.B. was "crying and upset throughout" the recording—a fact that clearly made a lasting impression on the judge. 1RP at 55. There can be no argument that the replaying of this tape generated an emotional response with the jury.

**c. The court's error was not harmless**

The trial court's error was not harmless given the nature of the evidence in this case. An evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Mr. Diese disputed whether any sexual contact had taken place. The question whether the alleged conduct occurred boiled down to the jury's determination of who was more credible—N.B. or Mr. Diese. Given the totality of the circumstances, it is probable the jury's decision was materially affected by the replaying of the CD during deliberations. Mr. Diese's conviction should therefore be reversed.

7. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO MOVE FOR A MISTRIAL OR MOVE FOR NEW TRIAL FOLLOWING A WRITTEN JURY INQUIRY THAT JUROR NO. 3'S "HEARING DOESN'T ALLOW HIM TO HEAR A GOOD PORTION OF THE AUDIO" AND REQUESTED THAT THE CELL PHONE RECORDING BE REPLAYED DURING DELIBERATION

Counsel was ineffective for failing to move for a mistrial following receipt of a jury inquiry stating Juror Number 3 states that his hearing doesn't allow him to hear a portion of the audio recording. 9RP at 990. Because there was no valid tactical reason to fail to move for a mistrial, which likely would have been granted, Mr. Diese can demonstrate he was denied effective assistance.

The federal and state constitution's guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. The accused is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), *cert. denied*, 510 U.S. 944 (1993). Nolan meets both requirements.

Here, counsel did not move for mistrial when the juror's hearing difficulty was revealed, and did not move for new trial following conviction.

9RP at 991. But given the implication of a juror admitting at the 11<sup>th</sup> hour of a trial that he has hearing difficulty and was unable to hear all of a significant piece of evidence, no competent attorney would have failed to move immediately for a mistrial or file a motion for a new trial and for time to investigate the extent of the juror's inability to hear the trial.

An essential element of a fair trial is a jury capable of deciding the case based on the evidence before it. *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). A defendant is denied due process when a juror cannot hear all the relevant evidence. *State v. Turner*, 186 Wis.2d 277, 284, 521 N.W.2d 148 (Wis. App. 1994). "A juror who has not heard all the evidence in the case is grossly unqualified to render a verdict." *People v. Simpkins*, 16 A.D.3d 601, 792 N.Y.S.2d 170 (N.Y. App. Div. 2005).

Under CrR 7.5, trial courts are authorized to grant a new trial in several enumerated circumstances, including whenever a trial irregularity prevented the defendant from receiving a fair trial. CrR 7.5(a)(5). In light of the fact that the audio recording was viewed by the jury as a critical piece of evidence—shown by the fact that they asked to have it replayed twice during deliberations—this was a serious irregularity. The admission that a juror had a hearing problem begged an obvious question that if he was unable to hear the recorded evidence, what was the extent of his hearing impairment and was he unable to hear the other testimony as well?

Mr. Diese suffered prejudice because there is a "reasonable

probability" that, but for counsel's error, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 693-94).

Trial courts must grant a mistrial where the irregularity may have affected the outcome of the trial, thereby denying the defendant his right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

Moreover, if Mr. Diese's counsel would have moved for new trial, the request is likely to have been granted. It is clear that she had adequate support to request a new trial. For instance, in *Wisconsin v. Turner*, the Wisconsin Court of Appeals held a criminal defendant's state and federal constitutional rights to an impartial jury and due process were infringed upon when either one or two jurors were unable to hear the testimony of a material witness. 186 Wis.2d 277, 521 N.P.W.2d 148, 151 (1994). Similarly, in *Kansas v. Hayes*, a juror was unable to hear trial testimony; the state Supreme Court reversed the denial of a mistrial, holding that the defendant's rights to an impartial jury and due process were violated when the juror could not hear the defendant's testimony. 17 P.3d

317 (Kan. 2001).

In this case, even if one juror did not hear the recorded testimony, Mr. Diese was convicted by a juror who necessarily did not consider all the evidence and the verdict was a priori not unanimous. Counsel's failure to request move for mistrial during deliberation—or a new trial following conviction—undermines confidence in the outcome of this case. This Court should reverse his conviction.

8. **THE TRIAL COURT VIOLATED MR. DIESE'S RIGHT TO DUE PROCESS AND CRIMINAL RULE 6.15 WHEN IT REQUIRED THE JURY TO RECONVENE AFTER A THREE DAY RECESS, EVEN THOUGH THE JURY DECLARED IT WAS DEADLOCKED.**

The federal and state constitutions guarantee a criminal defendant the right to a fair trial before an impartial jury. U.S. Const. Amend. VI, XIV; Const. art. I, sec. 3, 22. The Washington Constitution also requires a jury verdict be based on unanimity that every element was proven beyond a reasonable doubt. Const. art. I, sec. 21, 22; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). The right to a jury trial includes the right to have each juror reach his or her own verdict "uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." *State v. Goldberg*, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003) (citing *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978)).

When a jury is deadlocked on a general verdict, the trial court has

authority, within limits, to require the jury to continue deliberations. CrR 6.16(a)(3). However, the right to a fair and impartial jury trial demands that the judge not bring coercive pressure to bear upon the deliberations of a criminal jury. CrR 6.15(f)(2) provides: "After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." The purpose of the rule is to prevent judicial intervention into the deliberative process and to ensure that the court does not instruct the jury in such a way as to suggest the need for agreement after deliberations have begun. *State v. Watkins*, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983); *Boogaard*, 90 Wn.2d at 736, 738.

When a jury declares it is unable to reach a verdict, the judge may consider the complexity of the case and the length of deliberations relative to the length of the trial, make limited inquiries of the jury that do not amount to impermissible coercion, and then determine whether to discharge the jury or order them to resume their deliberations. *State v. Jones*, 97 Wn.2d 159, 165, 641 P.2d 708 (1982); *State v. Barnes*, 85 Wn. App. 638, 656, 932 P.2d 669 (1997).

Here, the jury had deliberated approximately three hours before informing the court that it was unable to reach a verdict. Supp. CP 351-52 ( Jury Trial Clerk's Minutes at 16-17). When the court received the juror inquiry, it discussed its options with the prosecutor and defense counsel, but did not

consider the length of deliberation or the complexity of issues involved.

The judge called the jurors into open court and conducted the following inquiry:

THE COURT: Ladies and gentlemen, I've called you back into the courtroom to find out whether you have a reasonable probability of reaching a verdict. First, a word of caution, because you are in the process of deliberating, it is essential that you give no indication about how the deliberation are going. You must not make any remark here in the courtroom that may adversely affect the rights of either party or may, in any way, disclose your opinion of the case or the opinions of other members of the jury.

I'm going to ask the presiding juror if there's reasonable probably of the jury reaching a verdict within a reasonable time. The presiding juror must restrict his answer to "yes" or "no" when I ask this question and must not say anything else.

It's my understanding, Mr. White, that you are presiding juror.

JUROR: That's correct.

THE COURT: Okay. Is there a reasonable probability of the jury reaching a verdict in a reasonable time?

JUROR: I do not believe so.

THE COURT: do the jurors—would you raise your hand if you agree with that statement? Would you raise your hand if you disagree with that statement?

At this time, I'll send you back to the jury room and talk further with counsel. Thank you.

9RP at 988-89.

Approximately an hour later, however, the jury sent an inquiry stating that Juror No. 3 was having difficulty hearing the audio. CP 216, Supp. CP 352, Jury Trial Clerk's Minutes at 17). Yet, rather than call on the alternate juror, the court again replayed the audio recording and then released the jury at 6:52 p.m. until Tuesday morning, Supp. CP 352, (Jury Trial Clerk's Minutes at 17).

The jury resumed deliberations on Tuesday and reached a verdict at 11:46 a.m. (Supp. CP 352, Jury Trial Clerk's Minutes at 17). The jury was polled and each juror indicated the verdict represented the verdict of the jury and his or her individual verdict. 9RP at 999-1000.

Under these circumstances, the court's conduct was inherently coercive. without significant discussion regarding the issues presented to the jury, the court directed the jury to continue deliberation despite two notes indicating that it was deadlocked. This procedure unquestionably pressured jurors to reach a verdict as soon as possible to avoid additional time at the courthouse.

On this record, this Court should conclude that by ordering the jury to continue deliberations without respecting the jury's conclusion that it was deadlocked, and by continuing deliberations despite the admission that one could not hear the evidence, the court improperly coerced a verdict. This matter should be remanded for a new trial. *See Boogaard*, 90 Wn.2d at 738.

**9. CUMULATIVE ERROR DEPRIVED MR. DIESE OF A FAIR TRIAL.**

Pursuant to the cumulative error doctrine, even where no single error standing alone merits reversal, a reviewing court may nonetheless find the combined errors denied a defendant a fair trial. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine requires reversal where the cumulative effect of otherwise nonreversible errors materially affected the outcome of the trial. *State v.*

*Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 150 (1992).

Here, Mr. Diese contends that each error set forth above, viewed alone, engendered sufficient prejudice to merit reversal. Alternatively, however, he argues the errors, taken together, created a cumulative and enduring prejudice that was likely to materially affect the jury's verdict and the integrity of the verdict cannot be assured. This Court must reverse his conviction and order a new trial.

**E. CONCLUSION**

For the foregoing reasons, Mr. Diese respectfully requests this Court reverse his conviction and dismiss, or, in the alternative, reverse and remand for a new trial.

DATED: January 8, 2016.

Respectfully submitted,

THE TILLER LAW FIRM



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Of Attorneys for Lawrence Diese

**CERTIFICATE OF SERVICE**

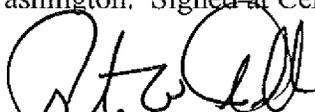
The undersigned certifies that on January 8, 2016, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 8, 2016.



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PETER B. TILLER

APPENDIX A

RCW 9.73.030

Intercepting, recording, or divulging private communication — Consent required — Exceptions.

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full-time or contractual or part-time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

RCW 9A.44.050  
Rape in the second degree.

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion;
- (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;
- (c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:
  - (i) Has supervisory authority over the victim; or
  - (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;
- (d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;
- (e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or
- (f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:
  - (i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.

RCW 9A.44.060

Rape in the third degree.

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person:

(a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony.

RCW 9A.44.020

Testimony—Evidence—Written motion—Admissibility.

(1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for 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, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape, trafficking pursuant to RCW 9A.40.100, or any of the offenses in chapter 9.68A RCW, 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, except where prohibited in the underlying criminal offense, 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.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

#### RULE CrR 6.15 INSTRUCTIONS AND ARGUMENT

(a) Proposed Instructions. Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury. Not less than 10

days before the date of trial, the court may order counsel to serve and file proposed instructions not less than 3 days before the trial date.

Each proposed instruction shall be on a separate sheet of paper. The originals shall not be numbered nor include citations of authority.

Any superior court may adopt special rules permitting certain instructions to be requested by number from any published book of instructions.

(b) (Reserved.)

(c) Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

(d) Instructing the Jury and Argument of Counsel. The court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecutions rebuttal.

(e) Deliberation. After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.

(f) Questions from Jury During Deliberations.

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and

provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

(2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

(g) Several Offenses. The verdict forms for an offense charged or necessarily included in the offense charged or an attempt to commit either the offense charged or any offense necessarily included therein may be submitted to the jury.

#### RULE 7.5 NEW TRIAL

(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;
- (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
- (4) Accident or surprise;
- (5) Irregularity in the proceedings of the court, jury or

prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

(6) Error of law occurring at the trial and objected to at the time by the defendant;

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done. When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) Time for Motion; Contents of Motion. A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time. The motion for a new trial shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The prosecution has 10 days after such service within which to serve opposing affidavits. The court may extend the period for submitting affidavits to a time certain for good cause shown or upon stipulation.

(d) Statement of Reasons. In all cases where the court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record which cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(e) Disposition of Motion. The motion shall be disposed of before judgment and sentence or order deferring sentence.

#### RULE ER 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT;  
EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

# TILLER LAW OFFICE

**January 08, 2016 - 4:51 PM**

## Transmittal Letter

Document Uploaded: 5-474328-Amended Appellant's Brief.pdf

Case Name: State v. Lawrence Diese

Court of Appeals Case Number: 47432-8

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Amended Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Shirleen K Long - Email: [slong@tillerlaw.com](mailto:slong@tillerlaw.com)