

No. 82613-7

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

CHRISTOPER JONES,
Petitioner

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

The Honorable Cameron Mitchell, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/defendant/plaintiff containing a copy of the document to which this declaration is attached.

Scott Johnson, Benton II
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

7/31/09
Done in Seattle, WA Date

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A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEF

1. The trial court prevented Jones from testifying about the defense theory of the case by determining it did not believe Jones' testimonial offer of proof. The Court of Appeals affirmed this result, citing no applicable authority. Did the trial court and Court of Appeals violate Jones' constitutional right to testify and present evidence in his defense?

2. The "rape shield" statute precludes the defense from offering evidence of a complaining witness' past sexual conduct to attack credibility. It does not preclude evidence of contemporaneous sexual conduct with multiple partners as part of a drug, alcohol, and sex party. Did the trial court and Court of Appeals improperly rewrite the rape shield statute to preclude Jones from offering contemporaneous sexual contact with multiple partners, which supported the defense theory of consent?

3. When presenting evidence and closing argument, the prosecutor repeatedly commented on Jones' exercise of his right to refuse consent to a warrantless search and his right to remain silent.

a. Were the comments misconduct and constitutional error?

b. Where the first jury rejected the state's initial charge and did not return a verdict on the lesser, where the misconduct was flagrant and emphasized on multiple occasions in the second trial, and where this Court has at least twice reversed following similar constitutional errors, is reversal required?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The facts are set forth in detail in Jones' opening brief. BOA at 5-18. In short, the state alleged Jones raped his niece, Kashauna Dixon, 17. Jones sought to prove the intercourse was consensual during an all-night party with two women, three men, cocaine, and alcohol. The trial court excluded the proposed defense evidence. Due to space limitations and to avoid repetition, relevant facts and record citations are set forth in the argument sections, infra.

C. SUPPLEMENTAL ARGUMENT

1. THE COURT OF APPEALS AND TRIAL COURT DENIED JONES HIS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE. A TRIAL COURT CANNOT SUBSTITUTE ITS VIEW OF THE ACCUSED'S CREDIBILITY FOR THE JURY'S TO DENY AN ACCUSE THE RIGHT TO TESTIFY.

Jones sought to present evidence, including his own testimony, that Dixon was using cocaine and alcohol on the night of the events. According to the offer, there were three men and two women at an all night party. Dixon and the other woman danced and engaged in

sexual intercourse for money with the three men. 2RP 196-97, 202-03, 211-15.

The trial court excluded the sexual contact evidence, finding it barred by the "rape shield" statute. 2RP 199, 246. The defense objected, arguing the ruling violated Jones' right to present evidence and to confront the state's witnesses. 2RP 200.

The state then sought to exclude the alcohol and cocaine evidence under ER 404(b). The court held a brief evidentiary hearing where Dixon denied consuming drugs, alcohol, or partying with others. The investigating detective said Jones did not mention drugs and alcohol during an interview at the jail. 2RP 204-08.

Jones' testimony at the in limine hearing differed substantially. He said Dixon and her brother went with him to a truck stop in Pasco where they met two Hispanic males and procured some cocaine. The group returned to the house and consumed the cocaine. Two more cocaine purchases were made and Dixon continued to consume cocaine. She also drank beer. The party continued until 8:00 in the morning. 2RP 111-15.

The trial court excluded the "party" evidence, finding Jones' testimony less credible than Dixon's. 2RP 222-23.

In the Court of Appeals, Jones showed why the trial court's ruling denied his constitutional rights to confront witnesses and to present evidence in his defense. BOA at 18-26; U.S. Const. amend. 6, 14; Const. art. 1, § 22; citing, *inter alia*, 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).

This Court's decisions in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) recognize the constitution permits the accused to present even minimally relevant evidence unless the state can demonstrate a compelling interest for excluding it. Darden, 145 Wn.2d at 612. This is not an ER 403 balancing test. Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it. If the state cannot do so, the evidence must be admitted. Hudlow, 99 Wn.2d at 15-16; *see also*, State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence

relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest.").

a. The Court's Affirmance of the ER 404(b) Ruling Denied Jones' Right to a Jury Trial.

The trial court excluded the offered evidence of Dixon's cocaine and alcohol use by finding it did not believe Jones' offered testimony. As Jones' brief shows, however, the jury should determine witness credibility, not the judge. BOA at 31-34. Because of space limitations, Jones incorporates that argument here. See Appendix A.

The Court of Appeals did not address Jones' authority, but instead cited an ER 404(b) case for the proposition that a trial court may exclude misconduct evidence if the proponent does not convince the court the misconduct actually occurred. Slip op. at 13-14 (citing State v. Lough, 125 Wn.2d 847, 852, 864, 889 P.2d 487 (1995)).

Lough was a case where the state sought to admit Lough's prior misconduct under the "common scheme or plan" exception. This Court held the evidence admissible. Lough, 125 Wn.2d at 861.

Lough, of course, neither addressed nor approved a trial court's exclusion of important defense evidence. Lough did not hold a trial court may find an accused is not credible under an evidence rule and thereby deny his constitutional right to testify in his own defense.

According to the Court of Appeals, however, “that is exactly what ER 404(b) permits.” Slip op. at 14 (citing no authority).

As stated in Jones’ brief, the Court of Appeals misidentified the controlling rule in reaching this remarkable conclusion. BOA at 31-34; appendix A. A judge cannot exclude defense evidence by finding the defendant incredible. As Washington’s leading evidence commentator states in the context of ER 403,

Rule 403 does not authorize the exclusion of relevant evidence solely because the judge disbelieves the witness or in some other way regards the evidence as unreliable. The notion runs consistently through the rules and the case law that the jurors alone determine credibility.

5 K. Tegland, Was. Pract. § 403.8 (5th ed. 2007).¹

Washington courts in other contexts have repeatedly held the jury, not the court, must evaluate witness credibility. When determining whether evidence supports a party’s theory, so as to justify instructions, “the trial court must interpret the evidence most strongly in favor of the defendant. The jury, not the judge, must weigh

¹ See also, United States v. Thompson, 615 F.2d 329, 333 (5th Cir. 1980) (“Rule 403 does not permit exclusion of evidence because the judge does not find it credible”); United States v. Platero, 72 F.3d 806, 813 (10th Cir. 1995) (“If a rule were to say that a defendant may not offer evidence in defense unless the Judge believes it, that rule would violate the right to jury trial”).

the proof and evaluate the witnesses' credibility." State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005) (citing State v. May, 100 Wn. App. 478, 482, 997 P.2d 956, rev. denied, 142 Wn.2d 1004 (2000); State v. Williams, 93 Wn.App. 340, 348, 968 P.2d 26 (1998), rev. denied, 138 Wn.2d 1002 (1999)). The rule is venerable:

It is the jury and not the court which decides questions of fact. If substantial evidence from a competent source has been presented to prove the existence of each element of the offense and the accused's commission of it, then the court is without discretion to take the case from the jury. In evaluating whether the evidence is substantial, the court must, as we said in State v. Zorich, 72 Wn.2d 31, 431 P.2d 584 (1967), view the evidence 'most strongly against the moving party and in the light most favorable to the opposing party, and whether the evidence is sufficient to submit the issue to the jury is a question of law for the court and no element of discretion is involved.' State v. McDonald, 74 Wn.2d 142, 443 P.2d 651 (1968).

State v. Basford, 76 Wn.2d 522, 530, 457 P.2d 1010 (1969).

The Court of Appeals therefore wrongly held the trial judge could exclude proffered defense testimony based on the court's decision the testimony was not credible. The error denied Jones his right to a jury determination of the facts.

b. The Court Erred in Rewriting the Rape Shield Statute.

The trial court relied on the rape shield statute to preclude Jones from testifying that Dixon engaged in contemporaneous sexual

intercourse with himself and the other men. Jones cited authority from other courts distinguishing between past and present behavior when construing similar rape shield statutes and rules. BOA at 27-29 (citing numerous cases, including State v. Colbath, 130 N.H. 316, 540 A.2d 1212, 1217 (1988)).²

The Court of Appeals, however, analyzed none of the cited authority. Instead, the court conducted its own dissection of Hudlow to support its conclusion “that previous consent to sexual behavior with a different man was not relevant to the question of whether the victim had consented to the present sexual contact with the defendant.” Slip op at 11-12 (emphasis added). According to the Court, “[t]he underlying premise – that consent with one person makes it more likely there was consent to sexual contact with another person – simply is not dependent upon temporal factors. The premise is logically invalid regardless of the length of time between the two incidents.” Slip op at 12 (citing Hudlow, 99 Wn.2d at 10.)

Again, the cited authority does not support the Court of Appeals’ conclusion. Hudlow did not address the exclusion of evidence of consensual contemporaneous sexual contact with

² The statute bars evidence of “past sexual behavior” to attack credibility. RCW 9A.44.020(3).

multiple individuals. The Court of Appeals' decision also removes the word "past" from RCW 9A.44.020(3).

The Court of Appeals' analysis suffers from a naïve and nostalgic view of American sexuality, coupled with an apparent aversion to a true conceptualization of group sexual contact. It is axiomatic that a person's willingness to engage in contemporaneous sex with multiple partners is highly probative evidence on the question whether the person consented to sex with one of those partners. The Court of Appeals' contrary leap of logic falls flat. Its exclusion of this highly probative evidence was constitutional error.

Ultimately, if the state or the trial court did not believe Jones' testimony, the state's remedy was to cross-examine him, impeach him, or present its own countervailing evidence. But as this Court held in Hudlow and has reaffirmed numerous times since, the state cannot lawfully exclude probative defense evidence without a compelling interest.

The court's contrary ruling denied Jones his right to confront his accuser and his right to a jury trial. U.S. Const. amend. 6; Const. art. 1, § 22. For the reasons stated in Jones' opening brief, the state cannot show this constitutional error was harmless beyond a reasonable doubt. BOA at 18-34. The exclusion of the evidence was

the exclusion of the defense. Jones' conviction should be reversed and the case remanded for a new trial.

2. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

Jones' appeal raises two separate but related claims of prosecutorial misconduct. One arises from the prosecutor's improper comments on Jones' refusal to consent to a warrantless search of his person. The other arises from the prosecutor's improper comments on Jones' right to silence.

During the second trial the prosecutor asked the Richland Police detective numerous questions relating to the detective's efforts to secure a DNA sample from Jones. The prosecutor first offered testimony to show it is easy to take DNA with a cheek swab. The prosecutor then asked the detective whether Jones would allow the swab, and the detective said no. The prosecutor then pointed out "[a] judge of the Benton County Superior Court granted you a search warrant to actually force the defendant to give you the swab, is that right?", to which the detective answered "yes." 2RP 265. In closing, the prosecutor again commented on Jones' exercise of his Fourth Amendment rights, equating Jones' exercise of his rights with the actions of a guilty man. 2RP 334.

The prosecutor also elicited testimony from the detective that Jones did not attempt to contact the police after the accusation surfaced. 2RP 251-53. In closing, the prosecutor emphasized Jones' alleged failure to contact the police, arguing Jones did not behave the way an innocent man would behave. 2RP 330-31.

On appeal, Jones argued the prosecutor's tactics unconstitutionally commented on his Fourth Amendment right to refuse to consent to a warrantless search. BOA at 38-41. The state's brief in the Court of Appeals wholly failed to respond to this argument.

Citing settled authority, Jones also argued the comments on his alleged failure to contact police violated his Fifth Amendment right to remain silent. BOA at 35-37 (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) and State v. Keene, 86 Wn. App. 589, 592, 938 P.2d 839 (1997)).

The Court of Appeals did not analyze these issues or cite authority. It instead assumed these instances of misconduct were error. Also without citing relevant authority, the court then found the errors harmless. Slip op. at 17.

a. The Improper Evidence and Prosecutor's Comments on Jones' Refusal to Consent to A Warrantless Search Were Constitutional Error.

The state and federal constitutions guarantee an accused the right to remain silent. U.S. Const. amend. 5; Const. art. 1, § 9. The state and federal constitutions also guarantee Washington residents the right to be free from warrantless and unreasonable searches absent authority of law. U.S. Const. amend. 4; Const. art. 1, § 7.

This Court and the United States Supreme Court have condemned prosecutorial comments on an accused's prearrest and postarrest exercise of the right to remain silent. State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008). The state's substantive use of prearrest silence violates the Fifth Amendment,³ and the state's substantive use of post-Miranda silence violates the Fourteenth Amendment.⁴

The basic premise for these decisions is simple: where the constitution protects individual rights, a person should not be punished for exercising those rights. The state may not insinuate an

³ Burke, 163 Wn.2d at 211-17, (citing, inter alia Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) and State v. Easter, 130 Wn.2d 228, 231-35, 922 P.2d 1285 (1996)).

⁴ Burke, 163 Wn.2d at 211-17 (citing, inter alia, Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)).

accused is guilty based on the exercise of constitutional rights. Burke, 163 Wn.2d at 211-17.

This Court has made it clear we may refuse to consent to a warrantless search of our persons and property. State v. Morse, 156 Wn.2d 1, 13, 123 P.3d 832 (2005) (citing State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998)). This Court also has made it clear the Washington Constitution provides broader protection of our privacy rights than does the Fourth Amendment. State v. Eisfeldt, 163 Wn.2d 628, 636-37, 185 P.3d 580 (2008) (citing cases); State v. Surge, 160 Wn.2d 65, 70-71, 156 P.3d 208 (2007). This right to refuse consent includes the preconviction right to privacy in our bodily fluids. Schmerber v. California, 384 U.S. 757, 770, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); cf., Surge, 160 Wn.2d at 211-13 (after conviction, a felon's right to privacy in his identity may be lessened); State v. Meacham, 93 Wn.2d 735, 612 P.2d 795 (1980) (court-ordered blood draw to determine paternity after adversarial hearing is still a "search" under the Fourth Amendment).

This case provides the opportunity to clearly prohibit Washington prosecutors from insinuating a person is guilty because the person refused to consent to a warrantless search. As shown in Jones' brief, numerous other courts have addressed this question in

persuasively reasoned opinions. In a leading case, United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978) the court held it was prejudicial error to admit evidence showing Prescott refused permission for a warrantless search of her apartment. The court explained a person cannot be penalized for asserting the Fourth Amendment right to refuse consent:

The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. . . . *Nor can it be evidence of a crime.*

581 F.2d at 1351 (emphasis added). Recognizing the well-established rule that a person may not be penalized for exercising the Fifth Amendment right to silence, the court reasoned the same principle applies to the Fourth Amendment:

Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, so one may withhold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing. . . .

The rule that we announce . . . seeks to protect the exercise of a constitutional right, here the right not to consent to a warrantless entry.

581 F.2d at 1351-52; accord, Gasho v. U.S., 39 F.3d 1420, 1431-32 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995).⁵

⁵ Numerous jurisdictions follow this settled rule. BOA at 40 (citing Elson v. State, 659 P.2d 1195, 1197-99 (Alaska 1983); Gomez v.

Prosecutors are not only prohibited from commenting on warrantless searches of our property, but also on warrantless searches of us – i.e. our bodies. Passive refusal to consent to a search of DNA cannot be treated as evidence of a crime. State v. Jones, 678 N.W.2d 1, 12 n.3 (Minn. 2004) (citing Prescott). When a Kentucky prosecutor argued a suspect's refusal to consent to a DNA test showed his guilt, the Kentucky Supreme Court held this violated the Fourth Amendment and the parallel state constitutional protection. Deno v. Commonwealth, 177 S.W.3d 753, 761-62 (Ky. 2005).⁶

State, 572 So.2d 952, 953 (Fla. App. 1990); People v. Stephens, 133 Mich. App. 294, 349 N.W.2d 162, 163-64 (Mich. App. 1984); Garcia v. State, 103 N.M. 713, 712 P.2d 1375, 1376 (N.M. 1986); Commonwealth v. Tillery, 417 Pa. Super. 26, 611 A.2d 1245, 1249-50, review denied, 616 A.2d 984 (1992); Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992); Reeves v. State, 969 S.W.2d 471, 493-95 (Tex. Ct. App. 1998), cert. denied, 526 U.S. 1068 (1999).

⁶ As the Deno court explained, in the different context of a DUI arrest, there may be no right to refuse to consent to a warrantless search of bodily fluids. If driving is considered a “privilege,” not a “right,” and if implied consent statutes exist, the “right” to refuse consent may only rise from legislative grace. A different rule therefore governs that different scenario, allowing prosecutorial comment on that refusal. Deno, 177 S.W.3d at 760 (citing, inter alia, South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)); cf. RCW 46.20.308 (implied consent statute); State v. Long, 113 Wn.2d 266, 267, 778 P.2d 1027 (1989) (refusal to take DUI breath test may be admissible); State v. Zwicker, 105 Wn.2d 228, 244, 713 P.2d 1101 (1986) (refusal to take DUI blood test may be admissible). In contrast, there is no question Jones had the right, under the Fourth

These persuasively reasoned decisions set forth a clear and workable rule that prevents the state from unconstitutionally inferring guilt from the exercise of the constitutional right to be free from warrantless searches. The rule should apply with even greater vigor in Washington, where our state constitution provides more protection against warrantless government intrusion than does the Fourth Amendment.⁷ Otherwise this Court's constitutional decisions would become hollow proclamations of theory, lacking substance.⁸

Amendment and article 1, § 7, to refuse to consent to a warrantless request for his DNA.

⁷ Assuming a prosecutor might claim he or she did not know such comments were prohibited, Washington also has long had a strong and independent exclusionary rule, refusing to adopt an exception for the government's allegedly "reasonable" actions taken in "good faith." State v. Einfeldt, 163 Wn.2d at 639; Morse, 156 Wn.2d at 12; State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); State v. Gibbons, 118 Wash. 171, 188-89, 203 P. 390 (1922).

⁸ The state's ability to undermine this Court's decisions would be profound. Ferrier warnings, for example, would become meaningless. Although officers on the scene could advise us of the right to refuse consent, the prosecutor at a subsequent trial would argue those who exercise the right do so only because we know we are guilty. Similarly, a person tells an officer she does not want to be frisked would invite the officer to conclude she is hiding something, thereby justifying the frisk. Cf. State v. Xiong, 164 Wn.2d 506, 509, 514, 191 P.3d 1278 (2008) (properly rejecting this analytical charade).

b. The Prosecutor's Comments on the Exercise of Fifth Amendment Rights Were Clear Error.

Jones' brief also challenged the state's evidence and prosecutor's argument commenting on Jones' alleged failure to contact the Richland police. BOA at 35-37. The Court of Appeals properly assumed this misconduct was error. Slip op. at 17; cf., Burke, 163 Wn.2d at 211-17.

c. The Constitutional Error Warrants Reversal.

As this Court recently suggested in Warren, a constitutional harmless error standard may apply where misconduct improperly comments on the exercise of a constitutional right. Warren, 165 Wn.2d at 26 n. 3; State v. Dixon, 150 Wn. App. 46, 58 n.4, 207 P.3d 459 (2009). The state must show constitutional error is harmless beyond a reasonable doubt. For the reasons stated below, the state cannot meet that burden.

d. The Misconduct was Flagrant

If the traditional two-part test for misconduct is applied, reversal also is appropriate. The prosecutor presented evidence and argument to draw negative inferences from two constitutional provisions. The prohibition against comments on the exercise of Fifth

Amendment rights is longstanding.⁹ Prescott, which prohibits comments on the exercise of Fourth Amendment rights, was decided in 1978. Misconduct is flagrant when improper argument follows court decisions condemning the state's tactic. See, e.g., State v. Charlton, 90 Wn.2d 657, 663-64, 585 P.2d 142 (1978) (single reference to Charlton's "failure" to call his wife to the stand was flagrant and reversible); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutor's contention the jury had to find the state's witnesses were "lying" to acquit Fleming was flagrant and reversible), rev. denied, 131 Wn.2d 1018 (1997).

Furthermore, for the first time in rebuttal, when defense counsel could no longer respond, the prosecutor improperly argued the jury could infer Jones was guilty because the defense did not call Dixon's mother as a witness. As defense counsel said when objecting and moving for a mistrial, Dixon's mother was not available as a witness. A material witness warrant had been issued. 2RP 347-48,

⁹ Griffin and Doyle were decided in 1965 and 1976, respectively, and have been cited in numerous Washington decisions.

351-52.¹⁰ The record shows the prosecutor knew this¹¹ but made the prohibited argument anyway. This is flagrant.

In determining flagrancy, this Court also has looked to whether the same prosecutor has engaged in misconduct in other cases. State v. Warren, 165 Wn.2d 17, 27 n.4, 195 P.3d 940 (2008). This Court recently reversed a conviction for prosecutorial misconduct by the same Benton County trial deputy. See State v. Fisher, 165 Wn.2d 727, 748-49, 756-57, 202 P.3d 937 (2009) (same Benton County prosecutor engaged in misconduct by misusing ER 404(b) evidence; other claims also caused this Court concern); see also 165 Wn.2d at 770-73 (Madsen, J., concurring) (further describing instances of misconduct).¹²

¹⁰ The state may argue a missing witness inference only when the allegedly missing witness is in the control of or peculiarly available to the defense. State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008) (citing State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991)); WPIC 5.20.

¹¹ The prosecutor, defense counsel, and the court discussed the material witness warrant for Abigail Dixon. The prosecutor's direct exam of Detective Shepard established the warrant had not been served. 2RP 23-28, 37, 276. Given this, Abigail Dixon was not peculiarly available to the defense. The prosecutor's rebuttal was clearly improper. State v. Blair, 117 Wn.2d at 489.

¹² The ACORDS docket shows that different counsel substituted to appear at oral argument in this Court.

e. The Misconduct Was Prejudicial.

Misconduct should result in reversal where there is a substantial likelihood the misconduct affected the verdict. State v. Fisher, 165 Wn.2d at 749; State v. Boehning, 127 Wn. App. 511, 518-19, 111 P.3d 899 (2005). As shown in Jones' brief, the state faced a difficult case on retrial. The first jury had rejected the state's theory and could not agree on the lesser charge.

In order to obtain a conviction, the state had to convince the jury Dixon was credible beyond a reasonable doubt. Inconsistencies in her statements could have sewn seeds of doubt in a rational juror's mind. Dixon testified she was dragged by Jones from the bedroom to the kitchen on her knees, but she did not make this assertion to Officer Glasgow who took her statement just hours after the incident. Dixon testified she threw a mask against the wall, breaking it. In her statement to Glasgow she claimed she threw a glass, breaking it as well. When Glasgow searched the house that same day, he observed neither a broken mask nor broken glass. These inconsistencies spoke directly to the material issue of consent. Doubt that Dixon was dragged from the bedroom to the kitchen and doubt she smashed the mask and water glass in anger would necessarily undermine her assertion that Jones forced her to have sexual intercourse.

The state's improper comments on Jones' exercise of his constitutional rights were designed to distract the jury from these weaknesses in the state's case. The state cannot satisfy its burden to show the errors were harmless beyond a reasonable doubt.¹³

The prosecutor took maximum unfair advantage from Jones' refusal to consent to a DNA sample without a warrant. During the detective's testimony and in closing, the prosecutor made the prejudicial comments several times. 2RP 264-65, 334.

The prosecutor also made the improper comments a theme of his closing argument, as in Easter. That error was not harmless. Easter, 130 Wn.2d at 242. In Burke, the prosecutor emphasized Burke's silence on several occasions. That error was prejudicial. Burke, 160 Wn.2d at 221-23.

When applied, Burke and Easter lead to the same conclusion. In commenting on Jones' right to remain silent, the prosecutor argued:

And what did the defendant do after this took place? What did he do? Did he clear-- did he clear up any misunderstanding? No. Did he find Detective Shepherd and say, "Boy, big misunderstanding here. We need to clear this up?" No. . . .

¹³ This independent prejudice analysis does not factor in the cumulative prejudice from the court's exclusion of defense evidence set forth in argument 1, supra. Reversal is appropriate based on each error individually, as well as the cumulative errors.

[W]hen Detective Shepherd first learned that Center, Texas, had the defendant, did the defendant come right back then? No. He didn't come right back up and say, "Let's clear this up." He didn't call Detective Shepherd and go, "Holy cow, I've got a warrant out for rape for me. I better get to the bottom of this."

2RP 329-30.

The prosecutor similarly emphasized the refusal to consent to the DNA search, initially setting the stage with Shepherd's description of the benign procedure for collecting DNA, a swab of the inner cheek with a "Q-tip type" device for "about five seconds". 2RP 264. After Shepherd testified Jones "would not allow me to take the swab at that time", 2RP 264-65, the prosecutor said:

Q. A judge of the Benton County Superior Court granted you a search warrant to actually force the defendant to give you the swab; is that right?

A. Yes.

2RP 265. In case any jurors missed the point, the prosecutor followed up:

Q. All right. Again, this is all in the context of the conversation you had with the defendant where he claims he had done nothing wrong, correct?

A. Yes.

2RP 265. The prosecutor emphasized the issue in closing argument:

Why did he say no at that point, ladies and gentlemen? You know, you don't have to be real smart to know why. Because he knew. The DNA wasn't gonna lie. . . . he said, "No. You're not gettin' my DNA." Detective

Shepherd said, "Yeah, I am," and he did. He got a court order. Nothing voluntary from this man.

2RP 334.¹⁴

Because these errors were prejudicial individually and cumulatively, the Court of Appeals erred in finding them harmless. This Court should reverse and remand for a fair trial. Burke, 163 Wn.2d at 222-23; Easter, 130 Wn.2d at 242-43.

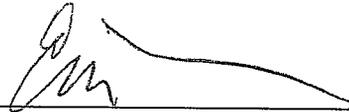
E. CONCLUSION

This Court should reverse the Court of Appeals and remand for a new trial consistent with this Court's decision.

DATED this 3rd day of July, 2009.

Respectfully submitted,

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¹⁴ The prosecutor in Deno made a similar argument. Deno, 177 S.W.3d at 760.

APPENDIX A

No. 82613-7

Jones' offender score was counted as six, yielding a standard range of 146-194 months. 2RP 374. The State offered no evidence to ascertain the comparability of Jones' Nevada conviction for sentencing purposes.

The court imposed an exceptional sentence of 242 months. CP 6. The court did not enter written findings of fact and conclusions of law setting forth its reasons for the exceptional sentence.

C. ARGUMENT

1. THE EXCLUSION OF DIXON'S CONTEMPORANEOUS SEXUAL BEHAVIOR AND DRUG AND ALCOHOL CONSUMPTION DEPRIVED JONES OF HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO TESTIFY, AND TO CONFRONT HIS ACCUSER.

Evidence of Dixon's sex with other men and of her drug and alcohol consumption was crucial to Jones' consent defense. By excluding this evidence, the trial court eviscerated Jones' ability to defend himself and deprived Jones of a fair trial under the state and federal constitutions.

a. The Excluded Evidence Was Relevant And Crucial To Jones' Defense.

When a complaining witness alleges rape, it is obvious that evidence the witness had contemporaneous sex for money with other men during an all-night party is relevant to a consent defense. Justice Souter has characterized a witness's promiscuous behavior a few hours before an alleged rape: "[i]t would, in fact, understate the importance of such evidence in this case to speak of it merely as relevant." State v. Colbath,

130 N.H. 316, 540 A.2d 1212, 1217 (1988). Evidence that Dixon exchanged consensual sex for money with two other men was relevant to show she consented to sex with Jones.

Dixon's drug and alcohol consumption was also relevant to Jones' consent defense and to Dixon's ability to perceive and recall the incident. In excluding this evidence, the trial court acknowledged it "would have been significant exculpatory information". 2RP 223. In State v. Sheets, 128 Wn. App. 149, 115 P.3d 1004 (2005), review denied, 156 Wn.2d 1014 (2006), this court stated the complaining witness's "degree of intoxication had high probative value" in a rape prosecution. 128 Wn. App. at 157. And in State v. Brown, 48 Wn. App. 654, 739 P.2d 1199 (1987), it was error to exclude evidence concerning a witness's contemporaneous drug use:

We hold that the evidence of the young woman's ingestion of LSD and its effect is crucial evidence. With such evidence, the defendants could have argued that the prosecutrix believed she was resisting sexual contact when, in fact, she was not and that her hysterical state at the hospital was drug induced and not the result of rape. Thus, the trial court abused its discretion in excluding it.

48 Wn. App. at 660; see also, Tegland, 5A Wash. Pract. Evidence, § 607.12 (5th Ed. 2007) ("A witness's use of alcohol or other drugs at the time of the events in question is admissible to show that the witness may not remember the events accurately.").

The importance of the evidence excluded by the trial court cannot be overstated. The excluded evidence *was* Jones' defense. Without it, Jones plainly had no means of rebutting Dixon. Had Jones taken the stand, his testimony was restricted to a bland assertion, with no explanation of surrounding circumstances, that his niece consented to sexual intercourse. In light of Dixon's allegations, the jury would obviously require more to consider Jones' testimony as anything other than a tacit admission of guilt. Given this grim terrain, it is not surprising Jones did not testify.

The blanket exclusion of defense evidence also crippled Jones' ability to cross examine Dixon. Her testimony was shielded from serious challenge on the issues of consent and her ability to perceive and recall the incident.

b. Jones Was Denied His Constitutional Rights To Present A Defense And To Testify.

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. 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 offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version

of the facts as well as the prosecution's to the jury so it may decide where the truth lies." State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. at 689-690.

The Washington Supreme Court's decisions in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), and State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002), define the expanse of an accused's right to present evidence in his defense. The accused is allowed to present even minimally relevant evidence unless the State can demonstrate a compelling interest for exclusion. Darden, 145 Wn.2d at 612. Instead of applying an ER 403¹⁰ balancing test, once defense evidence is shown to be even minimally

¹⁰ ER 403 provides that relevant evidence is admissible unless its probative value is outweighed by prejudice or has a tendency to confuse the issues, mislead the jury, cause undue delay, or is an unnecessary presentation of cumulative evidence.

relevant, the burden shifts to the State to show a compelling interest in excluding it. If the State cannot do so, the evidence must be admitted. Hudlow, 99 Wn.2d at 15-16; see also, State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest.").

The right to present a defense burns brightest when the accused intends to take the stand. An accused has a fundamental constitutional right to testify in his own defense and to "present his own version of events in his own words". Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 2709, 97 L. Ed. 2d 37 (1987). The right to testify is derived from 14th Amendment due process, 6th Amendment rights to compulsory process and self-representation, and the Fifth Amendment's guarantee against compelled testimony. 107 S. Ct. at 2708-10.

In Rock, the Supreme Court held a per se state exclusion of post-hypnotic testimony violated the defendant's right to testify. The court traced the evolution of law from the common law bar against an accused's testimony, grounded in the defendant's interest in the outcome of the case, to the modern constitutional right. The court explained the right to testify furthers the truth seeking process because important evidence is heard and because a defendant's credibility is adequately tested under cross examination. 107 S. Ct. at 2709.

The right to testify on one's own behalf is one of the rights that "are essential to due process of law in a fair adversary process." 107 S. Ct. at 2708-09 (quoting Faretta v. California, 422 U.S. 806, 819, n.15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). Thus, a State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony". 107 S. Ct. at 2711. The Rock court concluded:

[T]he right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

107 S. Ct. at 2711 (citation omitted).

Jones was denied his constitutional rights to present a defense and to testify in his defense. The court prevented the jury from hearing obviously relevant evidence of Dixon's participation in an all-night cocaine binge and from hearing Dixon exchanged sex for money with other men. The rulings gagged the appellant, barring him from telling his version of what transpired. The trial court effectively annulled Jones' defense without the justification of a compelling State interest. His conviction should be reversed.

c. Jones Was Denied His Right To Confront His Accuser.

The Sixth Amendment guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. The main and essential purpose of confrontation is to afford the opportunity of cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105 (1974). The purpose is to test the perception, memory, and credibility of witnesses. State v. Darden, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. 145 Wn.2d at 620. The right to confront must therefore be zealously guarded. 145 Wn.2d at 620.

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. State v. Darden, 145 Wn.2d at 619. To allow the defendant no cross-examination into an important area is an abuse of discretion. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

The trial court's evidentiary rulings denied Jones his right of confrontation. While the excluded evidence *was* Jones' defense, Dixon's testimony *was* the prosecution. A more essential State's witness could never be. Inquiry into her sexual behavior and her consumption of cocaine

and beer was essential to explore her credibility, motives, memory, and perception. Cross-examination in these areas would fundamentally test the truth of her allegation. Instead of constricting the scope of Jones' cross-examination, the trial court should have allowed the wide latitude mandated by the Sixth Amendment. The denial of Jones' confrontation right corrupted and distorted the fact finding process. His conviction should be reversed.

d. The Constitutional Errors Were Not Harmless.

It is the State's burden to show a constitutional error was harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Under harmless error analysis, a conviction will be upheld only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). When the error involves erroneously admitted evidence, the court examines the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. 148 Wn.2d at 139. Harmless error analysis avoids reversal on "hypertechnical grounds". 148 Wn.2d at 139.

The State cannot carry its burden to show the constitutional errors discussed above were harmless. There were two possibilities at the trial below. Either Dixon's account would be subjected to serious challenge,

or it would not. The jury would hear Jones' description of the all-night sex and cocaine binge or it would not. It cannot be said "any reasonable jury" would reach the same verdict under either scenario. The errors were neither harmless nor hypertechnical. Jones' conviction should be reversed and remanded for a new trial.¹¹

2. THE TRIAL COURT'S EVIDENTIARY RULINGS WERE INCORRECT UNDER WASHINGTON LAW.

The trial court erred by ruling Dixon's contemporaneous sexual behavior was inadmissible under Washington's rape shield statute. The shield statute is inapplicable to Dixon's contemporaneous conduct. The statute establishes a rule of relevance limiting the admissibility of *past sexual behavior*, not contemporary conduct.

The court also erred by excluding Dixon's cocaine and alcohol consumption. The ironclad rule in Washington requires juries, not judges, to determine the credibility of witnesses. ER 404(b) does not empower the

¹¹ To the extent the constitutional claims discussed in this section are deemed raised for the first time on appeal, their consideration by the Court of Appeals is nevertheless appropriate. A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Errors are "manifest" for purposes of RAP 2.5(a)(3) when they have "practical and identifiable consequences in the trial of the case." State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). The practical and identifiable consequences here are that Jones was prevented from defending himself by offering relevant evidence, by testifying, and by confronting his accuser.

trial judge to usurp this fundamental role of the jury under the guise of the court's "preponderance" inquiry.

a. The Rape Shield Statute Is Inapplicable To Dixon's Contemporaneous Sexual Behavior.

Washington's "rape shield" statute, RCW 9A.44.020, bars evidence of "past sexual behavior" to attack a witness's credibility. RCW 9A.44.020(3). The statute *allows* such evidence when it is "relevant to the issue of the victim's consent". RCW 9A.44.020(3)(d).

In applying the shield statute, Washington courts understand the difference between current sexual conduct and past behavior. In State v. Sheets, 128 Wn. App. 149, 115 P.3d 1004 (2005), review denied, 156 Wn.2d 1014 (2006), the defendant was charged with attempted rape. A state's witness under cross examination testified the complaining witness was intoxicated and flirtatious on the night of the incident. The State moved for a mistrial, which the trial court first denied, then granted. This court held it was error to grant the mistrial because the complaining witness's intoxication and flirtatiousness was relevant and admissible under RCW 9A.44.020. The court observed the rape shield statute "does not violate a defendant's constitutional right to confrontation precisely because the statute does not preclude evidence of high probative value". 128 Wn. App. at 157 (citing Hudlow, 99 Wn.2d at 15). The court approved the trial court's initial decision to deny the mistrial, commenting, "[a]s the [trial]

court saw it, [the complaining witness's] conduct on the evening in question was admissible, while her past sexual conduct was not admissible." The

Sheets court agreed with the trial court:

Here, Mr. Young's testimony about the victim's uncharacteristic flirtatious behavior on the evening in question barely qualifies as past sexual conduct. Even if the evidence qualifies as past sexual conduct, its prejudicial impact can fairly be described as low.

...

[W]e agree with the court's first and only analysis of the issue—the evidence was admissible and not barred by the rape shield statute.

128 Wn. App. at 157-58; see also, State v. Gregory, 158 Wn.2d 759, 787-88, 147 P.3d 1201 (2006) (under shield statute, dispute whether complaining witness was acting as a prostitute on night of alleged rape did not open door to witness's history as a prostitute); Hudlow, 99 Wn.2d at 17-18 (co-defendants allowed to testify rape victims "traded places" with co-defendants, while evidence of victims' history of prior general promiscuity was properly excluded).

Other jurisdictions recognize the commonsense distinction between past and present behavior under rape shield laws. In State v. Colbath, 540 A.2d 1212, the court held it was error to exclude evidence of the complaining witness' sexual advances toward other men hours before the alleged rape. As noted above, Justice Souter commented it would

"understate the importance of such evidence in this case to speak of it merely as relevant." 540 A.2d at 1217; see also, State v. Sherman, 637 S.W.2d 704, 706-07 (Mo., 1982) (Witness's statement she was raped earlier in the evening should have been admitted. "[A]cts, statements, occurrences and the circumstances forming part of the main transaction may be shown in evidence under the *res gestae* rule where they precede the offense immediately or by a short interval of time and tend, as background information, to elucidate a main fact in issue."); State v. Perez, 26 Kan.App.2d 777, 995 P.2d 372 (1999) (error to exclude evidence complaining witness had sex with two others at a party shortly before alleged rape); State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989) (error to exclude defendant's proffered testimony he saw complaining witness having sex with another male on the night in question); Villafranco v. State, 252 Ga. 188, 313 S.E.2d 469 (1984) (error to exclude witness's statement she wanted "to go to the party to get some nookey"); Commonwealth v. Majorana, 503 Pa. 602, 470 A.2d 80 (1983) (witness's sexual activity two hours before alleged rape is not "past sexual conduct" under rape shield law); Hubbard v. State, 271 Ark. 937, 941, 611 S.W.2d 526 (1981) ("sexual conduct between the prosecutrix and a third party is not admissible unless it occurred in such close proximity of time and location to the alleged

rape that it bears on the issue of consent or other material element of the offense").

Contrary to this well reasoned law, the trial court excluded Jones' proffered evidence that Dixon consented to having sex with him and other men in exchange for money in the course of an all-night drug and alcohol binge. The offered evidence pertained to Dixon's contemporaneous conduct, not "past sexual behavior." This evidence, obviously probative and relevant to Jones' consent defense, did not fall within the scope of the rape shield law.¹²

A trial court's ruling on the admissibility of evidence should be reversed when the court abuses its discretion, *i.e.*, when manifestly unreasonable or based upon untenable grounds or reasons. State v. Darden, 145 Wn.2d at 619. The court's exclusion of proffered defense evidence was untenable because it depended on an erroneous interpretation of the shield law. The trial court abused its discretion by excluding the evidence.

¹² The State may be tempted to claim for the first time on appeal that Jones did not comply with the requirement under 9A.44.020(3) that a defendant file a written motion seeking admission of "past sexual behavior" evidence. The argument would lack merit because, as argued here, the evidence proffered by Jones did not consist of "past" sexual behavior. Furthermore, the State waived any procedural objection by failing to raise the issue below. See, e.g., Haywood v. Aranda, 143 Wn.2d 231, 238 n.8, 19 P.3d 406 (2001) (non-jurisdictional, procedural objections are waivable).

b. The Trial Court Erred By Excluding Evidence Of Dixon's Drug And Alcohol Consumption. The Court's "Preponderance" Finding That Jones Was Not Credible Usurped The Jury's Function.

It is well established in Washington "the jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses." State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). "[J]udges determine the competency of witnesses, and juries determine their credibility." State v. Israel, 91 Wn. App. 846, 848, 963 P.2d 897, review denied, 136 Wn.2d 1029 (1998).

Because credibility determinations are reserved for the jury, evidence is not excluded merely because a judge finds a witness potentially not credible. Washington's leading evidence commentator underscores this point in the context of ER 403's probative versus prejudicial balancing requirement:

Rule 403 does not authorize the exclusion of relevant evidence solely because the judge disbelieves the witness or in some other way regards the evidence as unreliable. The notion runs consistently through the rules and the case law that the jurors alone determine credibility.

5 K. Tegland, Washington Practice § 403.8 (5th ed. 2007).

State v. Gosby, 11 Wn. App. 844, 526 P.2d 70 (1974), aff'd, 85 Wn.2d 758 (1975), forcefully applied the rule that jurors alone determine credibility. In Gosby, the credibility of a robbery victim in identifying the perpetrators appeared to be in tatters. She had made a previous erroneous

identification, she had failed to identify a defendant in a lineup, stated she would be unable to identify her assailants, her description of the assailants was imperfect, she failed to positively identify one of the defendants in trial, and her testimony at a preliminary hearing varied from her trial testimony. 11 Wn. App. 845. Nevertheless, the Court of Appeals held the testimony was properly admitted:

The victim's testimony was clearly competent, relevant and material. As with any witness, her credibility was at issue. Under our adversary system, witness credibility is tested by cross-examination and is the subject of fair comment in final argument. . . . [N]either reason nor precedent supports defendants' contention that eyewitness identification testimony should be suppressed because credibility is in issue.

11 Wn. App. 845. The Supreme Court agreed with the Court of Appeals analysis: "[U]ncertainty or inconsistencies in the testimony affects only the *weight of the testimony and not its admissibility.*" 85 Wn.2d at 760 (emphasis added).

A trial court's finding that a child witness was incompetent to testify due to credibility concerns was reversed in State v. Griffith, 45 Wn. App. 728, 727 P.2d 247 (1986). At different times, the child had identified two different perpetrators. The child's answers could have been influenced by suggestive questions and by a suggestive parent. Noting the trial court may have found the child witness incompetent "simply because it disbelieved her testimony," the Griffith court emphasized:

[T]he jury, not the judge, is the sole and exclusive judge of the credibility of witnesses. State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). Moreover, any inconsistency in her testimony *went to credibility and not admissibility*.

45 Wn. App. at 735-36 (emphasis added); see also, State v. Woodward, 32 Wn. App. 204, 208, 646 P.2d 135, review denied, 97 Wn.2d 1034 (1982) ("Any inconsistencies in [child's] testimony went to her credibility and not to admissibility.").

The bedrock principle that a witness's credibility goes to weight, not admissibility, applies to ER 404(b). The rule states:

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.

Nothing in this language suggests ER 404(b) inhabits a specialized niche in the law of evidence granting judges authority to determine credibility.

That judges do not make credibility determinations in admitting or excluding evidence under ER 404(b) is implicit in the Supreme Court's holding in State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). In order to admit "other acts" evidence under 404(b), the trial court must find the acts "probably occurred" by a preponderance of the evidence. 147 Wn.2d at 292. Kilgore held trial courts are not required to conduct evidentiary

hearings for the purpose of making "preponderance" findings. The court explained:

Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. As the Court of Appeals observed, the defendant will always have the right to confront the witnesses who testify against him at trial.

147 Wn.2d at 294-95.

Because an evidentiary hearing serves "no useful purpose" under ER 404(b), and because parties "will always have the right to confront the witnesses" who testify to 404(b) facts, it is clear the rule does not deviate from the fundamental principle in Washington that judges determine witness competency, while juries determine their credibility.

The trial court erred by excluding Jones' eyewitness testimony regarding Dixon's drug and alcohol consumption. The evidence was relevant to the issue of consent and to impeach Dixon's ability to perceive and recall the events in question. In excluding the evidence, the court invaded the jury's exclusive function to determine credibility. The court's exercise of authority it did not possess was untenable and an abuse of discretion.