No. 57806-9-II
Pierce Cty. No. 20-1-02855-1

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON,
DIVISION TWO

STATE OF WASHINGTON,
Plaintiff / Respondent,

v.

ROBERT JAMES CONWAY, JR.,
Defendant / Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON, PIERCE COUNTY

The Honorable Bryan E. Chuschcoff, Trial Judge

APPELLANT'S OPENING BRIEF
SECOND CORRECTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

COURT OF APPEALS

FEDERAL AUTHORITIES

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

1. The prosecutor committed flagrant, ill-intentioned and highly prejudicial misconduct which could not have been cured by instruction, the cumulative effect of which deprived appellant R.J.C., Jr., of a fair trial.

   Did the prosecutor commit such misconduct in misstating crucial facts and using those claims to argue guilt, misstating the jurors' role and the State's burden, shifting a burden to the accused, invoking passions, prejudice and sympathy, bolstering the victim, and urging jurors to treat their decision as a choice between sides?

   Where the evidence of guilt is not overwhelming and the case depended upon credibility, and where all of the prosecutor's misconduct directly interfered with the jurors' ability to fairly and impartially decide the case, is reversal and remand for a new trial required?

2. In the alternative, appointed counsel was prejudicially ineffective in violation of appellant's Sixth Amendment and Article 1, § 22 rights.

   If the Court finds that any or all of the misconduct could have been cured by instruction, was counsel prejudicially ineffective in failing to seek such mitigation of harm to her client?

3. Appellant R.J.C., Jr., was deprived of his state and federal due process rights to present a defense

and his rights to confrontation and cross-examination.

The defense was that the victim was mistaken about what had occurred and could not backtrack or express any hesitation once she had told her sister she was raped because the case took on a life of his own, especially after her sister told their mom.

Did the trial court violate R.J.C., Jr.'s rights to present a defense and to cross-examination by excluding evidence which was relevant and material to that defense?

4. R.J.C., Jr.'s state and federal rights to be free from double jeopardy were violated.

Appellant assigns error the Order Merging and Vacating, as to Count 2 Only, which provides, in relevant part:

> A jury has found defendant guilty of two crimes - Count 1, Rape in the Second Degree, and the lesser included crime to Count 2, Assault in the Fourth Degree. The jury also returned a special verdict that found defendant had committed Count 2 with Sexual Motivation.
>
> The only evidence of assault presented in trial was committed during the act of rape. The assault was used to effectuate the rape. Therefore, this Court finds that the

lesser included crime of Count 2, Assault in the Fourth Degree, merges into Count 1, Rape in the Second Degree. *See State v. Williams,* 156 Wn. App. 482, 234 P.3d 1174, 1179-80 (2010). Due to, and conditioned upon that merger, this Court hereby vacates defendant's conviction for the lesser included crime to Count 2, Assault in the Fourth Degree.

CP 255-56.

Appellant also assigns error to the emphasized portions of the judgment and sentence which provide in relevant part:

2.1 CURRENT OFFENSES: The defendant was found guilty on October 26, 2022 based upon [ ] guilty plea [x] jury verdict [ ] bench trial of:

Count 1: RAPE IN THE SECOND DEGREE . . .as charged in the AMENDED Information

[x] A special verdict/finding of sexual motivation was returned on Count(s) ____ RCW 9.94A.835.

. . .

III. JUDGEMENT

3.1 **The defendant is GUILTY of the Counts**

and Charges listed in Paragraph 2.1 . . .

3.2 **[x] The Court ~~DISMISSES~~ merges and vacates Counts __2__ in the charging document. See attached order.**

CP 229-30 (emphasis added).

5. This Court should strike the $500 victims fund assessment, the $100 DNA Database Fee, and the condition of community custody set forth in Appendix H which provides as a "standard condition:"

> 4. Pay supervision fees as determined by the Department of Corrections.

CP 245.

> Is R.J.C., Jr., entitled to relief from costs and other conditions imposed below which are no longer authorized under the law under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018)?

B. STATEMENT OF THE CASE

1. *Procedural facts*

Appellant R.J.C., Jr., was charged by corrected amended information in Pierce County with second-degree rape and second-degree assault with sexual motivation. CP 46-47; RCW 9.94A.030; RCW 9.94A.533; RCW 9.94A.835; RCW

9A.36.021(1)(g); RCW 9A.44.050.

Pretrial and trial proceedings were held from December 2020 until trial was held before the Honorable Judge Ronald Culpepper on October 11-13, 17-20, 24-26, 2022.[1] The jury acquitted of second-degree assault but found guilt of the "lesser" of fourth degree assault with the "sexual motivation" finding, as well as second-degree rape. CP 190-93.

Judge Culpepper imposed a standard-range sentence. CP 227-248. R.J.C., Jr., appealed and this pleading follows. *See* CP 288-306.

2. *Testimony at trial*

When E.P. was 19 years old she met 21 year old R.J.C., Jr., on the dating "app" Tinder. TRP 437-39. On their first date

[1]The verbatim report of proceedings consists of five volumes not all chronologically paginated, which will be referred to as follows:

December 16, 2020, August 10, September 2, October 29, 2021, August 26, September 8, and November 23, 2022, as "1RP;"

September 12, 2022, as "2RP;"

the three volumes with the trial and sentencing proceedings of October 11-13, 17-20, 24-26, 2022, and January 13, 2023, as "TRP."

in late June or early July, they smoked marijuana together; she did not recall if they kissed. TRP 438. By late July they were "official boyfriend and girlfriend." TRP 438, 472.

E.P. had not had had sexual intercourse in the form of physical penetration before. She told R.J.C., Jr., that she would not have sex with him and he was fine with that. TRP 440, 480-81, 484.

They dated for several months and she went to his house several times, also taking him to her home to meet her parents, introducing him to her sister, and taking him to a friend's home, too. TRP 472, 510-11. He invited her to go with him to visit his family later that year; she had been introduced and spoken to his mom or sister by phone. TRP 510-11.

During that time, E.P. and R.J.C., Jr., also engaged in consensual sexual behavior which E.P. described as "heavy making out." TRP 473. Although at first she said that did not involve their genitals even through clothing, she later

conceded that they had engaged in "dry humping" which involved "grinding" their bodies against each other, mutually, in a sexual way, including their clothed genitals. TRP 474, 479.

Around his birthday in July of that year, R.J.C., Jr., asked E.P. to be in an exclusive relationship and she readily agreed. TRP 479. To her, this also meant that they would have a sexual relationship when she was eventually ready and prepared. TRP 480-81, 484. When they were making out, she said, she set clear boundaries about their sexual relationship and he respected them. TRP 485.

In early August, they planned that she would spend the night together but agreed that they were not going to have sex. TRP 440. He had previously asked her to stay over but she had declined, telling him she was not yet comfortable enough. TRP 481.

E.P. admitted she did not tell R.J.C., Jr., that even the idea of sleeping in his home made her nervous. TRP 481. She

suffered from anxiety but did not really share that information with others, even him. TRP 481. For this evening, however, she expected that she would be sleeping in his bed next to him and was now comfortable with that. TRP 483. She said she thought he would respect her boundaries. TRP 483.

Once at his house, they talked, then went out to buy marijuana. TRP 441. E.P. said the effects of marijuanas wear off "in, like, 5, 10 minutes" or "[m]aybe 20 max." TRP 457. She also takes pills including an antidepressant and sleeping pills, but did not take them that night. TRP 458, 508-509.

Back home, they "smoked a bowl or two with one of his roommates," then went into his bedroom to watch a movie. TRP 441. She thought that they watched some anime, then the "Princess and the Frog." TRP 422. That's what they were watching, she said, "when he forced himself upon me." TRP 442.

A moment later, despite that inflammatory statement,

E.P. explained that it did not happen quite like that. TRP 443. Instead, they were making out for quite some time first. TRP 443.

More specifically, E.P. said, she and R.J.C., Jr., were "groping, dry humping," and doing "hand stuff" which meant "being fingered or [a] hand job." TRP 443. Being "fingered" meant "[h]e put his fingers inside" her. TRP 443. "[G]roping" mean grabbing someone's butt or boobs and fondling them, including touching genitals. *Id*. "Dry humping" meant rubbing "privates together with clothes on." TRP 471.

E.P. said that they started with their clothes on and made out for awhile, but she eventually went to switch into shorts and a shirt for "PJs." TRP 445, 491. She also said, however, that they made out with their clothes on for awhile and, when describing taking off her clothes it was the pants and tank top she had worn to the house. TRP 445, 492. She was not wearing a bra. TRP 492.

E.P. was clear that all of this sexual conduct was consensual. TRP 444, 475. When they were making out, he put his fingers in her vagina, consensually. TRP 492. He started with one finger and then put in two, but she was not sure if he ever put in three. TRP 492-93. She had never been digitally penetrated before, it was dark and she had her eyes closed. TRP 493.

During that time, she said, he pulled his underwear down and had his penis out, had her underwear "aside," and rubbed it against her privates but when she said "no" he stopped and apologized. TRP 446. She said this happened twice. TRP 446. She continued making out with him, however. TRP 434-44.

At one point gave him a "hand job," causing him to ejaculate over her chest and stomach. TRP 443-44, 494. She had never done that before, but he suggested it and she said yes. TRP 493-94. Although she would later say that it actually

made her "uncomfortable," she never expressed that to him. TRP 493-94.

In the dark room, the two of them cleaned her off by wiping with a piece of clothing. TRP 444, 495. They then continued making out. Probably about ten minutes later, they were taking off each other's clothes, with E.P. taking off R.J.C., Jr.'s shirt. TRP 495-96. They continued to make out for another quarter hour or so, which E.P. said was all consensual kissing, "grinding," dry humping, and more digital penetration. TRP 495.

E.P. said she then felt what seemed like his penis against her vagina, skin on skin, her underwear apparently aside. TRP 497. They had moved underneath the covers and she said he started to insert his penis, she said no, and he stopped. TRP 447, 497-98. According to E.P., a moment later he just "inserted himself fully" and although she said to stop, he did not. TRP 447. She also said he "put his arm over" her

"shoulder and neck." TRP 447.

E.P. went into a shock, got very anxious and had trouble breathing and blurred vision. TRP 447. On direct examination she testified that he was "pounding" into her and it "hurt a lot." TRP 448-49. On cross-examination, however, she backtracked, saying he was not "going really hard" or "pounding," just moving in and out. TRP 498. She did not know how long it lasted. TRP 449.

When it was over he held her. TRP 449. He apologized, she said, asking if she was okay and if he could do anything for her. TRP 448. She did not respond but got up and went to the bathroom, taking her phone and texting her twin sister to ask if she could come over. TRP 448-49. In the bathroom, she noticed she was bleeding and started to cry. TRP 449-50. There was blood on the very upper part of her legs, too. TRP 500.

Because E.P. believed that you are supposed to urinate

after sex or you will "get a yeast infection," she tried to go. TRP 500. When asked about this belief, she said, "[e]verybody knows you're supposed to go to the bathroom after you have sex[.]" TRP 500. She claimed she had "always known that, like, from reading books, from friends." TRP 501.

E.P. also thought that her hymen would remain intact if they only engaged in digital - not penile - penetration. TRP 506. She believed that fingers could not break or hurt her hymen but a penis would. TRP 506-507. When the prosecutor asked if the fingering felt different, she said the penetration was more painful, a sharp pain that hurt and "stung" and was very uncomfortable. TRP 509-510. She had never had finger penetration before, however. TRP 509-10.

E.P. did not think that R.J.C., Jr., had ejaculated anywhere near her panties that night, although she never said he was wearing a condom to prevent sperm from leaking out during foreplay. TRP 508. A State's expert would later testify

that "leakage" is possible without ejaculation. TRP 702.

Once she left the bathroom, E.P. started to gather her stuff to leave. TRP 450. R.J.C., Jr., was trying to talk to her and kept her marijuana bag from her initially. TRP 450. He then followed her to her car, she said, apologizing. She drove off, and ending up where her twin sister Lauren[2] was with their mutual friend, Sierre Leone. TRP 450, 525-29, 551.

Ms. Leone and Lauren said E.P. looked upset and sad when she arrived. TRP 450, 525-29, 551. She declined to talk at first, instead taking a shower. TRP 450, 501. Once she was done, Lauren and Ms. Leone tried to comfort her and asked her to tell them what happened. TRP 525-29. Once she did, they talked her into texting R.J.C., Jr., to see if he would incriminate himself. TRP 450.

E.P. then texted R.J.C., Jr., and he responded,"I'm so

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[2]Because they share the same last name, Lauren will be referred to by her first name to distinguish her from E.P., the victim, with no disrespect intended.

sorry. I don't want to lose you," but she texted back, "it's best if we end things." TRP 451. A little later, E.P.'s sister Lauren texted R.J.C., Jr., calling him a rapist and declaring that he belonged in Hell. TRP 1054-55.

E.P. was blaming herself and really sad, not sure what she wanted to do. TRP 452. Her sister and Ms. Leone convinced her to go with them to the hospital to get a "rape kit" done. TRP 452, 501-502. Lauren did not recall urging her sister to go to the hospital. TRP 532. Lauren admitted she thought that a rape kit was about getting tested for sexually transmitted diseases and get "preventative care." TRP 532.

E.P. testified that in fact, her sister and Ms. Leone wanted to order an ambulance to take her to the hospital but E.P. did not want to pay that cost. TRP 453.

The women first went to Valley Medical Center. TRP 453, 501-502. Missy Griffith Carter, the physician's assistant who saw E.P. that night, confirmed that E.P. said she was

there for a "rape kit." TRP 566-57. E.P. told Ms. Griffith Carter that she had been forcefully raped by a person that she knew and he had held her down and strangled her to do it. TRP 566-67. E.P. gave no more specifics, however, about the claim of strangulation. TRP 583.

With Ms. Griffith Carter, E.P. reported pain in the front of her neck but said she had no symptoms like being dizzy. TRP 585-86. The physician's assistant found no bruising, scratches, or redness on E.P.'s chest or neck. TRP 590-91. There was also nothing in E.P.'s eyes such as petechiae which would indicate past strangulation. TRP 592.

E.P. reported "[d]iffuse tenderness throughout the shoulder" and "some tenderness" when Ms. Griffith Carter examined the "soft tissues of the neck" but said it was not significant. TRP 569-70.

At trial, E.P. testified that she was bleeding a lot - indeed, she said, "I was bleeding for days." TRP 449. With the

physician's assistant at Valley Medical Center, however, E.P. described the bleeding she had experienced that night as "spotting." TRP 880, 585. That was consistent with what Ms. Griffith Carter saw; E.P.'s vagina had only "scant" bleeding and there was a small laceration, approximately 3 millimeters long, in the 6 o'clock position. TRP 571. The physician's assistant saw no injuries on E.P. which needed following up. TRP 579-80.

E.P. never told anyone at Valley Medical Center that she had also engaged in consensual sexual behavior - including digital penetration - that night. TRP 584, 586. Nor did she mention that he had ejaculated on her; she said she was unsure about whether he had ejaculated. TRP 574. E.P. asked for preventative medication for possible pregnancy or sexually transmitted diseases but the physician's assistant referred her to Harborview, because it had an onsite sexual assault nurse examiner (SANE) nurse who could do the rape kit. TRP 575.

Several hours after they arrived at Valley Medical, the three women went to Harborview. TRP 503. Heather Vargas-Lyon was the SANE nurse that night. TRP 599. Ms. Vargas-Lyon wrote down at the time what E.P. said, which was that he had his fingers inside her vagina when she felt pain and the pain then got bad. TRP 610-11.

At first, E.P. told the SANE nurse, she thought it was his fingers. TRP 610-11.

E.P. told Ms. Vargas-Lyon that she pushed R.J.C., Jr., off and he stopped. TRP 610-11. According to E.P. however, a moment later he pushed into her and started started choking her so she could not breathe, almost passed out and thought for a second she was going to die. TRP 610-11. E.P. told the SANE nurse that she "was able to get into the bathroom" and then leave. TRP 610-11.

Nurse Vargas-Lyon testified that it was unusual with sexual assault patients to see any injuries. TRP 601-602. The

SANE nurse saw a redness below E.P.'s "clavicles" on her chest but none on her neck. TRP 612-13. With Ms. Vargas-Lyon, E.P. said nothing about pain on the *front* of her neck; it was tenderness on both sides. *Id.* E.P. gave the SANE nurse more details about the "strangulation," however, saying it had occurred with "two hands." TRP 613-17.

When asked to document her neck injuries or the small cut on her vagina with photos, E.P. declined. TRP 615-17. In taking swabs, the SANE nurse did not use a speculum to hold the vagina open and prevent contamination, instead just holding it open with one hand. TRP 620-21. She only took one vaginal swab because E.P. kept "grimacing and tensing her body." TRP 633-34.

Nurse Vargas-Lyon did not see a 3 millimeter laceration at 6 o'clock and the entry of the vagina that Nurse Carter saw; the SANE nurse instead saw a one centimeter laceration on E.P.'s hymen at about 9 o'clock. TRP 631. There was also a

light abrasion on E.P.'s posterior fourchette, which is the fold of skin below the vagina, and can be caused by rubbing. TRP 631-32.

Indeed, the SANE nurse conceded, she could not determine what caused the injuries and could not say whether the small laceration was the result of consensual or nonconsensual conduct. TRP 633. She thought the injuries seemed consistent with what E.P. said had occurred. TRP 633.

E.P. did not call police that night. TRP 454, 504. She testified that her sister and Ms. Leone wanted her to, "right away." TRP 454. Lauren remembered that when medical professionals asked about going to police that night, E.P. was unsure. TRP 533-34.

Lauren denied talking to her sister about it but ultimately said she did not actually "remember what was said" between the incident and E.P. going to police TRP 534. Lauren denied, however, telling her sister to go. TRP 534-35.

E.P. said it was very uncomfortable to sit the next day. TRP 455. On August 25th, she went to police. TRP 503-504. A Tacoma Police Department officer asked E.P. to keep the text messages and took the shorts and tank top and underwear she gave him which she said was what she was wearing when the assault occurred. TRP 512. Although E.P. said she had been wearing pants, not shorts, she gave the officer only shorts. TRP 522-23. The officer opined that the underwear E.P. provided had a "definite" faded stain in the crotch area that seemed red. TRP 520.

E.P. did not keep any text messages from or to her sister or others; there was a screenshot of her last texts to R.J.C., Jr., admitted at trial. TRP 456-57.

R.J.C., Jr., testified in his own behalf. TRP 1008-1068. He denied ever putting his penis in E.P.'s vagina. TRP 1008-1068. Instead, he only put his fingers inside her. *Id.* He did not strangle or choke her and the only thing he did with her

neck beside kiss it was cradle it as part of kissing. TRP 1040-55. He was putting his fingers inside her when she abruptly just said stop, so he moved off. TRP 1036. They then both began to get dressed again and got into a little "spoon" position. TRP 1037.

After about 10 minutes she asked to go to the bathroom and got out of their embrace. TRP 1039. When she returned, she said she wanted to leave and would not talk to him. TRP 1040. He asked what was going on and she did not respond. TRP 1040-41. She seemed upset and angry and said she just did not feel comfortable staying the rest of the night. TRP 1041-41. He walked her to her car and she promised to text when she made it home. TRP 1043. About an hour later, she texted him that she was okay but did not want to see him anymore. TRP 1044-45.

He only found out that she was accusing him of rape about an hour after that, when her sister texted to accuse him.

TRP 1051.

There was no evidence of semen found on the crotch of E.P.'s underpants, although they had been rinsed out. TRP 687-88. The vaginal and anal swabs initially tested positive for a marker of semen but the State's expert could not conclusively say it was, in fact, semen. TRP 703. Another state's expert examined the "non-sperm fraction extract" from the vaginal swabs but did not test the anal swabs. TRP 716-17. The swab from the vagina was tested and there was DNA the expert said R.J.C., Jr., could not be excluded as a contributor. TRP 723. That DNA was "a non-sperm fraction," and could be from skin, saliva, or other sources. TRP 727-28.

C. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE OF THE PROSECUTOR'S FLAGRANT, ILL-INTENTIONED AND HIGHLY PREJUDICIAL MISCONDUCT. IN THE ALTERNATIVE, APPOINTED COUNSEL WAS PREJUDICIALLY INEFFECTIVE.

A prosecutor is not like any other attorney. *State v.*

Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). Because of their unique role, a prosecutor functions as a representative of the people, with "quasi-judicial" status. *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Because of that status, a prosecutor's statements and arguments are often perceived by jurors to carry an "aura of special reliability and trustworthiness," as compared to the defense. *See, e.g., State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001).

As a result, the prosecutor shoulders special duties. *See State v. Huson*, 73 Wn. 2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969). A prosecutor is required to seek justice, not merely to convict. *See State v. Rivers*, 96 Wn. App. 672, 674, 981 P.2d 16 (1999). Further, she has a duty to seek convictions based only on the relevant, admissible evidence and the relevant, applicable law. *See In re the Personal Restraint of Glasman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The accused is not entitled to a perfect trial but they are

entitled to a fair trial and a person charged with a crime is owed that by the State. *See Monday*, 171 Wn.2d at 676.

The prosecutor repeatedly failed in his duties here, causing extreme prejudice in light of the issues and evidence in the case. The misconduct was flagrant, ill-intentioned, and could not have been cured by instruction. In the alternative, if the Court finds that the misconduct *would* have been cured had counsel properly objected and sought such a remedy. This Court should hold that counsel was prejudicially ineffective in failing to take those steps.

a. *Standards of review*

This Court reviews improper comments in the context of the entire argument, the evidence presented, and the issues in the case. *See State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Reversal is required if the prosecutor makes improper arguments which cause prejudice. *See State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014). If counsel

objected below, this Court asks only if there is a substantial likelihood the misconduct affected the verdict. *See*, *Glasmann*, 175 Wn.2d at 704. If counsel did not object below, the misconduct is deemed "waived" unless it is so flagrant, ill-intentioned and prejudicial that no instruction could have cured it. *See id.* Alternatively, if misconduct could have been cured and counsel fails to take the steps to try to get the court to so mitigate harm to her client, counsel may be found prejudicially ineffective. *See State v. Neidigh*, 78 Wn. App. 71, 78, 895 P.2d 483 (1995).

b. *Misconduct in misstating crucial facts*

It is serious error for a prosecutor to mislead the jury by misstating the evidence at trial. *See State v. Markovich*, 19 Wn. App.2d 157, 170, 492 P.3d 206 (2021), *review denied*, 196 Wn.2d 1036 (2022).

First, the prosecutor repeatedly misstated the conduct to which R.J.C., Jr., had admitted at trial - and then used those

misstatements as evidence of his guilt.

At trial, R.J.C., Jr., testified that whenever he and E.P. were doing consensual aggressive kissing he would have his hand on her face or the side of her neck. TRP 1048. In that context, he would probably squeeze the back or side of her neck sometimes during a kiss. TRP 1051. On cross-examination, he said they had both kissed and touched each other's necks, but he never put his hand on the front side where her airway was, rather just fingers on the back of the neck, palm towards the front. TRP 1050-51.

In initial closing argument, the prosecutor asked jurors to decide if it was "reasonable" for R.J.C., Jr., not to mention this to police:

> And he knew, the defendant knew that he was being investigated for forcible rape, sexual assault. **Do you think it's reasonable for the defendant to give the account that he did, recounting many of the things that he said on the stand and to leave out the fact that he put his hand on [E.P.'s] neck and squeezed?**
>
> . . .

> **You can also decide whether that was reasonable for him to say that he just decided out of the blue that the first time that [E.P.]. . . touched [his] penis, he decided that he was just going to put his hand on her neck and just squeeze apparently without any intent to do anything other than squeeze**. I submit to you that it's not. The state's proved forcible compulsion beyond a reasonable doubt.

TRP 1099-1100 (emphasis added).

Thus, the prosecutor repeatedly misstated what R.J.C., Jr., said about when he might have had his hand on E.P.'s neck. And the prosecutor then relied on his own misstatements as evidence of R.J.C., Jr.'s guilt.

The prosecutor did the same, and worse, regarding the text exchange. At trial, the evidence was that E.P.arrived at the home where her sister and Ms. Leone were that night and took a shower. TRP 450, 501. After that, she spoke to her sister and friend, telling them what happened. TRP 450, 525-59. They convinced her to text him and she did, telling him she wanted to break up. TRP 450.

A little later, E.P.'s sister, Lauren, texted R.J.C., Jr., that

he was a rapist and belonged in hell. TRP 1051, 1055. This was about an hour after E.P. had last texted. TRP 451, 1051.

When the prosecutor asked why R.J.C., Jr., did not respond to the texts accusing him of rape, he said he did not think there was anything he could say at that point that would "change what was being said." TRP 1068-69.

In closing, however, the prosecutor declared that "**right after**" E.P. had arrived, her sister and Ms. Leone were "**immediately** accusing the defendant of being a rapist" by text. TRP 1098 (emphasis added). Then, towards the very end of rebuttal closing argument, the prosecutor asked jurors to consider, "[w]hy isn't the defendant surprised when he is accused of rape?" TRP 1130-31.

The State's attorney declared that when E.P. had left R.J.C., Jr.'s home, they would have still been "boyfriend and girlfriend," but when E.P. arrived at the home where her sister and Ms. Leone were staying, "**immediately** the defendant

starts being accused of being a rapist by [E.P.'s] friends and sister." TRP 1131 (emphasis added). The prosecutor then exclaimed to jurors, "I submit to you that **the only way that you don't respond to those friends with anything or to [E.P.] is if you have actually committed a rape; if you have done the thing that your being accused of."** TRP 1131 (emphasis added).

The prosecutor did not stop there. "Not only that[,]" the prosecutor went on, "**after that, after he's accused of rape,**" E.P. texts him and says, "I'm breaking up. What does he say? Okay." TRP 1131. The prosecutor said this is because R.J.C., Jr.,"knew that he had done" what he was accused of doing. TRP 1131.

Thus, the State's attorney misstated the crucial facts about the texts and exploited his own misstatements as evidence of R.J.C., Jr.,'s guilt. Indeed, the prosecutor seemed to ask jurors to put themselves in the shoes of someone

accused of rape and make assumptions about what R.J.C., Jr., *should* have done if he was innocent. Their prejudice was enhanced as they were made at the end of the rebuttal closing, the last thing jurors hear before deliberation. The prosecutor's repeated misstatements of crucial facts and his improper exploitation of his own misconduct as if it showed R.J.C., Jr.'s, guilt were misconduct.

c. *Misconduct in arguing a false choice and shifting a burden*

The prosecutor also committed serious misconduct in misstating the jury's role and shifting the burden to R.J.C., Jr., to disprove parts of the State's case.

Both the state and federal due process clauses mandate that the prosecution bear the burden of proving every element of the crimes charged, beyond a reasonable doubt. *See State v. Cleveland,* 58 Wn. App. 634, 648, 794 P.2d 546, *review denied*, 115 Wn.2d 1029 (1990), *cert*. *denied*, 499 U.S. 948 (1991). Further, the defendant bears no burden of disproving

the prosecution's case in any way. *Id.*

Throughout closing, the prosecutor framed the issues as the jurors having to decide what was "true" and whose testimony to "trust" - E.P. or R.J.C., Jr. TRP 1092. The State's attorney agreed that jurors could "know that it's true" that there was forcible compulsion by relying on E.P.'s testimony about what had occurred and the vaginal abrasion. TRP 1092-93. They could "trust" E.P., the prosecutor argued, because she was not biased. TRP 1095. The prosecutor urged jurors to believe E.P. and not believe R.J.C., Jr., characterizing E.P.'s testimony and prior statements as all consistent and declaring that R.J.C., Jr., had been inconsistent. TRP 1098-99.

The prosecutor also faulted the defense for not having rebutted or provided a "reasonable" explanation for parts of the State's evidence. The State's attorney said R.J.C., Jr., had not provided "any other explanation. . . at least not a reasonable one" for why E.P. would have asked for medicine

for pregnancy if E.P. had not just had sex. TRP 1090.

In rebuttal closing argument, the prosecutor told jurors the "only reasonable explanation" for the semen marker on the anal swab was "the defendant ejaculated in [E.P.'s] vagina, and when he pulled out, it drips down in there." TRP 1127-28. The prosecutor told jurors, "**I challenge you to come up with a more reasonable explanation than that.**" TRP 1128 (emphasis added).

The prosecutor also faulted the defense for giving "no explanation" for the State's evidence of E.P.'s reported demeanor after the alleged assault, or at her friend's house, or at the hospital, "and **no reason from the evidence that you've seen for** her to have the demeanor that you saw on the stand." TRP 1128 (emphasis added). The prosecutor then declared:

> Nothing. You have no explanation in front of you as to why, after apparently being the perfect boyfriend for months, why allegedly following every single thing that she wanted to do when he was at her house, **why she**

> **broke up with the defendant at the end of the night. We have no explanation. I submit to you the reason why you don't is because the only reasonable explanation for that is that the defendant did the one thing that he wasn't supposed to do.**

TRP 1128 (emphasis added).

In case it was not clear that the State's attorney was telling the jurors they had to decide between E.P. and R.J.C., Jr.'s versions of events in order to decide the case, at the end of rebuttal closing, the prosecutor declared:

> Members of the jury, **you're either going to believe it or you're not, right? And just like I said at the beginning of this, I can't tell you who to believe, the defense can't tell you who to believe, and not even the judge. I put it all in your hands.**

TRP 1132 (emphasis added).

These arguments were flagrant misconduct. The question the jury had to answer was not whether it was "reasonable to doubt" guilt - it was whether the prosecution had met its burden of proving that guilt, beyond a reasonable doubt. *See*, *e.g.*, *State v. Venegas*, 155 Wn. App. 507, 228 P.3d

813, *review denied*, 170 Wn.2d 1003 (2010).

Further, it is improper to tell jurors they had to decide which side to believe to decide a case where, as here, the two versions of events were not mutually exclusive. *See State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996). Jurors could easily believe both E.P. and R.J.C., Jr., but decide that E.P. was mistaken about her impressions of what had occurred, or otherwise find that the State had not meet its full burden of proof. And arguing that jurors had to essentially choose a side misstates not only the jurors' role and function but the prosecutor's burden of proof, converting it into something akin to a preponderance standard as jurors weighed both sides and chose one. That is far less than the constitutionally mandated burden the prosecution should have shouldered. *See, e.g.*, *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

The prosecutor's argument was improper in another way, too. A jury may convict based on the testimony of a single witness if the jury is satisfied that the witness' testimony established all the essential elements of the crime, beyond a reasonable doubt. *See State v. Thomas*, 52 Wn.2d 255, 256-57, 324 P.2d 821 (1958). Here, the prosecutor suggested jurors could not acquit if they found E.P. credible. But jurors could have believed that E.P. believed what she said and was credible in that belief and still thought she was mistaken or had other questions about whether the State had met its burden in this case.

d. *Misconduct in inciting passions and prejudice*

It is serious misconduct for the prosecutor invoke jurors passions and prejudices, because it encourages decision on an improper, emotional basis rather than reason, the evidence, and the law. *See State v. Claflin*, 38 Wn. App. 847, 850-52, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985). Here,

the prosecutor repeatedly urged jurors to decide based on how awful the rape kit collection process and testifying or participating in the prosecution had been for E.P.. Several times, the prosecutor emphasized the rape kit, talking about how E.P. "had to get her entire body swabbed, her anal cavity, her vagina, the opening of her vagina, her skin." TRP 1095-96. He also talked about her having to talk to multiple people "in explicit detail" about it and then having to "come in here and talk to all of you" jurors about the incident. TRP 1095-96.

A little later, the prosecutor talked about E.P.'s demeanor, her "reluctance" to look at R.J.C., Jr., as she testified, and the emotion she displayed "when she had to point out the person who had sexually assaulted her." TRP 1097. The prosecutor declared, "it was real." TRP 1097.

In rebuttal closing argument, the prosecutor again returned to this theme of invoking sympathy for E.P. because of the requirements of criminal prosecution and evidence

gathering. TRP 1126-28. Indeed, the prosecutor emphasized the size of the swabs (holding them up), the intrusiveness of the evidence gathering, the difficulty and unpleasantness of what E.P. had to go through for the case to be brought. TRP 1126-27.

The prosecutor thus improperly invoked the jurors passions and prejudices and sympathy for E.P. The prosecutor further urged jurors to rely on those passions and prejudices as evidence of E.P. being "credible." These arguments were misconduct.

e. *Misconduct regarding "consistency"*

The prosecutor also engaged in misconduct when he argued that jurors should presume that E.P. had been consistent in all her statements despite the lack of evidence, based on the *defense* failure to point out inconsistencies in cross-examination.

Before trial, the prosecution moved to have E.P.'s sister

and Ms. Leone repeat what E.P. told them about that night. TRP 74. The trial court ruled against the State, however, holding that such testimony would be cumulative, improperly bolster E.P. with a prior "consistent" statement, and circumvent the requirements for admission of such statements, which was a claim of "recent fabrication," not present here. TRP 75-78, 81-86.

Nevertheless, in initial closing argument, in arguing that jurors should find E.P. credible, the prosecutor relied on what he described as the "consistency" of her statements to everyone, including her sister and Ms. Leone - even though those statements were excluded by from trial. TRP 1098-99. The prosecutor said:

> [W]e have the consistent statements that [E.P.] made. She reported this to Lauren and to Sierra, and we know [this] . . not from them, but from the inference of the fact that **right after she went over there, they're immediately accusing the defendant of being a rapist, right?**

TRP 1098 (emphasis added). The State's attorney drew a

contrast with R.J.C., Jr., saying that he had made an "inconsistent statement" by not having told police anything about having squeezed E.P.'s neck. TRP 1099.

Then, in rebuttal closing argument, the prosecutor told jurors the defense suggestions that the investigation was problematic "were not true" and they could know that

> Because you've seen [E.P.] get questioned about this for hours. You've seen that. You've seen her get questioned by me. **You've seen her hold up on cross-examination for half a day. *And during that time, was there anything that caused you to have a reasonable doubt as to what she was saying? When was she ever confronted with the statement that was inconsistent with what she told you?* I'd submit to you there was not any such occasion.**

TRP 1129 (emphasis added).

This argument was flagrant, prejudicial misconduct. It is misconduct and improper bolstering when a prosecutor argues that jurors should presume that a victim's inadmissible prior statements were "consistent" with her trial testimony based on the "fact that the defense counsel did not impeach

the victim with any prior inconsistent statements[.]" *State v. Boehning*, 127 Wn. App. 511, 513, 111 P.3d 899 (2005).

In *Boehning*, the prosecutor pointed out that the defense had the opportunity to cross-examine about any of the victim's previous statements and that counsel "never pointed out that she told a different story to these other individuals." 127 Wn.App. at 520. Because of that, the prosecutor told jurors, they should make a "reasonable inference" that the victim's statements before trial must have been consistent. 127 Wn. App. at 520.

In finding these remarks were misconduct, this Court first rejected the idea that the prosecutor was "merely raising reasonable inferences from the evidence." *Id*. The Court noted that the prosecutor had argued that Mr. Boehning "had failed to establish that [the victim's] out-of-court statements about the abuse were inconsistent with her testimony at trial," so the jurors could infer they *were* consistent and she was thus

a credible witness. 127 Wn. App. at 523. In making this argument, the Court held, "the prosecutor improperly argued that Boehning, not the State, carried the burden of production to present evidence regarding [the victim's] credibility." *Id*.

Similarly, here, the prosecutor's arguments improperly told jurors that R.J.C., Jr., carried the burden of production to present evidence regarding E.P.'s credibility, and that jurors should draw a negative inference from counsel's "failure" to present such evidence to essentially rebut E.P.'s credibility. These arguments were prejudicial misconduct.

f. *Reversal is required*

Counsel did not object to any of the many acts of misconduct below. The law thus deems this a "waiver" of that misconduct, unless the misconduct was so flagrant, ill-intentioned and prejudicial that even a jury instruction could not erase its negative effect. *See Glasmann*, 175 Wn.2d at 704.

Here, the misconduct meets that standard, especially

when the cumulative effect of the errors is examined together. The facts which the prosecutor misstated were not collateral but used by the prosecutor directly as evidence of guilt. *See* TRP 1099-1100. Further, whether and how R.J.C., Jr., might have touched E.P.'s neck was a hotly disputed issue and crucial to a finding of "forcible compulsion" - an issue about whether the jury had concerns. *See* CP 159-60. The prosecutor's false choice argument that jurors had to decide who was saying what was "true" and choose a side minimized the burden of proof for the State in a way likely to resonate with those untrained in the law. As a date rape case, the trial was already emotionally charged and the prosecutor invoked passions and sympathy for the victim, also improperly bolstering her and urging jurors to apply a burden to R.J.C., Jr., to disprove credibility in this close case.

All of the misconduct was pervasive and of the type to be difficult to erase. All of it went directly to the crucial issues and

the misconduct was so pervasive only a new trial could remedy the errors. This is so even if each individual type of misconduct would not, standing alone, compel reversal, because the corrosive cumulative effect of all of the misconduct deprived R.J.C., Jr., of his constitutionally protected right to a fair trial before an impartial jury. The "cumulative error" doctrine requires reversal when the multiple trial errors which, taken together, deny the accused a fair trial. *See State v. Maza*, 26 Wn. App. 2d 604, 624, 529 P.3d 398 (2022). Where there is cumulative error, reversal is required unless the evidence of guilt is "overwhelming." *Id*.

Here, the cumulative effect of all of this misconduct cannot be overstated. The evidence against R.J.C., Jr., was far from overwhelming - as the jury itself indicated in acquitting him of the second-degree assault "strangulation" charge. And the jury struggled over the intersection of consent and forcible compulsion. TRP 1138, 1141-42. A fair trial depended upon the

jury being able to impartially consider the evidence as it actually was, not as the prosecutor misstated. The prosecutor invoked passions and prejudices to create sympathy for the victim and bolster her in this close case. The State's attorney told jurors they had to find the defense was "reasonable" and, worse, that R.J.C., Jr., had some burden to provide a "reasonable explanation" for portions of the State's evidence. The prosecutor also shifted the burden to R.J.C., Jr., to present evidence to rebut credibility. Finally, the prosecutor misled the jury into believing the jury's role was to pick a side, rather than the more difficult, correct standard of deciding whether the State had met its burden of proof beyond a reasonable doubt.

The cumulative effect of all of that error deprived R.J.C., Jr., of a fair trial. This Court should so hold and should reverse.

g. *In the alternative, counsel was ineffective*

In the unlikely event this Court finds that any of the misconduct could have been cured had counsel timely objected

and sought a curative instruction, the Court should nevertheless reverse based on appointed counsel's prejudicial ineffectiveness in failing to take those steps to try to mitigate the harm.

Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. *Strickland v. Washington*, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled in part and on other grounds by*, *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). To show ineffective assistance, a defendant must show that, despite a presumption of effectiveness, counsel's representation was deficient and that the deficiency caused prejudice. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel's performance is deficient if it falls below an "objective standard of reasonableness" and was not sound strategy. *See In re PRP of Rice*, 118 Wn.2d 876, 888, 828 P.2d

1086, *cert*. *denied*, 506 U.S. 958 (1992). That performance prejudices the defense when there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. *Hendrickson*, 129 Wn.2d at 78.

Here, R.J.C., Jr., submits that the cumulative effect of the misconduct was so corrosive that no objection or instruction could have cured it. If the Court disagrees, however, it should find counsel prejudicially ineffective in failing to object and seek to mitigate the harm the prosecutor's misconduct had caused her client. In general, the decision whether to object is a matter of tactics, but for significant testimony or errors, the failure to object may amount to ineffective assistance if there was no reasonable tactical reason for counsel's conduct. *See, State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011).

Here, there is no tactical reason for counsel to have sat mute while the prosecutor repeatedly misstated the relevant

facts, the burden of proof, and the juror's role and duties, to his client's detriment. If the Court finds that any of the misconduct could have been cured, there is more than a reasonable probability that counsel's failure to make that error is an unprofessional error which is "sufficient to undermine confidence in the outcome." *See, e.g.*, *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). In the alternative, if any of the misconduct could have been cured, this Court should find that appointed counsel's failure to seek that remedy was ineffective assistance. Given that the case was so close, had objection and instruction occurred, there is more than a reasonable probability that the same jury which found the State did not prove strangulation sufficient to prove second-degree assault could have had a reasonable doubt as to guilt for the rape, had counsel done their job.

2. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO CONFRONTATION AND TO CROSS-EXAMINATION

A person accused in a criminal case has a state and federal due process right to present a complete defense. *See State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); Fifth Amend.; Sixth Amend.; 14th Amend.; Art. 1, §§ 3, 22. Indeed, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to 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 accused also have the related right to meaningful confrontation. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct.

1105, 39 L. Ed. 2d 347 (1974); Sixth Amend.; Art. 1, § 22.[3] This includes the right to meaningful cross-examination. *See Davis*, 415 U.S. at 316.

Indeed, cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316.

In this case, reversal and remand for a new trial is required. R.J.C., Jr., was deprived of his state and federal rights

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[3]The Fifth Amendment to the U.S. Constitution provides, in relevant part, that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of his life, liberty, or property, without due process of law[.]" The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." The Fifth and Sixth Amendments are applied to the states through the 14th Amendment, which also provides, in relevant part, "[n]o state shall . . .deprive any person of life, liberty, or property, without due process of law[.]" *See Mapp v. Ohio*, 367 U.S. 641, 656. 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); *Washington v. Texas*, 388 U.S. at 23.

Article 1, § 3, of the Washington Constitution provides, "[n]o person shall be deprived of life, liberty, or property, without due process of law." Article 1, § 22 provides, in relevant part, "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

to present a defense and to meaningful confrontation. Further, the State cannot meet its heavy burden of proving these serious errors constitutionally "harmless."

a. *Relevant facts*

At trial, when the defense was cross-examining E.P.'s sister Lauren counsel tried to ask about how their mother found out about the allegations. TRP 535-36. The prosecution did not object, but *sua sponte* the judge excused the jury then told counsel the evidence was not relevant. TRP 536-38. Counsel explained the defense theory that evidence that Lauren had told their mom was to show there was pressure on E.P. to not backtrack or show hesitation about what she was now saying happened, especially once her sister told their mom the claims of rape. TRP 538.

The judge thought counsel was claiming "this whole thing has been made up" and the sister and mother were somehow forcing her to lie, but the judge thought the mom

and sister were just being supportive and acting "in complete good faith." TRP 542. The lower court ruled that the evidence was only relevant if the defense was that E.P. was lying, not unsure, about what occurred. TRP 543-44. Further, the judge said that it was "irrelevant" whether Lauren or E.P. had disclosed the rape to their mom, finding it "collateral" and ruling the evidence inadmissible unless E.P. denied her mom knew about the alleged rape. TRP 548.

b. *The trial court violated appellant's due process rights to present a defense and his rights to meaningful confrontation*

By excluding this evidence and precluding this cross-examination, the trial court violated R.J.C., Jr.'s fundamental due process rights to present a defense and to confrontation.

As a threshold matter, a trial court's decisions on exclusion of evidence are usually reviewed for "abuse of discretion." *See, e.g.*, *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). However, where as here there are arguments that the constitutional

rights to present a defense and to confrontation were violated, this Court applies *de novo* review. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014).

Applying *de novo* review here, this Court should find that R.J.C., Jr., was deprived of both his due process rights to present a defense and his rights to confrontation and cross-examination.

First, the exclusion violated R.J.C., Jr.'s, rights to present a defense. That right is, "in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294. Like all other rights, the right to present a defense is not absolute, and it does not give a defendant leave to introduce any evidence he wants. *See State v. Sanchez*, 171 Wn. App. 518, 288 P.3d 251 (2012). But where there is evidence which is relevant to the defense, a court may violate the right to present a defense in its exclusion. *See State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

Evidence is relevant if it tends to make a fact of issue in the matter more or less probable. *See State v. Perez-Valdez*, 172 Wn.2d

808, 824-25, 265 P.3d 853 (1976). Put another way, "[a]ll facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." 172 Wn.2d at 824-25, *quoting, Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 89, 549 P.2d 483 (1976).

If evidence is relevant to the defense, the burden is on the prosecution to show that its admission would disrupt the fact-finding process at trial. *Hudlow*, 99 Wn.2d at 15-16. Further, "[e]vidence relvant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." *State v. Reed*, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Even the rules of evidence will not support excluding "crucial evidence relevant to the central contention of a valid defense." *State v. Young*, 48 Wn. App. 406, 739 P.2d 1170 (1987). The State's interest in excluding prejudicial evidence is balanced against the defendant's rights, and relevant information can only be excluded if the State's interest outweighs the defendant's need." *Darden*, 145

Wn.2d at 622.

Our Supreme Court has cautioned courts to remember that in this context, "'the integrity of the truthfinding process and [a] defendant's right to a fair trial' are important considerations." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *quoting Hudlow*, 99 Wn.2d at 14. In addition, the Court has adopted essentially a sliding scale of concern. For evidence which is relevant and material, if it is of high probative value, "it appears **no state interest can be compelling enough**" to support exclusion under the Sixth Amendment and Article 1, § 22. *Jones*, 168 Wn.2d at 721 (emphasis added), *quoting Hudlow*, 99 Wn.2d at 16.

Here, the excluded evidence was relevant and material to R.J.C., Jr.'s defense. His defense was that E.P. had mistaken what occurred but once she told her sister, things got out of E.P.'s control and the case went forward with an accusation of rape with E.P. unable to express any doubt or question whether she had been mistaken without jeopardizing her relationships. She was locked

into a claim of rape and pushed to get the rape kit, then to go to police, by her sister and Ms. Leone. The pressure was increased when her mom was told she had been raped - something E.P. herself did not choose to do.

Notably, this Court does not make credibility determinations and thus does not presume one side's witnesses credible and the other side's not in assessing whether there has been error or whether that error affected the verdict. *See State v. Maupin*, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). Credibility of a witness and weight to give testimony or evidence is the province of the trier of fact. *Id.* The trial court's exclusion of evidence from which the fact-finder could have inferred that E.P. was making the accusations even though no rape had occurred because she was inexperienced and misread what had happened but then could not backtrack her claims - especially after her sister told her mother. The trial court's decision deprived R.J.C., Jr., of his right to present a defense.

The lower court's decision also violated R.J.C., Jr.'s state and

federal rights to confrontation, which guarantee the right to meaningful cross-examination. *Darden*, 145 Wn .2d at 620. The purpose of cross-examination is to test the witness's perception, memory, and credibility. *Id.* Further, the right to confrontation includes the right to impeach with evidence of bias. *See State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

Cross-examination is so crucial to the fairness of a trial that defendants in criminal cases are given extra latitude to cross-examine about issues relevant to credibility, especially when a witness is important to the State's case. *See State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). The "partiality" of a witness is "always relevant" to discredit a witness and affects the weight of her testimony. *Davis*, 415 U.S. at 316. As the U.S. Supreme Court has held, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." 415 U.S. at 316-17.

Indeed,

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (*quotations omitted*).

There is no question that the right to cross-examination is not absolute. *Darden*, 145 Wn.2d at 620. But where, as here, the excluded evidence is directly relevant to the defense, the right to confrontation is abridged. *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980), is instructive. In that case, the defendant was accused of first-degree rape of one girl and kidnaping her and two others. 25 Wn. App. at 832-33. There was no dispute that intercourse had occurred; the only issue was consent. 25 Wn. App. at 832-33. The three girls testified that the intercourse had been unwilling and at knifepoint. *Id*. The accused said it was consensual. *Id*.

During trial, the court prevented the defense from cross-examining the victim about having been physically disciplined by a parent after failing to show up to cooperate with an interview with the prosecution. 25 Wn. App. at 833. The defense argued the evidence was relevant because it showed the alleged victim "was under external pressure to cooperate with the prosecuting attorney and therefore had a motive to testify falsely." *Id*. The trial judge found it irrelevant, however, because there had been no showing by the defense that the victim had given "inconsistent or differing statements." 25 Wn. App. at 833.

On review, the Court of Appeals reversed. The right to cross-examine a witness as to facts tending to show bias, prejudice, or interest is "'generally a matter of right," the Court held. 25 Wn. App. at 834. Although the scope and extent of cross-examination is discretionary, denying the accused the right to adequately cross-examine an essential state's witness as to matters tending to establish bias or motive will violate the Sixth Amendment right to

confrontation in cases where the jury's "belief or disbelief of essentially one witness" is the crucial question. 25 Wn. App. at 834. The inquiry the defendant had sought to make in *Roberts* was relevant to the question of whether the witness had been coerced to testify in a particular way. 25 Wn. App. at 834.

Further, the Court noted, "[i]n the prosecution of sex crimes, the right of cross-examination often determines the outcome," and that "[i]n such cases, the credibility of the accuser is of great importance, essential to prosecution and defense alike." 25 Wn. App. at 834-35. The exclusion of the evidence and the limit of cross-examination violated R.J.C., Jr.'s, rights to present a defense and to meaningful cross-examination.

c. *The State cannot meet its heavy burden*

Where, as here, there is a violation of the constitutional rights of the accused at trial, that error is presumed prejudicial and reversal is required unless and until the State can prove it harmless. *See State v. Guloy*, 104 Wn.2d 412, 415, 705 P.2d 1181 (1985), *cert.*

denied, 475 U.S. 1020 (1986). To meet its burden, the State must show that the evidence untainted by the constitutional error is so overwhelming that every reasonable juror would necessarily convict even absent the error. *Guloy*, 104 Wn.2d at 415.

Notably, on constitutional harmless error review the issue is not whether the defense version is somehow strong or even if other evidence contradicts it. *Jones*, 168 Wn.2d at 724. The question is whether the State can prove that the constitutional error had no effect on the verdict because the evidence of guilt, absent the error, is so overwhelming that *every* reasonable juror would necessarily still convict. *See id.* Thus, in *Cayetano-Jaimes*, although the evidence was cumulative of testimony from the accused it was important testimony from someone outside their family who was the victim's biological mother. 190 Wn. App. at 303-304. Looking at the other evidence in the case, the Court noted, "this additional evidence could have raised enough reasonable doubt to cause the jury to reach a different result." *Id*. The constitutional error was thus not

harmless beyond a reasonable doubt and reversal and remand was required. *Id*.; *see State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997) (looking at "only the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt;" concluding that the inconsistencies and credibility issues were such that the evidence was "not so overwhelming that it necessarily" led to a conclusion of guilt, the constitutional harmless error standard was not met. *Id*.

And where the jury is "[p]resented with a credibility contest" and there is conflicting evidence, the overwhelming untainted evidence standard is not met even though the evidence of guilt is stronger than evidence supporting the defense. *See State v. Romero*, 113 Wn. App. 779, 54 P.3d 1255 (2002).

The State cannot meet the constitutional harmless error standard here. There is not overwhelming untainted evidence necessarily showing guilt. Instead, the case was close, with the jury itself unconvinced by some of the State's claims, as it acquitted of

the strangulation assault and only convicted on a lesser. Further, questions of credibility were crucial.

3. THE SENTENCING COURT VIOLATED THE PROHIBITIONS AGAINST DOUBLE JEOPARDY

Both the state and federal constitutions prohibit multiple convictions or punishments for the same offense. *See State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007); Article 1, § 9; Fifth Amend. It violates double jeopardy for multiple such convictions to exist even if the sentencing court does not impose punishment on them all. *Womac*, 160 Wn.2d at 650-51. It further violates double jeopardy when a sentencing court conditionally vacates one of two convictions with the intent to allow for reinstatement if the greater verdict and sentence were later set aside. *Womac*, 160 Wn.2d at 658.

This Court reviews double jeopardy arguments *de novo*. *See State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). Applying such review here, this Court should find that the sentencing court violated R.J.C., Jr.'s, rights to double jeopardy by only conditionally

dismissing the fourth-degree assault and by appearing to retain the currency of the "sexual motivation" enhancement to that underlying crime.

Double jeopardy from multiple convictions occurs either if the court reduces to judgment both the convictions or conditionally vacates the lesser conviction "while directing, in some form or another, that the convictions nonetheless remains valid." *State v. Turner*, 169 Wn.2d 448, 656, 238 P.3d 461 (2010). Thus, in *Turner*, the trial court conditionally vacated the lesser crimes but identified them as valid so they could have been revived if the greater conviction was reversed. 169 Wn.2d at 452-53. The *Turner* Court reversed. It held that "a judgment and sentence must **not include any reference to the vacated conviction - nor may an order appended thereto include such a reference, similarly, no reference should be made to the vacated conviction at sentencing**." 169 Wn.2d at 464 (emphasis added); *see also, State v. Trujillo*, 112 Wn. App. 390, 393, 49 P.3d 935 (2002), *review denied*, 144 Wn.2d 1002 (2003) (with

multiple convictions for the same conduct, the court "should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense").

Put another way, the Supreme Court has declared that a person who is convicted of multiple crimes for the same conduct is entitled to "vacation of their lesser convictions without reference to any validity attributable to those convictions." *Turner*, 169 Wn.2d at 464.

The lower court violated these prohibitions here. It correctly agreed that count 2 had to be dismissed. But in the Order Merging and Vacating as to Count 2 (Order) the sentencing court found that the assault "merges" into the second-degree rape, but also referred to the assault and the sexual motivation as findings of the jury and declared that it was only dismissing the lesser conviction "[d]ue to, and conditioned upon" the merger[.]" CP 255-56. In the judgment and sentence, the sentencing court explicitly

referred to count 2 and the Order. CP 229-30. The judgment and sentence and attached order improperly not only mention count 2 and its enhancement but suggest the validity of the vacated conviction.

Further, the lower court did not explicitly dismiss the "sexual motivation" enhancement and the judgment and sentence appears to retain its currency, in sections 2.1, where it is indicated that R.J.C., Jr., was found guilty of not just the second degree rape but also "**[a] special verdict/finding of sexual motivation was returned on Count(s) ____ RCW 9.94A.835**," and in section 3.2, when it refers to guilt for "the Counts and Charges" listed in paragraph 2.1. CP 229-30.

Thus, the judgment and sentence and Order improperly refer to count 2 and its enhancement, appearing to conditionally dismiss that count and not clearly dismissing its enhancement. This violated R.J.C., Jr.'s, rights to be free from double jeopardy. This Court should so hold.

4. THE $500 FEE, $100 DNA FEE AND COSTS OF COMMUNITY SUPERVISION SHOULD BE STRICKEN

Even if reversal was not required, R.J.C., Jr. would be entitled to relief from the condition of community custody requiring him to pay costs of community supervision, the $500 crime victim's compensation fee, and the $100 DNA database fee.

At sentencing, the court found that R.J.C., Jr., was financially indigent, "as defined in RCW 10.101.010(3)(a)-(d)" and "is unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel." CP 231. The judge imposed no other legal financial obligations because of that indigence except for a $100 DNA fee and a $500 fee for the crime victim's compensation fund. TRP 1197. On the judgment ~~and sentence~~, however, there was a preprinted clause requiring R.J.C., Jr., to pay costs of community supervision. CP 245.

The Court should strike these provisions, based on changes in the law. First, the victim's fund fee is no longer appropriate.

Effective July 1, 2023, RCW 7.68.035, the statute authorizing that fee, now includes a new subsection (4), which provides that the trial court "shall not impose the penalty assessment . . . if the court finds that the defendant, at the time of sentencing, is indigent as defined in RCW 10.01.160(3)." Laws of 2023, ch. 449, § 1. Another new subsection provides that the court "shall waive any crime victim penalty assessment imposed prior to the effective date of this section" if the person does not have the ability to pay. *Id*. Further, a person is deemed not to have the ability to pay if they are indigent as defined in RCW 10.01.160(3). Laws of 2023, ch.449, §1.

Thus, by its terms, the new version of the statute authorizes striking the $500 fee in this case, as R.J.C., Jr., has been found financially indigent.

Further, the changes would apply even if the Legislature had not so provided in the statute under controlling state Supreme Court precedent. When a statute is amended and "the statutory amendments pertain to costs imposed on criminal defendants

following conviction," our high court has held that the amendments apply to all criminal cases still pending on direct appeal. *Ramirez*, 191 Wn.2d at 747; *see State v. Blank*, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997). The "precipitating event" for a statute concerning attorney fees and costs of litigation is the termination of the case, which only occurs in a criminal case when any direct appeal is over. *Blank*, 131 Wn.2d at 243. As a result, the Court applied the new provisions to every case still pending on direct review. *Id*.; *see Ramirez*, 191 Wn.2d at 748-49.

Second, as of July 1, 2023, RCW 43.43.7541 no longer authorizes imposition of the $100 DNA collection fee. *See* Laws of 2023, ch. 449, § 4. Further, a new section provides that, at the request of the offender, a court 'shall waive any fee for the collection of the offender's DNA imposed prior" to that July 1 date. *See id.*

Third, the Legislature also amended *former* RCW 9.94A.703(2018), the statute which allowed a sentencing court to impose a senting condition to pay costs of community supervision.

See Laws of 2022, ch. 29, §§ 7, 8. The condition was "waivable" in the past but no longer - now it may not be imposed at all. *See State v. Wemhoff*, 24 Wn. App.2d 198, 519 P.3d 297 (2022); *see* RCW 9.94A.703.

The changes to these statutes all apply to R.J.C., Jr., pursuant to *Blank* and *Ramirez*. *See, e.g., State v. Jenks*, 197 Wn.2d 708, 711, 487 P.3d 482 (2021). Even if it does not grant other relief, this Court should so hold.

D. CONCLUSION

For the reasons stated herein, R.J.C., Jr. respectfully asks the Court to grant the requested relief.

DATED this 10th day of January, 2024.

CORRECTED BRIEF FILED this 26th day of January, 2024

SECOND CORRECTED BRIEF FILED this 23rd day of February, 2024,

ESTIMATED WORD COUNT FOR SECOND CORRECTED BRIEF: 11,836, SUBMITTED IN 14 POINT WORD TYPE,

Respectfully submitted,

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