IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS LEE ELLIOTT, Appellant.	No. 39276-3-II UNPUBLISHED OPINION

Hunt, J. – Thomas Lee Elliott appeals his jury convictions for attempted second degree rape and indecent liberties. He argues that (1) in limiting his ability to cross-examine the victim's mother about her opinion of the defendant and the victim's past relationship, the trial court denied his constitutional rights to present a defense and to confront the witnesses against him; and (2) the State committed prosecutorial misconduct during closing arguments. We affirm.

Facts

I. Sexual Assaults

In 2005, Thomas Lee Elliott and BW[1] began a dating relationship, which lasted approximately 19 months until BW ended it in June 2006. Eighteen months after BW ended the

[1] Under RAP 3.4, we use the victim's initials to protect the victim's right to confidentiality.

relationship; Elliott and his mother were evicted from their home and moved into BW's family home. At this time, both Elliott and BW were 19 years old.

At some point between February 14 and March 15, 2008, (1) Elliott peered through a hole in a bathroom door and watched BW shower; (2) when she moved from the bathroom into her bedroom, Elliott entered the bedroom, forcibly removed the towel covering her naked body, pushed her onto the bed, and asked whether she wanted to have sex; and (3) after BW repeatedly refused, Elliott pinned her arms with his hand, put his knees between her legs, and "massaged" and allegedly penetrated her vagina with his finger for approximately 30 seconds. II Verbatim Report of Proceedings (VRP) (Mar. 10, 2009) at 108. The assault ended only when BW's four year-old brother entered the room. BW did not tell anyone about the assault until two weeks later when she told her mother, Kathleen Belsha, only part of the story.[2]

After hearing about this incident, Belsha prohibited Elliott from being in the home with BW without adult supervision. Despite that Elliott's mother was at the home on April 21, Elliott grabbed BW and "dry hump[ed]" her, rubbing his semi-erect penis against her clothed body without her consent for approximately 30 seconds. II VRP at 55. He stopped when BW struck him "really, really hard on the back of his shoulder." II VRP at 55. BW did not report the incident to police or family members that day. The next day, however, Belsha noticed that her daughter was upset, confronted Elliott about the incident, and told her daughter to call the police.

At her boss's urging two days later, on April 23, BW reported both incidents to the police.

[2] BW stated she did not tell her mother what Elliott had done to her because she did not want her mother to know.

Detective Mike Cabacungan interviewed Elliott that day and obtained oral and written statements from him about both incidents. Elliott admitted that he had held BW down, that she did not consent to his sexual advances, and that he had "massaged" her vagina with his finger, II VRP at 108; he did not admit to having penetrated BW, with his finger or otherwise. BW's mother, Kathleen Belsha, told Cabacungan she believed that, after Elliott moved into BW's family home, BW sometimes "led him on" because she knew he was still in love with her. Cabacungan arrested Elliott.

II. Procedure

The State charged Elliott with second degree rape, for the incident involving removing BW's towel, count I, and with a separate count of indecent liberties by forcible compulsion for the April 2008 incident, count III.[3] The State moved in limine to exclude (1) BW's sexual history under the "Rape Shield Statute," RCW 9A.44.020; and (2) Belsha's statement to Detective Cabacungan that BW knew Elliot still had feelings for her and that BW had "led [him] on" in the past. CP at 8. Citing the "Rape Shield Statute," RCW 9A.44.020, and the lack of relevancy, the trial court excluded BW's past sexual conduct with Elliott.[4] The trial court preliminarily granted

[3] Elliott's corrected amended information indicates that there were three separate counts. But counts I and II were charged in the alternative, and the jury found Elliott guilty of count I and not count II. Thus, count II is not at issue in this appeal.

[4] The trial court ruled:

> I had an opportunity to read the defendant's handwritten statement and to review the statute, RCW 9A.44.020, commonly known as the rape shield statute, and I do not believe that any prior relationship is relevant to the issues in this case.
>
> [Elliott's handwritten statement] is a pretty clear statement against interest. It doesn't appear that there are any issues in regards to intent, as far as I'm concerned, so I don't think that their prior sexual relationship is relevant, and I won't allow any testimony about that.

the State's motion in limine to exclude Belsha's out-of-court statement to Detective Cabacungan, relating her opinion about the nature of Elliott's and BW's past relationship, because it was not persuaded that the evidence would be relevant; the court agreed, however, that Elliott could make an offer of proof outside the jury's presence.

Consistent with his verbal and written statements to Detective Cabacungan, Elliott testified at trial that, during the first sexual incident, which had begun with his removing her towel, (1) he had held BW down against her will for about "2 to 4 minutes," during which BW physically and verbally resisted his sexual advances, III VRP at 147; (2) at no time during this incident did he have her consent to participate in the sexual activity; and (3) he had touched her vaginal area in an attempt to "arouse[ ]" BW, to remind her of their prior relationship, and to gain her consent to have sex, but no penetration had occurred. III VRP at 147. On cross-examination, Elliott testified:

> Q: She was yelling at you to stop?
> A: No, she did not yell.
> Q: She was asking you to stop?
> A: All she was saying was "No."
> Q: She was saying "No?"
> A: Yes.
> Q: So you dispute the fact that she's yelling, but you admit that she was telling you, "No, stop?"
> A: Yes.
> Q: But you didn't stop, did you?
> A: No.
> . . .
> Q: So it's safe to say she couldn't break [your grip] or get you off [of her], right?
> A: Yes.
> . . .
> Q: Now, you're saying that you massaged her vagina?
> A: Yes.

I VRP at 27.

> . . .
> Q: And she was trying to get you off [of her], wasn't she?
> A: Trying to, yes.
> Q: And you claim that you were trying to get her consent, even though this entire time she's saying "No?"
> A: Yes.
> Q: She's saying "No" the entire time?
> A: Yes.
> Q: And you said 2 to 4 minutes during your testimony, but at no point did she want you anywhere near her?
> A: I don't believe so.
> Q: You don't believe so, so that would be a no, right?
> A: Yes.

III VRP at 163-69. And, contrary to his earlier written statement, which had described his actions in the second sexual incident as "dry humping," III VRP at 137, on the witness stand, Elliott affirmed the second incident as merely "bump[ing]" into BW once. III VRP at 150.

During Belsha's cross-examination, Elliott made an offer of proof that her testimony about his past relationship with BW pertained to his state of mind and his defense. Specifically, he sought to prove that, although he had held BW down and touched her sexually, he would not have penetrated her without her consent. In the offer of proof, Belsha testified that the two had a "difficult to read" relationship, perhaps a "love/hate relationship," and that Elliott was "still in love with [BW]."[5] II VRP at 90. The trial court questioned the defense on the admissibility of the testimony as follows:

> [BW already] testified that she knew that he still had feelings for her, so how is it relevant whatever it [sic] is her mother's inability to describe? She says she doesn't really know what it was, and it was confusing for her to even describe it. How is that relevant?

[5] Beyond this, Belsha did not testify that BW and Elliott had a prior sexual relationship. Instead, Belsha testified that BW and Elliott were constantly on again off again. Belsha's testimony can be summarized by her statement, "It was, 'I can't stand you,' [one day] and then the next day it was, 'Hey, you know, we're going to—we're going to the mall.'" II VRP at 92.

II VRP at 93. Elliott responded:

> [I]t's relevant to [Elliott's] state of mind, and also with respect to [BW's] description of what happened, as you would get the impression that she avoided him at all times. . . . I think it goes to her credibility.

II VRP at 93. The trial court ruled that the testimony was irrelevant because BW had made clear through her testimony that she knew Elliott still had feelings for her. The trial court also noted that the substance of Belsha's proffered testimony would be further admitted during Elliott and Detective Cabacungan's testimonies.

During closing argument, the prosecutor stressed that BW had no reason to fabricate any of her testimony and that Elliott's testimony confirmed many facts of BW's testimony. By stressing the veracity of BW's statements, the prosecutor attempted to persuade the jury to believe BW's testimony that Elliott had penetrated her with his finger. Elliott neither objected nor sought a curative instruction.

Elliott argued that he was trying to seduce BW: "[H]e thought that if he swept her off her feet, if he could kiss her, then she would remember their prior relationship, and she would consent to have sexual contact with him." III VRP at 218. He also argued that there was no penetration.

Apparently believing Elliott's testimony that he did not penetrate BW with his finger, or at least having reasonable doubt about the alleged penetration, the jury found Elliott guilty of the lesser included crime of attempted second degree rape, for the towel incident, and indecent liberties by forcible compulsion for the April 2008 incident. Elliott appeals.

ANALYSIS

I. Belsha's Opinion Testimony – Harmless Error

Elliott argues that (1) the trial court erred in excluding Belsha's opinion testimony that he and BW had a "love/hate relationship"[6] and that "[BW] "led [him] on" by being very friendly one day and hostile the next," Br. of Appellant at 4, 17; (2) excluding this testimony denied his right to present a defense that he was not attempting to penetrate BW without her consent[7]; and (3) Belsha's testimony would have undermined BW's credibility.[8] We disagree.

Assuming, without deciding, that the trial court erred in excluding Belsha's opinion testimony,[9] such error was harmless. It is fundamental to our system of justice that a defendant receives a fair trial; nevertheless, he is not entitled to a perfect trial. *Brown v. United States*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). The improper admission or exclusion of evidence constitutes harmless error if the evidence is of minor significance in reference to the

---

[6] Belsha did not witness either of the charged incidents; nor was she even in the home at those times. Thus, she offered her opinion based only on past observations of the victim and Elliott when they had been a romantically involved couple.

[7] More specifically, Elliott contends that he attempted to arouse BW through sexual touching only to obtain her consent to intercourse and that Belsha's testimony was necessary to support this proposition.

[8] He also argues that the trial court should have admitted Belsha's opinion about the nature of his past relationship with BW because it would have showed that he did not intend to penetrate BW without her consent. *See e.g.,* Br. of Appellant at 15. Penetration is an element of second degree rape and its lesser included offense of second degree attempted rape; but penetration is not an element of indecent liberties. RCW 9A.44.050; RCW 9A.28.020 (1); RCW 9A.44.100.

[9] During his offer of proof, Elliott claimed that Belsha's opinion that BW led him on would have supported his defense that he would not have penetrated her without her consent.

overall, overwhelming evidence as a whole and did not affect the outcome of the trial. *Nghiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994); *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *See State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

The applicable standard of review depends on whether the alleged error deprived the defendant of a constitutional right. Because constitutional error is presumed prejudicial, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). *See also State v. Damon*, 144 Wn.2d 686, 693, 25 P.3d 418 (2001). Even an alleged violation of a defendant's rights under the confrontation clause,[10] may be so insignificant as to be harmless. *Harrington v. California*, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); *Chapman v. California,* 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d (1967).

Where, however, the claimed error is a violation of an evidentiary rule, not a constitutional mandate, we do not apply the more stringent "harmless error beyond a reasonable doubt" standard. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) (citing *State v. Nist*, 77 Wn.2d 227, 461 P.2d 322 (1969)). Instead, we apply "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (citing *Cunningham*, 93 Wn.2d at 831); *see also State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d

[10] U.S. Const. amend. V.

270 (1993). To determine whether the error is harmless, we look to the clearly admissible evidence to determine whether it is so overwhelming that it "necessarily leads to a finding of guilt." *Guloy*, 104 Wn.2d at 426 (citing *Parker v. Randolph*, 442 U.S. 62, 70-71, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979) *abrogated on other grounds by Cruz v. New York*, 481 U.S. 186 (1987); *Brown v. United States*, 411 U.S. 223, 231, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)). *See also State v. Davis*, 154 Wn.2d. 291, 305, 111 P.3d 844 (2005), *aff'd*, *Davis v. Washington*, 547 U.S. 813 (2006). Such is the case here.

Even evaluating the trial court's exclusion of Belsha's opinion testimony under the more stringent constitutional error standard, in light of Elliott's admission that BW did not consent to his sexual advances, the outcome would have been the same if the trial court had allowed Belsha to testify about her perception of the couple's prior relationship. *Stephens*, 93 Wn.2d at 190-91. Elliot argues that Belsha's excluded testimony would have provided additional information to the jury that BW knew Elliott maintained feelings for her and that, in Belsha's opinion, BW had led Elliott on in the past. The jury did hear Belsha's testimony that while Elliot lived in her home, Elliott and BW were friends one day, then the next day BW was upset by Elliott's behavior. BW testified that she knew Elliot was "still in love" with her. II VRP at 66. Moreover, Elliott testified that he was still in love with BW and that he was conflicted about whether he could obtain BW's consent for sexual intercourse by "massag[ing]" her vagina. II VRP at 108. Thus, Belsha's opinion testimony would not have provided new information to the jury about Elliott's feelings for BW, or the "love/hate" nature of their relationship, II VRP at 90; it would have been merely cumulative.

Additionally, Belsha stated during the offer of proof that she found Elliott and BW's relationship "very difficult" to describe. II VRP at 90. Elliott appeals the exclusion of Belsha's opinion testimony because, he argues, it proves he would not have penetrated BW without her consent, nullifying an element of second degree attempted rape. *See* Br. of Appellant at 4. But Belsha's opinion that her daughter, BW, led Elliott on is not dispositive as to whether Elliott would have penetrated BW without her consent; nor does it undermine the overwhelming evidence supporting the jury's verdict that Elliott committed attempted second degree rape.

A defendant commits second degree rape when he engages in sexual intercourse with another person by forcible compulsion; a defendant who takes a substantial step toward the commission of an offense may be found guilty of attempting to commit the offense. *See* RCW 9A.44.050; RCW 9A.28.020; *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978); *State v. Stewart*, 35 Wn. App. 552, 555, 667 P.2d 1139 (1983). The record shows that Elliott surreptitiously spied on BW as she showered, entered the bedroom when she moved from the bathroom into her bedroom, forcibly removed the towel covering her naked body, pushed her onto the bed, and asked whether she wanted to have sex. According to Elliott's testimony, BW was saying "no" the entire two to four minutes he was lying on top of her, holding her down, and massaging her vagina; but he did not stop. III VRP at 163. The evidence in the record is overwhelming that (1) at a minimum, Elliott intended and did have sexual contact (vaginal massage) with BW without her consent; and (2) as a result of these actions, he took a substantial step toward having vaginal intercourse with her.

The jury heard from other sources, including Elliott himself, the substance of the excluded

evidence, namely the nature of BW and Elliott's prior relationship. Thus, the record clearly establishes that the outcome of the trial would have been the same if the trial court had admitted Belsha's opinion testimony. We hold, therefore, that any error in excluding this testimony was harmless.

II. Prosecutorial Misconduct

Next, Elliott argues that during closing argument (1) the State impermissibly shifted the burden of proof to the defense and vouched for the credibility of a witness by repeatedly informing the jury that BW had no reason to lie and that Elliott was not being truthful; and (2) the prosecutor misstated the law by incorrectly "instructing" the jury on reasonable doubt. Again, we disagree.

To prove prosecutorial misconduct, a defendant must show that the prosecuting attorney's conduct was both improper and prejudicial, *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), namely that there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). Where, as here, "the defendant has failed to either object to the impropriety at trial, request a curative instruction, or move for a mistrial, reversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice." *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994) (citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). The burden is on the defendant to show that the misconduct was flagrant and ill-intentioned. *See Brown*, 132 Wn.2d at 561. Elliott fails to make this showing here.

A. Burden of proof

Flagrant and ill-intentioned prosecutorial misconduct is a due process violation. *State v. Davenport*, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984). A prosecutor's comment on the quality of the defense's evidence is not a due process violation, however, if it does not imply that the burden of proof of guilt or innocence rests with the defense. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009). Although it is improper for a prosecutor to assert a personal opinion about a witness's veracity, the prosecutor may argue an inference of credibility if it is based on the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

Elliott argues that the prosecutor's closing statement rose to the requisite level of flagrant misconduct to constitute a constitutional error. These claims are based on the prosecutor's characterization of Elliott's testimony as an attempt to minimize his behavior. Relying on *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), Elliott argues that the prosecutor's description of his testimony as "minimiz[ing] his behavior" improperly shifted the burden of proof from the State to the defense. Br. of Appellant at 20 (*quoting* III VRP at 204). We disagree.

In *Fleming*, the prosecutor stated that in order for the jury to find the defendants not guilty of second degree rape, it had to find "either that [the victim] lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom." *Fleming*, 83 Wn. App. at 213. The *Fleming* court held that the prosecution's closing statement—that the jury would be required to acquit the defendants unless it found the victim was lying or mistaken—violated the defendant's right to remain silent, and therefore rose to the constitutional level. *Fleming*, 83 Wn. App. at 214.

The prosecutor's improper comments in *Fleming* are distinguishable from the prosecutor's

argument here for two reasons. First, the *Fleming* prosecutor improperly argued that in order to acquit the defendants, the jury must find that the State's witnesses were either lying or mistaken. *Fleming*, 83 Wn. App. at 213. Here, in contrast, the prosecutor neither argued nor implied that the jury could acquit only if found BW's testimony credible; instead, the prosecutor merely underscored the veracity of BW's testimony, which was proper.[11] Second, the *Fleming* court reversed the convictions on grounds that the prosecutor's statements violated the defendants' right to remain silent under the Fifth Amendment to the United States Constitution where neither of those defendants had taken the witness stand at trial.[12] *Fleming*, 83 Wn. App. at 214. In contrast, Elliott does not assert, nor could he assert, that the State's closing argument violated his right to remain silent. Thus, *Fleming* does not apply here.

Elliott also relies on *State v. Stith*, 71 Wn. App. 14, 19-20, 856 P.2d 415 (1993); Br. of Appellant at 23. But he misconstrues *Stith's* holding. The *Stith* court held improper a prosecutor's closing argument comparing the sincerity of the defendant with that of police officers because the argument expressed the prosecutor's personal opinion. *Stith*, 71 Wn. App. at 19. Here, the prosecutor did not express her personal opinion, but rather asked rhetorical questions as an argument strategy. Thus, *Stith* does not advance Elliott's argument.

The pertinent issue here is whether the prosecutor impermissibly commented on BW's

---

[11] For example, the prosecutor asked rhetorically, "Why would [BW] make any of these facts up? [T]he simple answer is that she's not making these additional facts up." III VRP at 204.

[12] The *Fleming* prosecutor argued that because there was no evidence to the contrary, the jury would have to disbelieve the victim to acquit the defendants. *Fleming*, 83 Wn. App. at 213. Thus, the prosecutor had improperly infringed on the defendants' constitutionally protected right to remain silent. *Id*. at 215.

credibility by expressing her personal opinion and, if so, whether such error warrants reversal. During closing, the State argued about the veracity of BW's testimony, emphasizing its reasonableness through corroboration by other evidence, including Elliott's own testimony.[13] These comments were legitimate inferences from the evidence, which the State may lawfully argue. *Brett*, 126 Wn.2d at 175; *State v. La Porte*, 58 Wn.2d 816, 820-21, 365 P.2d 24 (1964).[14] Moreover, just before mentioning BW's credibility during closing arguments, the prosecutor reminded the jury to take into account each witness's demeanor, prejudice, and personal interest, merely restating the law correctly. We hold, therefore, that the prosecutor appropriately argued the State's theory of the case and did not express a personal opinion. *See Brett*, 126 Wn.2d at 175 (*quoting State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)) (finding no prejudicial error unless it is "clear and unmistakable" that counsel is expressing a personal opinion).

B. Reasonable Doubt

Elliott also argues that the prosecutor misstated the law in defining reasonable doubt during closing argument, when the prosecutor asked rhetorically,

> Beyond a reasonable doubt is, do you have an abiding belief in the truth of these charges? And all that asks you is not 'all' doubt, not 'beyond all doubt,' not to an absolute certainty, but has the State proved each and every element of the crimes charged?

[13] In any case, where two witnesses give conflicting testimonies, the State will have to argue that one recitation is accurate while the other is not. *See State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985).

[14] "There is a distinction between the *individual* opinion of the prosecuting attorney (discussed at length in *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956)) and 'an opinion based upon or deduced from the testimony in the case.'" *La Porte*, 58 Wn.2d at 820-21 (quoting *State v. Armstrong*, 37 Wash. 51, 55, 79 P. 490, 491 (1905)).

III VRP at 210. Again, we disagree with Elliott's argument.

In 2007, our Supreme Court expressly directed trial courts to use Washington Practice: Washington Pattern Instruction: Criminal (WPIC) 4.01 to inform juries of the State's burden to prove beyond a reasonable doubt every element of a charged crime. *State v. Castillo*, 150 Wn. App. 466, 467, 208 P.3d 1201 (2009) (citing *State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007)). WPIC 4.01 reads in relevant part:

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

The prosecutor's statement here was substantively similar to this approved instruction. The WPIC 4.01 standard requires that a juror have an "abiding belief" after a consideration of all the evidence. The State's assertion that the standard of proof does not require a finding "beyond all doubt" is permissible. Thus, the prosecutor did not misstate the law. We hold that Elliott fails to demonstrate prosecutorial misconduct.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

I concur:

Quinn-Brintnall, J.

Armstrong, P.J. (dissenting) — Because I believe the trial court erred in excluding evidence regarding the full extent of Elliott and BW's prior relationship, I respectfully dissent.

"A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). This right is limited to relevant evidence only, but the threshold for relevancy is very low; even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Although the crime of rape does not include a specific intent element, *State v. Brown*, 78 Wn. App. 891, 894, 899 P.2d 34 (1995), the State was required to show that Elliott took a substantial step toward the commission of the crime, *with the intent to commit the crime*, in order to convict him of attempted second degree rape. RCW 9A.28.020(1) (emphasis added); *State v. Aumick*, 126 Wn.2d 422, 430-31, 894 P.2d 1325 (1995). Accordingly, Elliott had the right to present evidence corroborating his claim that he would never have penetrated BW absent consent. Because Belsha's perception of their prior relationship—involving patterns of acceptance and rejection—would have provided the jury context in which to assess Elliott's state of mind at the time of the incident, the trial court should have allowed Elliott to cross-examine Belsha along those lines. Moreover, I believe that evidence of Elliott's and BW's prior sexual relationship is relevant to Elliott's alleged belief that he could have convinced BW to consent to the sexual activity. *State v. Carver*, 37 Wn. App. 122, 124, 678 P.2d 842 (1984) (noting that the rape shield statute does not establish a blanket exclusion of prior sexual history that is relevant to issues other than consent and credibility).

The majority correctly tests the error by applying the constitutional error standard that requires us to find "beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *See* Majority at 8; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). But it is my opinion that we cannot say beyond a reasonable doubt that a jury would have reached the same result had a jury understood the full extent of the relationship. Elliott's defense hinges on speculation of whether he would have eventually penetrated BW absent her consent. On hearing about their volatile relationship, including their prior sexual relationship, a jury could have reasonably concluded that the inconsistent nature of their relationship influenced Elliott's misguided hope that B.W.'s refusal would have turned to consent. I would reverse and remand.

_____
Armstrong, P.J.