Case 118837 CLERK OF THE APPELLATE COURTS Filed 2018 Sep 11 PM 3:47

No. 18-118837-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

State of Kansas,
Plaintiff-Appellee,

v.

Hanbit Chang,
Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the District Court of Douglas County
Honorable Sally Pokorny
District Court Case No. 2017-CR-261

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Oral Argument Requested

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NATURE OF THE CASE

This case arises from two university students attending a party, consuming alcohol, leaving the party, going to defendant's dorm room, and voluntarily sharing defendant's bed (even though his out-of-town roommate's bed was unused). While the two shared defendant's bed, defendant touched complainant's breasts and put his hand on her bikini area.

Prior to the party the complainant and defendant had exchanged text messages about complainant taking defendant's virginity. The district court refused to allow defendant to put on the evidence of the text messages, substantively or by impeachment. Defendant contended the text messages, coupled with complainant's decision to spend the night in defendant's room, and her voluntary choice to get into defendant's bed, were evidence of the complainant's consent to the questioned sexual contact.

During closing argument the prosecutor referenced facts beyond the evidence at trial, and argued that defense counsel had "made up" the concept of implied consent. These errors are cumulative and taken together deprived defendant of his Fair Trial Right.

STATEMENT OF ISSUES

1. DEFENDANT'S RIGHT TO PRESENT A DEFENSE.

A district court commits constitutional error when it excludes evidence relevant to the defense theory. Here, defendant desired to present evidence that just a few days before he touched complaint's breasts while the complainant voluntarily shared a bed with him, he and the complainant had exchanged text messages about her taking his virginity. The evidence was critical to establishing the defense of consent. Did the district court err in excluding evidence of the text messages about sexual contact, thereby depriving defendant of his defense of consent?

2. DEFENDANT'S RIGHT TO CONFRONT WITNESSES.

A district court commits constitutional error when it prevents valid impeachment at trial, because the United States Constitution guarantees that criminal defendants may confront – and impeach – the witnesses against them. Here, the defendant desired to impeach the testimony of the complainant with questions about their recent exchange of sexually-oriented text messages – especially after she testified at trial that she was unaware defendant had any romantic interest in her. Did the district court err when it prevented defense counsel from asking questions and impeaching the complaining witness about the exchange of text messages regarding her taking defendant's virginity?

3. PROSECUTORIAL ERROR.

Criminal defendants are denied a fair trial when a prosecutor misstates the law and the facts such that the jury could have been confused or misled. Here, the prosecutor told the jury several times in closing that the defendant touched the complainant's "vagina," when no evidence supported that statement. Further, the prosecutor told the jury also in closing that there was no such thing as implied consent, when in reality implied consent is a well-established legal concept. Was the defendant denied a fair trial because of the prosecutor's false statements of both law and fact?

4. CUMULATIVE ERROR.

Even if individually harmless to a defendant's Constitutional Fair Trial guarantee, the cumulative effect of trial errors can deny a defendant a fair trial. Here, (i) defendant was unable to present a complete defense due to the trial court's refusal to allow evidence of sexually-oriented text messages; (ii) the prosecutor repeatedly misrepresented to the jury during closing argument the nature of the sexual contact; and (iii) the prosecutor falsely stated that there is no such thing as implied consent. Regardless of whether each of these errors is alone sufficient to warrant a new trial, did the cumulative effect of these errors also deny defendant a fair trial?

STATEMENT OF FACTS

Part 1: the alleged criminal conduct

On September 3, 2016, defendant "Joseph" Chang attended a party at Ellsworth Hall with A.S. and other friends, including Erin Sullivan, Jane Azhar, and Keaton Prohaska. (R. Vol. 6, 136-37). The partiers drank alcohol. (R. Vol. 6, 139-40). When the party was winding down, the partiers discussed sleeping arrangements for A.S., who was visiting from out-of-town. (R. Vol. 6, 133, 135, 142-43). Prohaska offered -- "basically begged" -- A.S. to stay in his room, but A.S. declined. (R. Vol. 6, 142-43, 184). Azhar and Sullivan offered to let A.S. stay in their room, but A.S. declined. (R. Vol. 6, 143); see also (R. Vol. 6, 212).
("Q. Did you talk with [A.S.] about -- did she say anything about other places she could stay? A. She mentioned staying in [Chang]'s room."). A.S. did elect to stay in Chang's room at Oliver Hall. (R. Vol. 6, 142-43). A.S. testified:

> [Chang]'s roommate, Sam Michaels, was out of town, and I wanted everybody to have a bed, so I said I would stay in [Chang's] room and take Sam's bed.

(R. Vol. 6, 142-43).

Chang and A.S. arrived at Chang's room, and A.S. asked for a change of clothing from Chang. (R. Vol. 6, 146). Chang obliged, giving her a T-shirt and sweatpants. (R. Vol. 6, 146-47). A.S. asked Chang to turn around while she changed clothes in his room. (R. Vol. 6, 147-48, 188-89). A.S. then elected to get into Chang's bed. (R. Vol. 6, 149). There was dispute at trial as to how that came about. A.S. claimed Michaels' bed did not have sheets on it, so Chang's bed was chosen by default. (R. Vol. 6, 149). But Michaels testified that he did not remove

his bed sheets prior to leaving town, and that the bedding was still on the bed when he returned to the room days later. (R. Vol. 7, 291-92).

In any event, A.S. got into Chang's bed -- a twin bed -- and asked Chang the whereabouts of a painting that she had made for him as a memento of a road trip they had taken together. (R. Vol. 6, 149-50, 173, 179). Chang told her it was on a nearby desk, and he showed it to her. (R. Vol. 6, 150). A.S. took the picture from Chang and told him he should put it right on top of his bed. (R. Vol. 6, 150). A.S. and Chang then lay next to one another, looking at the painting (which A.S. had positioned above the bed on some pipes), when Chang said he wanted to watch a movie. (R. Vol. 6, 150-51). Chang started the movie on a laptop and brought it to the pillow. (R. Vol. 6, 152-53). A.S. tired of the movie quickly, though, and she smacked her hand on the laptop. (R. Vol. 6, 153). Chang shut the laptop, put it on his desk, and lay back down in his bed with A.S. (R. Vol. 6, 154).

A.S. changed positions to give Chang more room on the bed. (R. Vol. 6, 154). A.S. testified that she chose to stay in Chang's bed at this point because:

> "I didn't want to move. I was just wanting to go to bed. I didn't think anything of it."

(R. Vol. 6, 154). A.S.'s testimony about what happened next was that she believed she was asleep and she awoke to Chang touching her breasts and then her bikini area, before suddenly stopping. (R. Vol. 6, 155-58, 204). A.S. pretended to be asleep during the touching. (R. Vol. 6, 157-58). She made no verbal protest to the touching. (R. Vol. 6, 194). After the touching ended, she pretended to wake up and then left Chang's room. (R. Vol. 6, 158).

Azhar testified that she was awakened in her room at 4:00 a.m. to discover A.S. and Sullivan talking while seated on the floor. (R. Vol. 6, 213). A.S. was crying and Sullivan was trying to comfort her. (R. Vol. 6, 214). The first thing A.S. said to Azhar was "[t]ell me, was I with [Chang] just now"? (R. Vol. 6, 214). A.S. kept saying that and asking that. (R. Vol. 6, 214). Azhar and A.S. reported this incident to the dormitory staff as a sexual assault. (R. Vol. 6, 217-18). A University (Title IX) investigation (R. Vol. 6, 234-35) and criminal investigation (R. Vol. 7, 296) both followed.

Hanbit "Joseph" Chang was convicted of sexual battery after a jury trial in the Douglas County, Kansas District Court. (R. Vol. 7, 408).

Part 2: trial proceedings and argument

On the morning of the first day of trial, the State filed a motion *in limine*. (R. Vol. 1, 18). The motion sought to exclude from evidence, relevantly:

1. a prior statement made by the defendant that he and A.S. spoke previously about getting together, and A.S. said she would if she was drunk; and

2. a text message from several days before the incident wherein the defendant asked A.S. to take his virginity.

(R. Vol. 1, 18-19).

The State argued:

> "The second one is a text message from the defendant to the victim some days before the incident in question where he brings up the topic of her taking his virginity. She –
>
> THE COURT: Of her what?
>
> MR. SIMPSON: Taking his virginity. She says -- she declines. And that is evidence that -- it's not relevant because it doesn't go to any of the elements of the crime to have to be proved or disproved or called into

question by the defense, and so it should be excluded. I mean, it doesn't -- what it does is it sort of paints a picture of, well, maybe she shouldn't have been around him, she knew he was interested in her. None of that goes to whether she consented or not, which is one of the elements of the crime. So the State's position is that that sort of evidence is not relevant and directs the jury away from the elements of the crime that they are supposed to look at."

(R. Vol. 5, 4-5). In response, defense counsel argued:

> "The second one is my main problem. I object strenuously. The evidence in the case is, and the investigation shows, and, in fact, it's listed in the State's Motion in Limine that the victim spoke previously about getting together and that she said she would if she was drunk, which is testimony that needs to be elicited. The issue here is consent, and consent is not defined in Kansas. It's not going to be defined in the instructions to the jury. Consent can be implied consent. It could be verbal consent. It could be physical consent. So that is the issue, and that is what we need to be able to delve into.
>
> Detective Campbell in this case in his report says that this alleged victim said she received several strange texts from Chang days prior to the incident and some of them were sexual in nature. She admits that he asked to take her virginity, and she was aware of it. She was aware of his attraction to her. She was aware of his romantic attraction to her. And if we can't -- if we are disallowed to get into this, it cuts off the defense at its knees. Not that we want to bring it into -- as the State argues, to state that she should have known better, but just to put the whole night in context. What preceded it, what happened, what came after, it's all context and it all bears on whether it was implied consent in this case.
>
> So I ask the Court strenuously to allow that testimony to come in. It's going to come in from Ms. Ananda, Detective Campbell, from the victim herself -- the alleged victim, and Mr. Chang."

(R. Vol. 5, 6-8). The district court found and concluded:

> "So as far as number two, you know, I am granting that. This just smacks to me of, you know, a woman saying no is not really a no, and in order for a woman to -- no to mean no, that means she never -- can never have contact with you again, because, obviously, if she wants to still hang around with you, it must mean that in her heart, she really wants to have sex with you.
>
> MR. FRYDMAN: You are granting the State's motion?

THE COURT: Yes.

MR. FRYDMAN: The evidence is going to be –

THE COURT: "I want you to take my virginity." "No," she says. But this means to him maybe -- maybe you do.

MR. FRYDMAN: But his testimony was she didn't say no, but she said, "Yes, if I get drunk," or something to that effect. Then she goes to his room alone to spend the night; and for the jury not to know what preceded it, I think it is just improper to disallow that.

THE COURT: I understand that, but my ruling is that -- he can say, you know, "She came to my room, she came alone, said she was coming to spend the night." I mean, all that will come in. Jury can draw whatever inference they want from that, but –

MR. FRYDMAN: And he can't say, "And she knew because I told her days before that I wanted to have sex with her and I wanted her to take my virginity"?

THE COURT: Well, you know, this comes into sort of what we are struggling with as a society right now. You go in to talk to your boss about a raise. And he says, "Well, yeah, if you have sex with me." And then you say, "Well, no, I won't have sex," but you still keep working for him and you still keep hanging around him. Then does that mean that, well, you are kind of thinking about it, because, otherwise, you would have just quit your job and totally separated yourself from that position.

MR. FRYDMAN: In every case, as far as I know, in America that is on the news, it all involved a man having power over a woman: their boss, their Congressperson, the President. These are just two college freshmen, no power at all. No evidence of any coercion or any fear or any pressure or any threats of any kind. So it's a totally different scenario than what the Court is indicating.

THE COURT: Well, it is the same scenario to me -- and I understand your power argument -- but it is still then anybody who has ever expressed any sexual interest in you, then you must just never hang around with them again; otherwise, you are asking for it.

MR. FRYDMAN: Well, the State, of course, can make that argument. That is their prerogative. But for us not to be able to bring it up and -- yeah, they can counter it; but if we can't address it, it's like the elephant in the room that you can't look at it and they can't know about that.

I understand the 15 years as a sexual offender registry, that that is not within their prerogative or their purview, but to not know that she came to town and came out with him and spent the night in his room with the knowledge that his intent was to have sex with her, it's improper. Your Honor, I know why the State wants it out, because it is damaging to them. But, again, it's not that she deserved -- I am not going to say she deserved what happened or that -- as they say, that she should have known better, but it's just part of the whole context of everything and it should be allowed.

THE COURT: Well, once again, I see that it's a variation of evidence of a complaining witness' previous sexual conduct. Even one's previous sexual conduct with the person that you are now saying has sexually battered you or raped you is not automatically admissible.

MR. FRYDMAN: Right. But this is going to allow the State to argue that they never had sex before and they had no romantic inclinations before, that they were just friends, and next thing they know, he is touching her. So, again, without the allowance of what came before and what she knew and what he had told her and her response, it allows the State to make arguments that I have a lot of trouble refuting because the Court is disallowing us.

THE COURT: Still my ruling.

(R. Vol. 5, 10-14).

A.S. testified at the trial. During A.S.'s direct testimony, the following colloquy occurred:

Q. And I want to take you back a little bit, Ms. S[]. When he touched your breasts, did you want Mr. Chang to touch your breasts?
A. No.
Q. Had you ever said it was okay if he did?
A. No.
Q. And did you want Mr. Chang to touch your vagina, your pubic area?
A. No.
Q. Had you ever said to him that he could?
A. No. No, never.
Q. Did he ever ask if he could touch your breasts or your vagina?
A. No.
Q. When Mr. Chang touched your breasts and your vagina area, was that something that you expected to have happen?
A. Never.

> Q. Why not?
> A. Because he never made advances in the past at all.

(R. Vol. 6, 159). Following the direct testimony, defense counsel requested a bench conference to address whether A.S. had opened the door to previously-excluded evidence:

> MR. FRYDMAN: In Ms. S[]'s direct testimony, she said he never previously made a pass at all, and we know he did make a pass.
>
> THE COURT: We do?
>
> MR. FRYDMAN: By sending her a text he wants to sleep with her and wants to take her -- her to take his virginity, that is a pass. I think it opened the door.
>
> MR. SIMPSON: Judge, I don't think it does open the door. I think -- I don't recall her answer being exactly that, so I would think we would want to look at the transcript before saying that opened the door, but I don't recall anything that opened the door.
>
> MR. FRYDMAN: We can take a break and get a readback. My note is "never made a pass at all."
>
> THE COURT: That is what I wrote down.
>
> MR. SIMPSON: Made an advance. Judge, I recall that. I took that as a -- that was in the context, I believe, of the -- he didn't ever make a physical advance. That is different than what Mr. Frydman is talking about, never made advances. I take that to mean he never hit on her and never approached her.
>
> MR. FRYDMAN: If saying you want to have sex with someone is not hitting on her, I don't know what is.
>
> THE COURT: I think Mr. Frydman has -- can ask her to clarify that and why it's an advance or not an advance, so you can cross-examine her on that.
> MR. FRYDMAN: I can ask her if it was an advance in the text he sent her?
>
> THE COURT: Yeah.
>
> MR. SIMPSON: Judge, would he be able to ask her what she said, he never made an advance before, what does she mean by that? If he says don't you think this text was an advance, then there is no point -- he is just going there. I think the clarification needs to be what does she mean by advance, because if

> she says he never talked about anything, then, yeah, that probably opens the door. But if she says he never tried to touch me, then I don't think it does. If the Court's ruling is we are not sure if the door has been opened, then I think clarification of what she means is what we should do.
>
> THE COURT: Let's start there with the clarification.
>
> MR. FRYDMAN: For the record, I object. I think the door is open.
> THE COURT: Start there and we will see where we are going.

(R. Vol. 6, 174-76). Consistent with the Court's directive, defense counsel inquired:

> Q. (By Mr. Frydman) Ms. S[], thank you for your patience. When Mr. Simpson asked you questions on direct examination, the answer to one of his questions, you said, "He never previously had made a pass to me at all." What did you mean by that?
> A. He never tried to kiss me or anything. The most that we ever did was hug.
> Q. He never made any type of statement or text to you that considered-
> MR. SIMPSON: Judge, Mr. Frydman is not following the order.
>
> THE COURT: You need to approach.
>
> (The following proceedings were had at the bench.)
> MR. SIMPSON: I am confused as to why Mr. Frydman just did the thing he was not supposed to do. It's beyond me.
>
> MR. FRYDMAN: I didn't talk about a specific text. I am just trying to inquire about if that is considered a pass. If she is now saying that a pass was a physical pass, doesn't mean that this text wasn't also a pass in her mind.
>
> THE COURT: Well, I think the issue was what did she mean, and that is clarified now. She meant there was nothing ever physical, and she has confirmed that. Now I think we need to stop there.
>
> (The following proceedings continued in open court.)
> Q. (By Mr. Frydman) Ms. S[], didn't you have reason to believe that [Chang] was romantically attracted to you when you came to Lawrence on Labor Day?
> A. No.

(R. Vol. 6, 176-77). When this issue was raised again, the Court clarified the rationale for its earlier ruling:

> THE COURT: Okay. The problem is we are dealing with a normal human act, sexual intercourse, that then has components of criminality under certain circumstances. We treat -- it seems to be that we treat sex crimes in a whole different light than any other crime. So I want you to envision this. I text you, Mr. Frydman, that I am broke and that I need some money from you. And you text back, "Yeah, when I'm drunk." And then I go to your house, and we have some drinks, and then I pull your wallet out and take your money and leave. Now, did you consent because you said, "Yeah, when I am drunk to me taking your money"? I don't think so. This is the other problem, too, with saying that somebody has consented to something by text. Text has no emotion. You can't tell the context from any text. You know -- and I have to look at this based upon the evidence that we have already presented here. How do you consent when you are asleep? And that is what the testimony has been, she was asleep. Yeah, I consented.
>
> MR. FRYDMAN: Well, but then the testimony is varied on that. It's malleable. She believed she was asleep, she was awake, she was asleep, she wasn't in a deep sleep, she woke up several times. So it's arguable. And, obviously, you are making a distinct case for them. They can make those points to the jury in rebuttal of my arguments and our case.
>
> THE COURT: The only evidence I heard is what woke her up is that his hands were on her breasts. She was asleep before that happened. Even if she had -- even if she had three days before said, "Sure, let's have sex sometime," that is not consent when the other actor decides to accept your offer when you are asleep.
>
> MR. FRYDMAN: It's implied consent.

(R. Vol. 6, 275-76).

> THE COURT: He can testify that she wasn't asleep. He can testify to whatever he perceived at that time. But consent -- the issue of consent is at the time of the act.
>
> MR. FRYDMAN: Right, but the term isn't defined.
>
> THE COURT: Okay. That is my ruling. I will see you at 8:25.
>
> MR. SIMPSON: Thank you, Judge.

(R. Vol. 6, 278).

Based on the evidence presented, the State argued, relevantly, in closing argument:

"The issue here and the issue I expect the defense to argue is the issue of consent, whether or not Ms. S[] consented to the touching by the Defendant.

* * * * * *

Think about Ms. S[]'s reaction to the touching. Well, you are probably going to hear she didn't say no, she didn't swat his hand. But what did she do? First she froze. And why did she freeze? Would it be because this was her friend? He described himself as her best male friend. *She did not expect him to do this to her. And she didn't understand it when it first started happening, and so she froze because she thought she was safe*. Isn't that what the evidence led you to believe? *She thought she was safe with the Defendant*. (emphasis added).

And so he starts the touching, and she wakes up, and she freezes. And she said she didn't want to deal with it, or something along those lines, so she acted like she was asleep. And as soon as he stopped, what does she do? She gets out of there.
Isn't that consistent with something that has happened that she didn't consent to, she gets out of the room? As soon as her processing of what this person that she considers a friend has done catches up, she gets out of there.

* * * * * *

When I was questioning the Defendant, did he ever say they talked about this, about this happening? Did he bring it up? Did she bring it up? No. You heard no evidence. Where is the consent coming from? From her being in his room? This person that is her best male friend that she says she trusts.

The fact that she is in his room means he gets to feel her breasts and touch her vagina? That is not consent.

The fact she is going to sleep in the bed? *There is some variation on why, but she has been consistent over time about why she slept in that bed.* And you will recall the evidence was Mr. Chang said you can sleep in that bed. Mr. Chang invited her to stay in his room. She is not begging to get in there. But does the fact that she is going to sleep in her *friend's* bed mean she has consented to him touching her breasts *and vagina*? And has she consented to him doing it while she is asleep? Folks, that is not consent, is it? (emphasis added).

(R. Vol. 7, 369-74). Then the State, in rebuttal, argued relevantly that:

…Where did she consent? And the best we heard was that she consented by getting in the bed. Do you believe that, that this woman got in the bed and that meant he could touch her vagina? No conversation. No talking about it. She is in the bed and that is consent. Is that a reasonable view to have of this situation?

You know, this implied consent that Mr. Frydman talked about, that is not in your instructions. You didn't hear that term. That is a term that he has made up and is using with you. And it's really an argument that is a way of saying, well, she said yes without actually saying yes. Because all the evidence you heard is that not only did she not say yes, but it was never discussed. The defendant just did it to her, took it upon himself and started touching her.

So there is no such thing as implied consent. There is either consent or there is–

MR. FRYDMAN: Consent is not defined, and I am allowed to argue consent, and he is allowed to argue otherwise.

THE COURT: It's not defined. Both of you can argue what you want to argue.

MR. SIMPSON: So there is either consent or there is not. Did she consent? I mean, implied consent sounds like a way of saying, well, he thought she consented by her actions. But she told you she didn't consent. *And her actions tell you she didn't consent.* (emphasis added).

Remember that instruction that said it's not a defense that he wasn't aware she didn't consent. So please keep that in mind. It's not a defense for him to say, "I thought she consented." And what you heard from her is that she didn't consent.

* * * * * *

I would argue that the way to look at her behavior, up until Mr. Chang touches her, is two things: One is she is tired and she trusts him. Isn't her behavior consistent with that? Why doesn't she go get her clothes from another room? Well, because she is tired, it's 3:00 in the morning, and she trusts him.

In retrospect, of course she could have done things differently. But she didn't expect that to happen because she trusted him. Doesn't that explain her behavior?

You know, why does she take her bra off? Who knows? She said it was uncomfortable, so she took it off at the party. So what? Does that mean she was somehow consenting he could touch her vagina or her breasts? Does that mean anything? *She was with her friend who she trusted.* (emphasis added).

And think about her testimony about she said she woke up and he was touching her breasts. The defendant said, well, he started touching her stomach first. Well, first of all, couldn't touching the stomach be touching with the intent to sexually arouse or gratify himself? Sure. He is not doing that to be friendly. He is doing that trying to lead up to more and more and more. So that's evidence right there.

(R. Vol. 7, 398-401).

ARGUMENT AND AUTHORITIES

1. **A district court commits constitutional error when it excludes evidence relevant to the defense theory. Here, defendant desired to present evidence that just a few days before he touched complaint's breasts while the complainant voluntarily shared a bed with him, he and the complainant had exchanged text messages about her taking his virginity. The evidence was critical to establishing the defense of consent. Did the district court err in excluding evidence of the text messages about sexual contact, thereby depriving defendant of his defense of consent?**

Standard of review: A claim that a defendant was denied the constitutional right to present a defense raises a question of law subject to de novo appellate review. *State v. Maestas*, 298 Kan. 765, 780, 316 P.3d 724, 735 (2014).

"A defendant is entitled to present the theory of his defense." *State v. Bradley,* 223 Kan. 710, Syl. ¶ 2, 576 P.2d 647 (1978). "The exclusion of evidence, which is an integral part of the theory of defense, violates the defendant's fundamental right to a fair trial." *Id.* The *Bradley* court went on to note that "[it was] fundamental to a fair trial to allow the accused to present his version of the events so that the jury may properly weigh the evidence and reach its verdict." 223 Kan. at 714, 576 P.2d 647. The *Bradley* court concluded that "[t]he right to present one's theory of defense is absolute." 223 Kan. at 714, 576 P.2d 647.

In this case, the defense theme was "implied consent[1]." See *Escue v. N. OK Coll.*, 450 F.3d 1146, 1158 (10th Cir. 2006) ("[T]he Third Circuit has explained that '[e]xpress consent may be given by words or affirmative conduct and implied consent may be manifested when a person takes no action, indicating an apparent willingness for the conduct to occur'.") (citing *Barnes v. Am. Tobacco Co.,* 161 F.3d 127, 148 (3d Cir.1998) (citing Restatement (Second) Torts § 892 cmt. b & c). That is, the defense wished the jury to infer from the evidence at trial that although A.S. testified that she was asleep and did not consent to the sexual touching by the defendant, A.S.'s actions (her insistence on sleeping in Chang's room, her desire to sleep in Chang's clothing,

[1] Although this defense theme is stated as an affirmative proposition, it is not an affirmative defense; it was the State's burden to prove that A.S. *did not* consent to the touching.

her decision to sleep in Chang's bed, her removal of her bra) and her inaction (her lack of any contemporaneous objection to Chang's touching), were both (1) inconsistent with her testimony, and (2) consistent with consent to sexual touching.

The defense, however, was prevented from offering probative and admissible evidence on that point. Specifically, the defense was prevented from offering evidence that: (1) the defendant and A.S. spoke previously about getting together, and A.S. said she would if she was drunk; and (2) the defendant sent A.S. a text message several days before the incident wherein the defendant asked A.S. to take his virginity. The district court excluded this evidence after an analysis which contained an improper weighing of the evidence and usurpation of the jury role. See, e.g. (R. Vol. 5, 10-14):

> ([THE COURT]: "This just smacks to me of, you know, a woman saying no is not really a no, and in order for a woman to -- no to mean no, that means she never -- can never have contact with you again, because, obviously, if she wants to still hang around with you, it must mean that in her heart, she really wants to have sex with you.").

At trial, A.S. testified that she consumed alcohol -- the condition precedent in her earlier (but excluded) statement concerning her willingness to "get together" with the defendant. See (R. Vol. 6, 139-40). The defendant also testified at trial; his prior statement was therefore properly admissible under the rules of evidence if it was relevant to an issue in controversy. K.S.A. 60-460(a). And it *was* relevant to an issue in controversy and integral to the defense theory as outlined above. However, this statement was excluded by the trial court.

After the partying was through on the night in question, A.S. chose to sleep in the defendant's room. She chose to change clothes in the defendant's room. She chose to sleep in the defendant's clothes instead of her own. She chose to sleep in the

defendant's bed, and she declined offers to sleep elsewhere. (R. Vol. 6, 142-49). Men and woman *can* have platonic relationships with one another, and in that context, A.S.'s behavior *could* be consistent with "trust" in a platonic opposite-sex friend, as the State argued at trial, but considerable doubt would have been cast on that "trust" theory if the jury heard the excluded evidence that the defendant had asked A.S. to take his virginity just a few days before the party, charging A.S. with knowledge of the intentions of the defendant. With that context, a jury may have received with additional skepticism the argument that "[A.S.] didn't expect [the sexual touching] to happen because she trusted [the defendant]." (R. Vol. 7, 401). Because the defendant testified at trial, his prior statements would be admissible hearsay. K.S.A. 60-460(a). However, as a result of the Court's ruling, the jury did not get to evaluate A.S.'s actions in the full context of the parties' relationship.

The facts here are analogous to those in *State v. Perez*, where a jury convicted Michael Perez of raping a 16-year-old girl during a ride in a pickup truck in the country. *State v. Perez*, 26 Kan. App. 2d 777, 779, 995 P.2d 372, 378 (1999), *as corrected* (Jan. 12, 2000). Perez argued consent, but the trial court excluded evidence that C.I., the victim, had been engaging in a course of consensual sex with strange men at a party in the hours preceding the pickup ride. *Id.* Criticizing the trial court's decision, the Court of Appeals observed that:

> When the trial court stripped Perez of the right to present evidence of C.I.'s sexual activities at the party, it slammed the door on Perez' strongest defense argument: C.I. willingly participated in any sexual activities taking place in the vehicle.
> The trial court thwarted Perez' attempt to demonstrate why this young girl would agree to go to the country with two men and engage in sexual activities with Perez despite Allen's presence in the vehicle. It would be difficult for a jury

> deciding this case to make the leap that C.I. would consent to sex with Perez when Allen was present without hearing vital defense evidence that C.I. had consented to similar sex acts only hours before. As a result, the trial court prevented Perez from painting a complete and accurate picture for the jury of the events taking place that morning.

State v. Perez, 26 Kan. App. 2d 777, 784, 995 P.2d 372, 378 (1999), *as corrected* (Jan. 12, 2000).

Similarly here, without evidence to weigh bearing on recent sexually-oriented communications between the defendant and A.S., the jury was left with a single impression about the nature of the relationship between A.S. and the defendant – it was platonic. The defense was disarmed when it was prevented from presenting its own evidence of prior communications suggesting otherwise. In closing argument, the prosecution – having successfully argued that the defendant's evidence would be irrelevant – switched gears and impeached the defense's failure to offer the exact evidence that was excluded:

> Think about Ms. []'s reaction to the touching. Well, you are probably going to hear she didn't say no, she didn't swat his hand. But what did she do? First she froze. And why did she freeze? Would it be because this was her friend? He described himself as her best male friend. *She did not expect him to do this to her.* And she didn't understand it when it first started happening, and so she froze because she thought she was safe. Isn't that what the evidence led you to believe? She thought she was safe with the Defendant. (emphasis added).
>
> * * * * * *
>
> When I was questioning the Defendant, did he ever say they talked about this, about this happening? Did he bring it up? Did she bring it up? No. You heard no evidence. Where is the consent coming from? From her being in his room? This person that is her best male friend that she says she trusts. The fact that she is in his room means he gets to feel her breasts and touch her vagina? That is not consent.
>
> The fact she is going to sleep in the bed? There is some variation on why, but she has been consistent over time about why she slept in that bed. And you will recall the evidence was Mr. Chang said you can sleep in that bed. Mr. Chang

> invited her to stay in his room. She is not begging to get in there. But does the fact that she is going to sleep in her *friend's* bed mean she has consented to him touching her breasts and vagina? And has she consented to him doing it while she is asleep? Folks, that is not consent, is it? (emphasis added).

(R. Vol. 7, 369-74). Further, in rebuttal:

> Do you believe that, that this woman got in the bed and that meant he could touch her vagina? No conversation. No talking about it. She is in the bed and that is consent. Is that a reasonable view to have of this situation?
>
> * * * * * *
>
> Because all the evidence you heard is that not only did she not say yes, but it was never discussed. The defendant just did it to her, took it upon himself and started touching her.
>
> * * * * * *
>
> I would argue that the way to look at her behavior, up until Mr. Chang touches her, is two things: One is she is tired and she trusts him. Isn't her behavior consistent with that? Why doesn't she go get her clothes from another room? Well, because she is tired, it's 3:00 in the morning, and she trusts him.
>
> In retrospect, of course she could have done things differently. But she didn't expect that to happen because she trusted him. Doesn't that explain her behavior?
>
> You know, why does she take her bra off? Who knows? She said it was uncomfortable, so she took it off at the party. So what? Does that mean she was somehow consenting he could touch her vagina or her breasts? Does that mean anything? She was with her friend who she trusted.
>
> And think about her testimony about she said she woke up and he was touching her breasts. The defendant said, well, he started touching her stomach first. Well, first of all, couldn't touching the stomach be touching with the intent to sexually arouse or gratify himself? Sure. He is not doing that to be friendly. He is doing that trying to lead up to more and more and more. So that's evidence right there. (emphasis added).

(R. Vol. 7, 398-401).

This sequence of events was manifestly unfair. The jury didn't get to hear, and weigh, all of the evidence because the Court excluded relevant evidence that would have been consistent with the defense theory, and <u>then</u> the State capitalized on this forced silence, arguing that the absence of defense evidence of prior discussions was relevant to the outcome. The Court permitted the jury to hear one-half of the story, and

it excluded the other half. The verdict should be overturned and the case remanded for a fair trial.

2. A district court commits constitutional error when it prevents valid impeachment at trial, because the United States Constitution guarantees that criminal defendants may confront – and impeach – the witnesses against them. Here, the defendant desired to impeach the testimony of the complainant with questions about their recent exchange of sexually-oriented text messages—especially after she testified at trial that she was unaware defendant had any romantic interest in her. Did the district court err when it prevented defense counsel from asking questions and impeaching the complaining witness about the exchange of text messages regarding her taking defendant's virginity?

Standard of review: This court employs "an unlimited standard of review when addressing issues pertaining to the Confrontation Clause of the Sixth Amendment to the United States Constitution." *State v. Belone*, 295 Kan. 499, 502–03, 285 P.3d 378, 381 (2012).

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' " *Delaware v. Van Arsdall,* 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). "Confrontation means more than being allowed to confront the witness physically." *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Central to the Clause's purpose is "secur[ing] for the opponent the opportunity of cross-examination." *Van Arsdall,* 475 U.S. at 678, 106 S.Ct. 1431 (emphasis omitted) (quoting *Davis,* 415 U.S. at 315–16, 94 S.Ct. 1105) (internal quotation marks omitted). As the U.S. Supreme Court explained in *Davis*:

> Cross-examination is the principal means by which the *believability* of a witness *and* the *truth of his testimony* are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' [s] story to test the witness' [s] perceptions and memory, but *the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.*

415 U.S. at 316, 94 S.Ct. 1105 (emphasis added). A.S. testified at trial that Chang "never made advances in the past at all" and she had no "reason to believe that

[Chang] was romantically attracted to [her] when [she] came to Lawrence on Labor Day[.]" (R. Vol. 6, 159, 177). This evidence supported the State's theory of sexual battery because it explained why A.S. would sleep in the defendant's room alone with the defendant, in the defendant's bed, with the defendant also in the bed, and have no expectation that the defendant would make a sexual advance. However, the defense theory was that A.S. and Chang exchanged messages in the days leading up to Labor Day, and Chang was sexually explicit in his messages to A.S., asking her to take his virginity. (R. Vol. 5, 11). Further, A.S. told Chang that she would be willing to take Chang's virginity if she got drunk. (R. Vol. 5, 11). And at the time in question, A.S. had been drinking alcohol. (R. Vol. 6, 139-40).

When defense counsel attempted to ask A.S. about these prior communications, in the context of A.S.'s statement that the defendant never made an advance on her, the trial court interrupted the effort:

> Q. He never made any type of statement or text to you that considered-
> MR. SIMPSON: Judge, Mr. Frydman is not following the order.
>
> THE COURT: You need to approach.
>
> (The following proceedings were had at the bench.)
>
> MR. SIMPSON: I am confused as to why Mr. Frydman just did the thing he was not supposed to do. It's beyond me.
>
> MR. FRYDMAN: I didn't talk about a specific text. I am just trying to inquire about if that is considered a pass. If she is now saying that a pass was a physical pass, doesn't mean that this text wasn't also a pass in her mind.
>
> THE COURT: Well, I think the issue was what did she mean, and that is clarified now. She meant there was nothing ever physical, and she has confirmed that. Now I think we need to stop there.
>
> (The following proceedings continued in open court.)

> Q. (By Mr. Frydman) Ms. S[], didn't you have reason to believe that [Chang] was romantically attracted to you when you came to Lawrence on Labor Day?
> A. No.

(R. Vol. 6, 176-77). Without the ability to inquire whatsoever about recent sexually-oriented communications between the defendant and A.S., the jury was left with the impression that A.S. was credible, naïve about the defendant's intentions, and exploited by the defendant. If defense counsel would have been able to inquire, and impeach, the inquiry and impeachment would reasonably have resulted in: (1) damaging the credibility of A.S., both specifically as to her knowledge of the defendant's intentions and globally as being generally untruthful, and (2) testimony that A.S. did know about the defendant's intentions. The Court prevented this inquiry, though, and permitted the jury to hear one-half of the story, excluding the other half. That was unfair. The verdict should be overturned for this reason and the case remanded for a fair trial.

3. Criminal defendants are denied a fair trial when a prosecutor misstates the law and the facts such that the jury could have been confused or misled. Here, the prosecutor told the jury several times in closing that the defendant touched the complainant's "vagina," when no evidence supported that statement. Further, the prosecutor told the jury also in closing that there was no such thing as implied consent, when in reality implied consent is a well-established legal concept. Was the defendant denied a fair trial because of the prosecutor's false statements of both law and fact?

Standard of review: "To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman*. In other words, prosecutorial error is harmless if the State can demonstrate "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060, 1075 (2016)

"Because it is the prosecutor's duty in a criminal matter to properly present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction, prosecutors are afforded wide latitude in arguing their cases." *State v. Morningstar*, 289 Kan. 488, Syl. ¶7, 213 P.3d 1045, 1047 (2009). "Inherent in this wide latitude is the freedom to craft an argument that includes reasonable inferences based on the evidence." *Id.* However, "[w]hen the prosecutor argues facts not in evidence, the first prong of the prosecutorial misconduct test is met and the court must consider whether the misstatement of facts constitutes plain error. *State v. Hall*, 292 Kan. 841, Syl. ¶5, 257 P.3d 272, 276 (2011).

At the time of closing argument, the prosecutor made four (4) references to the defendant touching A.S.'s vagina in the context of the consent issue, to wit:

> “The fact that she is in his room means he gets to feel her breasts and touch her vagina”?

(R. Vol. 7, 374).

> “But does the fact that she is going to sleep in her friend’s bed mean she has consented to him touching her breasts and vagina”?

(R. Vol. 7, 374).

> “Do you believe that this woman got in the bed and that meant he could touch her vagina”?

(R. Vol. 7, 398).

> “Does [taking her bra off] mean [A.S.] was somehow consenting he could touch her vagina or her breasts”?

(R. Vol. 7, 401). The evidence at trial, however, did not include the defendant touching A.S.’s vagina. Instead, A.S.’s testimony was:

> Q. What happened next?
> A. He stopped for a second, and then he made a fist and tried to -- or shoved it down the front part of the sweatpants.
> Q. Okay. And when you say he made a fist, kind of describe what he was doing.
> A. He was trying to touch my vagina and just made a fist. I felt his knuckles on my bikini line.
> Q. And so was his hand inside your sweatpants?
> A. Yes, under my underwear.
> Q. And then how close did he get to your vagina?
> A. Just to the bikini line.
> Q. And what did you feel him trying to do?
> A. Touch my vagina.
> Q. What were you doing at that point?
> A. Clenching my legs.
> Q. Why were you doing that?
> A. So he couldn't go any further, and I was trying to turn again.
>
> * * * *
>
> Q. Okay. What made him stop touching you?
> A. He just gave up. (emphasis added).

(R. Vol. 6, 157-58). The prosecutor's multiple references to the defendant touching A.S.'s vagina find no mooring in the evidence presented in the case. Although the prosecutor is arguing the issue of consent when these references arise, the only consent at issue is the consent to the *completed* sexual battery. That battery *did not* include a touching of A.S.'s vagina, and the charges *did not* include an allegation of attempted sexual battery. Of course, the prejudicial effect on the jury is clear – the vagina *is* the female sex organ, and a touching of a vagina is much more clearly a sexual touching of an intimate area than the touching of breasts. An average juror would be more likely emotionally disturbed by an unwanted touching of a vagina than an unwanted touching of breasts. The prosecutor's conflating of bikini area and vagina was unfairly prejudicial to the defendant, and it was prosecutorial error.

In addition to the prosecutor's duty to stay within the confines of the evidence during argument, the prosecutor also has a duty to accurately state the law. See *State v. Pribble*, 304 Kan. 824, Syl. ¶6, 375 P.3d 966, 969 (2016) ("A prosecutor may not misstate the law applicable to the evidence presented."). In rebuttal, the prosecutor told the jurors there was no such thing as implied consent and that defense counsel just made that term up:

> You know, this implied consent that Mr. Frydman talked about, that is not in your instructions. You didn't hear that term. That is a term that he has made up and is using with you. And it's really an argument that is a way of saying, well, she said yes without actually saying yes. Because all the evidence you heard is that not only did she not say yes, but it was never discussed. The defendant just did it to her, took it upon himself and started touching her.
>
> So there is no such thing as implied consent. There is either consent or there is –
> MR. FRYDMAN: Consent is not defined, and I am allowed to argue consent, and he is allowed to argue otherwise.

> THE COURT: It's not defined. Both of you can argue what you want to argue.
>
> MR. SIMPSON: So there is either consent or there is not. Did she consent? I mean, implied consent sounds like a way of saying, well, he thought she consented by her actions. But she told you she didn't consent. And her actions tell you she didn't consent.

(R. Vol. 7, 398-99).

Implied consent, though, is a fixture in practically every area of Kansas law, and it has been – as a concept – present in Kansas for at least 100 years. Perhaps the best known implied consent law in the criminal law area is K.S.A. 8-1001, which statute is partially denominated "consent implied," and which is called the "implied consent law" in the appellate cases. See K.S.A. 8-1001; and *e.g. State v. Ryce*, 303 Kan. 899, 902, 368 P.3d 342, 347 (2016), *adhered to on reh'g*, 306 Kan. 682, 396 P.3d 711 (2017).

Beyond just criminal law, though, the idea that consent can be inferred from all existing circumstances under the moniker "implied consent" is well-established in Kansas. See *Turner v. Gilbreath,* 3 Kan.App.2d 613, Syl. ¶ 2, 616, 599 P.2d 323, 325 (1979) ("Consent may arise from action, inaction or silence from which arises an inference that consent has been given, or it may exist where a person by his line of conduct has shown a disposition to permit another person to do a certain thing without raising an objection thereto."); *Hoke v. Williamson*, 98 Kan. 580, 158 P. 1115, 1116 (1916) ("Consent of the landlord may be express, or may be implied from all the circumstances."); *Armstrong v. Topeka Ry. Co.*, 93 Kan. 493, 144 P. 847 (1914) ("Consent may also be implied."); *Holyfield v. Harrington*, 84 Kan. 760, 115 P. 546, 547 (1911) ("[Consent] may be express, or it may be implied from custom, or from the acts

of the parties."); *Evans v. Jacobitz*, 67 Kan. 249, 72 P. 848, 848 (1903) ("[T]here need not be in all cases an express rescission, and the same may be implied from the dealings and conduct of the parties."); *United States v. Gray*, 71 F. Supp. 2d 1081, 1083 (D. Kan. 1999) ("An invitation or consent to enter a house may be implied in some circumstances."); *cf. Tightmeyer v. Mongold*, 20 Kan. 90, 91 (1878) ("It is a familiar rule of law, that a promise may be express, or implied."); *cf also Barnes v. Am. Tobacco Co., 161 F.3d 127, 148 (3d Cir.1998) (citing Restatement (Second) Torts § 892 cmt. b & c).* ("Express consent may be given by words or affirmative conduct and implied consent may be manifested when a person takes no action, indicating an apparent willingness for the conduct to occur."). Because this is a well-established legal principle, it is clear that the prosecutor misstated the law.

The prosecutor's denigration of opposing counsel in addition to the misstatement of law increases the prejudicial effect of this error on the jury. The prosecutor did not just tell jurors "there is no such thing as implied consent," but he also said "[t]hat is a term that [defense counsel] has made up and is using with you." There was no positive interjection by the Court tending to correct the juror's impression of the law, or demonstrate that defense counsel was making a valid and competent argument. Instead, jurors were naturally left with the impression that defense counsel was engaged in some sort of hoodwink. The prosecutor's misstatement of law was unfairly prejudicial to the defendant, and it was prosecutorial error.

4. Even if individually harmless to a defendant's Constitutional Fair Trial guarantee, the cumulative effect of trial errors can deny a defendant a fair trial. Here, (i) defendant was unable to present a complete defense due to the trial court's refusal to allow evidence of sexually-oriented text messages; (ii) the prosecutor repeatedly misrepresented to the jury during closing argument the nature of the sexual contact; and (iii) the prosecutor falsely stated that there is no such thing as implied consent. Regardless of whether each of these errors is alone sufficient to warrant a new trial, did the cumulative effect of these errors also deny defendant a fair trial?

Standard of review: This court employs "a de novo standard when determining whether the totality of circumstances substantially prejudiced a defendant and denied the defendant a fair trial based on cumulative error." *State v. Roeder*, 300 Kan. 901, 939, 336 P.3d 831, 857 (2014)

"In a cumulative error analysis, an appellate court aggregates all errors and, even though those errors would individually be considered harmless, analyzes whether their cumulative effect on the outcome of the trial is such that collectively they cannot be determined to be harmless." *State v. Seba*, 305 Kan. 185, 215, 380 P.3d 209, 229 (2016) (citing *State v. Colston*, 290 Kan. 952, 978–79, 235 P.3d 1234 [2010]). "In other words, was the defendant's right to a fair trial violated because the combined errors affected the outcome of the trial"? *Id.* In a cumulative error analysis, '[i]f any of the errors being aggregated are constitutional in nature, the cumulative error must be harmless beyond a reasonable doubt.' *United States v. Toles*, 297 F.3d 959, 972 (10th Cir. 2002).

"The first task in the cumulative error analysis is to count up the errors, because the doctrine does not apply if no error or only one error supports reversal." *State v. Williams*, 299 Kan. 1039, 1050, 329 P.3d 420, 428 (2014). The defendant has brought three errors to the attention of this Court. Each of those errors had a negative impact on the defendant's Constitutional Fair Trial guarantee. Further, these errors

compounded upon one another in a unique way to deprive the defendant of his right to be heard in the manner contemplated by the Constitution.

The defendant showed up for his trial with a defense theory and trial strategy (implied consent), only to be waylaid by a State motion *in limine* filed that morning that prevented the defendant from presenting evidence of – or even discussing – prior, sexually-oriented communications between himself and A.S. which would: (1) color A.S.'s actions during the events to suggest that she got into the defendant's bed because she was consenting to sexual contact with him; and (2) impeach A.S.'s testimony that she had no idea the defendant had any sexual interest in her. Then, in closing argument, the State argued that the entire defense theory of implied consent was just "made up." This peculiar sequence was unfairly devastating to the defense, and it infringed on the defendant's right to present his defense, cross-examine witnesses, and hold the State to its burden. All of these matters are at the heart of the right of a fair trial. Because this right was variously infringed, the Court should reverse the verdict and judgment and remand the matter.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court, vacate the defendant's conviction based thereon, and remand this case for further proceedings, as necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the Kansas Courts eFiling system thereby effecting service on Kate Butler and that a copy of the same was also sent via email this 11th day of September, 2018, to kbutler@douglascountyks.org.

/s/ Adam M. Hall
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