91306-4

No. 44324-4-II

THE SUPREME COURT
OF THE STATE OF WASHINGTON

ABBIGAIL GUTIERREZ,
individually and as Guardian for NL, a minor,

Respondent,

vs.

OLYMPIA SCHOOL DISTRICT,
a municipal corporation,

Petitioner.

ANSWER TO THE DISTRICT'S PETITION FOR REVIEW

Darrell L. Cochran, WSBA No. 22851
Christopher E. Love, WSBA No. 42832
Counsel for Respondent

PFAU COCHRAN VERTETIS
AMALA, PLLC
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402
(253) 777-0799

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I. IDENTITY OF RESPONDENT

Abbigail Gutierrez, individually and as Guardian for NL, a minor, asks this Court to deny review of Division Two of the Court of Appeals' unpublished opinion *Gutierrez v. Olympia Sch. Dist.*, No. 44324-4-II, 2014 WL 6984636 (2014).[1]

II. RESTATEMENT OF THE CASE

On December 30, 2010, NL, a five-year-old girl who rode the bus to afternoon kindergarten at Centennial Elementary School in the District, disclosed to her mother, Gutierrez, that "Gary," a "helper on the bus," had molested her on the bus sometime between Halloween and Christmas the same year. RP 73-74, 201-04, 410-412, 1056, 1058-59, 1063-064. Gutierrez immediately reported the abuse to the Thurston County's Sherriff's Office. RP 1064-065.

During a criminal investigation by Detective Cheryl Stines, NL immediately identified a photograph of Gary Shafer, a District bus driver, as her abuser. RP 195-96. Shafer ultimately pled guilty to three counts of first degree child molestation involving NL; NL's school bus seat mate, VV; and another kindergarten girl, and also to one count of possession of depictions of a minor engaged in sexually explicit conduct. RP 185; Ex. 12. Subsequently, Gutierrez, individually and on behalf of NL, filed this lawsuit against the District. CP at 10-16.

Much of the evidence introduced at trial focused on the frequency and nature of Shafer's unpaid "ride alongs" on NL's bus and other District

[1] Appendix A.

kindergarten and preschool bus routes. During the 2010-2011 school year, Mario Paz, a District bus driver with 18 years of experience, was assigned to NL's kindergarten bus route. RP 55, 58, 73. Paz knew that NL and VV were best friends who sat together every day in the seat directly behind him, a unique seat because it was the only blind spot on the entire bus where the driver cannot see using the overhead mirror. RP 58, 59, 62, 76-77, 79. Paz testified that he had been trained to prohibit adults from sitting with children on the bus and that the District had a policy prohibiting bus drivers from sitting with children while riding buses. RP 59, 61-62, 65-68. Paz understood that this training and policy was designed to protect children from harm, including sexual abuse. RP 61-63, 65-67.

Despite this training and policy, however, Paz allowed his friend Shafer to ride along on his bus and sit with NL and VV in the blind spot seat directly behind him. RP 59, 61-62, 65-66, 157. Shafer would sit in the seat behind Paz with either NL or VV in his lap, RP 201, 203, 217-18, 222, 234, until Paz pulled the bus into the school, at which point Shafer would move to the front right seat of the bus. RP 146. Paz knew that Shafer would tell the girls jokes and talk about what they were going to do at school that day while he sat with them. RP 79-80. Paz admitted that he found Shafer's conduct "strange." RP 85-87. Paz claimed that Shafer rode his bus only a maximum of two or three times and sat with NL and VV only once during a 20-25 minute trip. RP 90, 94-95. However, when asked whether he knew that NL and VV knew Shafer as "Gary," Paz testified, "Yeah. He asked them all the time." RP 95.

Paz's minimization of the number of times that Shafer rode NL's bus was also contradicted by testimony and evidence adduced from numerous other sources. For example, the jury heard without objection an edited video recording of Detective Stines' interview with NL. RP 197. When asked whether Shafer rode the bus every day, NL answered, "[s]ome days," and then clarified that "[s]ome days he's not. Some days there's a different guy. Some days there's no one." RP 204. Likewise, NL's teacher, Melanie Evans, testified that she had observed NL's bus arrive at the school "[m]aybe 75 percent of the time" in the fall of 2010 and that "occasionally a few times" she noticed another adult riding along. RP 412, 416-17. The principal of NL's school, Alice Drummer, testified that she and Evans had discussed the presence of a man riding along on NL's bus, and that they both thought it was "very unusual" that another man was riding along. RP 427, 446-47. Finally, in response to a survey conducted by Stanley after Shafer's arrest, bus driver Todd Adams stated that Shafer rode on NL's bus route twice in September and October of 2010 when Adams substituted for Paz. Exs. 43, 50.

Additionally, the jury heard evidence of Shafer's interactions with NL and VV on the bus and their perceptions of their "friendship" with him, strongly indicating that he had cultivated a close, peer-level relationship with them only possible over the course of multiple bus rides. Gutierrez testified without objection that, prior to her abuse, NL was "pretty shy" and took a long time "to get to know people." RP 1062. Following Shafer's arrest, NL disclosed details of Shafer's interactions

with her and VV, initially stating, "this guy tickled me, and . . . we used to sit on his lap." RP 1066. NL later disclosed, "He was really funny, and he rubbed [my] back and rubbed [VV's] back and . . . they were friends." RP 1072. NL felt she was friends with Shafer to such an extent that, for nearly two weeks after his arrest, she wanted to pray for Shafer because she was concerned about getting him in trouble and "felt bad for her friend that she had to tell on him . . . [and] wanted him to be safe." RP 1071-072. Only then, after a sustained hearsay objection, did Gutierrez testify that NL said Shafer "always rode the bus" and clarified that he rode the bus "[a]bout two times a week for awhile." RP 1073-074.

Likewise, after a sustained hearsay objection, Stines testified concerning evidence she had obtained from VV. RP 205, 209-212. Stines directly attributed to VV the statement that Shafer "was [VV's] friend." RP 219. Stines also testified that she learned Shafer sat the girls on his lap, tickled them, and told them knock-knock jokes from his cell phone, which Stines characterized as peer-level "grooming behavior" designed to appeal to kindergarten children in order "[t]o get closer to them." RP 217-218, 222, 236. However, the trial court admitted without objection a picture that VV had drawn of herself and Shafer, and Stines' testimony that VV had hoped to take that picture to school to show her class "her friend Gary." RP 219; Ex. 120. Stines stated that, according to her investigation, the relationship between Shafer and the girls developed through "[m]ore than one" interaction occurring on "multiple days." RP 222. Finally, Stines testified that she had "received some information that

there were possibly additional victims" and was able to identify a District student in addition to NL and VV to whom Shafer also pled guilty to molesting. RP 226. Over the District's objection, the trial court then admitted Shafer's judgment and sentence for the molestations of NL, VV, and the third kindergarten girl, as well as for possession of depictions of a minor engaged in sexually explicit conduct. RP 226-227; Ex. 12

Additionally, testimony and evidence adduced at trial established that Shafer was riding District kindergarten bus routes in general at an unusual frequency and with virtually no oversight or control. The District's transportation director, Fred Stanley testified that, although drivers had to obtain his permission before riding along with another driver, the District had no controls in place monitoring or governing ride alongs in general. RP 477, 487; 607. According to Paz, the first time Shafer asked to ride along on Paz's bus, he had asked for Stanley's permission, but had "never bothered asking again because Fred Stanley just let [Shafer] ride whenever he wanted." RP 69. Stanley acknowledged that Shafer may have ridden along on NL's bus without permission. RP 489.

Indeed, in his survey of District kindergarten route drivers conducted after Shafer's arrest, Stanley admitted that the District had "no records of when or how often" Shafer may have ridden along on any District buses. Exs. 48-52. The survey's responses demonstrated that Shafer had ridden along on kindergarten buses at least 11 times during the four months of Fall 2010, and many of those surveyed drivers testified

themselves that Shafer often rode along on their kindergarten routes—as many as 70 times over five years on one driver's route, for example. RP 264, 335-36, 341, 367-373, 1126-17. Shafer's conduct during those ride alongs also stood out; one driver, Thomas Engle, testified that Shafer would move between seats to sit and chat with children and that he could not recall any other District employee who would move around the bus and sit with kindergarten children while riding along. RP 367-73, 391.

Finally, the jury heard testimony that the District ignored reported parental concerns regarding District buses on which he was present. Kevin Gearhart testified that on October 19, 2010, his daughter, the last student to get off her kindergarten bus at school, arrived home more than 30 minutes late. RP 746, 750-51, 753, 758. According to Gearhart, his daughter was "not her chipper self" when she got off the bus and told him later that evening that she would not ride the bus to school anymore, but refused to say why not. RP 753-54. Gearhart testified that he spoke to various District employees, but never got a satisfactory explanation. RP 756-58. Gearhart made repeated phone calls to the District, hoping that it would investigate this incident, to no avail. RP 758-59, 762-63. After Shafer's arrest, Gearhart learned that Shafer had substituted for the regular driver on October 19, a fact confirmed by a District record admitted by the trial court. RP 761-764; Ex. 128.

Based on his review of the evidence in this case, Chris McGoey, a professional security consultant and Gutierrez's standard of care expert, opined that blindly "trusting the drivers is not enough" and that the

District should have had policies and procedures in place regarding bus ride alongs to "set the standard of care" and monitor for deviations from those procedures and standards. RP 658-660, 683. McGoey further opined that this case involved "many years, many occurrences" and the District had missed many opportunities to discover or prevent Shafer's misconduct because "ordinary policies and procedures and systems would have caught the unusual behavior, when it required some type of reporting and some type of inquiry into the behavior." RP 666. Gutierrez then raised Paz's testimony, asking McGoey whether he had reviewed information in forming his opinion showing that Shafer had rode NL's bus more times than claimed by Paz. RP 667. Over the District's objection, the trial court allowed McGoey to testify that he had reviewed a report from psychologist Dr. Mark Whitehill relating NL's statement that Shafer rode her bus twenty times. RP 668, 672. However, the trial court first instructed the jury that this testimony was "not offered for the truth of the matter asserted but to explain this witness's testimony to you." RP 671-72. Without objection, McGoey also explained that in forming his opinion he had concluded that Shafer rode NL's bus "definitely more than three times" based in turn on the information he had reviewed, including information showing that Shafer's pattern was riding "multiple times with many drivers." RP 673.

Likewise, Dr. Whitehill, Gutierrez's damages expert, testified that the information he had reviewed demonstrated extended contact between Shafer and NL and his extensive "grooming" of her, leading to PTSD and

other psychological and emotional harms due to the large break in trust NL suffered when her "friend" turned out to be a manipulative abuser. RP 978, 991-92, 1004, 1006-007, 1011-012. In discussing the materials on which he had based his opinion, Dr. Whitehill testified that he has observed his colleague, licensed mental health counselor Cynthia Beebe, conduct a half-hour video recorded interview with NL. RP 984-85, 987. Over the District's objection, the trial court allowed Gutierrez to play for the jury an excerpt of the video in which Beebe asked NL how many times Shafer had ridden her bus, and NL responded, "Twenty." RP 989-90. Before the jury heard the video, however, the trial court read the following limiting instruction to the jury:

> You will now hear testimony that is offered for a limited purpose. This evidence is admitted as part of the basis for the opinion for Dr. Whitehill, but may not be considered for other purposes. You may not consider this testimony as proof that the testimony relied upon is true. You may use the testimony only for the purpose of deciding what credibility or weight to give Dr. Whitehill's opinion.

RP 988-89.

At the close of the evidence, the trial court instructed the jury that circumstantial evidence is just as probative as direct evidence. CP 1089. Jury instruction no. 13 also provided, the "District and its employees have a legal duty to exercise reasonable care to protect a student in its custody from reasonably foreseeable dangers" and that "[h]arm is reasonably foreseeable if the . . . District knew or should have known of the risk that resulted in the harm." CP at 1095. Instruction 13 further specified that the

jury could find a breach of this duty if "the actual harm fell within a general field of danger which should have been anticipated," even if it found that the District did not anticipate "the exact sequence of events" leading to the harm. CP at 1095. Finally, over Gutierrez's objection, instruction 13 also provided,

> [w]ith regards to the criminal actions of any employee of the District, these actions are reasonably foreseeable only if the District and its employees knew or in the exercise of reasonable care should have known that ***the*** employee was a risk to harm ***a*** student.

CP at 1095 (emphasis added). It was undisputed that NL suffered PTSD and would require lifelong treatment. RP 1011-012, 1518, 1522. After deliberations, the jury returned a verdict for Gutierrez, awarding damages to her and NL in the amount of $1,425,000. CP 1107.

After the District appealed, the Court of Appeals observed in its thorough opinion that Gutierrez adduced properly-admitted evidence at trial through multiple witnesses and sources that Shafer rode the bus on which he sexually molested NL more than the two to three times claimed by the District; Shafer rode kindergarten bus routes in general whenever it suited him; Shafer's mere presence and activity as a rider on these buses was noticeably unusual; Shafer had been convicted of molesting NL on one of these buses; and ER 705 grants trial courts the discretion to allow expert witnesses to testify regarding otherwise inadmissible evidence for purposes of explaining the basis of their opinions, subject to a proper limiting instruction. Thus, the Court of Appeals held: (1) The trial court's erroneous admission of a short video clip of NL stating that Shafer rode

her kindergarten school bus twenty times, NL's statements to Gutierrez concerning how frequently Shafer rode her bus, and the trial court's admission of evidence of Shafer's convictions for sexually abusing two other kindergarten girls and for possession of child pornography was harmless due to that evidence's cumulative nature, *Gutierrez*, 2014 WL 6984636 at *24-25; (2) the trial court's admission of NL's "twenty times" statements through McGoey and Dr. Whitehill to explain the basis of their opinions was proper under ER 705, *id.*, at *11-13[2]; and (3) the trial court's admission of VV's out-of-court statements to Stines regarding her "friendship" with Shafer was proper under ER 801 (c) because they were not offered for the truth of the matter asserted, but for another relevant purpose, *id.*, *16-18.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4 (b) limits review of decisions by the Court of Appeals to a set of specific circumstances. However, the District's petition gives only

[2] In its petition, the District repeatedly raises the issue of McGoey's and Dr. Whitehill's alleged "vouching" for the credibility of NL's out-of-court "twenty times" statement. Petition at i, 2, 4-6, 10-11, 15-16. However, the District fails to mention the Court of Appeals' holding that the District waived appellate review of these "voucher" issues by failing to raise them before the trial court, much less designate these waiver holdings for discretionary review or provide any argument as to why they merit review by this Court. *Gutierrez*, 2014 WL 6984636 at *13. Because the Court of Appeals' holding that the District waived appellate review of these "voucher" issues is unchallenged, the District may not seek review on the merits of those issues by this Court. *Shumway v. Payne*, 136 Wn.2d 383, 392-93, 964 P.2d 349 (1998) (citing RAP 13.7(b)) (the Court reviews "only the questions raised in the petition and in the answer to the petition, unless the court orders otherwise"); *see also Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988) (respondent's failure to assign error to a Court of Appeals holding means that the propriety of that holding is not before the Supreme Court); *Clam Shacks of Am., Inc. v. Skagit Cy.*, 109 Wn.2d 91, 98, 743 P.2d 265 (1987) (court rejected argument that an appeal of part of a Court of Appeals decision amounts to a request to review every aspect of that decision). Accordingly, this Court should strike or otherwise ignore the portions of the District's petition referring to these "vouching" issues, and Respondent does not discuss them further.

passing, conclusory reference to RAP 13.4(b)'s requirements, instead presenting irrelevant arguments on the merits that have already been rejected.

Where the District does briefly discuss the criteria for review, it appears to assert that review of each of the issues raised in its petition is warranted under RAP 13.4(b)(1), (b)(2), and (b)(4). None of these criteria are applicable to the issues raised in the District's petition, however. Review is inappropriate under RAP 13.4(b)(1) and (b)(2) because none of the Court of Appeals' holdings regarding the harmless nature of evidence erroneously admitted in this particular case or the proper admission of evidence under ER 705 and ER 801(c) conflict with any previous Washington appellate decision cited by the District.

Moreover, the context-dependent nature of the issues raised by the District's petition underscores why review is inappropriate under RAP 13.3(b)(4). The harmless error standard and the evidentiary rules are entirely case-specific and depend upon the context of what occurred at trial. Accordingly, the Court of Appeals' holdings regarding harmless error in this case and evidentiary issues, limited as they are to the specific facts of this case, necessarily do not and cannot present an issue of "public importance," much less ***substantial*** public importance warranting this Court's review.[3] Accordingly, the Court should deny the District's petition.

[3] Indeed, the Court of Appeals recognized as much when it denied the District's motion to publish the opinion in this case. Appendix B.

A. Review is not warranted under RAP 13.4(b)(1) or (b)(2)

The Court may accept review of a decision of the Court of Appeals if it is in conflict with a decision of this Court or a decision of the Court of Appeals. RAP 13.4(b)(1), (b)(2). Here, not a single previous Washington appellate decision cited in the District's petition is in conflict with the Court of Appeals' holdings in this case regarding (1) the cumulative and harmless nature of the evidence erroneously admitted at trial, (2) the proper admission under ER 705 of NL's "twenty times" statements to explain the basis of Dr. Whitehill's and McGoey's expert opinions, and (3) the proper admission of VV's statements to Detective Stines under ER 801(c).

1. The Court of Appeals' harmless error holdings do not conflict with previous Washington appellate decisions

First, the District contends that the Court of Appeals' decision is in conflict with this Court's previous statements that "'harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" *In re Det. of Pouncey*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). But the specific errors reviewed in *In re Pouncey*, 168 Wn.2d at 390-92, and *Britton*, 27 Wn.2d at 341-42, were jury instruction errors. As this Court has made clear, the particular harmless error standard applied in *In re Pouncey* and *Britton* applies to erroneous jury instructions: "'***An erroneous jury instruction is harmless*** if it is 'not prejudicial to the substantial rights of the part[ies] . . ., and in

no way affected the final outcome of the case.'" *Blaney v. International Ass'n of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004) (emphasis added); *see also State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

Here, the issues raised by the District in its petition involve evidentiary errors, not instructional errors. Evidentiary errors are harmless unless "it was reasonably probable that it changed the outcome of the trial." *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 452, 191 P.3d 879 (2008); *accord State v. Benn*, 161 Wn.2d 256, 266 n. 4, 165 P.3d 1232 (2007). The Court of Appeals applied this well-settled standard to these issues. *Gutierrez*, 2014 WL 6984636 at *24-25. Thus, there is no conflict with previous Washington appellate decisions.

Moreover, the Court of Appeals' held that the improperly admitted evidence in this case—the short video clip of NL making her "twenty times" statement, Gutierrez's testimony regarding NL's statements about how frequently Shafer rode her bus, and Shafer's convictions for molesting two other kindergarten girls and possession of child pornography—was merely cumulative of other, properly-admitted evidence that Shafer rode NL's bus on multiple occasions and otherwise painting him in a bad light. *Id.* at *25. These holdings are consistent with well-settled Washington law that the improper admission of evidence is harmless when it is merely cumulative of other properly-admitted evidence. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983); *see also Miller v. Arctic Alaska*

Fisheries Corp., 133 Wn.2d 250, 261, 944 P.2d 1005 (1997) (citing Dennis J. Sweeney, *An Analysis Of Harmless Error in Washington: A Principled Process*, 31 Gonz. L. Revv. 277 (1995), at 319).[4] Accordingly, the Court of Appeals' harmless error holdings were entirely consistent with Washington precedent.

Finally, the District cites a number of Washington appellate decisions—all without any supporting argument or explanation—to support its conclusory statement that the Court of Appeals' harmless error holdings are "inconsistent" with these cases.[5] This court does not consider conclusory arguments. RAP 10.3(a)(6), .4; *see also* RAP 13.4(e) ("The petition . . . should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4."). "Such '[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). The Court should strike or otherwise refuse to consider this portion of the District's petition.[6] Thus, no conflict exists

[4] Notably, the District fails to mention the cumulative nature of the improperly admitted evidence, which was the primary basis for the Court of Appeals' harmless error holdings.

[5] Petition for Review at 9.

[6] Even if the Court considered this portion of the District's petition, the Court of Appeals' decision is not in conflict with any of the cited cases. In *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 452, 191 P.3d 879 (2008), this Court held that the erroneous admission of an OSHA investigator's hearsay report was harmless because, "[e]ven without the added credibility from the OSHA investigator," the jury had heard "other safety and retaliation testimony" and "would likely have reached the same conclusion." 164 Wn.2d at 452. As in *Brundridge*, in this case, even without any theoretical added "credibility' from the video clip of NL's "twenty times" statement or Gutierrez's testimony regarding NL's statements about how many times Shafer rode NL's bus, the jury heard other evidence from which it likely would have reached the same conclusion that Shafer rode NL's bus numerous times and that the unusual nature and frequency of

between the Court of Appeals' harmless holdings in this case and these previous decisions, and review of these holdings is unwarranted under RAP 13.4(b)(1) and (b)(2).

2. The Court of Appeals' holding in this case regarding the proper admission under ER 705 of facts on which expert witnesses based their opinions does not conflict with previous Washington appellate decisions

Second, the District asserts that the Court of Appeals' holdings that (1) the trial court did not abuse its discretion by admitting under ER 705 testimony by Dr. Whitehill and McGoey regarding certain facts on which their expert opinions were based—namely, NL's "twenty times" statement—and (2) the trial court did not abuse its discretion by admitting such testimony without first considering ER 403 conflict with previous Washington appellate decisions. But no such conflict exists.

First, it is well-settled Washington precedent that "ER 703 permits an expert to base his or her own expert opinion on facts or data that are not otherwise admissible provided that they are of a type reasonably relied on

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his bus ride alongs in general provided constructive notice to the District of his potential risk of harm to students.

On the other hand, *Saldivar v. Momah*, 145 Wn. App. 401, 186 P.3d 1117 (2008), is distinguishable. There, the Court of Appeals held that the improper *exclusion* of a witness's prior consistent statements was not harmless error where the trial court dismissed the plaintiff's claims on the trial court's *specific* finding that the plaintiff's testimony was not credible, thus putting her credibility directly at issue. *Saldivar*, 145 Wn. App. at 383-384, 401. Likewise, *Day v. Goodwin*, 3 Wn. App. 940, 943, 478 P.2d 774 (1970), is inapposite. In *Day*, the Court of Appeals held that the improper admission of some witnesses' prior inconsistent hearsay statements to impeach the trial testimony of those same witnesses was not harmless error within the context of the specific issues and evidence of that trial. Unlike in *Saldivar* or *Day*, the District does not claim prejudice by the improper *exclusion* of evidence. And, unlike in *Day*, the improperly admitted hearsay statements by NL was consistent with other evidence at trial and was not offered to impeach prior testimony by NL Indeed, this Court previously relied on the same rationale in distinguishing *Day*. *Brown*, 100 Wn.2d at 196 (*Day* was distinguishable where improperly admitted evidence "was consistent with the testimony at trial and not used for impeachment purposes.").

by experts in the particular field." *In re Det. of Marshall*, 156 Wn.2d 150, 162, 125 P.3d 111 (2005). Likewise, it is well-settled under Washington law that, under ER 705, "[a] trial court may allow an expert to reveal the underlying basis for her opinion if doing so will help the jury understand the expert's opinion . . . even if the information would be inadmissible as substantive evidence." *In re Det. of Coe*, 175 Wn.2d 482, 513, 286 P.3d 29 (2012).[7]

As the Court of Appeals observed in its decision, Dr. Whitehill and McGoey both testified that "in reaching their opinions, experts in their respective fields routinely rely on victims' statements." *Gutierrez*, 2014 WL 6984636 at *11; RP 673, 983-84. And the Court of Appeals affirmed the trial court's ruling that NL's statements were admissible under ER 705 for the limited purpose of explaining the basis of Dr. Whitehill's and McGoey's expert opinions. *Id.* at *11-12. The District fails to identify a single Washington appellate decision in conflict with these principles.[8] Accordingly, review is unwarranted under RAP 13.4(b)(2) or (b)(3).

[7] *See also Marshall*, 156 Wn.2d at 162, 125 P.3d 111 (2005); *GroupHealth Co-op of Puget Sound v. Dep't of Rev.*, 106 Wn.2d 391, 399, 722 P.2d 787 (1986).

[8] The District does argue without any citation to supporting or conflicting legal authority that McGoey did not actually rely on NL's "twenty times" statements in forming his specific opinions, again improperly arguing the merits of the trial court's decision. Petition at 13. More importantly, the District fails to inform the Court that the Court of Appeals held that the District waived any such arguments by raising them for the first time in its reply brief. *Gutierrez*, 2014 WL 6984636 at *11 n. 4; *see also* RAP 10.3(c); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (issues and argument raised for the first time in a reply brief are untimely and waived). The District does not challenge the Court of Appeals' waiver holding. Accordingly, the Court of Appeals' waiver holding must stand. *Shumway*, 136 Wn.2d at 392-93, 964 P.2d 349 (1998); *see also Honcoop*, 111 Wn.2d at 193; *Clam Shacks*, 109 Wn.2d at 98. Thus, the District should not be permitted to inject into its petition issues and arguments that were not properly raised before the Court of Appeals, and the Court should strike or otherwise ignore the portions of the District's petition arguing that McGoey did not actually rely on NL's statements in forming his opinion.

Second, the District contends that the Court of Appeals' holding that the trial court did not err by admitting this testimony under ER 705 without first performing an ER 403 balancing test conflicts with its previous holding in *State v. Martinez*, 78 Wn. App. 870, 879, 899 P.2d 1302 (1995), that a trial court "must" perform such a balancing test. However, the Court of Appeals observed that its previous statement in *Martinez* that a trial court "should" perform an ER 403 balancing test "hardly establishes that a trial court commits reversible error by failing to" do so. *Gutierrez*, 2014 WL 6984636 at *13. In other words, "should" does not mean "must," as the District contends. More importantly, the Court of Appeals observed that the District did not object under ER 403 to this testimony at trial, and, thus, waived further consideration of the issue. The District's petition does not seek review of the Court of Appeals' waiver holding. Thus, the Court of Appeals holding that the District waived appellate review of this issue must stand, and this Court should strike or otherwise ignore the portions of the Districts' petition addressing it.[9]

3. The Court of Appeals' holding in this case affirming the admission of VV's statements to Detective Stines under ER

[9] Even if the Court did consider the District's argument, however, this Court has clearly stated the requirements for admitting evidence under ER 703 and 705, and an ER 403 balancing is not among them. "The trial court ***need only*** give an appropriate limiting instruction explaining that the jury is not to consider this revealed information as substantive evidence." *Coe*, 175 Wn.2d at 513-14 (emphasis added). Here, before the jury heard evidence about NL's "twenty times" statements, the trial court gave limiting instructions that were materially identical to the one provided in *Coe*. Accordingly, the Court of Appeals' decision affirming the admission of this evidence subject to the *Coe* limiting instruction does not conflict with previous Washington appellate decisions.

801(c) does not conflict with previous Washington appellate decisions

Finally, the District contends that the Court of Appeals' holding in this case affirming the admission of VV's statements to Detective Stines conflicts with previous Washington appellate decisions. But the Court of Appeals held that these statements were admissible under ER 801(c) as out-of-court statements offered for a purpose other than their truth and, thus, were not hearsay. The District cites no cases conflicting with this holding, instead offering only conclusory arguments, a straw man argument built around ER 803(a) hearsay objections, and a straw man argument built around ER 705. Accordingly, review of this holding is not warranted under either RAP 13.4(b)(1) or (b)(2).

B. Review is not warranted under RAP 13.4(b)(4)

The District contends that the Court of Appeals' holdings that the trial court committed harmless error by its admission of certain evidence and that the trial court properly admitted certain evidence under ER 705 and ER 801(c) involve issues of "substantial public importance" warranting review by this Court under RAP 13.4(b)(4). But the District's contention is self-defeating. Such holdings are necessarily contingent on the full context of the lengthy trial and voluminous evidence adduced in this specific case. Limited as they are to the specific facts of this case, no issues of substantial public interest can exist.

Although this Court has not strictly defined what an "issue of substantial public interest" means for purposes of RAP 13.4(b)(4), it has provided examples of such issues. In *State v. Watson*, 155 Wn.2d 574,

577, 122 P.3d 903 (2005) (emphasis added), a case involving sentencing of drug offenders, the Court stated:

> This case presents a prime example of an issue of substantial public interest. The Court of Appeals holding, while affecting parties to this proceeding, **also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue.**

Unlike in *Watson*, here the Court of Appeals' challenged holdings have no potential to affect proceedings outside this case. The Court of Appeals' holdings regarding harmless evidentiary error are contingent on the specific context of the trial in this case, as demonstrated by the applicable harmless error standard: "whether 'within reasonable probabilities, had the error not occurred, the outcome of ***the*** trial would have been materially affected.'" *Benn*, 161 Wn.2d at 266 n. 4, 165 P.3d 1232 (2007) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)) (emphasis added).

In the same vein, the Court of Appeals' holdings regarding the proper admission of evidence under ER 705 and ER 801(c) involve the affirmance of a trial court's discretionary decision based on its application of evidentiary rules to the unique facts of this case. In the mootness context, Washington courts have held that such discretionary evidentiary issues do not involve issues of "substantial public interest" justifying review. *See, e.g., In re Det. of R.W.*, 98 Wn. App. 140, 143-44, 988 P.2d 1034 (1999); *see also In re. Det. of W.R.G.*, 110 Wn. App. 318, 322, 40 P.3d 1177 (2002) (issue that turned on trial court's discretionary decision

based on cases' unique facts did not warrant review). Accordingly, the Court of Appeals' challenged holdings do not involve "issues of substantial public importance," given their fact-specific or discretionary nature, and review is unwarranted under RAP 13.4(b)(4).

IV. CONCLUSION

For all the reasons stated above, the Court of Appeals' unpublished does not warrant review under RAP 13.4(b)(1), (2), or (4), and Gutierrez respectfully requests that the Court deny the District's petition.

RESPECTFULLY SUBMITTED this 11th day of March, 2015

PFAU COCHRAN VERTETIS AMALA, PLLC

By: _____

Darrell L. Cochran, WSBA No. 22851
Christopher E. Love, WSBA No. 42832

STATE OF WASHINGTON)
)ss
COUNTY OF KING)

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on March 11, 2015, I placed for delivery with Legal Messengers, Inc., a true and correct copy of the above, directed to:

Jerry J. Moberg
Jerry J. Moberg & Associates
451 Diamond Drive
Ephrata, WA 98823

DATED this 11th day of March, 2015.

Laura Neal
Legal Assistant to
Darrell L. Cochran

4832-9591-6322, v. 3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Abbigail Gutierrez, individually and as
Guardian for NL, a minor,
Respondent,

vs

Olympia School District, a municipal corporation,
Petitioner.

No. 44324-4-II
DECLARATION OF
EMAILED DOCUMENT
(DCLR)

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 27 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: March 11, 2015 at Tumwater, Washington.

Signature: _____

Print Name: Jacob Josephsen