No. 47017-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

JAMES ELLIS CROCKET, Sr.

AMENDED BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. Assignments of Error 1

B. Statement of Facts 2

C. Argument 18

1. The trial court erred by admitting statements made by M.W. on August 29, 2013 to Detective Brooks and Ms. Campbell pursuant to ER 801(d)(1)(ii) 18

2. The prosecutor committed prosecutorial misconduct by repeatedly asking witnesses to comment on the veracity of other witnesses and appealing to the passions of the jury 22

3. The trial court erred by allowing the State to impeach testimony that had been stricken 29

4. The trial court erred by disallowing the defense to impeach Officer Chell 30

5. The trial court erred by restricting Officer Chell's description of his interview with the defendant 31

6. Reversal is required under the cumulative error doctrine 34

D. Conclusion 34

Cases

In re Glasmann, 175 Wn 2d 696, 286 P 3d 683 (2012) 25

State v. Allen S., 98 Wn.App. 452, 989 P.2d 1222 (1999) 29

State v. Avendano-Lopez, 79 Wn.App. 706, 904 P.2d 324 (1995), quoting Karl B. Tegland, 5 Wash.Prac. 41 (3rd ed. 1989) 33

State v. Casteneda-Perez, 61 Wn App. 354, 810 P 2d 74 (1991) 24, 27

State v. Echevarria, 71 Wn App. 595, 597, 860 P.2d 420 (1993) 26

State v. Ellison, 36 Wn.App. 564, 676 P.2d 531 (1984) 19

State v. Green, 71 Wn.2d 372, 428 P.2d 540 (1967) 24, 27

State v. Greiff, 141 Wn.2d 910, 929, 10 P 3d 390 (2000) 34

State v. Makela, 66 Wn.App. 164, 831 P.3d 1109 (1992) 19

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011) 25

State v. Neidigh, 78 Wn App. 71, 895 2d 423(1995) 26

State v. Padilla, 69 Wn.App. 295, 846 P.2d 564 (1993) 24

State v. Pierce, 169 Wn.App. 533, 280 P.3d 1158 (2012) 25

State v. Washburn, 116 Wn. 97, 198 P. 980 (1921) 30

Tome v. United States, 513 U.S. 150, 115 S Ct. 696, 130 L.ed.2d 574 (1995) 18

A. Assignment of Errors

Assignment of Errors

1. The trial court erred by admitting statements made by M.W. on August 29, 2013 to Detective Brooks and Ms. Campbell pursuant to ER 801(d)(1)(ii).
2. The prosecutor committed prosecutorial misconduct by repeatedly asking witnesses to comment on the veracity of other witnesses and appealing to the passions of the jury.
3. The trial court erred by allowing the State to impeach testimony that had been stricken
4. The trial court erred by disallowing the defense to impeach Officer Chell.
5. The trial court erred by restricting Officer Chell's description of his interview with the defendant.
6. Reversal is required under the cumulative error doctrine.

Issues Pertaining to Assignment of Errors

1 Should the trial court have admitted statements made by M.W on August 29, 2013 to Detective Brooks and Ms. Campbell pursuant to ER 801(d)(1)(ii) when the statements were made after the alleged motive to fabricate?

2. Did the prosecutor commit prosecutorial misconduct by repeatedly asking witnesses to comment on the veracity of other witnesses and appealing to the passions of the jury by suggesting they were there to get justice for the victim and an acquittal would put homeless children of veterans in danger?

3. Did the trial court err by allowing the State to impeach testimony that had been stricken?

4. Having allowed the State to introduce "impeachment" evidence of stricken testimony, did the trial court erred by disallowing the defense to impeach this evidence?

5. Officer Chell interviewed Mr. Crockett where he offered three explanations of why his stepdaughter was falsely accusing him The State introduced one of those explanations in an effort to impeach his testimony. Did the State open the door to the other two explanations?

6. Should this Court reverse because of cumulative error?

B. Statement of Facts

James Crockett was charged by Information with four counts of second degree child rape for allegedly having sexual intercourse with his step-daughter, M.W., on four separate occasions between August 1, 2008 and November 30, 2008. CP, 1. M.W. first reported the alleged abuse to

her mother, Rhonda Crockett, on Thanksgiving Day, 2008, and Ms. Crockett immediately confronted her husband about the allegation. This was followed by a family meeting, about which there was considerable disagreement about what was said, but the result of the meeting was that law enforcement was not called and there was no sexual abuse after that date. Nearly five years later, in late August of 2013, M.W. began sending texts to close friends and posted a message on Facebook saying she was very upset at her parents because of recent physical abuse by her mother and prior sexual abuse by her stepfather. An unidentified person saw the Facebook post and called law enforcement. The family was contacted, everyone was interviewed, and M.W. was taken into protective custody by Child Protective Services (CPS). Mr. Crockett testified at trial and denied any inappropriate sexual touching of his stepdaughter. RP, 853-54. The jury convicted him of all four counts. RP, 1008-09. He was sentenced to 210 months in prison, which considering his age is 67 years old, is likely a life sentence. CP, 160. He filed a timely notice of appeal. CP, 163.

M.W. was born on December 31, 1995, making her 18 years old at the time of trial. RP, 332. When she was four years old, on January 7, 2000, she was adopted by Rhonda Crockett. RP, 335, 504. Ms. Crockett later had a biological daughter, L.C., who was born on April 4, 2002. RP, 343. When M.W. was twelve years old, Rhonda Crockett met and married

James Crockett, who moved into the family home. RP, 337. He moved into the home in July of 2008. RP, 344, 512.

According to M.W., at some point after he moved into the family home, Mr. Crockett started touching her inappropriately. RP, 344. The first time this occurred, he approached her and put his hand under her shirt and bra and touched her breast. RP, 344. The second time started like the first time, with touching of the breast, but then it moved below her waist with Mr. Crockett inserting his fingers into her vagina. RP, 348. M.W. was asked how many times this pattern was repeated and she could not remember exactly, saying it was "multiple times." RP, 349. The prosecutor refreshed her memory with a police interview where she told law enforcement it was 15 to 20 times. RP, 349. She also described being touched in the vaginal area in the car while driving home from church, although no penetration occurred on these occasions. RP, 352-54. During the car rides, her sister would be in the back seat. RP, 353. On one occasion, he told her not to tell anyone. RP, 353.

On Thanksgiving Day, 2008, M.W. got upset at Mr. Crockett at Safeway and, upon returning to the house, decided to tell her mother he was "raping" her. RP, 355-56. Ms. Crockett confronted Mr. Crockett about the abuse. According to M.W., Mr. Crockett initially denied any abuse, but then he admitted he had "touched her." RP, 357-58. Ms.

Crockett decided against calling law enforcement, however. RP, 358. The sexual abuse stopped after Thanksgiving of 2008. RP, 359.

On August 26, 2013, M.W. posted an entry on Facebook. RP, 362. In the Facebook post she revealed that her mom's husband raped her, her mom was breaking her neck, and she was a "dead girl walking." RP, 362. Someone saw the Facebook post and called law enforcement. RP, 363. A police officer came to the home and took her to a residential center for youth in Olympia. RP, 363

During the State's direct examination of M.W., the State brought out that M.W.'s relationship with her mother was strained in 2013. RP, 363 The week of the Facebook posting, M.W. and her mother had been in a conflict that ended with Ms. Crockett yelling at her while M.W. was driving, causing her to feel uncomfortable. RP, 364. Once home, M.W. told her mother she would not drive her anymore RP, 365. Ms Crockett responded by hitting her, punching her, grabbing her hair and twirling her on the floor by her ponytail. RP, 365.

Mr. Crockett, through counsel, had a lengthy cross-examination of M.W.. RP, 370-432 Some of the highlights of the cross-examination include that after Lilian was born, M.W did not feel as close to Ms. Crockett as before and this caused her to feel depressed. RP, 373. M.W. was not happy when Ms. Crockett met Mr. Crockett and decided to marry

him. RP, 374. Ms. Crockett had a conservative parenting style in setting house rules, such as appropriate clothing, what to watch on the television, and computer and cell phone use. RP, 376-78. M.W. was prohibited from dating or having a boyfriend. RP, 379. Regarding Facebook, M.W. initially had an account, but her mother made her deactivate it. RP, 378 All of these rules made M.W. feel "frustrated." RP, 379. On some occasions, M.W. would disobey the house rules. RP, 384. When that occurred, Ms. Crockett would give M.W. a "whooping," which, at various times, would involve the use a switch, shoe, hand, or an extension cord. RP, 387-88. M.W. would get whooped when she argued with or pushed her sister, did not do her chores, or got an "attitude" with her mother. RP, 389. Defense counsel elicited testimony of an occasion when M.W. lied in school and her mother whooped her with an extension cord or a switch. RP, 390. All of this discipline made M.W. feel angry and unloved. RP, 391. Although her mother forced her to deactivate her Facebook account, M.W. later reactivated her account without her mother's permission. RP, 394.

On cross-examination, Mr. Crockett also got into more detail about the events leading to the Facebook posting of August 26, 2013. Just prior to making the Facebook post, M.W. had gone to Tennessee to visit her biological family. RP, 395. While there, she confronted her own anger at

her adopted mother and decided her adopted mother did not love her. RP, 395. Apparently at the time, Ms. Crockett was having some marital problems and M.W. felt that her mother was blaming her for her mother's problems with Mr. Crockett. The discipline during this period was becoming more physical and escalating. RP, 396.

Defense counsel inquired in more detail about the hair pulling incident that M.W. described in her direct examination. She testified the incident started on August 26, 2013 when she decided she was not going to take her mother to a doctor's appointment. RP, 396. Ms. Crockett got mad at her daughter, punched her, pulled her hair and swung her around by her ponytail. RP, 396-97. M.W. felt mad and hurt. RP, 397. M.W. posted the Facebook post that started the police investigation that very same day. RP, 397-98, 401.

Defense counsel also inquired about some text messages she sent to a friend, Terrell Wehr, the week prior to the Facebook post. RP, 427. On August 19, 2013, M.W. sent Mr. Wehr a text message where she said, "Me and my brother have a plan to get justice." RP, 430. On August 26, 2013 at 9:02 a.m. M.W. sent her friend Hideya[1] a text saying she was mad at her mother and felt like driving a knife through her sometimes. RP, 431. Later that same day she posted the Facebook post. RP, 432.

[1] The record only reflects a first name.

Defense counsel also cross-examined M.W. about inconsistencies between her direct testimony and her statements to law enforcement. For instance, defense counsel asked her whether she had described being penetrated by "finger" or "fingers." RP, 402. He questioned her whether Mr. Crockett had ever exposed himself to her and whether she had told law enforcement he had not. RP, 405-06. He clarified that M.W. never told law enforcement he touched her sexually in the car. RP, 407. He pointed out some inconsistencies about which house the touching occurred in. RP, 408. Defense counsel asked about an allegation Mr. Crockett told M.W. to put her foot on his penis, something she did not tell law enforcement. RP, 416.

At the conclusion of M.W.'s testimony, the State moved to allow testimony from two witnesses of her prior consistent statements pursuant to ER 801(d)(1)(ii). RP, 488. The State argued that the "general nature of his cross-examination, was that it was a recent fabrication based on the text messages." The Court reviewed Professor Tegland's comments on the rule and preliminarily ruled with the State, saying, "I don't disagree that, in theory, you have the right to do it." RP, 492. The Court afforded defense counsel a little more time to review the rule. RP, 493.

The State next called Rhonda Crockett to testify. RP, 502. Ms. Crockett was able to provide more precise dates about when major events

occurred and where they were living at the time. RP, 502-524. Ms. Crockett also recounted her recollection of the events of Thanksgiving Day, 2008. On that day, M.W. came into the house and said, "Dad's been nice to me because he's been molesting me." RP, 530. Ms. Crockett stopped what she was doing and confronted her husband about the allegation. RP, 530. Mr. Crockett said, "Whatever is going on, we need to find out." RP, 531. Asked for more details, M.W. repeated Mr. Crockett was molesting her. She clarified it was over the clothes and that he touched her "under the breast area and the inside of the thigh." RP, 532. The prosecutor then asked Ms. Crockett the following questions:

> Q: Did your husband admit to touching M.W.?
>
> A: Not in a sexual way.
>
> Q: Did he admit touching her in the way M.W. described?
>
> A: No.

RP, 533. The decision was made to not call law enforcement and "keep it in the family." RP, 533. Ms. Crockett instructed her daughter, if he ever touched her again, she had permission to hurt him. RP, 536.

During the cross-examination of Ms. Crockett, defense counsel asked her about the Thanksgiving Day conversation. Ms. Crockett described for the jury what M.W. said about the molestation. RP, 590. She was then asked about the context of the statements. Ms. Crockett

said, "Well, when James shared his – I guess, his – what he was saying happened, that he was trying to show her – ." RP, 590. At that point the State objected on hearsay grounds and the court excused the jury to discuss the objection. The Court started the discussion by saying, "I don't think what she's about to say is hearsay, but my concern is, it's self-serving hearsay.[2] And if your client decides not to take the stand, there's no attempt to rebut anything that – or question him about what he did say or didn't say, but it was clear to the Court that she was about to get into exculpatory testimony from your client. And the Court won't allow that because, again, it's self-serving hearsay." RP, 591. The Court sustained the objection. RP, 592.

The State's third witness was Mara Campbell. RP, 652. Ms. Campbell is a social worker employed by the Department of Social and Health Services (DSHS). RP, 653. Ms. Campbell, accompanied by Detective Brooks, met with M.W. on August 29, 2013, soon after she was removed from the home. RP, 661-62. In response to questions from the State, Ms. Campbell testified about numerous out-of-court statements made by M.W. to her. These included that she had been "touched on her

[2] During the motions in lime, the Court had suppressed "self-serving" hearsay, saying it was "black-letter law" to exclude "any out-of-court statement made by your client in which he professed his innocence or made some self-serving statement regarding his nonguilt." RP, 151.

breast and vaginally penetrated, as well as touching with her foot on Mr Crockett's penis, skin to skin." RP, 665. She said it happened ten to fifteen times. RP, 668. She provided locations where the touching occurred. RP, 69. She described touchings that occurred in the car going to church. RP, 671. She described disclosing the touching to her mother on Thanksgiving Day. RP, 673.

Later in the morning on August 29, 2013, Ms. Campbell also interviewed Ms. Crockett. RP, 674. Ms. Crockett described an incident where Mr. Crockett was wrestling with the girls and Ms. Crockett did not think it was appropriate. RP, 676. According to Ms. Campbell, on Thanksgiving Day of 2008, Mr. Crockett admitted to Ms. Crockett that he touched M.W. on her stomach area and her leg. RP, 676. Ms. Crockett allegedly told Ms. Campbell that M.W. had run away last year because of what her stepfather was doing. RP, 677-78.

The State's final witness in its case-in-chief was Detective Cynthia Brooks. RP, 711. In response to questions from the State, she also described the interviews she conducted with Ms. Campbell on August 29, 2013. RP, 722. In the interview, she said James Crockett committed multiple acts of sexual abuse on her. RP, 728. The first time was when they were watching TV in the living room and he rubbed her back and breasts. RP, 728. The touching then progressed to skin to skin contact

with the vaginal area and inserting his finger into her vagina and moving it around. RP, 729. She said it occurred 10 to 15 times, but could have been as many as 20 times. RP, 729. When asked whether Mr. Crockett said anything to her during the touching, defense counsel objected and the Court overruled the objection as a "prior consistent statement." RP, 730. In response to the question, M.W. had told Detective Brooks he wanted to see how she was going to react to older boys. RP, 730. He also told her not to tell anyone because he would go to jail. RP, 730. She described an incident in the car going to church where he touched her vaginal area over her underwear. RP, 731. There was an occasion where he took her foot and rubbed it on his bare penis. RP, 731. She described which house the touchings occurred in and the timeframe. RP, 762. She said on Thanksgiving Day of 2008 Mr. Crockett admitted to touching her. RP, 733-34.

The defense called M.W.'s half-sister, L.C. to testify. RP, 781. She never saw any inappropriate touching in the car on the way to church. RP, 792. Nor did she see any inappropriate touching in the house. RP, 793.

Mr. Crockett also testified during the defense case-in-chief. RP, 800. He testified he is a 20 year veteran of the Air Force, having served for two years in Vietnam during the Vietnam War, and was honorably

discharged. RP, 802-04. When he met Ms. Crockett, he was working for the Vietnam Veterans of America, assisting families that are homeless, particularly when the families had children. RP, 806. He denied ever putting his hands inside her pants, under her underwear, touching her breasts under her clothing, touching her private personal areas, digitally penetrating her vagina with his fingers, putting her foot on his penis, showing her his penis, or raping M.W.. RP, 853-54.

On direct examination, Mr. Crockett described an incident where he had accidently brushed against Ms. William's breast while discussing with her what to do if a boy were to approach her inappropriately. RP, 827-28. According to Mr. Crockett, this accidental touching was discussed on Thanksgiving Day of 2008 and he admitted the accidental touching to his wife and M.W.. RP, 837. He also testified he demonstrated to a police officer on August 26, 2013 about the accidental touching incident. RP, 850. During the State's cross-examination, the State asked about his conversation with Officer Chell. RP, 864. The State suggested that he told Officer Chell the breast touching incident occurred while the family was moving out of a house and not during a conversation. RP, 865. Mr. Crockett testified he could not recall telling him about a touching incident during moving. RP, 866.

During the direct examination of Mr. Crockett, he was asked about the night police took M.W. into protective custody and the following colloquy occurred:

Q: Two police officers came to your house, right, on that night?

A: Yes. The first – yes.

Q: One of them took M.W. and went outside?

A; Well –

Q: Is that right? One of them – M.W went outside with one of the policemen?

A: Yes, sir. He was already outside and she went outside to talk to him.

Q: Then the other policeman stayed inside with you and Rhonda?

A: Yes.

Q: The one who came to court yesterday was the one who went outside with M.W , right?

A: Yes, sir.

Q: And the one who came into your house and stayed with you and Rhonda, he didn't come yesterday, did he?

A: He did not come.

Q: So what happened next?

A: The after, next, the one inside policeman, he was writing his report and everything. And I asked him – and he walked around, and he made this quotation that I don't believe what she's saying. I don't –

Mr Sanchez [prosecutor]: Objection, Your Honor. Hearsay, move to strike.

The Court: Yeah.

A: Well –

The Court: I need to excuse the jury, please. And for the record, you're to disregard that last answer, and it's stricken.

(Jury excused.)

The Court: I don't want to declare a mistrial.

Mr. Kannin [defense counsel]: No, Your Honor.

The Court: But if you continue to vocalize what other people said who are not in court as to ultimate issues as to guilt or innocence, I may be forced to call a mistrial because you're telling things the jury is prohibited from hearing.

The Witness: Yes, sir.

RP, 845-46.

In rebuttal, the State called Officer Eric Chell. RP, 894. Prior to calling him, the State made the following comment, "And as the Court may recall, Mr. Crockett had started to say that Officer Chell told him a particular statement.... And I'm prepared to ask Officer Chell whether or not he made any opinions to anyone about the case, and he'll give his answer to the Court or to the jury." RP, 893. Defense counsel inquired whether the comments of Mr. and Ms. Crockett to Officer Chell would also be admissible. RP, 894. The Court commented, "Well, I'm allowing this for one purpose only." RP, 894.

Officer Chell testified he contacted the Crockett family on August 26, 2013. RP, 897. Eventually, he advised Mr. Crockett why he was there and the general nature of the sexual assault allegations. RP, 900. Mr. Crockett made a "general denial" of the allegations and then said, "[I]he

family had moved from one residence to another. During that time while they were moving – I'm not sure if it was boxes or whatnot, but they were moving something from one house to another, and his hand, while moving, inadvertently brushed up against the juvenile while she had her clothes on, brushing up against a breast." RP, 901. He did not recall any demonstrations about how this happened. RP, 901.

Later, Officer Chell was asked, "Did you offer any opinions to anyone about this case?" Officer Chell answered, "No." RP, 902.

At that point, the jury was excused to allow defense counsel to raise an issue. RP, 902. Defense counsel explained that Mr. Crockett had in fact offered to Officer Chell three explanations about why M.W. would be falsely accusing him. RP, 903. The first was that she had been molested in Tennessee when she was four years old. The second was she had accused him of touching her breast in August of 2008, which was discussed on Thanksgiving Day. And the third was the moving incident. RP, 903. Defense counsel argued the State had opened the door to the first two explanations, saying, "They either get all the explanations or none of the explanations." RP, 904. Defense counsel further argued, "[I]t's more prejudicial than probative on that issue to Mr. Crockett because you can't pick and choose the evidence that you want to shape your case." RP, 904. The Court held that Officer Chell was called for two purposes: to rebut

Mr. Crockett's denial that he had admitted touching M.W.'s breast while moving and to rebut the allegation "whether or not he expressed an opinion about the veracity of these charges." RP, 905. The Court held the door was not opened and sustained the State's objection. RP, 906-07.

In surrebuttal, the defense recalled Rhonda Crockett. RP, 916. During her testimony, it became clear she was being asked about the events of August 26, 2013. RP, 916. She did not get very far, however, before the Court excused the jury. RP, 918. Defense counsel clarified he intended to ask Ms. Crockett about the conversation between Mr. Crockett and Officer Chell, including "whether or not the police believed M.W.. That was the other thing that caused all this." RP, 921. The Court responded, "I'm not going to allow that. I'm not going to allow her to repeat the fact that this officer said that I think he's innocent." RP, 921. Defense counsel said, "Well, I guess what's happened now is because of the State calling this witness as a rebuttal witness to rebut some area of evidence that was inadmissible and they talked about it, why can't we rebut their rebuttal with her? I hear what you're saying, Your Honor, but this would be door-opening because now they've brought it up, and he made a denial on the witness stand that he didn't say it." RP, 922. The Court refused the testimony. RP, 923.

C. Argument

1. The trial court erred by admitting statements made by M.W. on August 29, 2013 to Detective Brooks and Ms. Campbell pursuant to ER 801(d)(1)(ii).

Any out-of-court statement offered by a person for the truth of the matter asserted is inadmissible hearsay unless it fits within one of the exceptions. ER 801. One such exception is the prior consistent statement rule of ER 801(d)(1)(ii). The prior consistent statement rule is a very narrow rule and only applicable when offered to rebut an express or implied allegation of recent fabrication or improper motive. In this case, the State proffered M.W.'s statements to Detective Brooks and Ms. Campbell (from a single interview on August 29, 2013) to rebut an implied allegation of recent fabrication. The trial court agreed with this analysis and allowed M.W.'s statements in the interview of August 29, 2013 to be introduced as substantive evidence of guilt. This was error.

The key case to interpreting ER 801(d)(1)(ii) (which is identical to F.R.E. 801(d0(1)(ii)) is *Tome v. United States*, 513 U.S. 150, 115 S.Ct 696, 130 L.ed 2d 574 (1995). In *Tome*, a six-year-old child was called to testify against her father regarding a sexual assault that allegedly occurred when she was four. The defense cross-examined her at length in a manner tending to show the allegation was fabricated so she could live with her

mother and not return home to her father. The State then called six witnesses to testify about statements made to them by the victim alleging abuse. All of the statements were made after the alleged motive to fabricate. The Court granted certiorari in order to determine whether F.R.E. 801(d)(1)(ii) embodies the common law temporal requirement that the prior consistent statement "was made before the source of the bias, interest, influence or incapacity originated." *Tome* at 156, citing McCormick on Evidence §49, page 105 (2nd Ed. 1972). The Court reviewed the history of the rule and early common law sources and found the rule requires this temporal foundation. As one prominent early source, Justice Story, explained: "[W]here the testimony is assailed as a fabrication of a recent date, ... in order to repel such imputation, proof of the ... *antecedent* declaration of the party may be admitted." *Tome* at 156, citing *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439, 9L.ed 475 (1836). Washington follows the rule that the motive to fabricate must be antecedent to the statements. *State v. Ellison*, 36 Wn.App. 564, 676 P.2d 531 (1984). Cf. *State v. Makela*, 66 Wn.App. 164, 831 P.3d 1109 (1992).

Once the rule is properly understood as requiring the motive to fabricate precede the statements, it is easy to see why M.W.'s statements on August 29, 2013 are inadmissible. The chronology of events from the perspective most favorable to the State is as follows:

July, 2008	Defendant marries Ms. Crockett and moves into family home
July-November, 2008	Defendant rapes M.W. 15-20 times
Thanksgiving, 2008	M.W. accuses defendant of molesting her; family meeting is held
August 19, 2013	M.W. sends Mr. Wehr a text message, saying "Me and my brother have a plan to get justice." RP, 430
August 26, 2013 at 9:02 a.m.	M.W. sends Hideya a text saying she was mad at her mother and felt like driving a knife through her sometimes.
August 26, 2013 (unknown time)	M.W. posts on Facebook her stepfather has molested her
August 26, 2013 (evening)	Law enforcement arrives at Crockett home and interview witnesses. M.W. taken into protective custody by CPS
August 29, 2013	M.W. interviewed by Detective Brooks and Ms. Campbell

The State's theory for admitting the prior consistent statements under ER 801(d)(1)(ii) was that defense counsel's cross-examination of M.W. about the August 19 and 26 text messages created an implied allegation of recent fabrication by her of the events in the fall of 2008. The above timeline clearly shows there was no such allegation. First, M.W. had asserted on Thanksgiving of 2008, nearly five years earlier, that Mr. Crockett had molested or raped her. While it is possible to read defense counsel's cross-examination as an implied allegation of

fabrication, there was no attempt to allege the fabrication was *recent*. In fact, defense counsel cross-examined M.W. in depth about the events on Thanksgiving Day of 2008.

Second, assuming M.W. had a motive to lie, as evidenced by her text messages on August 19 and 26, the motive preceded her August 29 interview by ten and three days respectively. The purpose of the rule is to show that her allegations were the same before developing the motive to lie and after. In this case, her motive to lie would have been the same on August 29 as on August 19 and 26. The trial court erred by admitting testimony from Detective Brooks and Ms. Campbell of statements made on August 29.

In determining the prejudice to Mr. Crockett in admitting these statements, it is worth reviewing the prosecutor's closing argument. When referencing Ms. William's credibility, the prosecutor repeatedly emphasized the consistency between her in-court testimony and her out-of-court statements to Detective Brooks and Ms. Campbell. He said, "When she was interviewed by Detective Brooks and Mara Campbell three days later, she was consistent about the digital penetration, when she was interviewed by defense counsel, and when she testified." RP, 951. Later he said, "You heard from Mara Campbell the CPS procedures, and you heard Mara Campbell describe what M.W. disclosed to both her and

Detective Brooks, which was consistent with what she testified to " RP, 958 Later yet, "[H]er statements were consistent with what she told Mara Campbell, what she told Detective Brooks and what she told defense attorney's defense interview, which was all consistent with her testimony and the evidence in this case " RP, 959. Mr. Crockett was prejudiced by the improper admission of hearsay.

2 The prosecutor committed prosecutorial misconduct by repeatedly asking witnesses to comment on the veracity of other witnesses and appealing to the passions of the jury.

The prosecutor employed an improper cross-examination technique with multiple witnesses in this case. The first time he used it was when he was questioning Ms. Crockett about her pre-trial statements to law enforcement. RP, 535 During the pretrial interview with Detective Brooks and social worker Mara Campbell, Ms Crockett was asked to recollect what happened on Thanksgiving Day, 2008. RP, 535. When asked if she heard Mr. Crockett admit to his son that he had touched M.W., Ms. Crockett denied that occurred or that she told officers that occurred RP, 535-36. The following colloquy then occurred:

Q: So if Detective Brooks were to state that you said that to her, would she be incorrect?

A: I don't know because I'm not Detective Brooks.

Q: And if Mara Campbell was to state that, would she also be wrong?

A: I don't know, because I'm not her either.

RP, 536. The questions were not objected to. Later, an issue arose about a time M.W. ran away.

Q: Didn't you tell Mara Campbell that the reason M.W. ran away was because what – of what the defendant had done to her.

A: No, I did not tell Mara Campbell that. I gave a letter that M.W had written to Mara Campbell.

Q: Okay. So, if Mara Campbell were to state that you told her that, would she be incorrect?

A: I'm not going to make that conclusion.

RP, 541-42.

During the State's cross-examination of Mr. Crockett, he was asked about a conversation he had with Officer Chell about possibly accidently brushing against M.W.'s breasts while she was clothed RP, 865. The following colloquy occurred:

A: I didn't tell him that I touched her when we were moving out – out of the home

Q: So if Officer Chell testified to that, would he be incorrect?

A: I don't know I don't know what he – what I might had said at that time, how he received it in his ear, and at this present time on this present day, I don't remember repeating that to him. I repeated – I remember repeating to him and demonstrating to him what I did when I was showing M.W and L.C how to protect themselves. So I couldn't say he lied or not.

Q: So your recollection is that you told Officer Chell about the demonstration, and it had nothing to do with moving out of the house?

A: I – again, sir. I can't remember that. I don't remember that.

Q: Is it possible that you told Officer Chell that if you can't remember?

Mr. Kannin [defense counsel]: Objection. Asked and answered.

The Court: Sustained.

RP, 866.

It is well established that a prosecutor commits misconduct by asking a witness to express an opinion on whether another witness is lying. *State v. Padilla*, 69 Wn.App. 295, 846 P.2d 564 (1993); *State v. Casteneda-Perez*, 61 Wn App. 354, 810 P.2d 74 (1991); *State v. Green*, 71 Wn 2d 372, 428 P.2d 540 (1967). In this case, the prosecutor at three different points in the trial and with two separate witnesses tried to get the witness to express an opinion that another witness was lying. This was prosecutorial misconduct.

During the prosecutor's closing argument, he twice improperly appealed to the passions of the jury. The first time, he said the following: "When he was talking about his work with Vietnam Veteran's, one thing stood out for me. And I don't know if you caught it, but he said I work with Vietnam veterans, especially if they have children. I wrote that down in my notes, and I don't know if you captured that, but I thought it was something to consider." RP, 962.

While testifying to his background, Mr. Crockett had described his military career as a Vietnam War veteran. At the time of the trial, he was working with homeless veterans, particularly those with children, to obtain a home. The prosecutor used this innocuous statement to inflame the jury into believing that if they acquitted Mr. Crockett, they would be sending an alleged child molester back onto the streets to have unrestrained contact with homeless children of veterans. This suggestion was designed to inflame the passions of the jury and was improper. *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 683 (2012).

In the second instance, the prosecutor opened his rebuttal argument as follows: "It's not just the defendant that was affected by this case. It was someone else, M.W., and justice for her, justice delayed for six years." RP, 987-88. Suggesting that a conviction is necessary to get justice for victim is improper. *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012); *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011).

Defense counsel, however, failed to raise an objection to any of this misconduct. When defense counsel finally did raise an objection during Mr. Crockett's cross-examination, the ground for the objection was that it was "asked and answered." When defense counsel fails to timely raise an objection, the Court looks to whether the question was "flagrant and ill-intentioned" such that no curative instruction could have cured the

error. *State v. Echevarria*, 71 Wn.App. 595, 597, 860 P.2d 420 (1993) It was over 20 years ago that the Court of Appeals, in reviewing the "flagrant and ill-intentioned" standard, issued the following rebuke:

> And so we reject the suggestion, implicit in the State's argument, that courts must and do wink at intentional and repeated unfair questioning by prosecutors under the rubric of harmless error The tactics at issue are creating problems on appeal in far too many cases. Questions designed to force witnesses to accuse each other are out of bounds. . The most obvious responsibility for putting a stop to such conduct lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line

State v Neidigh, 78 Wn App. 71, 895 2d 423(1995). It is incredible that after 20 years, the Court of Appeals is still addressing issues of prosecutorial misconduct, without objection from the defense, in areas where the Courts and have repeatedly and consistently held the subject matter off limits

How ironic this case originates out of Pierce County, a county that has been the subject of an unprecedented number of reversals for prosecutorial misconduct. Two articles, one dated April 19, 2015 in the Tacoma News Tribune and the other dated August 3, 2015 in the Seattle Times, highlight the fact that since 2013, Pierce County has stood out both

in terms of number of supported allegations of prosecutorial misconduct and the number of times the misconduct has been found to be flagrant and ill-intentioned.[3] Of the reversals for prosecutor misconduct in that period, nearly half originated in Pierce County. The article also pointed out how, unlike King County, Pierce County makes no effort to train prosecutors on issues of prosecutorial misconduct or counsel prosecutors after misconduct has been found.

In determining whether the prosecutorial misconduct in Mr. Crockett's case was "flagrant and ill-intentioned," this Court should look at several factors. First, this Court should consider that the rule prohibiting prosecutors from asking witnesses to express an opinion whether another witness is lying is well-established. There is case law critical of this practice going back nearly half a century. See *State v. Green*, 71 Wn.2d 372, 428 P.2d 540 (1967). And since 1991 the Courts have been unflinching in their condemnation of this practice. See *State v. Casteneda-Perez*, 61 Wn. App. 354, 810 P.2d 74 (199). A prosecutor's use of a technique that is so well-established as improper tends to lend support to the conclusion that the use was flagrant.

[3] http://www.thenewstribune.com/news/local/crime/article26279821.html. See also: http://www.seattletimes.com/seattle-news/crime/many-pierce-county-cases-reversed-because-of-prosecutors.

Second, the Court should consider that in every instance where the prosecutor asked the improper questions, the rebuttal witness had not yet testified. Two of the instances involve Ms. Crockett, who was called in the State's case-in-chief as its second witness. The prosecutor asked Ms. Crockett whether Ms. Campbell, a witness the jury had yet to hear from, was wrong or incorrect. The questioning of Mr. Crockett was even more egregious given that the questions asked him to express an opinion whether Officer Chell, a witness that was not called by the State in its case-in-chief at all, was lying. In fact, in cross-examining Mr. Crockett, the prosecutor was put into an awkward position because he was essentially asking Mr. Crockett to speculate on what Officer Chell would testify to if he were in fact called ("So if Officer Chell testified to that... RP, 866). This demonstrates that the improper questions were ill-intentioned

Third, the prosecutor's closing argument twice attempted to inflame the passions of the jury, first by suggesting that an acquittal would send him into the path of homeless children, and second by appealing to their sense of justice for the victim. These improper arguments further demonstrate the ill-intentioned nature of the prosecutor's tactics.

The prosecutor committed prosecutorial misconduct by asking witnesses to express an opinion on the veracity of other witnesses and

making arguments designed to inflame the jury. Although the misconduct was not objected to, the conduct was so flagrant and ill-intentioned as to require a reversal.

3. The trial court erred by allowing the State to impeach testimony that had been stricken.

At trial, Mr. Crockett gave a non-responsive answer to a question posed by his lawyer that an unnamed police officer (the one who questioned him and his wife) "made this quotation that I don't believe what [M.W. is] saying." RP, 845 The State promptly objected and the Court sustained the objection, instructing the jury to disregard the response. Later, in its rebuttal case, the State called Officer Chell to establish he was the officer who questioned Mr. Crockett He was then asked if he offered any opinions to anyone about the case and he answered in the negative. The trial court ruled this was admissible to rebut the allegation "whether or not he expressed an opinion about the veracity of these charges." RP, 905. The trial court erred by admitting this impeachment evidence

Impeachment evidence may only be offered to rebut substantive evidence *State v. Allen S.*, 98 Wn.App. 452, 989 P.2d 1222 (1999). When evidence is initially admitted, then later stricken, impeachment of the stricken statement is "certainly improper." *State v. Washburn*, 116 Wn. 97,

198 P 980 (1921). In this case, Ms. Crockett's non-responsive answer was properly objected to by the State and sustained by the Court with instructions to the jury that the statement was stricken and the jury was to disregard the response Having stricken the answer, there was nothing left for the State to rebut and the trial court erred by allowing the answer

4 The trial court erred by disallowing the defense to impeach Officer Chell.

Having improperly allowed the State to introduce evidence from Officer Chell that he did not express any opinions to anyone about the case, the defense tried to recover from this testimony by impeaching Officer Chell. The defense called Ms. Crockett in surrebuttal to establish that she heard Officer Chell's statement The trial court sustained the State's objection.

At that point in the trial, the only admitted evidence on this topic before the jury was that Officer Chell had expressed no opinions to anyone about the case While this testimony was arguably irrelevant, the trial court had admitted the testimony nevertheless. Having admitted it, the defense should have been permitted to rebut it with a witness who was present and heard the alleged statement. By refusing Ms. Crockett's anticipated testimony, the trial court left Officer Chell's statement unrebutted. Whether the jury would have believed Officer Chell or Ms

Crockett on this point is irrelevant; the point is that the trial court, having admitted one side of the story, should have allowed the jury to hear the other side.

5 The trial court erred by restricting Officer Chell's description of his interview with the defendant.

When Mr. Crockett was interviewed by Officer Chell on August 26, 2013, he offered three explanations why M.W. might be falsely accusing him. The first was that she was molested in Tennessee when she was young.[4] The second was an accidental touching that was discussed by the family on Thanksgiving Day of 2008. The third was the moving incident. The State asked Officer Chell about the moving incident and whether Mr. Crockett had conducted any "demonstration" of sexual

[4] Throughout the pretrial and trial proceedings, an incident in Tennessee was discussed where M.W. was molested when she was between five and six years old by an unrelated perpetrator in Tennessee. RP, 95-96. The issue was first raised as part of a defense subpoena for CPS records related to M.W.'s adoption and her move from Tennessee to Washington. CP, 3. The prosecutor's office had received as part of its investigation certain redacted CPS records and had turned those over to the defense pursuant to CrR 4.7. RP, 11. The defense wanted the complete records, including unredacted copies of the records it had received. RP, 11. The attorney general's office appeared and opposed releasing the records. RP, 9-10. Mr. Crockett argued the records were "relevant and necessary" to the preparation the defense. RP, 7. He further argued that M.W.'s statements about what had occurred in Tennessee were "very similar" to her statements about the alleged incident involving Mr. Crockett. RP, 22. The Court reviewed the records en camara and determined the incident in Tennessee was not sufficiently similar to merit disclosure. RP, 24. As a result, the Court declined to turn over the requested records. RP, 24. Later, during the trial, the Court ruled there would be no mention of the sexual abuse in Tennessee by any party. RP, 309.

contact. Officer Chell answered he could not recall, but if there had been an "elaborate demonstration," he would have put it in his report. RP, 901. He was not asked whether Mr. Crockett had offered any other explanations and when, on cross-examination, the defense tried to elicit this information, the Court held it was inadmissible. The trial court erred by allowing this improper impeachment.

Mr. Crockett offered three explanations to Officer Chell. The trial court had earlier ruled that his first explanation, the Tennessee incident, was irrelevant and inadmissible, and the jury never heard about the Tennessee incident. Assuming arguendo that the trial court's initial ruling about the Tennessee incident was correct, Mr. Crockett was still entitled to clarify what happened with Officer Chell. Mr. Crockett testified he told Officer Chell about the accidental touching that was discussed on Thanksgiving and he could not recall telling him about a second accidental touching while moving. The State was allowed to impeach his testimony by calling Officer Chell to create the impression that he told him about the moving incident and nothing further. But in fact Mr. Crockett had mentioned the earlier touching incident, he just did not put on an "elaborate demonstration" about how it happened. As defense counsel put it, "They either get all the explanations or none of the explanations ... [and] it's more prejudicial than probative on that issue to Mr. Crockett because

you can't pick and choose the evidence that you want to shape your case." RP, 904

The State had opened the door to all three of Mr. Crockett's explanations. The Court of Appeals explained the "open the door" doctrine as follows:

> A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party. The introduction of inadmissible evidence is often said to "open the door" both to cross-examination that would normally be improper and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence. The doctrine is intended to preserve fairness: It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.

State v. Avendano-Lopez, 79 Wn.App. 706, 904 P.2d 324 (1995), quoting Karl B. Tegland, 5 *Wash.Prac.* 41 (3rd ed. 1989). In this case, the State chose to introduce one of Mr. Crockett's explanations when he in fact offered three. The State opened the door to allow defense counsel to introduce the remaining two.

A lot of the focus in the trial court was on the court's desire to exclude the Tennessee incident. But by focusing on that portion of the issue, the court missed the larger issue: the State was marshalling the impeachment in a way that made Mr. Crockett look like he was changing his story when in fact he was not. Mr. Crockett admitted to Officer Chell

two accidental touchings, he testified about one on the stand and could not remember telling him about the second one. The State introduced the second touching but made it seem that was the only explanation he offered when in fact he did mention the first touching. The State improperly impeached Mr. Crockett and when the defense tried to clarify the confusion, the trial court refused the offer. This was error.

6. Reversal is required under the cumulative error doctrine.

Under the cumulative error doctrine, reversal may be warranted where multiple errors, when considered as a whole, combine to deny a defendant his right to a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It is difficult to assess in Mr. Crockett's case the prejudice of each individual error, and undoubtedly the State will argue each error is harmless. But considered as a whole the multiple errors deprived him of a fair trial and this Court should reverse.

D. Conclusion

This Court should reverse the conviction and remand for a new trial.

DATED this 9th day of September, 2015.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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September 10, 2015 - 3:13 PM

Transmittal Letter

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Plaintiff/Respondent, vs JAMES ELLIS CROCKETT, Sr., Defendant/Appellant.	Court of Appeals No.: 47017-9-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On September 10, 2015, I e-filed the Amended Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and, designated a copy of said document to be sent to Kathleen Proctor of the Pierce County Prosecuting Attorney's Office via email to: PCpatcecf@co.pierce.wa.us through the Court of Appeals transmittal system.

On September 10, 2015, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Amended Brief of Appellant to the defendant:

James Ellis Crockett, Sr., DOC # 377861
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

////

The Law Office of Thomas E. Weaver
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Bremerton, WA 98337
(360) 792-9345

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: September 10, 2015, at Bremerton, Washington.

Alisha Freeman

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