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Supreme Court No. 99179-1  
(CoA No. 36488-7-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

NATHAN B. NAVE,  
Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Annette S. Plese, Judge

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PETITION FOR REVIEW

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**A. SUMMARY OF APPEAL**

Nathan Nave was wrongfully convicted following a series of erroneous evidentiary rulings which put minimally relevant and unduly prejudicial evidence before the jury while improperly limiting his ability to present his defense. These errors each individually, and cumulatively, deprived Mr. Nave of his constitutional right to a fair trial. The Court of Appeals' opinion affirming his conviction is inconsistent with the decisions of this Court, other Court of Appeals' opinions, and presents significant constitutional questions.

**B. IDENTITY OF PETITIONER AND THE DECISION BELOW**

The petitioner, Nathan Nave, through the undersigned attorney, David L. Donnan, requests this Court grant review pursuant to RAP 13.3 and RAP 13.4(b)(1), (2) and (3), of the unpublished decision of the Court of Appeals, Division Three, in *State v. Nave*, No. 36488-7-III, filed July 16, 2020, following the denial of a motion for reconsideration on September 29, 2020. A copy of the opinion is attached hereto as an Appendix A and the Order Denying Motion for Reconsideration is attached hereto as Appendix B.

**C. ISSUES PRESENTED FOR REVIEW.**

1. The State must prove a criminal offense beyond a reasonable doubt and a jury's unanimous determination of that fact must be supported

by evidence sufficient to establish each element. Where the complaining witness's testimony definitively established she never saw or spoke to her assailant, the remaining evidence was insufficient to sustain the conviction. The Court of Appeals' opinion affirming the conviction is, therefore, inconsistent with the decisions of this Court and presents a significant question of constitutional law.

2. Due process bars evidence when probative value is outweighed by its prejudicial effect. Evidence Mr. Nave went to New York City following I.V.'s allegations had minimal probative value in establishing consciousness of guilt. Given the limited probative value, the evidence was likely to distract or confuse the jury. The Court of Appeals opinion finding there was a reasonable inference Mr. Nave traveled to New York City to "evade arrest and prosecution" was not supported by the record and the prejudicial effect was so significant it warrants further review.

3. ER 404(b) bars evidence of a person's prior acts "to prove the character of a person in order to show action in conformity therewith." Such evidence is relevant only if it tends to establish an element of the crime and is still subject to exclusion if it is unduly prejudicial.

Evidence Mr. Nave massaged a child in his care long before the alleged abuse was not relevant to prove the offense occurred and was highly prejudicial given the propensity to produce unfounded speculation. The

trial court abused its discretion in admitting such evidence. The Court of Appeals' opinion to the contrary is inconsistent with the decisions of this Court and presents a significant constitutional question.

4. The constitutional rights to confrontation and due process of law require the accused be allowed to present evidence which undercuts the reliability and trustworthiness of the State's case. The trial court unreasonably constrained Mr. Nave's constitutional right to present his defense by excluding evidence the alleged victim's cousin made similar disclosures of sexual abuse in the same time frame that would have explained to the jury the true source of disclosure. The trial court improperly excluded this evidence and the Court of Appeals' opinion affirming Mr. Nave's conviction is inconsistent with the decisions of this Court and presents significant questions of constitutional law.

5. The scope of cross examination is generally limited to topics raised in direct examination. ER 611. Mr. Nave's direct testimony was limited to his denial of sexual misconduct; however, the prosecutor was allowed to cross examine on a number of extraneous matters which produced highly inflammatory inferences regarding Mr. Nave's abandonment of his family. The trial court abused its discretion by permitting this examination and the Court of Appeals' opinion is inconsistent with the decisions of this Court.



6. The Fifth and Fourteenth Amendments to the U.S.

Constitution and Art. 1, sec. 3 of the Washington Constitution guarantee due process of law. Mr. Nave argued the investigator and prosecutor effectively suppressed exculpatory evidence, and then used manifestly unreliable or perjured testimony to gain his conviction, in violation of the guarantees of due process of law.

7. Mr. Nave was held to answer in this matter in the absence of an indictment delivered by a grand jury pursuant to the provisions of the Fifth Amendment. The Washington practice of charging by information supported only by a declaration describing probable cause is inconsistent with this federal constitutional guarantee and his seizure without properly established probable cause violated the Fourth Amendment. Mr. Nave asks this Court to review these significant constitutional questions.

8. The right to a fair trial may be eroded by a series of errors which together compromise the fact-finding process. Here the introduction of inflammatory and irrelevant evidence distracted the jury from its constitutional function. The errors denied Mr. Nave a fair trial. The Court of Appeals' opinion to the contrary is inconsistent with the decisions of this Court and presents significant constitutional questions

#### **D. FACTS RELEVANT TO PETITION**

The facts relevant to the petition are detailed in the briefing of the parties (AOB at 1-10; Supp'l B. of Resp. at 2-10) and the opinion of the Court of Appeals (Slip op at 2-6), which are hereby incorporated by reference and supplemented as necessary in the arguments below.

#### **E. ARGUMENT FOR REVIEW**

##### **1. The evidence was insufficient to establish Mr. Nave sexually assaulted I.V. where she testified she never saw or spoke with her assailant**

Anyone accused of a crime is presumed innocent until the State proves all of the elements of the charged offense beyond a reasonable doubt.<sup>1</sup> Among the elements the State must prove is the identity of the defendant as the individual who committed the offense. State v. Thomson, 70 Wn.App. 200, 211, 852 P.2d 1104 (1993), *aff'd*, 123 Wn.2d 877, 872 P.2d 1097 (1994). In Mr. Nave's case, even when viewed in a light most favorable to the verdict, the evidence failed to establish, beyond a reasonable doubt, Mr. Nave committed the charged offenses.

There was no physical evidence offered to support the allegations. Proof was dependent on the testimony of I.V. She testified, however, that

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<sup>1</sup> U.S. Const. amend. XIV; Const. Art. I, secs. 3 and 22; State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015); State v. Homan, 181 Wn.2d 102, 105, 330 P.3d (2014).

she would sleep “[o]n my side facing the wall or on my back – I mean, stomach.” RP 54.<sup>2</sup> As a result, I.V. never saw her assailant.

Q: Were there some times when he did this that you were facing him so that you could see his face?

A: No.

Q: Were you always facing towards the wall?

A: Yes.

Q: As best you can remember, did he ever say anything during any of the times that he did this?

A: No.

RP 58. I.V. explained her room would usually be dark, except for the occasional morning light when she “would cover [her] head ... [b]ecause [she] didn’t want him to see that I had woken up.” RP 65, 67.<sup>3</sup> This was

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<sup>2</sup> The prosecutor also inquired: “So you’d be facing to the left where the wall it?” I.V. answered “Yes.” RP 54. I.V. then confirmed:

Q: Could you see his face while that was happening?

A: No.

Q: How come?

A: Because I was facing the wall.

Q: Did you stay facing the wall the whole time?

A: Yeah.

RP 55.

<sup>3</sup> I.V. confirmed on redirect:

Q: Mr. Phelps, also, asked you some questions about the way that you were sleeping. You said there were times you slept on your stomach?

A: Yes.

...

Q: Kind of how you drew on that picture, was there ever a time that you would be looking at Mr. Nave when he came in?

A: No.

Q: So whether it was on your stomach or your side, you were you still facing away from your door?

A: Yes.

RP 79-80.

problematic because I.V. admitted she did not “know it was real” or “if it was really happening.” RP 73.<sup>4</sup>

The testimony by I.V. on identification, and other essential elements including sexual motivation and penetration, was based on a series of leading questions first posed by her mother, then Crime Check, investigating officers (oral contact) and ultimately the trial prosecutor (“on your business”). The result was a failure to provide the certitude necessary to support the verdict. I.V. was unequivocal that she never saw her assailant. In the absence of evidence corroborating the identification of Mr. Nave as the assailant, his mere proximity was not sufficient to infer guilt and evidence that merely raises a suspicion of guilt is insufficient. See e.g. People v. Tripp, 151 Cal.App.4th 951 (2007). Furthermore, an inference regarding identity is unreasonable when it is based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guess work. Id. That is all the testimony established. I.V. state of consciousness and her inability to perceive leave only speculation regarding the identity of any assailant.<sup>5</sup>

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<sup>4</sup> In the pretrial defense interview she reiterated this uncertainty.

Q: .... Do you recall telling me that it would scare me because I didn't know if it was actually happening?

A: Yes.

RP 73.

<sup>5</sup> The problem with basing a conviction on nothing more than an out-of-court statement which is contradicted by the witness's trial testimony "is that the

The alleged “1, 2, or 3” conversation failed to provide any meaningful corroboration where I.V. testified she was confused and thought her allegations might be part of a dream until this brief and cryptic conversation. RP 63, 74. Furthermore, an alleged admission “alone is not sufficient to establish that a crime took place.” State v. Brockob, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006); State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

Furthermore, the testimony of an identification witness, like that of any other witness, is subject to the constraints imposed by ER 602. State v. Vaughn, 101 Wn.2d 604, 610, 682 P.2d 878 (1984). Pursuant to ER 602, a witness may only testify concerning facts within his or her personal knowledge, that is, facts he has personally observed. 5 Teglund, Washington Practice § 218 (2d ed. 1982). Where I.V.’s testimony was unequivocal that she did not personally observe her assailant, her testimony fails to clear this initial hurdle. RP 55, 58.

The Court of Appeals identified three theories upon which to pin the identification. Slip op. at 8-9. First, the two earlier incidents

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fact finder has no logical basis for determining which statement is true and may even be falsely persuaded by the presentation of the out-of-court statement.” United States v. Bahe, 40 F.Supp.2d 1302, 1310 (D.N.M. 1998). See also Beber v. State, 887 So.2d 1248 (Fla 2004) (“prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt.”)

described by I.V. as occurring on the couch well before the alleged abuse. Slip op. at 8. These incidents were so isolated and distant in time, however, and relatively ambiguous with regard to their sexual nature, they fail to provide any meaningful basis to conclude they establish the identify of Mr. Nave as the alleged assailant.

Second, given the sexual nature of the subsequent contact, and Mr. Nave's being the only male in the house, the jury could infer identity. Slip op. at 8. "Mere presence" in the household is not enough to sustain conviction where the law requires evidence the accused actually committed the offense alleged. See e.g. State v. Jackson, 137 Wn.2d 727, 976 P.2d 1229 (1999). The law certainly requires more.

Finally, the Court of Appeals mistakenly assumes that "Mr. Nave's admitted he abused her..." Slip Op at 8. In fact, I.V. admitted, she was at times confused and thought her allegations might be part of a dream. RP 63, 74. The "1, 2, or 3" conversation was vague and failed to identify any specific sexual misconduct to support such an inference.

This was not merely a question of the jury's deciding on the credibility of a witness. There was a fundamental shortfall in the proof required to sustain conviction. Mr. Nave asks this Court to grant review and find the evidence insufficient.

**2. Evidence Mr. Nave went to New York following disclosure required unfounded speculation and the prejudice outweighed any probative value**

Evidence of “flight” is insufficient in itself to establish guilt. State v. Pettit, 74 Wash. 510, 133 P. 1014 (1913). It may be admitted as a manifestation of an “instinctive” or “impulsive” reaction, however, Mr. Nave’s trip to New York City was the following day and reflected a logical train of thought rather than an impulsive decision to flee. Cf. State v. Wilson, 26 Wn.2d 468, 482, 174 P.2d 553 (1946). In fact, Mr. Nave made himself available for the Court as soon as he was advised of the warrant and moved to facilitate his appearance on the matter.

The probative value of this evidence was, therefore, minimal and more likely to be prejudicial by inducing unsupported speculation. State v. Bruton, 66 Wn.2d 111, 401 P.2d 340 (1965); United States v. Russell, 662 F.3d 831 (7th Cir. 2011).<sup>6</sup> Because this evidence was not probative of the elements of the alleged crimes, when balanced against this potentially

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<sup>6</sup> The federal courts suggest the probative value depends “upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.” United States v. Peltier, 585 F.2d 314, 323 (8th Cir. 1978) (internal quotation marks omitted); United States v. Jackson, 572 F.2d 636, 639 (7<sup>th</sup> Cir. 1978). Courts must “carefully consider whether there are a sufficient number of evidentiary manifestations to support these inferences.” United States v. Hankins, 931 F.2d 1256, 1261 (8th Cir. 1991).

unmoored speculation, the prejudicial effect ran the risk of depriving Mr. Nave of a fair trial. Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990).

The chronology of events, and in particular the passage of time between the commission of a crime, or the defendant being accused of a crime, and his purported flight, is a critical consideration in the assessment of the probative worth of flight evidence. Jackson, 572 F.2d at 640-41. In Mr. Nave's case, his travel reflected little more than the reality that he had lost home when he left at the request of his wife. The prejudicial speculation engendered by this evidence only served to distract the jury from its central function of weighing the credibility of the State's witnesses and compromised Mr. Nave's right to a fair trial. United States v. Solerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); United States v. Benedetti, 433 F.3d 111, 116 (1<sup>st</sup> Cir. 2005). Admission of this evidence, therefore, appears inconsistent with the decisions of this Court and raises significant constitutional questions.

**3. Testimony regarding Mr. Nave's physical contact with I.V. long before the alleged offenses should have been excluded**

The State moved to admit two instances of the defendant's physical contact with I.V. occurring well prior to the charging period. RP

6. Mr. Nave objected that the testimony was not relevant because the



conduct would not have been criminal in the first place, the two incidents remote in time and neither incident were overtly sexual. RP 8.<sup>7</sup> The trial court admitted it to prove “lack of accident, mistake or intent, [and] the fact that they charged it as an aggravating, as an ongoing pattern of sexual abuse....” RP 10. The Court of Appeals found the earlier incidents were admissible to prove the aggravator of a pattern of abuse or, in the alternative, to establish identity. Slip op. at 13-14.

Mr. Nave argued the remoteness of the two prior incidents, occurring well before the charging period, eroded any probative value in establishing the identity of the assailant. The evidence similarly failed to establish the “ongoing pattern of sexual abuse” given the remoteness and the absence of an indication of sexual gratification. RP 8. Finally, since Mr. Nave testified he never touched I.V. on her vagina or at all. RP 136. As such, there was no issue of mistaken or accidental

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<sup>7</sup> I.V. testified she was eleven when Mr. Nave first touched her “inappropriately.” RP 50. They had been watching a movie when I.V. fell asleep and woke up to “him touching under my shorts on my upper thigh.” RP 51. He was “just massaging my legs” RP 51. As to the second incident, I was about 13 maybe, and we had gotten a different couch, and, again, I’d fallen asleep watching a movie on the complete opposite side of the couch from where he was laying, and I woke up to him touching me in the same, similar spot. RP 52. I.V. later told the responding officers that she did not really remember anything about that second incident. RP 73.

contact for which the criminal intent was in dispute. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Even if there were some probative value, it is outweighed by the danger of unfair prejudice. ER 403. Carson v. Fine, 123 Wn.2d 206, 222-23, 867 P.2d 610 (1994); State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Admitting this evidence to prove “lack of accident, mistake or intent, [and] an aggravating, as an ongoing pattern of sexual abuse,” was untenable given the interaction was over the clothes and did not involve sexual contact or indications of sexual gratification. It was, therefore, untenable to conclude it was admissible for that purpose.

Where evidence was admitted on untenable grounds, the court looks for prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). In Mr. Nave’s case, this miniscule element of potential probative value was outweighed by the prejudicial effect. The evidence inevitably distracted the fact-finder from its thoughtful evaluation of the evidence and improperly colored how the jury weighed the evidence. The result is a lack of confidence in the result reach below and reversal was required. Mr. Nave asks the Court to grant review and order a new trial.

**4. The right to present Mr. Nave's defense was violated by excluding evidence I.V.'s cousin made similar allegations**

The federal and state constitutions guarantee the right to confront witnesses and present evidence in one's own defense. U.S. Const., amend. VI; Wash. Const., art. I § 22; "The primary and most important component" of the confrontation clause "is the right to conduct a meaningful cross-examination of adverse witnesses." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

Evidence of I.V.'s cousin's contemporaneous disclosure of sexual abuse at the hands of a relative was relevant to explain a potential motive or impetus for I.V. making the charge. RP 21-22. Furthermore, evidence providing an explanation for a child-victim's knowledge and descriptions of sexual activity, is admissible "to rebut the inference [the child] would not know about such sexual acts unless [he or she] had experienced them with defendant." State v. Kilgore, 107 Wn.App. 160, 179-80, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288 (2002) (alteration in original); State v. Swan, 114 Wn.2d 613, 648-49, 790 P.2d 610 (1990).

Where the trial court erroneously excludes relevant and material evidence necessary to the defense, there is a constitutional violation. State v. Cayetano-Jaimes, 190 Wn.App. 286, 300, 359 P.3d 919 (2015). This error requires reversal unless the State establishes it was harmless. State v.

Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). In Mr. Nave's case, it was critical the jury be made aware of the potential source of I.V.'s allegations, particularly in light of her testimony she wasn't sure if it was real and she never saw her alleged assailant. A reasonable jury that heard of these contemporaneous disclosures by a close confidant of I.V.'s would have been inclined to see the allegations in a far different light. It is very possible that a reasonable jury may have thereafter reached a different result. This constitutional error was not harmless. Reversal was required.

**5. Cross-examination of Mr. Nave beyond the limited scope of the direct examination was improper**

Mr. Nave testified and denied any inappropriate sexual contact with I.V. RP 136. He explained he learned of the criminal charges when he was served with a warrant while staying with his cousin in Idaho. RP 136. On cross-examination, the prosecutor sought to go far beyond the limited scope of the direct examination. RP 139-40. Mr. Nave noted his objection to the scope of the examination, but the judge allowed the prosecutor considerable latitude. RP 142.

The rule in Washington has long been that the cross-examination of a witness is limited to the scope of the direct examination. State v. Jeane, 35 Wn.2d 423, 431, 213 P.2d 633 (1950). ER 611(b) now provides that "Cross examination should be limited to the subject matter of the

direct examination and matters affecting the credibility of the witness.” Although the rule further provide that “[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination,” that discretion is not unbounded. State v. Robideau, 70 Wn.2d 994, 997, 425 P.2d 880 (1967) (cross-examination permitted only if it is material and germane to the issues). When "a general subject is unfolded [in direct examination], the cross-examination may develop and explore the various phases *of that subject*." Wilson v. Miller Flour Mills, 144 Wash. 60, 66, 256 P. 777, 779 (1927) (emphasis added).

The scope of Mr. Nave’s examination far exceeded that contemplated by the rules and caselaw so as to constitute an abuse of discretion. In Coe, for example, this Court found the trial court abused its discretion by allowing the prosecuting attorney to question the defendant about the details of his writings to show a lustful disposition. But the evidence had no bearing on any element of the charges against Coe and would have been inadmissible had it been offered on direct examination. State v. Coe, 101 Wn.2d 772, 780, 684 P.2d 668 (1984); see also State v. Golladay, 78 Wn.2d 121, 143, 470 P.2d 191 (1970).

Mr. Nave asserted a general denial and, therefore, examination on extraneous collateral matters was improper and an abuse of the court’s discretion. Cf. State v. Anderson, 46 Wn.2d 864, 869, 285 P.2d 879

(1955); Robideau, 70 Wn.2d at 99. Evidence regarding Mr. Nave's relationship with his step-daughter did not relate to the topics covered in the direct examination, nor go to inform the jury as to Mr. Nave's credibility. RP 139. Further inquiry regarding family finances and sleeping habits were similarly beyond the scope of the direct examination and not germane to Mr. Nave's trustworthiness. See e.g. RP 140, 146-47. Instead, the testimony was inflammatory because it sought to paint Mr. Nave as having abandoned his family. It thereby distracted the jury from the relevant evidence and determining if the elements of the alleged offenses were proven. The Court of Appeals opinion affirming Mr. Nave's conviction is contrary to the decisions of this Court and warrant.

**6. Mr. Nave alleged multiple *Brady* violations warrant reversal of his conviction**

Mr. Nave argued the investigator and prosecutor suppressed exculpatory evidence, and then used manifestly unreliable or perjured testimony to gain his conviction, in violation of the constitutional guarantees of due process of law. Statement of Additional Grounds (SAG) at 26-31. Of particular concern was evidence regarding the suggestive and leading nature of the questioning of I.V. first by her mother, then as lead by Crime Check, and subsequently by the investigating officer. SAG at 29-30. The effect was to create substantial

doubt regarding the reliability of I.V.'s testimony, but the substance of this important evidence was not disclosed before trial. SAG 26-29.

Where the prosecution failed to timely disclose exculpatory evidence in the form of this suggestive line of questioning, its effect on I.V.'s state of mind and her motive to make false accusations, the due process violation is manifest. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The prejudice from the failure to timely disclose this crucial impeachment evidence was compounded by the trial court's exclusion of questioning about the I.V.'s awareness of the similar allegations made by her cousin. Since this evidence was not subject to the hearsay bar and the impetus for contriving the allegations was highly relevant, the prejudice was substantial.

Finally, there is a reasonable probability the results would have been different had these materials been disclosed because it would have provided the jury with critical insight regarding the source and evolution of the allegations. Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 619, 157 L.Ed.2d 491 (1999). Impeaching the credibility of prosecution witnesses is at the core of the Brady guarantees. Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The prosecution used I.V.'s

“identification” to convict Mr. Nave, while failing to timely disclose evidence regarding the source and development of those disclosures.<sup>8</sup>

### **7. Lack of grand jury indictment**

Mr. Nave was “held to answer for [this] infamous crime” in the absence of an indictment delivered by a grand jury pursuant to the provisions of the Fifth Amendment. SAG 22-23. The Washington practice of charging primarily by information supported only by a declaration describing probable cause is inconsistent with this federal constitutional guarantee. The arbitrary failure to provide for grand jury indictment violated both the equal protection and privileges and immunities clauses of the Fourteenth Amendment. Mr. Nave’s result seizure was without properly established probable cause violated the Fourth Amendment. SAG 23-25. Mr. Nave asks this Court to review these constitutional violations.

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<sup>8</sup> See RP 54-59, 76-77. Further illustrations of the unreliable or potentially perjured nature of the testimony are seen in the inconsistent statements by I.V. regarding oral contact. SAG at 29. I.V. indicates that the assailant did not use his mouth, but the detective confirmed she indicated there was oral contact. RP 64-65; 111-12.



### **8. Cumulative error denied Mr. Nave a fair trial**

During Mr. Nave's trial, several critical errors occurred in the admission of minimally relevant, but highly prejudicial, evidence which unfairly prejudiced the jury against him and their cumulative impact affected the outcome of the case. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Furthermore, the exclusion of defense evidence of the similar allegations of a close relative hobbled Mr. Nave's ability to present a defense in the form of any indication where I.V.'s imagination grasped the allegations. Coe, 101 Wn.2d at 789. A new trial is required.

### **F. CONCLUSION**

Mr. Nave requests the Court take review and reverse his convictions.

DATED this 28<sup>th</sup> day of October, 2020.

Respectfully submitted,



David L. Donnan (WSBA 19271)  
Attorney for Petitioner Nave

**FILED**  
**JULY 16, 2020**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 36488-7-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
NATHAN B. NAVE,	)	
a/k/a NATHAN BRICK NAVE,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Nathan Nave appeals after a jury found him guilty of second degree rape, third degree rape of a child, and third degree child molestation. The jury also made a special finding for each offense that it included the aggravating circumstance of an ongoing pattern of abuse of the same victim under 18 years old. Mr. Nave raises several issues on appeal. We remand to strike the criminal filing fee, but otherwise affirm.

APPENDIX A

## FACTS

Danielle Valentine gave birth to I.V.<sup>1</sup> in June 2002. Ms. Valentine began dating Nathan Nave when I.V. was 5. The two had twin girls and eventually married. The family lived in a two-level house. I.V.'s bedroom was downstairs next to a living room and the other bedrooms were upstairs.

Once when I.V. was 11, she and Mr. Nave were watching a movie. I.V. fell asleep and, when she awoke, Mr. Nave was touching her under her shorts on her upper thigh. At the time, I.V. thought he was just massaging her legs, but was alarmed because the touching was so far up on her leg.

About two years later, I.V. fell asleep watching a movie in the living room on the opposite side of a couch from Mr. Nave. When she awoke, Mr. Nave was touching her vagina, but above her underwear. I.V. tried to go to her room, but Mr. Nave insisted she stay. He pulled her arm, but she pulled away and went to her bedroom. She did not disclose this incident to her mother, but she stopped watching movies with Mr. Nave.

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<sup>1</sup> To protect the privacy interests of I.V., we identify her only through the use of initials. General Order of Division III, *In Re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), [http://www.courts.wa.gov/appellate\\_trial\\_courts/?fa=atc.genorders\\_orddisp&ordnumber=2012\\_001&div=III](http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III).

The next incident occurred in early 2017. I.V. was asleep in her bedroom, facing the wall, and was awakened by someone touching her. The person, whom I.V. later testified as Mr. Nave, massaged her legs, rubbed her back, and touched her vagina. This occurred for 15 to 20 minutes, and I.V. was terrified. The person penetrated I.V.'s vagina digitally. Again, I.V. did not disclose this to her mother.

After that incident, the sexual abuse continued three or four times per week. Each time, I.V. faced the wall and often covered her head with a blanket because she did not want Mr. Nave to know she was awake. I.V. never saw the person who repeatedly abused her during this time nor did the person ever speak to her during the abuse.

In the midst of this abuse, Mr. Nave once acknowledged he had come into her room the prior night. While driving I.V. to school, Mr. Nave said, “[A]bout last night, one of three things could happen. One, you don’t tell anyone and I keep doing it; two, you don’t tell anyone and I stop; three, you feel like you have to tell someone.” Report of Proceedings (RP) at 63. I.V. told him she would not tell anyone and for him to stop. Mr. Nave explained that if she told someone, the family would lose their home. Despite I.V.’s request that he stop, Mr. Nave continued sexually abusing I.V.

On May 12, 2017, I.V. told her mother that Mr. Nave had raped her. Her mother confronted Mr. Nave and told him to leave the house and go to his mother’s house

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because she needed to figure things out. Mr. Nave then went to his mother's house. Mr. Nave quit his job, sold his car, and traveled to New York the following day.

On May 31, 2017, the State charged Mr. Nave with one count of rape in the second degree, one count of rape of a child in the third degree, and one count of child molestation in the third degree. The charges included a special allegation of aggravating circumstances for each count, alleging that the offense was part of an ongoing pattern of abuse of the same victim under 18 years old. Federal marshals later served an arrest warrant on Mr. Nave in Idaho Falls, Idaho, where he had been staying with his cousin.

*Pretrial motions*

Prior to trial, the State filed a motion to allow evidence that Mr. Nave had touched I.V. when she was 11 and 13. The State argued the evidence was needed to prove the charged aggravator. Mr. Nave argued the prior acts were not criminal and nothing happened since the 2013 incident, thus making the acts irrelevant. The trial court granted the State's motion, ruling the evidence could be admitted under ER 404(b) for the purpose of showing lack of accident, mistake, or intent, and to show an ongoing pattern of abuse.

The State also filed a motion to exclude evidence that I.V.'s cousin had been sexually abused by a family member. Mr. Nave responded that I.V.'s mother "knows

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[that I.V.] knew of the allegations [yet she] was somewhat equivocal [about] the timing, but fully admitted that it *could have been* as earl[y] as a month before [I.V.] made her . . . disclosures.” RP at 21 (emphasis added). Mr. Nave argued the evidence was important to explain to the jury why I.V. would disclose contrived accusations in May 2017. The State responded that Mr. Nave had no basis to say the cousin’s allegations were similar and that Mr. Nave had not made a sufficient offer of proof. The trial court determined that Mr. Nave’s offer of proof was too nebulous. The court added that it would reconsider its ruling if Mr. Nave could establish the necessary link between I.V.’s and her cousin’s allegations outside the presence of the jury before cross-examining I.V.

Mr. Nave filed a motion to exclude evidence he went to New York after being confronted by Ms. Valentine. He also sought to exclude evidence he attempted to commit suicide. The trial court granted the motion in part, excluding evidence of his suicide attempt, but reserving its ruling on evidence of flight.

*Trial testimony of Mr. Nave*

The State presented its evidence to the jury. Mr. Nave elected to testify in his own defense. He denied ever touching I.V. inappropriately. He also testified that after being released on bond in Idaho, he returned to Washington as quickly as he could and presented himself to the court.

During cross-examination, the State began asking questions that Mr. Nave objected to as beyond the scope of Mr. Nave's direct testimony. The trial court excused the jury and heard arguments from both sides.

The State argued it was allowed to broadly question Mr. Nave based on his general denial that he had ever sexually abused I.V. The trial court agreed. Mr. Nave added that if the State questioned him about traveling to New York, he would object. The State argued it was entitled to question Mr. Nave about traveling to New York to counter his testimony that he quickly presented himself to the court. The trial court agreed.

The jury returned, and the State inquired into these areas. Mr. Nave confirmed he went to his mother's house after he was told to leave his house. He also confirmed he had two young biological daughters who continued to live in the house, was a father figure to I.V., yet quit going to work, placed his car for sale, and the next day traveled to New York.

*Verdict and sentencing*

The jury found Mr. Nave guilty of all three counts and answered yes to the special verdicts for the pattern of abuse aggravator charged on each count. The court sentenced Mr. Nave to 194 months to life confinement. The court imposed \$800 in legal financial obligations, including \$200 for the criminal filing fee.

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Mr. Nave timely appealed.

#### ANALYSIS

##### A. SUFFICIENCY OF THE EVIDENCE

Mr. Nave contends there was insufficient evidence to sustain his convictions. He argues the statements made by I.V. were inconsistent, and she could not identify him as her attacker. He further argues that his statement/confession to her while driving was not sufficient to convict him under principles of *corpus delicti*. We disagree.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When a defendant challenges the sufficiency of the evidence, he or she admits the truth of all of the State's evidence. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

Mr. Nave first argues I.V.'s statements were inconsistent and that she could not have identified him as her abuser. He emphasizes that I.V. testified she never saw her abuser and the abuser never spoke to her.

Identity of the defendant is one of the elements all crimes share that must be proved beyond a reasonable doubt. *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d



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1104 (1993), *aff'd*, 123 Wn.2d 877, 872 P.2d 1097 (1994). Where testimony of identification is unclear or inconsistent, the uncertainty only goes to the testimony's weight, not its admissibility. *State v. Vaughn*, 101 Wn.2d 604, 610, 682 P.2d 878 (1984). Issues of witness credibility are matters exclusively reserved for the finder of fact and this court will not review them on appeal. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Here, I.V. testified she always faced the wall when her abuser was touching her and her abuser never spoke to her. However, the jury had to weigh that fact against other facts supporting I.V.'s ability to identify Mr. Nave as her abuser. First, Mr. Nave had touched I.V. inappropriately while she slept before. Second, the touching was sexual and ongoing multiple times per week for several weeks. Mr. Nave was the only male in the house, and he had unfettered access to I.V.'s basement bedroom. Not even Mr. Nave argued that I.V.'s abuser was one of her younger sisters or her mother, all of whom slept upstairs. Third, and most important, Mr. Nave admitted he had abused her on one occasion when he gave her various choices of whether to report the abuse or not. Based on these facts, the jury was given the opportunity to weigh I.V.'s credibility and decided her identification of Mr. Nave and her accusations against him were credible. We will not disturb the jury's credibility findings.

Mr. Nave also argues that his admission to I.V. is insufficient to convict him under the principles of corpus delicti. The State argues that Mr. Nave did not properly assign error to this issue. We use our discretion to review the issue because it is simpler to refute Mr. Nave’s argument than to explain whether the argument is reviewable under RAP 2.5(a).

Corpus delicti principles protect a defendant from being convicted through false confessions by requiring the State to show evidence of the “body of the crime.” *State v. Aten*, 130 Wn.2d 640, 655-57, 927 P.2d 210 (1996). Corpus delicti involves two elements: (1) an injury or loss (2) caused by someone’s criminal act. *State v. Cardenas-Flores*, 189 Wn.2d 243, 263, 401 P.3d 19 (2017).

Here, I.V. testified she was sexually assaulted over a period of several weeks by a person entering her room at night while she slept. This was sufficient evidence of injury caused by someone’s criminal act.<sup>2</sup>

We conclude the State presented sufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt that Mr. Nave was the person who sexually abused I.V. in the spring of 2017.

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<sup>2</sup> We note that “identity” is not an element of corpus delicti. *See Cardenas-Flores*, 189 Wn.2d at 264 n.9. Nevertheless, as mentioned previously, there was substantial evidence that Mr. Nave was the person who repeatedly abused I.V. in the spring of 2017.

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B. EVIDENCE OF MR. NAVE'S FLIGHT

Mr. Nave next contends the trial court erred by allowing the State to present evidence he traveled to New York following Ms. Valentine confronting him about I.V.'s allegations. He argues evidence of flight was minimally relevant and the prejudice outweighed whatever relevance there was. We disagree.

When reviewing a trial court's evidentiary ruling, this court reviews for abuse of discretion. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596 (2017). Abuse of discretion is only found where the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Ugolini v. Ugolini*, 11 Wn. App. 2d 443, 446, 453 P.3d 1027 (2019) (internal quotation marks omitted) (quoting *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009)).

Under the rules of evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence of a defendant's flight is generally admissible as circumstantial evidence in determining guilt. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The principle behind this is that a defendant's flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate action made in order to avoid prosecution. *Id.* Nevertheless, the

relationship between flight and the inference of guilt “must be substantial and sufficient to create a reasonable and substantive inference that the defendant’s departure from the scene of difficulty was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.” *Id.* at 112-13.

Mr. Nave first argues the evidence he traveled to New York is minimally probative because it does not show an impulsive or instinctive reaction to a consciousness of guilt. He argues he did not immediately flee from the scene as is the case for most defendants in flight, but instead flew to New York the following day.

We have found evidence of flight to be admissible even when the defendant’s flight did not occur until one week after the commission of the crime. *State v. Bryant*, 73 Wn.2d 168, 172, 437 P.2d 398 (1968). Here, Mr. Nave knew that I.V. told her mother he had raped her and knew she might contact law enforcement. Mr. Nave went to his mother’s house, quit his job, sold his car, and the next day traveled to New York.

Mr. Nave argues he did these things because he was told to leave the house. But a trier of fact could reasonably disagree and find that Mr. Nave took these extreme steps because he knew that I.V.’s accusations were true and he sought to avoid arrest and prosecution.

Mr. Nave next argues the prejudicial effect of evidence of flight substantially outweighed its probative value. But ER 403 does not preclude prejudicial evidence, not even unduly prejudicial evidence. Instead, ER 403 precludes “unfair[ly]” prejudicial evidence. Mr. Nave does not explain why evidence of flight was unfairly prejudicial. To the extent his unfair prejudice argument is tied to his assertion he traveled to New York because he was told to leave his house, we are unpersuaded. Mr. Nave left his house as instructed and went to his mother’s house. He never explained why he took the additional steps of quitting his job, selling his car, and traveling across the country. Here, there was a reasonable and substantial inference that Mr. Nave did these things as an impulsive reaction to evade arrest and prosecution.

We conclude the trial court did not abuse its discretion by allowing evidence of Mr. Nave’s flight—quitting his job, selling his car, and traveling to New York.

C. EVIDENCE OF MR. NAVE’S PRIOR ABUSE OF I.V.

Mr. Nave contends the trial court abused its discretion by allowing the State to present evidence he touched I.V. when she was 11 and 13 years old. He argues the prior acts were not criminal and, therefore, not relevant. He also argues whatever minimal probative value the evidence had was outweighed by the unfair prejudice the evidence had on the jury. We disagree.

Prior bad acts cannot be used to show propensity to commit a crime, but they can be used for other reasons such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

The State charged Mr. Nave with a special aggravator that the attacks against I.V. were part of a pattern of abuse against her and that she was under 18 years old. Evidence of prior abuse would have a tendency to make proof of this aggravator more probable. Additionally, identity was a key issue at trial and remains a key issue on appeal. Although the trial court did not cite “identity” as a reason for admitting the prior uncharged acts, we may rely on it to affirm.<sup>3</sup> Evidence that Mr. Nave inappropriately touched I.V. while she slept in the basement when she was 11 and 13 years old is relevant to who touched I.V. numerous times for several weeks while she slept in the basement when she was 14 years old.

Mr. Nave first argues the prior actions were not overtly sexual and, therefore, are not relevant to establish a pattern of abuse. In isolation, the first touching that occurred high on I.V.’s thigh while she slept might be innocent. But two years later, Mr. Nave

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<sup>3</sup> “[W]e consider bases mentioned by the trial court as well as other proper bases on which the trial court’s admission of evidence may be sustained.” *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); *see also Gilmore v. Jefferson County Pub. Transp. Benefit Area*, 190 Wn.2d 483, 498, 415 P.3d 212 (2018) (trial court’s evidentiary ruling will not be disturbed on appeal if it is sustainable on alternative grounds).

touched I.V.'s vagina while she slept, albeit over her underwear. Taken together, a reasonable trier of fact could find that both touchings were part of a pattern of abuse.

Mr. Nave next argues that the probative value of the prior touchings were minimally relevant and substantially outweighed by their unfair prejudice. But because the State was required to prove identity, we cannot conclude the trial court abused its discretion. This is especially true given the similarity of the events. The prior events and the charged events occurred in the basement and the prior events and the charged events occurred at night while I.V. was sleeping. The prior events were highly probative to prove identity.

D. EVIDENCE OF I.V.'S COUSIN MAKING A SEPARATE CLAIM

Mr. Nave contends the trial court abused its discretion by excluding evidence that I.V.'s cousin reported she was sexually abused at about the same time I.V. reported that she had been sexually abused. He argues the evidence was highly probative because it explained why I.V. contrived her allegations when she did. The State responds that the trial court did not preclude the evidence. Rather, it required a clearer offer of proof. We agree.

Prior to trial, the State filed a motion to preclude evidence that I.V.'s cousin was sexually abused. Mr. Nave responded that I.V.'s mother knew that I.V. had heard about

her cousin, but that her mother was uncertain when I.V. had heard about it. The trial court decided that Mr. Nave's description of the evidence was too nebulous. The court excluded the evidence, subject to Mr. Nave establishing a nexus between I.V.'s and her cousin's allegations. The court told Mr. Nave he could raise the issue again prior to cross-examining I.V.

But Mr. Nave did not raise the issue again. He failed to make a specific offer of proof of what I.V. knew and when she knew it.

In *State v. Burnam*, 4 Wn. App. 2d 368, 421 P.3d 977, *review denied*, 192 Wn.2d 1003 (2018), we emphasized the importance of a specific offer of proof. We said an offer of proof should (1) inform the trial court of the legal theory under which the offered evidence is admissible, (2) inform the trial court of the specific nature of the offered evidence so the court can judge its admissibility, and (3) create an adequate record for appellate review. *Id.* at 377. An offer of proof must not be so vague as to require the trial court to speculate about the nature of the evidence. *Id.*

Here, the trial court tentatively excluded the evidence because Mr. Nave's offer of proof was nebulous. Mr. Nave did not explain how I.V.'s mother knew she had heard of her cousin's sexual abuse or when she had heard about it. The mother's testimony might be excluded on the basis of hearsay. Also, I.V. might testify that she did not know her



cousin had made a similar allegation or that she heard about the allegation after she had told her mother that Mr. Nave raped her. Either way, the trial court justifiably required Mr. Nave to raise the issue again once he could make a proper connection between I.V.'s and her cousin's allegations.

Mr. Nave additionally argues the trial court's ruling deprived him of his due process right to present a defense. We disagree. The trial court allowed Mr. Nave to develop the necessary connection between I.V.'s and her cousin's allegations outside the presence of the jury and suggested it could be done prior to I.V.'s cross-examination. Mr. Nave did not do this.

Because Mr. Nave's offer of proof was not sufficiently specific, we conclude the trial court did not abuse its discretion by excluding it until Mr. Nave could make a sufficient offer of proof.

E. SCOPE OF CROSS-EXAMINATION

Mr. Nave contends the trial court abused its discretion by allowing the State to cross-examine him beyond the scope of his direct testimony.

Challenges to the scope of cross-examination are reviewed for manifest abuse of discretion. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014). Abuse of discretion is only found where the trial court's decision is "manifestly unreasonable, or

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exercised on untenable grounds, or for untenable reasons.’” *Ugolini*, 11 Wn. App. 2d at 446 (internal quotation marks omitted) (quoting *McCormick*, 166 Wn.2d at 706).

ER 611(b) provides:

Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

First, the second sentence of ER 611(b) refutes Mr. Nave’s argument that a trial court abuses its discretion by allowing cross-examination beyond the scope of direct testimony.

Second, when a subject is opened on direct examination, the cross-examination may explore the subject in its various stages. *State v. Hayes*, 73 Wn.2d 568, 571, 439 P.2d 978 (1968). This rule does not confine the cross-examination to only the questions asked on direct, and the cross-examination may delve deeper into the subjects raised. *State v. Rushworth*, No. 36077-6-III, slip op. at 8 (Wash. Feb. 20, 2020) (published in part), [http://www.courts.wa.gov/opinions/pdf/360776\\_pub.pdf](http://www.courts.wa.gov/opinions/pdf/360776_pub.pdf).

Mr. Nave argues the trial court erred by allowing the State to question him about the uncharged touchings that occurred when I.V. was 11 and 13 years old. We disagree. In *State v. Solomon*, 5 Wn. App. 412, 420, 487 P.2d 643 (1971), the defendant elected to testify and briefly denied he committed the charged crimes. The State, over defense

objections, cross-examined him about where he was the night of the crime. *Id.* We concluded that the trial court did not abuse its discretion by allowing the cross-examination because it explored the various phases of the defendant's general denial. *Id.* at 420-21.

Similarly, Mr. Nave elected to testify, and he denied he had ever touched I.V. in an inappropriate manner. This claim permitted the State to question him about the previous uncharged touchings about which I.V. had already testified. As mentioned previously, those touchings were not excludable under ER 404(b) as evidence of prior bad acts because those touchings were relevant to the charged aggravating factor and to whether he was the person who came into I.V.'s room throughout the spring of 2017 and repeatedly abused her.

Mr. Nave next argues the trial court erred by allowing the State to question him about his travel to New York. We disagree. Mr. Nave testified on direct that after he was arrested in Idaho and posted bail, he returned to Washington as quickly as he could and presented himself to the court. This testimony gave the jury the impression that Mr. Nave was eager to defend against the charges. The State was permitted to challenge this impression with evidence that Mr. Nave was not eager to defend against the charges. Ms. Valentine had already testified that Mr. Nave telephoned her shortly after she told him to

leave the house and the telephone number of his incoming call showed he was calling from New York. The State was entitled to question Mr. Nave about this and to argue this showed that Mr. Nave was not eager to face the charges.

We conclude the trial court did not abuse its discretion in allowing the State to cross-examine Mr. Nave on these two subjects.<sup>4</sup>

F. CRIMINAL FILING FEE

Mr. Nave contends the trial court erred by imposing a \$200 criminal filing fee. He argues the trial court found that he was indigent for purposes of appeal, and RCW 10.01.160(3) expressly prohibits trial courts from imposing discretionary legal financial obligations on defendants who are indigent at the time of sentencing. He correctly cites RCW 36.18.020(2)(h) to support his argument that the criminal filing fee is a discretionary cost.

We exercise our discretion and review this claim of error that was not preserved below by an objection. We direct the trial court to strike the criminal filing fee.

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<sup>4</sup> Because we conclude that the trial court did not abuse its discretion in any of its evidentiary rulings, we need not address Mr. Nave's argument that cumulative error requires reversal and a new trial.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

SAG I: SUFFICIENCY OF THE EVIDENCE

Mr. Nave contends the elements of his case were not proved beyond a reasonable doubt and that the evidence against him was speculative. In making this argument, he challenges the sufficiency of the evidence with respect to I.V.'s identification of him as her abuser. We have already analyzed and rejected this argument.

SAG II, III: LACK OF GRAND JURY INDICTMENT

Mr. Nave raises two separate arguments that contain the same core complaint—that he was not indicted by a grand jury. These arguments are based on the mistaken belief that a defendant has a guaranteed constitutional right to be indicted by a grand jury. A defendant does not have such a right. *See State v. Jefferson*, 79 Wn.2d 345, 485 P.2d 77 (1971).

In Washington, the State has four options for the procedure it uses to file a criminal complaint. *Id.* at 347. It may (1) file the complaint with the superior court, (2) seek a grand jury indictment, (3) initiate inquest proceedings, or (4) file a criminal complaint before a magistrate for a preliminary hearing. *Id.* Any of these methods are allowed under Washington law and the Washington Constitution. *Id.* Here, the State filed the complaint with the superior court.

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Neither the Washington nor federal constitutions guarantee a defendant the right to a grand jury indictment. *Id.* at 347-48. As noted in *Jefferson*, the ability for a prosecutor to choose to file a criminal complaint is upheld by the United States Supreme Court. *Id.* at 348 (citing *Beck v. Washington*, 369 U.S. 541, 545, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962)). For this reason, a defendant is not guaranteed the right to a grand jury indictment as the Court in *Beck* noted. 369 U.S. at 545.

SAG IV; SAG V: LACK OF PRELIMINARY FINDING OF PROBABLE CAUSE

Mr. Nave again raises two arguments that contain the same core complaint. His core complaint here is that he was denied a preliminary hearing where a neutral magistrate could have determined there was insufficient probable cause for him to be arrested and prosecuted.

Mr. Nave is mistaken. The record shows that a hearing occurred in late May 2017, in which the trial court reviewed an affidavit establishing probable cause and found probable cause for Mr. Nave's arrest and detention. Although the order does not specifically identify the affidavit reviewed, we note the court record at the time included a May 25, 2017 certified statement by Detective Brandon Armstrong that set forth detailed and sufficient facts for Mr. Nave's arrest and detention.

SAG VI: *BRADY*<sup>5</sup> VIOLATIONS

Mr. Nave contends the State committed multiple *Brady* violations by suppressing the evidence that I.V.'s cousin disclosed a sexual assault against her and by allowing I.V. to perjure herself with inconsistent statements. Mr. Nave misconstrues what a *Brady* violation is.

A *Brady* violation requires proof of three elements: “[ (1) ] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [ (2) ] that evidence must have been suppressed by the State, either willfully or inadvertently; and [ (3) ] prejudice must have ensued.” *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). When viewing the second element, the key factor is that the State must be in possession of evidence that it does not turn over to the defense and that evidence must have been unobtainable to the defense through its own investigation. *Id.* at 895-96.

Mr. Nave complains the State committed a *Brady* violation when it successfully prevented him from inquiring about I.V.'s cousin's allegation against a family member and when a detective suggested to I.V. that Mr. Nave had oral contact with her. Neither

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<sup>5</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

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of these complaints involve the State failing to turn over evidence to Mr. Nave. Mr. Nave was aware of the evidence, sought to have the cousin's allegation admitted, and asked questions at trial about the detective's purported improper suggestion.

SAG VII: EVIDENCE OF MR. NAVE'S FLIGHT

Mr. Nave repeats the arguments raised above about the trial court allowing evidence of flight. Because we have addressed this issue above, we do not do so again here.

SAG VIII: EVIDENCE NAVE PREVIOUSLY TOUCHED I.V. INAPPROPRIATELY

Mr. Nave repeats the arguments raised above about the trial court allowing evidence of his prior touching of I.V. Because we have addressed this issue above, we do not do so again here.

SAG IX: I.V.'S COUSIN'S STATEMENTS

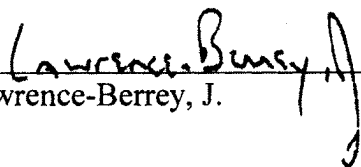
Mr. Nave repeats the arguments raised above about the trial court excluding evidence that I.V.'s cousin alleged a family member sexually abused her. Because we have addressed this issue above, we do not do so again here.



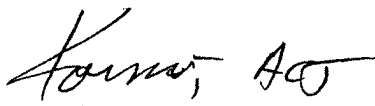
No. 36488-7-III  
*State v. Nave*

Affirmed in part and remanded.

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

  
\_\_\_\_\_  
Lawrence-Berrey, J.

WE CONCUR:

  
\_\_\_\_\_  
Korsmo, A.C.J.

  
\_\_\_\_\_  
Siddoway, J.

**FILED**  
**SEPTEMBER 29, 2020**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**


STATE OF WASHINGTON,	)	No. 36488-7-III
	)	
Respondent,	)	
	)	
v.	)	<b>ORDER DENYING</b>
	)	<b>MOTION FOR</b>
<b>NATHAN B. NAVE,</b>	)	<b>RECONSIDERATION</b>
<b>a/k/a NATHAN BRICK NAVE,</b>	)	
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of July 16, 2020, is denied.

PANEL: Judges Lawrence-Berrey, Korsmo, and Siddoway

FOR THE COURT:

  
\_\_\_\_\_  
REBECCA PENNELL  
CHIEF JUDGE

**MERYHEW LAW GROUP**

**October 28, 2020 - 12:27 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36488-7  
**Appellate Court Case Title:** State of Washington v. Nathan Brick Nave  
**Superior Court Case Number:** 17-1-02101-7

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