Supreme Court No. 100461-3
Court of Appeals No. 81557-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWIN GRAVES MAEURER,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

Other Jurisdictions

Other Authorities

Court Rules

A. IDENTITY OF PETITIONER/DECISION BELOW

Edwin Graves Maeurer requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Maeurer, No. 81557-1-I, filed on November 15, 2021. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Evidence of other bad acts is not admissible to demonstrate an accused person's character in order to prove propensity to commit the charged crimes. Here, the trial court erred by admitting evidence of alleged other bad acts by Mr. Maeurer under an exception to ER 404(b) where no exception applied to the facts of his case.

2. An accused receives ineffective assistance of counsel if his attorney fails to object to the admission of highly prejudicial, non-probative evidence, the court would probably have granted such a motion if one had been made, and the accused is prejudiced as a result. Here, Mr. Maeurer received

ineffective assistance of counsel because his attorney failed to object to the admission of highly prejudicial, non-probative evidence that likely influenced the jury's verdict.

3. The impact of cumulative errors at trial can warrant reversal even if each error, by itself, is harmless. The cumulative effect of several errors throughout Mr. Maeurer's trial deprived him of his constitutional right to due process.

C. STATEMENT OF THE CASE

Edwin Maeurer and Sunshine Ward were in a relationship and lived together with Ms. Ward's two younger children in Everson. RP 448, 637. From 2014 through 2016, Ms. Ward's teenage daughter Autumn Egerdal also lived with the family. RP 447.

On Autumn's sixteenth birthday, July 31, 2016, she told her stepmother and father that Mr. Maeurer had been touching her inappropriately. RP 468, 519. Earlier, she had also made sexual abuse claims to her friend Katelyn and Katelyn's mother Rose. RP 526-27, 552-56.

Mr. Maeurer was charged with two counts of third degree child molestation. CP 17-18.

At trial, Autumn testified that on occasion while she was living with her mother and Mr. Maeurer, she would ride in the car alone with him and he would "slam on the brakes" and "reach across and grab [her] breasts." RP 454. She also said that she often had shoulder or lower back pain and Mr. Maeurer would offer to give her a massage. RP 454-62. Sometimes, he would take off her pants and underwear during the massage, "play with [her] butt," and try unsuccessfully to touch her breasts or her vagina. RP 462-64. Autumn admitted that at least one incident she had told the police about was actually a dream and not reality. RP 475.

Prior to and during the trial, defense counsel moved to exclude evidence that witnesses had heard Mr. Maeurer make sexualized comments toward or about Autumn. CP 24-28, 33, 41-42; RP 39. Counsel argued this was inadmissible propensity evidence. RP 35-36, 39, 370, 424-26, 500-01, 504. The court

ruled the evidence was relevant to prove the sexual gratification element of child molestation and admissible under the "lustful disposition" exception to ER 404(b). RP 431-35, 502-10.

Thus, at trial, the court admitted, over objection, extensive testimony about sexualized comments that Mr. Maeurer allegedly made to Autumn, and to third parties about Autumn. RP 431-35, 465, 471, 502-10, 528, 557.

In his own testimony, Mr. Maeurer admitted he had told Autumn she had "a big ass and boobs." RP 641. He acknowledged he probably should not have said that. RP 641, 644. But he was just trying to make her feel better. RP 640-41. One day she came home from school and was upset that the guys at school kept looking at her. RP 641. Mr. Maeurer told her the boys were staring at her because she had "a big ass and boobs." RP 641. Another time, she came home from her father's house and said her stepmother had said that Autumn's mother was fat and ugly. RP 640-41. Autumn was upset because she looked like her mother. RP 640-41. Mr. Maeurer

tried to make her feel better by telling her, “Autumn, you’re beautiful. You do look like your mother.” RP 640-41. Mr. Maeurer did not make these comments for the purpose of his own sexual gratification. RP 641.

Autumn’s mother Sunshine corroborated Mr. Maeurer’s testimony. RP 685-86. She said Autumn struggled with her body image. Mr. Maeurer would tell her that he thought her mother was beautiful and, since she looked like her mother, “she should . . . consider herself beautiful, too.” RP 685-86.

Mr. Maeurer explained that he never touched Autumn inappropriately. RP 642. He gave her a shoulder massage, over her clothing, at her request. RP 641, 646. But he never gave her a sexual massage. RP 641.

During the trial, the State moved to admit a photograph that Autumn’s brother Jasper had found on Mr. Maeurer’s phone. RP 512-13. The photo depicted Autumn’s mother Sunshine on her knees with Mr. Maeurer’s semen on her face. RP 467, 566. Jasper had found the photo and mistakenly

thought the person was Autumn, not Sunshine. RP 467-68, 519. He told his stepmother about it and she confronted Autumn. RP 519. That is when Autumn disclosed that Mr. Maeurer had allegedly molested her. RP 519.

Defense counsel objected to admission of the photo as not relevant and overly prejudicial. RP 513. The court agreed and excluded the photo, ruling that any probative value was far outweighed by the danger of unfair prejudice. RP 513-14. But defense counsel did object to the admission of testimony *about* the photo. Thus, at trial, several witnesses testified about the photograph and described in detail what it depicted. RP 467-68, 519, 566-67, 690-91.

The jury found Mr. Maeurer guilty of both counts as charged. CP 101. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review and hold the trial court erred in admitting other bad acts evidence under the so-called "lustful disposition" exception to ER 404(b).[1]

The court admitted, over objection, extensive testimony about sexualized comments that Mr. Maeurer allegedly made to and about Autumn. RP 431-35, 465, 471, 502-10, 528, 557. The court ruled the evidence was admissible under the "lustful disposition" exception to ER 404(b). RP 431-35, 502-10. This was error, as the so-called "lustful disposition" exception is incompatible with ER 404(b). The evidence amounted to impermissible propensity evidence.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b).

Interpretation of an evidentiary rule is a question of law reviewed *de novo*. State v. Gresham, 173 Wn.2d 405, 419, 269

P.3d 207 (2012). Trial court evidentiary rulings are generally reviewed for abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion by failing to abide by the requirements of the evidentiary rule. Id.

Before admitting evidence of other bad acts by the accused, the court must (1) find by a preponderance of the evidence the acts actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. State v. Slocum, 183 Wn. App. 438, 448, 333 P.3d 541 (2015).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. State v. McCreven, 170 Wn. App. 444, 458, 284 P.3d 793 (2012). The proponent of the evidence carries the burden of establishing it is

---

[1] A similar issue is currently pending in this Court in State v. Crossguns, No. 99396-3.

offered for a proper purpose. Slocum, 183 Wn. App. at 448. Doubtful cases must be resolved in favor of exclusion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); State v. Wilson, 144 Wn. App. 166, 176-78, 181 P.3d 887 (2008).

The prohibition on propensity evidence under ER 404(b) "does not discriminate between the good and the bad in its safeguards." State v. Arredondo, 188 Wn.2d 244, 272, 394 P.3d 348 (2017) (Gonzalez, J., dissenting). This is because

> 'The protection of the law is due alike to the righteous and the unrighteous. The sun of justice shines alike 'for the evil and the good, the just and the unjust.' Crime must be proved, not presumed." For this reason, we have adopted rules prohibiting the introduction of character evidence because it incites the "deep tendency of human nature to punish" a defendant simply because he or she is a bad person, a "criminal-type" deserving of conviction.

Id. at 272-73 (quoting People v. White, 24 Wend. 570, 574 (N.Y. 1840); 1A John Henry Wigmore, Evidence in Trials at Common Law § 57, at 1185 (Tillers rev. 1983); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

Nonetheless, evidence of uncharged crimes or misconduct may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

When applying these exceptions, however, this Court has admonished against using them as "magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names," without conducting meaningful analysis into whether each exception truly applies to the facts of any given case. Saltarelli, 98 Wn.2d at 364 (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974)).

Evidence of uncharged misconduct is not admissible, for example, to prove motive or intent when those facts are not actually in dispute at trial. See, e.g., State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995).

Further, courts must give "careful consideration" in sex cases of whether evidence, even if relevant, requires exclusion

because its probative value is substantially outweighed by the danger of unfair prejudice. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). This is because the danger of an improper propensity inference by the jury is "at its highest" in such cases. Id.

In this case, the court found that the evidence of Mr. Maeurer's alleged other bad acts was admissible to show his "lustful disposition" toward Autumn, and to prove the element of sexual gratification. RP 431-35, 502-10. But the court provided no limiting instruction to the jury. Thus, the jury was free to consider the evidence for any purpose.

Moreover, as outlined below, the other misconduct evidence was not admissible to prove the element of sexual gratification because that element was not disputed at trial. Additionally, Washington courts should abandon the "lustful disposition" doctrine because it is incompatible with ER 404(b) and with this Court's precedent.

a. The other bad act evidence was not admissible to prove the element of sexual gratification.

The court admitted evidence of sexualized comments Mr. Maeurer allegedly made to and about Autumn to prove the element of sexual gratification. RP 431-35, 502-10. The court reasoned the sexual gratification element of child molestation is equivalent to "intent," which is an explicit exception provided in ER 404(b). RP 433. The court's ruling was error, as the evidence of other misconduct was not admissible to prove intent.

"Intent" refers to the "state of mind with which an act is done" or "what the defendant hopes to accomplish when motivated to take the action." Arredondo, 188 Wn.2d at 262 n.7 (quoting Powell, 126 Wn.2d at 261).

Evidence of uncharged misconduct is admissible to prove intent only when "proof of the doing of the charged act does not itself conclusively establish intent." Powell, 126 Wn.2d at 262. In sex cases, for example, in which proof of the alleged act is

sufficient to prove the required intent, evidence of other uncharged sex offenses is not admissible to prove intent because intent is not at issue. Id.; see also Saltarelli, 98 Wn.2d at 365-66; State v. Bowen, 48 Wn. App. 187, 184-95, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

Rather, to constitute valid evidence of intent, "there must be a logical theory other than propensity that demonstrates how the prior act connects to the intent required to commit the charged offense." Arredondo, 188 Wn.2d at 276 (Gonzalez, J., dissenting) (citing Wigmore, Evidence in Trials at Common Law, supra, § 192, at 1857).

Here, Mr. Maeurer testified at trial and categorically denied ever having touched Autumn's intimate areas. RP 641-42. It was not in dispute that, had he committed the alleged acts, it would have been for the purpose of sexual gratification.

Thus, the introduction of extensive testimony at trial regarding other bad acts by Mr. Maeurer cannot be justified under the ER 404(b) exception for evidence proving intent. Id.

b. The other bad act evidence was not admissible under the so-called "lustful disposition" exception to ER 404(b).

Washington courts should abandon the "lustful disposition" exception to the general ban on propensity evidence because it cannot be harmonized with ER 404(b) or with this Court's precedent. As outlined below, the "lustful disposition" doctrine is simply a vehicle through which courts have long permitted propensity evidence in sex cases. As such, the doctrine directly contradicts the mandate of ER 404(b).

The history of the "lustful disposition" doctrine demonstrates that it represents the continuation of an antiquated rule permitting propensity evidence in sex cases, in direct contradiction to the prohibition of ER 404(b).

The lustful disposition doctrine has its roots in English ecclesiastical law. Zachary Stirparo, Reconsidering

Pennsylvania's Lustful Disposition Exception: Why the Commonwealth Should Follow Its Neighbor in *Getz v. Delaware*, 23 Widener L. Rev. 65, 68 (2017) (citing Michael Smith, Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges, 52 Am. Crim. L. Rev. 321, 338-39 (2015)).

In England, most sex crimes were under the jurisdiction of church courts, not secular criminal courts. Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases, 21 Am. J. Crim. L. 127, 164 (1993) (citing Morris Ploscowe, Sex and the Law 1-3 (1951); 1 Richard Burn, Ecclesiastical Law 662-65 (London, H. Woodfall & Strahan 1763)). In church courts, unlike in English common law, there was no prohibition on propensity evidence because such courts were concerned only with "morality of duty." Stirparo, Reconsidering Pennsylvania's Lustful Disposition Exception, supra, 23 Widener L. Rev at 68. Church courts also followed other evidentiary rules in sex cases that have long

been abandoned, such as allowing evidence that a victim had a history of consenting to sexual encounters with other men as a defense to a rape charge. Id.

America has never had ecclesiastical, church courts. Reed, Reading Gaol Revisited, supra, 21 Am. J. Crim. L. at 166. But the colonies, nonetheless, imported some of the English ecclesiastical rules for sex cases, including the lustful disposition doctrine. Id. Originally, the doctrine was used in adultery cases to permit evidence of uncharged sexual activity between two consenting adults to show they had a "lustful disposition" toward one another and were, thus, more likely to have engaged in the charged adultery offense. Id.

"Statutory rape" offenses were the first codified sex crimes against children in the United States. Id. at 168. Courts expanded the lustful disposition doctrine to permit the admission of character evidence against people accused of statutory rape as well. Id. (citing Charles T. McCormick,

McCormick on Evidence §§ 186, 187, 188, 190 (John W. Strong, ed., 4th ed. 1992)).

The lustful disposition doctrine explicitly permitted the conclusion that the accused had a propensity to commit sex offenses based on his or her character. Id.; Stirparo, Reconsidering Pennsylvania's Lustful Disposition Exception, supra, 23 Widener L. Rev. at 69 (citing Black's Law Dictionary 539 (9th ed. 2009); L. S. Tellier, Annotation, Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses, 167 A.L.R. 559, 565 (1947)); Smith, Prior Sexual Misconduct Evidence in State Courts, supra, 52 Am. Crim. L. Rev. at 338; see also Basyle J. Tchividjian, Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions, 39 Am. J. Crim. L. 327, 336-37 (2012) (citing Burns v. State, 420 S.E.2d 582, 583 (Ga. Ct. App. 1992); Edward W. Cleary, McCormick on Evidence, 190, 560-61 (3d ed. 1984); Wigmore, Evidence in Trials at Common Law,

supra, § 58.2, at 398-402; State v. DeJesus, 953 A.2d 45, 49 (Conn. 2008)).

Washington courts adopted the lustful disposition doctrine for the specific purpose of establishing the character of the accused in order to demonstrate that he or she acted in conformity therewith. See, e.g., State v. Wood, 33 Wash. 290, 292, 74 P. 380 (1902) ("It is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity than between those whose behavior has been modest and decorous").

More recently, however, numerous jurisdictions have abandoned the lustful disposition doctrine (also referred to as the "depraved sexual instinct" or "lewd disposition" rule), holding that the rule does nothing more than permit improper propensity evidence, in violation of ER 404(b). See, e.g., State v. Grist, 147 Idaho 49, 54, 205 P.3d 1185 (2009); People v. Sabin, 463 Mich. 43, 68, 614 N.W.2d 888 (2000); State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716 (1998); State v. Osier,

569 N.W.2d 441 (N.D. 1997); State v. Winter, 162 Vt. 388, 392, 648 A.2d 624 (1994); Lannan v. State, 600 N.E.2d 1334, 1335 (Ind. 1992); Mitchell v. State, 539 So.2d 1366, 1372 (Miss. 1989); Getz v. State, 538 A.2d 726, 733-34 (Del. 1988).

At least two states have also found that the lustful disposition doctrine violates their state constitutional guarantees of due process. See State v. Cox, 781 N.W.2d 757 (Iowa 2020); State v. Ellison, 239 S.W.3d 603, 607-08 (Mo. 2007).

In the 1990s, the federal legislature and numerous other jurisdictions took steps to codify the lustful disposition doctrine into statute or court rule. The Washington Legislature followed suit in 2008, passing former RCW 10.58.090. That statute, like the federal rules, provided that evidence of the commission by the accused of any other sex offense was admissible in sex cases "notwithstanding Evidence Rule 404(b)." Former 10.58.090.

But this Court struck down that statute. In Gresham, the Court held the statute "cannot be harmonized with ER 404(b)"

because ER 404(b) "is a categorical bar to the introduction of evidence of prior misconduct for the purpose of showing the defendant's character and action in conformity with that character." Gresham, 173 Wn.2d at 429. Gresham emphasized that "there are no exceptions to this rule." Id.

If the codification of the lustful disposition doctrine cannot be harmonized with ER 404(b), then logic dictates that the doctrine, itself, cannot be harmonized with the rule, either.

This is particularly true given this Court's repeated warning that the potential for unfair prejudice from propensity evidence is "at its highest" in sex cases. See State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014); Gresham, 173 Wn.2d at 433; Smith, 106 Wn.2d at 776.

The Court has, similarly, cautioned lower courts to be on guard against the tendency toward lenient application of the rules of evidence in cases involving sex offenses:

> When deciding the issue of guilt or innocence in sex cases, where prejudice has reached its loftiest peak, our courts have been most liberal in announcing and fostering a nebulous exception,

> offering scant attention to inherent possibilities of prejudice. Just when protection is most needed, the rules collapse.

Saltarelli, 98 Wn.2d at 364-65 (quoting Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325 (1956)).

The lustful disposition doctrine is irreconcilable with ER 404(b). Gresham, 173 Wn.2d at 429. It is also incompatible with the Court's repeated admonishment that lower courts remain on guard against the very high risk of unfair prejudice resulting from the admission of propensity evidence in sex cases. See, e.g., Saltarelli, 98 Wn.2d at 364-64. This Court should grant review and hold that Washington courts may no longer apply the lustful disposition doctrine. Because the erroneous admission of the evidence prejudiced Mr. Maeurer, his convictions must be reversed.

2. Mr. Maeurer received ineffective assistance of counsel due to his attorney's failure to object to evidence regarding an irrelevant and inflammatory photograph.

At trial, defense counsel objected to the admission of a sexually graphic photograph that Jasper found on Mr.

Maeurer's phone, which depicted Autumn's mother Sunshine on her knees with Mr. Maeurer's semen on her face. RP 467, 513, 566. The court agreed and refused to allow the jury to view the photograph, ruling any probative value was far outweighed by the danger of unfair prejudice. RP 513-14. But counsel did not object to the admission of testimony *about* the photograph. Thus, several witnesses described the photograph in detail to the jury. RP 467-68, 519, 566-67, 690-91.

Counsel should have objected to the admission of all testimony about the photograph. The photograph was not relevant to the charges and was highly prejudicial, painting Mr. Maeurer in an unsavory light. Counsel's failure to object to the testimony about the photograph amounted to ineffective assistance of counsel.

The state and federal constitutions guarantee the accused the right to effective assistance from counsel. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. The accused receives ineffective assistance of counsel if his counsel performed deficiently and counsel's deficient conduct prejudiced him. Grier, 171 Wn.2d at 32-33.

An attorney performs deficiently if his conduct falls below an objective standard of reasonableness. Id. at 33. Although the reviewing Court presumes counsel's performance was reasonable, the defendant can rebut that presumption by demonstrating that no conceivable legitimate tactic explains counsel's performance. In re Pers. Restraint of Caldellis, 187 Wn.2d 127, 141, 385 P.3d 135 (2016). The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. Grier, 171 Wn.2d at 34.

An attorney's deficient performance prejudices a defendant if there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Grier, 171 Wn.2d at 34. A

reasonable probability is one sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 669.

Where the appellant claims that counsel performed deficiently by failing to make a motion to exclude evidence, he must show that the failure to object fell below prevailing professional norms, the objection would have been sustained if made, and the result of the trial would likely have been different if the evidence had not been admitted. State v. Sexsmith, 138 Wn. App. 497, 509, 157 P.3d 901 (2007).

Here, the trial court would likely have granted a motion to exclude testimony about the sexually graphic photograph if counsel had moved to exclude it. The photograph, depicting a sex act between Mr. Maeurer and his girlfriend Sunshine Ward—two consenting adults—was not relevant to the charged crimes. To be relevant, evidence must have a tendency to prove or disprove a fact, and that fact must be of consequence in the context of the other facts and the applicable substantive law. State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987); ER 401.

Whether Mr. Mauerer and Ms. Ward engaged in a consensual sex act had no bearing on whether Mr. Maeurer molested Autumn. The evidence was not relevant to prove a fact of consequence to the outcome of the trial.

Moreover, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Evidence is "unfairly prejudicial" if it "is likely to arouse an emotional response rather than a rational decision among the jurors." Rice, 48 Wn. App. at 13. A court must exclude evidence that has only minimal probative value if the undesirable characteristics of the evidence are pronounced. Id. In deciding whether to exclude evidence on the ground of unfair prejudice, the trial court should consider the availability of other means of proof and whether the fact the evidence is offered to prove is disputed. State v Cameron, 100 Wn.2d 520, 528, 674 P.2d 650 (1983).

Here, any marginally probative value of the photograph was vastly outweighed by the danger of unfair prejudice. The

witnesses' descriptions of the sexually graphic photograph, which depicted Sunshine Ward on her knees with Mr. Maeurer's semen on her face, undoubtedly elicited an emotional response among the jurors. The evidence likely led the jury to conclude Mr. Maeurer had depraved sexual proclivities and thus was more likely to have committed the charged crimes. The trial court recognized the prejudicial nature of the photograph and granted counsel's motion to exclude it, ruling any probative value of the photograph was far outweighed by the danger of unfair prejudice. RP 513-14. Counsel should have moved to exclude not only the actual photograph itself, but any mention of it.

Finally, the State had no need for the evidence. The purported relevance of the photograph was to demonstrate how Autumn's sexual abuse allegations came to light. Jasper found the photograph on Mr. Maeurer's phone and mistakenly assumed the woman in the picture was Autumn, not Sunny. RP 467-68, 519. He told his stepmother about the photo and that is

why she confronted Autumn, ultimately leading Autumn to disclose that Mr. Maeurer had allegedly molested her. RP 468, 519. But the State did not need for the jury to hear about the photograph. The jury could simply have heard that Autumn disclosed sexual abuse without hearing about what instigated the disclosures. After all, both Autumn's friend Katelyn and Katelyn's mother testified that Autumn disclosed sexual abuse to them, without explaining the circumstances surrounding those disclosures. RP 526-27, 552-56.

Because the evidence regarding the photograph had only marginal or no probative value, any probative value was vastly outweighed by the danger of unfair prejudice, and the State had no need for the evidence, the trial court would likely have granted a motion to exclude the evidence if counsel had made such a motion. Counsel had no reasonable tactical basis not to move to exclude the evidence. Counsel's conduct was deficient.

Counsel's deficient performance prejudiced Mr. Maeurer. This case was a credibility contest between Mr. Maeurer and

the complaining witness. "Because there were no eyewitnesses to the touching, nor any physical evidence, the question of guilt thus necessarily turned on the relative credibility of the accused and the accuser." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). The testimony regarding the photograph tended to portray Mr. Maeurer as "a person of abnormal bent, driven by biological inclination." Id. at 910 (quotation marks and citations omitted). "As such, it was relatively easy for the jury to believe [Mr. Maeurer] must be guilty because he could not help himself, and thus was more likely to be less credible in his recitation of events" than Autumn was. Id. The admission of the evidence likely influenced the jury's evaluation of all of the evidence and thus likely influenced the outcome of the trial.

Because counsel's failure to object to the admission of the evidence amounted to deficient performance that prejudiced Mr. Maeurer, his convictions must be reversed. Grier, 171 Wn.2d at 32-33; Thomas, 109 Wn.2d at 225-26; Strickland, 466 U.S. at 687.

3. The cumulative effect of the errors at Mr. Maeurer's trial deprived him of his constitutional right to a fair trial.

Under the doctrine of cumulative error, an appellate court may reverse a conviction where "the combined effect of errors during trial effectively denied the defendant his [check] right to a fair trial even if each error standing alone would be harmless." State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. amends. VI, XIV.

In Mr. Maeurer's case, the cumulative effect of the errors at trial requires reversal of his convictions. Taken together, the errors exposed the jury to extensive, highly prejudicial evidence regarding uncharged misconduct. This evidence strongly encouraged the jury to find guilt based on an improper propensity theory, which is disallowed because it directly contradicts the presumption of innocence. At the same time, the jury was exposed to additional prejudicial evidence that would not have been admitted but for counsel's failure to object. Taken together, these errors deprived Mr. Maeurer of a fair trial

by seriously undercutting his ability to hold the State to its burden or proof.

Even if this Court decides that each error, standing alone, does not require reversal, the cumulative effect of the errors at Mr. Maeurer's trial deprived him of a fair trial and requires reversal. Id.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 9th day of December, 2021. I certify this brief complies with RAP 18.17 and contains 4,795 words, not including the parts of the document exempted from the word count by the rule.

/s Maureen M. Cyr
State Bar Number 28724
Washington Appellate Project – 91052
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone: (206) 587-2711
Fax: (206) 587-2710
Email: maureen@washapp.org

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EDWIN GRAVES MAEURER, Appellant.	DIVISION ONE No. 81557-1-I UNPUBLISHED OPINION

DWYER, J. — Edwin Maeurer appeals from his two convictions of child molestation in the third degree. Maeurer asserts that the trial court erred by admitting certain evidence in violation of ER 404(b). Additionally, Maeurer contends that his defense attorney provided ineffective assistance by not objecting to the exclusion of certain testimony. Finally, Maeurer asserts that cumulative error deprived him of a fair trial. Because Maeurer fails to establish an entitlement to relief on any of these claims, we affirm.

I

Edwin Maeurer and Sunshine Ward were in a relationship and lived in a house together. In 2014, Ward's 14 year old daughter, A.E., moved into the house. Between 2014 and 2016, Maeurer made numerous sexual advances toward A.E.

The first time that A.E. recalled Maeurer touching her inappropriately was sometime in 2014 when A.E. was learning how to drive. On this occasion, A.E.

was alone in a vehicle with Maeurer. While A.E. was sitting in the passenger seat of the vehicle, Maeurer performed a "random brake check," reached toward A.E., and grabbed her breasts. Thereafter, Maeurer continued to occasionally perform "random brake checks" and grab A.E.'s breasts when he drove with A.E.

A.E. also recalled that Maeurer touched her inappropriately sometime in 2015. A.E. had "lower back problems" and Maeurer offered to give her a "massage." Maeurer unbuttoned A.E.'s pants and removed her underwear. While A.E. was laying on her stomach, Maeurer "rubbed [her] butt and continued to get lower and go towards [her] vagina." However, A.E. repositioned her body such that "he wouldn't be able to touch" her vagina. Maeurer "asked what was wrong" and A.E. "just turned away and covered [her]self up." Maeurer then stopped touching A.E. on this occasion.

Then, for several months in 2016, Maeurer gave A.E. massages approximately once per week. A.E. recalled that, for several of these massages, Maeurer "grab[bed] a towel from his bathroom and baby oil." Maeurer then placed the towel on his bed and A.E. laid "face down" on the towel. While A.E. laid down, Maeurer unhooked her bra and removed her pants and underwear. Maeurer "would mainly play with [A.E.'s] butt," but he also attempted to touch her breasts and vagina. During these massages, A.E. "could feel something that wasn't his hand or a normal body part touching [her] butt." A.E. believed that Maeurer touched her with his exposed penis.

Additionally, on more than one occasion, Maeurer asked A.E. to engage in sexual intercourse with him. According to A.E., Maeurer offered her money and

said that he would pay her to "put it in" her. A.E. understood this to mean that Maeurer wanted to put his penis inside of her.

One day, Maeurer gave A.E. a dildo. Approximately 20 minutes after giving A.E. the dildo, Maeurer entered her bedroom and asked whether she "needed help using it."

Furthermore, according to A.E., Maeurer frequently made comments about how her "breasts and . . . butt would look in . . . certain pieces of clothing." A.E.'s friend, Katelyn Howard, also recalled hearing Maeurer compare A.E.'s body to Ward's body. Similarly, Howard's mother heard Maeurer compare A.E.'s breasts to Ward's breasts and make "jokes about how she look[ed] like her mother, but a younger version."

While A.E. was living with Maeurer and Ward, A.E.'s brother found a photograph on Maeurer's cell phone that depicted Ward with Maeurer's semen on her face. A.E.'s brother, under the mistaken belief that this photograph depicted A.E. instead of Ward, informed his father and stepmother about the photograph.

On A.E.'s 16th birthday, A.E.'s father asked her about the photograph. Although the photograph did not depict A.E., she informed her father and stepmother that Maeurer had been touching her inappropriately.

The State charged Maeurer with two counts of child molestation in the third degree.[1] Following a jury trial, Maeurer was found guilty as charged. The

[1] In the information, each of the counts contained the same language, which provided: On or about from the 31st day of July, 2014 to the 30th day of July 2016, in the County of Whatcom, State of Washington, the above-named Defendant, being at least forty-eight (48) months older than A.E., had sexual contact with A.E., who

trial court imposed a standard range sentence of 60 months of incarceration for each count, to run concurrently.

Maeurer appeals.

II

Maeurer contends that the trial court erred by admitting testimony regarding comments that Maeurer made to A.E. about her body. According to Maeurer, the trial court should have excluded this testimony under ER 404(b). We disagree.

A

When the admissibility of evidence is challenged by invocation of ER 404(b), we review a trial court's ruling to admit or exclude the evidence for abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019). Additionally, we may affirm the trial court's ruling "on any ground within the pleadings and proof." State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587 (1997).

B

As a general rule, "[a]ll relevant evidence is admissible." ER 402. One exception to this general rule is provided by ER 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such

---

was at least fourteen (14) years old but less than sixteen (16) years old, and not married to the defendant; contrary to Revised Code of Washington 9A.44.089, which violation is a class C felony.

> as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In determining whether evidence of other misconduct is admissible under ER 404(b),

> the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

"This analysis must be conducted on the record, and if the evidence is admitted, a limiting instruction is required." State v. Arredondo, 188 Wn.2d 244, 257, 394 P.3d 348 (2017).

C

Prior to trial, Maeurer filed a motion in limine to exclude testimony from Howard "about a comment Edwin Maeurer allegedly made [to A.E.] to the effect of you are a beautiful young woman, and you look like your mother." Maeurer asserted that this testimony should be excluded under ER 404(b). The trial court denied this motion.

Additionally, on the day that the trial commenced, the State called A.E. to testify, outside the presence of the jury, as an offer of proof. A.E. testified that Maeurer would frequently "talk about [her] breasts, [her] butt, [and] how [she] would look in some clothing." The State sought to obtain a ruling from the trial court authorizing A.E. to testify about the comments that Maeurer had made about her body. During the hearing on the offer of proof, Maeurer's attorney argued, among other things, that the testimony regarding these comments

should be excluded under ER 404(b). The trial court ruled that the testimony was admissible as evidence of Maeurer's "lustful disposition" toward A.E.

D

There are three reasons why the trial court did not err by ruling that the testimony in question was admissible. First, our Supreme Court "has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended [person]." State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991) (citing State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983)). "'The important thing is whether it can be said that it evidences a sexual desire for the *particular* [person].'" Ray, 116 Wn.2d at 547 (emphasis added) (quoting Ferguson, 100 Wn.2d at 134). Moreover, "'[t]he kind of conduct receivable to prove this desire at such . . . subsequent time is whatever would naturally be interpretable as the expression of sexual desire.'" Ray, 116 Wn.2d at 547 (second alteration in original) (internal quotation marks omitted) (quoting Ferguson, 100 Wn.2d at 134).

The comments that Maeurer made to A.E. about her body tended to prove that Maeurer had a lustful disposition toward A.E. Indeed, these comments tended to show that Maeurer was sexually attracted to A.E. Therefore, the trial court did not err by ruling that the testimony regarding these comments was admissible to demonstrate Maeurer's lustful disposition toward A.E.

Next, "evidence that completes the story of the crime charged or provides immediate context for events close in both time and place to that crime is not subject to the requirements of ER 404(b)." State v. Sullivan, 18 Wn. App. 2d 225, 237, 491 P.3d 176, 183 (2021). Indeed, "[s]uch evidence is not of *other* misconduct of the type addressed in ER 404(b)." Sullivan, 18 Wn. App. 2d at 237 (citing State v. Grier, 168 Wn. App. 635, 647, 278 P.3d 225 (2012)). Rather, evidence of this kind "'more appropriately falls within ER 401's definition of "relevant" evidence, which is generally admissible under ER 402, rather than an exception to propensity evidence under ER 404(b).'" Sullivan, 18 Wn. App. 2d at 236 (internal quotation marks omitted) (quoting State v. Dillon, 12 Wn. App. 2d 133, 148, 456 P.3d 1199, review denied, 195 Wn.2d 1022 (2020)).

The testimony regarding the comments that Maeurer made to A.E. about her body completed the story of the crimes charged. Indeed, Maeurer was charged with violating RCW 9A.44.089(1), which provides:

> A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, *sexual contact* with another who is at least fourteen years old but less than sixteen years old and the perpetrator is at least forty-eight months older than the victim.

(Emphasis added.)

Notably, "'[s]exual contact' means any touching of the sexual or other intimate parts of a person *done for the purpose of gratifying sexual desire* of either party or a third party." RCW 9A.44.010(2) (emphasis added).

The comments that Maeurer made to A.E. about her body provided significant context to complete the story of the crimes charged. In particular,

these comments tended to show that Maeurer touched A.E.'s intimate parts for the purpose of gratifying a sexual desire. At trial, Maeurer denied ever touching A.E. in a sexual manner. According to Maeurer, he massaged A.E.'s shoulders on one occasion, but only while she was clothed and Ward was present. The challenged testimony supported both the State's theory that Maeurer had improperly touched A.E. and its theory that he did so to gratify a sexual desire.

Finally, "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). After all, "[i]t is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The State bore the burden to prove that Maeurer had "sexual contact" with A.E. RCW 9A.44.089(1). In order to establish this element, the State was required to show that Maeurer touched A.E.'s intimate parts "for the purpose of gratifying sexual desire." RCW 9A.44.010(2). The comments that Maeurer made to A.E. about her body tended to show that, when Maeurer touched A.E., he did so in order to gratify a sexual desire.[2]

[2] Maeurer contends that the testimony regarding the comments that he made to A.E. about her body "was not admissible to prove the element of sexual gratification because that element was not disputed at trial." Br. of Appellant at 11. However, before Maeurer testified, his counsel moved for a directed verdict, asserting that, with regard to one of the counts charged, there was insufficient evidence to support a jury finding that Maeurer touched A.E. for the purpose of gratifying a sexual desire. Therefore, whether Maeurer touched A.E. to gratify a sexual desire was, in fact, in dispute.

Accordingly, Maeurer's assignment of error fails.

III

Maeurer next contends that his trial attorney provided ineffective assistance of counsel by not objecting to testimony describing a photograph in which Ward was depicted with Maeurer's semen on her face. According to Maeurer, his trial attorney should have objected to this testimony because it was irrelevant and unduly prejudicial. Because defense counsel's decision to not object to this testimony can be described as a legitimate trial strategy, we disagree.

The defendant bears the burden to prove ineffective assistance of counsel. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To meet this burden, the defendant must establish that

> (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

McFarland, 127 Wn.2d at 334-35.

"To combat the biases of hindsight, our scrutiny of counsel's performance is highly deferential and we strongly presume reasonableness." In re Pers. Restraint of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). "For many reasons . . . the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." State

v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

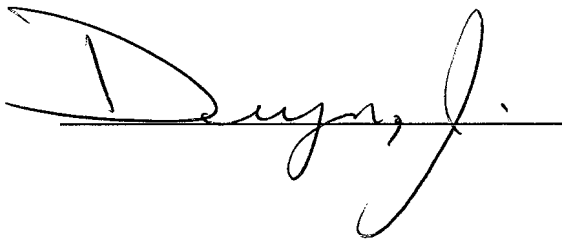
During opening argument, Maeurer's counsel emphasized the sexually explicit photograph depicting Ward in order to demonstrate that the investigation of Maeurer was rushed and based on a mistaken belief:

> Good afternoon, ladies and gentlemen of the jury. I think it's important to start with how this case was generated. The State made reference to a picture that the brother of [A.E.] found of an explicit nature of [A.E.]'s mother, Sunny, on the phone of Mr. Maeurer, and Mr. Maeurer and Sunny Ward were in a dating relationship. The picture was on Mr. Maeurer's phone. [A.E.]'s brother is going through the phone, sees the picture, remarkably somehow confuses it with his sister, who is 15 years old, and his mom is in her 30s.
>
> Based on that mistaken belief, I expect the testimony to show, the evidence to show that [A.E.] was taken to her therapist, and I'll briefly mention that I expect the evidence to show that [A.E.] was already in therapy previous to 2014. Goes to the therapist. Before she goes to the therapist, actually, she says that's not me. That picture is not me, but she makes a disclosure, what can be characterized as a disclosure. Goes to the therapist. The therapist sends a request to a [child protective services] worker.
>
> What I expect the evidence to show based on that is the CPS worker interviews [A.E.], but doesn't follow proper protocol. This also occurs in front of Officer Brown, Everson Police Department. Officer Brown -- to say it wasn't an investigation is an understatement. Officer Brown did absolutely nothing but listen to the allegation.
>
> He immediately goes and makes an arrest. He did not talk or interview, for example, [A.E.]'s mother, who was there during this period of time, Sunny. He did not interview [A.E.]'s brother . . . ; did

> not talk to the therapist; did nothing after maybe from the time the report I expect hit his desk or the call, to the time arrest is made, four hours. That's it.
>
> I also expect the testimony or the evidence to show that at least one event that was described on August the 4th, which is the date that all of this, all of these things happened, August 4th, 2016, when Mr. Maeurer is arrested by Officer Brown after not doing an investigation, I expect a further incident between [A.E.] and Officer Brown where she says one of these things could have been a dream. I don't know. It could have been a nightmare, but at that point, see, the problem is it's too late, because Edwin Maeurer is already arrested. There's no take-backs for that.

Thus, defense counsel made use of the disputed evidence to further a legitimate trial strategy. Counsel's representation has, therefore, not been shown to be deficient. Because both prongs of the ineffective assistance of counsel test must be met for appellate relief to be warranted, the failure to demonstrate either prong ends our inquiry.[3] State v. Classen, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

Affirmed.



WE CONCUR:

[3] Maeurer also asserts that cumulative error deprived him of a fair trial. "The cumulative error doctrine applies when several trial errors occurred and none alone warrants reversal but the combined errors effectively denied the defendant a fair trial." State v. Jackson, 150 Wn. App. 877, 889, 209 P.3d 553 (2009). Because no trial errors occurred, there was no cumulative error.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81557-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Kimberly Thulin, DPA
[kthulin@co.whatcom.wa.us]
Whatcom County Prosecutor's Office
[Appellate_Division@co.whatcom.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: December 9, 2021

WASHINGTON APPELLATE PROJECT

December 09, 2021 - 4:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	81557-1
Appellate Court Case Title:	State of Washington, Respondent v. Edwin Graves Maeurer, Appellant
Superior Court Case Number:	16-1-00989-4

The following documents have been uploaded:

- 815571_Petition_for_Review_20211209162205D1462365_0922.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.120921-03.pdf

A copy of the uploaded files will be sent to:

- Appellate_Division@co.whatcom.wa.us
- kkooistr@co.whatcom.wa.us
- kthulin@co.whatcom.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Maureen Marie Cyr - Email: maureen@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20211209162205D1462365