No. 89392-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JESSE SCOTT LAKE

Petitioner

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#42202-6-II

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Jesse Scott Lake, petitioner, respectfully requests that this Court accept review of the Court of Appeals decision in case number 42202-6 terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner respectfully requests that this court review the Court of Appeals decision, affirming the trial court's decision in this case. A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on September 24, 2013 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Whether the hearsay rule prevents participants to a conversation from testifying to the contents of the conversation as a "verbal act"?

2. Whether a defendant's hand written statement should be admitted into evidence as substantive evidence and used during deliberations?

IV. STATEMENT OF THE CASE

A. *Procedural History*

Petitioner adopts the procedural history as set forth in his opening brief.

B. *Facts*

Petitioner adopts the statement of facts as set forth in his opening brief.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Lake respectfully requests that this court accept review of this case as it conflicts with decisions from this Court and the various Courts of Appeals. Specifically, the decision is contrary to the decisions in City of Seattle v. Gerry, 76 Wn.2d 689, 458 P.2d 548 (1969); State v. Gregory, 25 Wn. 2d 773, 171 P.2d 1021 (1946); State v. Gonzales-Hernandez, 122 Wn. App. 53, 92 P.3d 789 (2004); State v. Roberts, 80 Wn.App 342, 908 P.2d (1996), as well as ER 801. Further, it presents issues of a constitutional magnitude. As such the case is should be accepted pursuant to RAP 13.4(b)(1), (2) and (3).

A. MR. LAKE WAS NOT AFFORDED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

As the courts in this state have continuously held, "when a party opens up a subject of inquiry on direct or cross examination, he contemplates that the rules will permit cross-examination or redirect examination ...within the scope of the examination in which the subject matter was first introduced." Ang v. Martin, 118 Wn.App. 553, 562, 76 P.3d 787 (2003), *affirmed* by Ang v. Martin, 154 Wn.2d 477, 114 P.3d 637 (2005)*(quoting* State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). The rule is all about fairness and truth-seeking. Both the defendant and prosecutor should have the opportunity to meet fairly the evidence and arguments put forward by the other. State v. Stackhouse, 90 Wn.App. 344, 359, 957 P.2d 344, 957 P.2d 218

(1998)*(citing* United States v. Robinson, 485 U.S. 25, 33, 108 S.Ct. 864, 99 L.Ed.2d 23 (1998)). As stated in Gefeller:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

76 Wn.2d at 455.

It is this curious rule that the trial court utilized in denying defendant the opportunity to meet fairly the evidence and arguments put forward by the state in this case. Adhering to pretrial rulings, defendant was not questioned nor did he testify to his lack of criminal history, which the court held was not relevant. However, the state then extensively questioned him regarding his failure to give complete statements to the authorities when initially questioned. RP 773:6-777:25; RP 789:19-793:24; 799:5-801:9; 807:10-808:2. To explain this lack of a complete statement, the defense, on rebuttal, attempted to demonstrate that this was the first time he had been arrested and questioned by the police and was, therefore, unaware of the importance of a complete statement. RP 808:6-15.

In an analogous situation, a defendant, in a criminal bench trial,

was prevented from explaining why he was unaware of his rights, due to his limited educational and environmental background. City of Seattle v. Gerry, 76 Wn.2d 689, 458 P.2d 548 (1969). Because he was unable to do so, the court reversed the conviction.

The Court of Appeals refused to consider this ruling because it held that it was not preserved for appeal, as there was no objection. Court's decision at 9-10. However, the State was the party objecting and the trial court sustained the objection. As such, the Court of Appeals decision is contrary to City of Seattle, supra. Review should be accepted on this issue.

B. THE HEARSAY RULE DOES NOT PREVENT THE ADMISSISION OF CONTENTS OF A CONVERSATION (I.E. VERBAL ACTS).

The decision whether to admit or refuse evidence is within the discretion of the trial court and will be reversed based on a manifest abuse of discretion. State v. Iverson, 126 Wn.App. 329, 336, 108 P.3d 799 (2005). A trial court abuses its discretion when the decision is manifestly unreasonable, exercised on untenable grounds or untenable reasons. In other words, if the court's decision is based on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. State v. Hudson, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

In sustaining the state's hearsay objections on numerous

occasions, the trial court applied the wrong legal standard and based its ruling on an erroneous view of the law. Specifically, the court simply did not understand the hearsay rule, essentially ruling that any verbal statement made outside of the courtroom was, in fact, hearsay. However, the hearsay rule is not all encompassing. It is defined as:

> ...a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c). Conversely, when a statement is not offered for the truth of the contents of the conversation, but only the fact that it was made, it is not hearsay. State v. Gonzalez-Hernandez, 122 Wn.App. 53, 57, 92 P.3d 789 (2004).

For example, an out of court statement is not hearsay if it is offered to explain its effect on the listener, rather than the truth of its content. See State v. Roberts, 80 Wn.App. 342, 352, 908 P. 2d 892 (1996). Kathy Lake attempted to testify about the conversation she had with Brett Howell. The defense attempted to question him about the same conversation. However, the court sustained the hearsay objections from the state even though it went directly to why and how Mr. Lake reacted and the credibility and motivations for A.M. to make false accusations.

The Court of Appeals held, without citing to any citation, that the conversation was hearsay and further that there was no argument

presented as to BH's recollection of the conversation between BH and KL. Court's opinion at 8. However, the appellant's brief addresses both issues in the argument section, so it is unclear as to how the court could conclude that the issue was not argued. See Appellant's brief at 15. The brief merely incorporated both trial court rulings in the same argument because it was the same conversation and based on the same law as set forth in the brief.

The Court of Appeals likewise held that it was hearsay for Mr. Lake to testify as to his knowledge of his heritage. Court's Opinion at 9.

In its ruling the Court cites to the definition of hearsay as set forth in ER 801(c), which sets forth when a "statement" is hearsay. However, the Court simply ignored the definition of "statement" as set forth in ER 801 (a), which requires it to be an "assertion". Based on the appellate court's ruling, all statements made outside of court would be considered hearsay.

However, that has never been the law and none of the proffered testimony here included an "assertion", which would have made it hearsay pursuant to the rules. The decision is directly at odds with Roberts, supra and Gonzales-Hernandez, supra. Further, it completely ignores the difference between what are known as "verbal acts" and the definition of "statement". Because the case hinged on the alleged victims' credibility and that of Mr. Lake it was extremely prejudicial

not to allow the above testimony into evidence. Thus, this Court should accept review as the decision is in direct conflict with the above cases and ER 801.

C. THE COURT SHOULD REVERSE THE TRIAL COURT BECAUSE IT ALLOWED INTO EVIDENCE, OVER OBJECTION, EVIDENCE THAT WAS NOT RELEVANT TO THE ISSUES OF THE CASE AND, EVEN IF RELEVANT, ITS PREUDICIAL EFFECT OUTWEIGHED ITS PROBATIVE VALUE.

1. The evidence was not relevant.

The evaluation of relevant evidence is analyzed under ER 401. ER 401 defines relevant evidence of that evidence having the tendency to make the existence of any fact as a consequence to the determination of the action more probable or less probable than it would be without the evidence. As mentioned above, the admissibility of evidence, while generally within the sound discretion of the trial court, will only be reversed if there is an abuse of discretion. An abuse of discretion exists when no reasonable person would take the view adopted by the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-914, 16 P.3d 626 (2001).

In State v. Cissne, 72 Wn.App. 677, 865 P.2d 564 (1994), Division III of the Court of Appeals discussed whether statements made by the defendant in the course of the arrest were relevant to prove an element of the crime of driving under the influence. While reversing on other grounds, the court found that particular statements the defendant made to the police officer were relevant because "objective

manifestations of insobriety, personally observed by the officer, are always relevant where ... the defendant's physical condition is an issue." 72 Wn.App at 687 *(quoting* State v. Nagel, 30 Ohio.App.3d 80, 80, 506 NE.2d 285, 286 (1986). The court, therefore, ruled that defendant's statements were properly admitted because the issue in that case was the defendant's intoxication. Id.

Here, the court allowed in testimony on no less than two occasions, including statements that Mr. Lake told A.M. that she looked like her mother, and that Kathy Lake and her sister were sexually abused by their father, neither of which had anything to do with the elements of the offense, which was whether Mr. Lake sexually abused his two children. Additionally, the court allowed testimony that Mr. Lake called his daughters sluts and whores.

None of this evidence was relevant for any purpose. It was at most character assassination. Thus, none of it was relevant to prove an element of the crimes.

First, the evidence regarding the prior sexual abuse of the sisters was allowed in to suggest that Kathy Lake was somehow impacted by it to ignore the alleged abuse involving her own children. However, there was no expert testimony suggesting that this was a product of one's own abuse and was admitted merely to undermine Kathy Lake's credibility and ultimately the credibility of the defense of the case.

Likewise, the comments regarding whether A.M. looked like her

mother did not demonstrate any sexual attraction by Mr. Lake towards his step daughter. Nor did any alleged name calling prove an element of the charge. It was admitted merely to undermine Mr. Lake's credibility to show some type of speculative propensity and disparage him.

2. The probative value of the evidence was outweighed by its prejudicial effect.

Assuming some relevance, the evidence was still prejudicial. ER 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Unfair prejudice is evidence that is more likely to arouse an emotional response rather than a rational decision by the jury. State v. Stackhouse, 90 Wn.App. 344, 356, 957 P.2d 218, *rev. denied* 136 Wn.2d 1002, 966 P.2d 902 (1998). Moreover, the court is required to weigh the evidence to determine unfairness during trial. 90 Wn.App. at 356. The court's decision is reviewed on an abuse of discretion standard. State v. Ames, 89 Wn.App. 702, 706, 950 P.2d 514, *rev. denied* 136 Wn.2d 1009, 966 P.3d 903 (1998). Evidence of other acts is inadmissible to prove the character of the defendant. ER 404(b).

In State v. Trickier, 106 Wn.App. 727, 25 P.3d 445 (2001), the

Court of Appeals addressed the admission of evidence of other crimes, wrongs or acts. In Trickier, the defendant was prosecuted for possession of stolen credit cards, the various witnesses all testified to the defendant's possession of other stolen items. In reversing the conviction, the Court of Appeals held that this testimony was highly prejudicial because he was not on trial for possessing any of those other items. 106 Wn.App. at 733. Moreover, the state's theory that it was admissible u nder a res gestae theory was meritless because it had not been demonstrated that his possession of the other items was "an inseparable part of his possession of the stolen credit card." Because of its admission, the jury was left to conclude that the defendant was a thief, which is prohibited under ER 404(b). Id. at 734.

Additionally, the court was required to go through a balancing test prior to admitting the evidence-something it did not do here. As stated in State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984), the court is required to go through a balancing test, beginning with the basis for its admissibility. As the court stated:

> ER 404(b) states that evidence of other crimes, wrongs or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith. Such evidence is admissible, however, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. If the evidence is admissible for one of these purposes, a trial judge must determine whether the danger of undue **prejudice** from its admission outweighs the probative value of the

evidence.

We have frequently observed that this balancing of probative value versus **prejudice** should be done on the record. Thus in State v. Tham, 96 Wn.2d 591, 597, 637 P.2d 961 (1981), we noted:

...

In State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982), this court was more specific as to the trial court's obligations:

The court must identify the purpose for which the evidence is to be admitted.... Only after the court has concluded ... that the evidence is relevant, can it appropriately balance the probative value against the prejudicial effect under ER 403.

We cannot overemphasize the importance of making such a record. Here, as in cases arising under ER 609, the absence of a record precludes effective appellate review. See State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984). Moreover, a judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating the specific reasons for a decision insures a thoughtful consideration of the issue. These reasons, as well as others, led us to conclude in Jones that a trial judge errs when he does not enunciate the reasons for his decision.

We hold that the same rule applies to evidence of prior misconduct admitted under ER 404(b). Indeed, these cases present an even more compelling need for adequate records. In ER 609 cases, the evidence is only admitted for one purpose-to impeach the defendant's **credibility.** Evidence can be admitted under ER 404, however, for several substantive purposes. Unless the trial court identifies the purpose for which it believes the evidence is relevant, it is difficult for that court (or the reviewing court) to determine whether the probative value of the

> evidence outweighs its prejudicial effect. See State v. Saltarelli, supra at 366.
>
> We conclude, therefore, that the trial court erred.

In rejecting this basis for appeal, the Court of Appeals found that the above evidence met the "low threshold" of relevance to show that Mr. Lake was sexually attracted to his child. Court's opinion at 10. And while the court acknowledged that the probative value for this theory put forward by the State was "admittedly low", the court refused to find that the probative value was outweighed by the prejudicial impact. Court's opinion at 11. The Court of Appeals also affirmed the trial courts decision to allow into evidence statements that Mr. Lake called his daughters "sluts and whores" Court's opinion at 12.

All of these rulings ignored the cases cited above. Thus, pursuant to RAP 13.4(b)(1) and (2), this court should accept review.

D. THE ADMISSION OF MR. LAKE'S WRITTEN STATEMENT TO THE DETECTIVES AS SUBSTANTIVE EVIDENCE WAS ERROR.

During the course of the trial, the state was allowed, over objection, to admit Mr. Lake's written statement made at the time of his initial arrest. Importantly, Mr. Lake never confessed to the crimes and the statement was allowed to go to the jury as impeachment evidence. However, this admission allowed undue influence as to a particular piece of evidence.

In addressing this issue, and holding that it is reversible e r r o r

to allow the admission of such evidence, the Washington Supreme Court stated in State v. Gregory, 25 Wn.2d 773,777, 171 P.2d 1021 (1946):

> It was admitted, doubtless upon the theory that it embodied a confession by appellant of the offense charged. But the transcript, in this instance, was not admissible as a confession, for, throughout the examinations and at all times, appellant has steadfastly denied that she killed the child or inflicted any injuries whatsoever upon it. The evidence of her conflicting statements was, of course, admissible, but not so the transcript of the examinations. To hold it admissible would, in effect, by authority for the transcription of the testimony of any particular witness in a case and submission of it the jury as an exhibit.

(citations omitted).

This is precisely what happened here. The defense did not contest that the oral testimony could be used as a prior inconsistent statement for impeachment purposes, but objected to the admission of the exhibit. By allowing it in, the court allowed it to receive undue influence above and beyond any other testimony. Pursuant to Gregory, this was error.

However, the Court of Appeals held that the defense did not preserve the error on appeal even though counsel objected twice. Court's opinion at 13. While the defense did not have specific case law to cite to the court, it specifically objected to its admission as improper. Interestingly, the trial court never requested that the state provide authority for its admission, only the defense. The objection

was made twice, it was preserved and the decision is in direct conflict with Gregory, supra. Review should be accepted.

E. MR. LAKE WAS DENIED HIS RIGHT TO A FAIR TRIAL BASED ON THE ACCUMULATION OF ERRORS.

The courts of this state have long held that the combined effect of an accumulation of errors, none of which standing alone might be sufficient to constitute grounds for reversal, may well require a new trial when considered together. State v. Badda, 63 Wn.2d 176, 183, 63 P.2d 176 (1963). In so doing, the court should consider all errors, preserved and not preserved, in determining whether Mr. Lake received his constitutional right to a fair trial. State v. Alexander, 64 Wn.App. 147, 151, 822 P.2d 1250 (1992)*(citing* State v Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Curry, 62 Wn.App. 6776, 679, 814 P.2d 1252 (1991)). The doctrine applies when the defendant establishes the impact the errors had on his right to a fair trial. State v. Thorgerson, 172 Wn.2d 438, 454, 258 P.3d 43 (2011).

Applying these standards in State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984), the Washington Supreme Court reversed the defendant's conviction wherein it held that the accumulated evidentiary errors necessitated a new trial. See also, Alexander, supra (cumulative error necessitates a new trial).

Similarly, in this situation, the cumulative impact of all of the evidentiary errors necessitate a new trial, a fair trial, one that allows the

defense to counter the state's case based on proper evidentiary rulings--something that did not occur in this trial. Based on the above arguments, the standard applies here and this Court, for all of the reasons set forth above, should accept review on this basis. Notwithstanding, the Court of Appeals' decision to the contrary, there was significantly more than a single evidentiary error in Mr. Lake's trial. As such, he was denied his due process rights to a fair trial and the Court should accept review pursuant to RAP 13.4(b)(3).

VI. CONCLUSION

Based on the arguments, records and files contained herein, petitioner respectfully requests that this court accept review of this matter.

Respectfully submitted this 11 day of October, 2013.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: _____
WAYNE C. FRICKE
WSB #16550

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor, WSB #14811
Deputy Prosecuting Attorney
946 County-City Building
Tacoma, WA 98402

Jesse Scott Lake
P.O. Box 2037
Milton, WA 98375

Signed at Tacoma, Washington, this 11th day of October, 2013.

LEE ANN MATHEWS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSE SCOTT LAKE, Appellant.	No. 42202-6-II UNPUBLISHED OPINION

BJORGEN, J. – A jury returned verdicts finding Jesse Scott Lake guilty of second degree incest for conduct against SL[1] and guilty of first degree child molestation and second degree incest for conduct against AM.[2] Lake appeals his convictions, asserting that the trial court erred by (1) excluding certain testimony as inadmissible hearsay, (2) not allowing him to testify about his lack of prior criminal history, (3) admitting as a trial exhibit his handwritten statement to police at the time of his arrest, (4) allowing testimony that Lake had told his wife that if she lost weight she would look more like her daughter, one of the child victims, (5) allowing testimony that certain witnesses had been victims of prior sexual abuse, and (6) allowing testimony that Lake had called the child victims "whores" and "sluts." Lake also asserts that cumulative error denied his right to a fair trial. In his statement of additional grounds for review, Lake repeats

[1] We use initials to identify the minor victims and certain witnesses under this court's General Order 2011-1. We also use initials to identify adult witnesses, apart from the defendant, who share a last name with the child victims to protect the victims' privacy.

[2] The jury also entered a verdict finding Lake not guilty of first degree child molestation for conduct against SL.

several of the arguments raised by his appellate counsel and also asserts that the trial court erred by (1) denying his motion to sever his charges for trial as to each victim, (2) allowing a witness to testify about a "black rubber circular thing" found in Lake's dresser, and (3) allowing a witness to testify about Lake's opinion regarding his daughter receiving counseling. Lake also asserts in his statement of additional grounds that the Milton police department's investigation of his crimes was flawed. We affirm.

FACTS

Lake is the biological father of SL and the stepfather of AM. AM's mother, KL, began a relationship and moved in with Lake in 1995. Shortly after KL moved in with Lake, he began touching AM inappropriately. Lake engaged in various acts of sexual contact with AM beginning when AM was in first grade and continuing until AM was 18 years old.

When AM was in the tenth grade, Lake began giving her massages that would include massaging her buttocks, breasts, and vaginal area while she was naked. These massages would take place nearly every day and would typically occur in Lake's bedroom with AM lying on his bed and Lake kneeling beside the bed. During some of these massages, Lake would have AM face away from him, and she could hear him grab something from out of his dresser and then feel him thrusting into the bed. On one occasion, Lake went to the bathroom to wash his hands and AM felt an object that she suspected was a sex toy placed between Lake's mattress and box spring. Sometime later, AM looked in Lake's dresser and found a rubber vagina, a rubber mouth, and lubrication.

Lake's biological daughter, SL, had visitation with him on the weekends. SL also lived full time with Lake for approximately a year when she was in the fifth grade. Starting around

this time, Lake would watch SL while she was in the shower and would follow her into her bedroom and watch as she got dressed. SL saw Lake engage in this same behavior with regard to AM. Lake would also rub both girls' buttocks and breasts while they were wearing only a towel.

In October 2008, AM began secretly dating BH. About four months into their relationship, BH became concerned that something inappropriate was taking place at AM's home based on AM's reaction when he tried to be intimate with her. BH discussed his concerns with SL, who told him that Lake was sexually abusing her and AM. The following day, BH told his father about the allegations and then reported the allegations to the police. The State charged Lake by third amended information with two counts of first degree child molestation and two counts of second degree incest for his conduct against AM and SL.

Before trial, Lake moved to sever his charges for trial as to each of the victims, which motion the trial court apparently denied.[3] Also before trial, the State filed a motion in limine to exclude evidence of Lake's lack of criminal history. The trial court granted the State's motion without objection from defense counsel. RP (3/1/2011) at 5.

At trial, SL testified about Lake's stated reasons for touching her and AM as follows:

> [SL]: [Lake] read in a book that girls should be touched by their dad otherwise they're going to grow up and be promiscuous and feel unloved and stuff like that just because of our neglect so we need to be touched.
>
> [State]: Okay. And did he ever tell you that if he didn't do that, that children would grow up to be whores?
>
> [SL]: Yes, I was trying to put it nicely but yes, we would be sluts and whores.

[3] The trial court's ruling on Lake's motion to sever his charges is not included in the record on appeal.

> [State]: We need to know exactly what he said so you're not going to embarrass anyone here, okay?
> [SL]: Okay.
> [State]: So why don't you tell me what he said?
> [SL]: Basically we would be sluts and whores if we were not touched by our father, that the neglect would be — we would try to find it elsewhere and the only boyfriend we needed, basically, was him and we didn't need anyone else.
> [State]: Okay.
> [SL]: That basically he was our boyfriend.

Report of Proceedings (RP) at 178-79. Defense counsel did not object to this testimony. Then the following exchange took place later in SL's testimony:

> [State]: Would [Lake] ever call you or [AM] in front of you any derogatory names or anything like that?
> [SL]: Yes.
> [State]: What kind of names would he call you?
> [Defense counsel]: Your Honor, I'm going to object as it being not relevant and 403(b).
> [Trial court]: Overruled, you may answer the question.
> [SL]: Slut, whore.

RP at 213-14. Over defense counsel's objection, the trial court allowed SL to testify that Lake had told KL that if KL lost weight, she would look like AM. SL also testified that to her knowledge her father was not Native American, and that her family was not registered as Native Americans.

On the second day of trial, the State requested the trial court to revisit a prior ruling excluding evidence that KL and her sister, TM, had been sexually abused by their father when they were children. The State argued that the evidence was relevant because TM indicated that she became concerned and confronted KL about behavior she had witnessed between Lake and AM based on her and KL's past abuse. The trial court ruled:

> As to the prior child abuse, I think that is relevant, and does not in any way implicate the defendant or pass on his character, his prior bad act, it explains

> why this person might be extra sensitive when she sees something happening in the home. So as to that issue, I'm allowing it.

RP at 229.

During the cross-examination of BH, defense counsel asked BH to state what KL had told him during a telephone conversation. The State objected to defense counsel's question, asserting that it would elicit hearsay testimony; the trial court sustained the objection. When KL testified for the defense, defense counsel also asked her to state what she had told BH during a telephone conversation, and the trial court sustained the State's hearsay objection.

After Lake testified that he was a Native American from the Seneca tribe, the following exchange took place:

> [Defense counsel]: Are you registered?
> [Lake]: No, sir.
> [Defense counsel]: Okay. Do you know the reasons why—what's the history of the registration?
> [Lake]: The history of the registration was they started in the Dawes and it was named after the guy Dawes.
> [State]: Your Honor, I would object to his narrative. Questions and answers, not—
> [Trial court]: Yes, I'd rather not get into a narrative.
> [Defense counsel]: I don't want to get too much but it did come up with [SL], that's why I'm even asking, Your Honor.
> [Trial court]: Can you ask him a more specific question then [sic] what's the history of the registration. I mean, that's a pretty broad area, maybe you could narrow it. Thank you.
> [Defense counsel]: That's fair enough. In fact, I'll repeat that question.
> [Defense counsel]: What is the history of the registration?
> [State]: Well, Your Honor, same thing—
> [Trial court]: No, I actually meant that I—I think that's a little too broad.
> [Defense counsel]: Oh, too broad, okay.
>
> . . . .
>
> [Defense counsel]: Without going into so much of that, why are you not registered as a Native American?
> [Lake]: My great, great grandparents chose not to be registered because if they were to get registration—
> [State]: Well, Your Honor—

. . . .

[State]: I'm not sure that this is from personal knowledge. I'm not sure what this answer is based on.

[Trial court]: Do you want to lay some foundation?

[Defense counsel]: Do you have knowledge as to why there is no registration?

[Lake]: Yes, sir.

[Defense counsel]: And where does the history or the reasons why come from?

[Lake]: My father and my uncle who—it's been handed down orally.

[Defense counsel]: Orally?

[Lake]: Yes, sir, it's an oral tradition.

[Defense counsel]: In writing as well and oral tradition?

[Lake]: Yes, sir.

. . . .

[Defense counsel]: Okay. That would be—

[State]: I think that is hearsay, Your Honor.

[Trial court]: It is hearsay.

[Defense counsel]: The writing part of it.

[State]: It's still hearsay.

. . . .

[Defense counsel]: Did you learn—well, let me ask you this. I'll get back to that. So are all Native Americans registered?

[Lake]: No, sir, most Native Americans are not registered.

[Defense counsel]: Okay. And you have grown up as a Native American?

[Lake]: Yes, sir.

RP at 713-15.

During Lake's cross-examination, the State asked why he omitted certain details to the police when providing them with a written statement. Then, during redirect, defense counsel attempted to ask Lake whether he had ever been previously investigated, but the trial court sustained the State's objection based on its ruling on the State's motion in limine to exclude evidence of Lake's lack of a prior criminal history. During closing, the State argued that Lake's testimony included details that he did not give to police in his written statement.

The jury returned a verdict finding Lake not guilty of first degree child molestation for conduct against SL and returned verdicts finding Lake guilty of second degree incest for conduct

against SL and guilty of first degree child molestation and second degree incest for conduct against AM. Lake timely appeals his convictions.

ANALYSIS

I. HEARSAY

Lake first contends that the trial court erred by excluding certain testimony as inadmissible hearsay. We disagree.

We review a trial court's decision to exclude or admit evidence at trial for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Evidence constituting hearsay is not admissible at trial unless an exception applies. ER 802. Here, defense counsel attempted to elicit testimony from KL describing the content of a conversation she had with BH:

> [Defense counsel]: [W]hat did you do once you had that phone number?
> [KL]: I called it.
> [Defense counsel]: Okay. And did you get an answer?
> [KL]: Yes.
> [Defense counsel]: And was it a male or a female that answered?
> [KL]: It was male.
> [Defense counsel]: Okay. Did you know who it was at that time?
> [KL]: No.
> [Defense counsel]: Did you talk to that person?
> [KL]: Yes.
> [Defense counsel]: What did you tell that person?

RP at 654. The State objected to defense counsel's question on the basis that it would elicit hearsay testimony, and the trial court sustained the objection. Then, outside the presence of the

jury, defense counsel argued that the testimony was not being offered to prove the truth of any matter asserted and instead was being offered to show that a conversation had occurred and to show what action KL took as a result of the conversation. The trial court responded, "Then all you need to do is say we had a conversation, I had a conversation with [BH], you don't need to get into the content of the conversation and as a result of the conversation did you take action, yes, I did and here's what I did." RP at 660. Following the trial court's ruling, KL testified that she had a conversation with BH and, as a result, she found out that BH had been texting her daughter.

We can discern no error from the trial court's ruling excluding this evidence as inadmissible hearsay. Defense counsel's question asking KL to relay the content of a conversation she had with BH would have elicited out-of-court statements, and defense counsel was able to achieve its stated purpose for offering the evidence without eliciting hearsay testimony.[4] In addition, to the extent that Lake contends the trial court erred by excluding testimony regarding the actual content of KL and BH's conversation, that issue is not preserved for appeal, since defense counsel did not present the trial court with an offer of proof as required under ER 103(a)(2).

[4] Lake also appears to assign error to the trial court's ruling excluding as inadmissible hearsay BH's testimony in regard to this same telephone conversation between BH and KL. Lake mentions the trial court's ruling excluding BH's hearsay testimony in the fact section of his brief but does not present argument addressing that ruling in the argument section of his brief. Accordingly, we do not address it. RAP 10.3(a)(6); *see also State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (absent supporting argument or citations to relevant authority, an assignment of error is waived).

Lake also contends that the trial court erred by sustaining the State's hearsay objection to testimony describing the source of Lake's knowledge that he is Native American. Again, we disagree. Here, the trial court excluded testimony that Lake's father and uncle told Lake that their family was Native American. Thus, Lake sought to present testimony consisting of out-of-court statements to prove the truth of his Native American heritage. Lake does not explain in his brief how this proffered testimony fell outside the definition of "hearsay" and does not state any exception to the hearsay rule allowing for this testimony to be presented at trial. Accordingly, we hold that the trial court properly excluded the testimony as inadmissible hearsay.

II. EVIDENCE OF LACK OF PRIOR CRIMINAL HISTORY

Next, Lake asserts that the trial court denied his due process rights by not allowing him to testify as to his lack of prior criminal history. Because Lake failed to object to the trial court's ruling excluding evidence of his lack of prior criminal history, we hold that he has waived the issue on appeal. Trial counsel must specifically object at trial to preserve an evidentiary issue for appellate review. RAP 2.5(a); *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000); *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Further, a party may only assign error in the appellate court on the specific ground of evidentiary objection made at trial. *State v. Fredrick*, 45 Wn. App. 916, 922, 729 P.2d 56 (1986) (citing *Guloy*, 104 Wn.2d at 422).

Here, the trial court granted the State's motion in limine to exclude any evidence of Lake's lack of prior criminal history without objection from defense counsel. Then, when defense counsel asked Lake whether he had ever been investigated before his arrest, the trial court sustained the State's objection based on its previous ruling on the State's motion in limine.

Further, defense counsel did not ask the trial court to revisit its prior ruling. Accordingly, Lake has failed to preserve this issue for appeal and we do not address it further.

III. RELEVANCE /ER 403

Next, Lake assigns error to two of the trial court's rulings admitting evidence at trial, asserting that the evidence was not relevant and, alternatively, that the prejudicial effect of the evidence outweighed its probative value. Again, we disagree.

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Relevant evidence is any evidence that has a "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. All relevant evidence is admissible unless its admissibility is otherwise limited. ER 402. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). Under ER 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

Lake first asserts that the trial court erred by overruling his objection to SL's testimony that Lake had told KL that she would look more like AM if KL lost weight. The State argued at trial that the testimony was relevant because it tended to show that Lake was sexually attracted to AM because, in Lake's view, AM was a younger and thinner version of his wife. The State is correct. This evidence meets the low threshold of relevance as it supported an inference that Lake touched AM for the purpose of satisfying a sexual desire, an essential element of the crimes of first degree child molestation and second degree incest. RCW 9A.44.010(2), .083; RCW

9A.64.020. Additionally, although the probative value of this evidence to the issue of Lake's sexual attraction to AM is admittedly low, we hold that the probative value of the evidence is not outweighed by the danger of unfair prejudice in light of the extensive testimony by AM regarding Lake's sexual conduct against her.

Lake also asserts that the trial court erred by admitting evidence that KL and TM had been sexually abused as children by their father. We agree with the trial court that this evidence was relevant to provide a context for the reasons TM became concerned when she observed Lake's behavior of walking in the bathroom and shutting the door while AM was naked in the shower. In addition, the probative value of this evidence was not outweighed by the danger of unfair prejudice, because the evidence did not reflect on Lake's character. Accordingly, the trial court did not err by admitting evidence that KL and TM had been sexually abused by their father.

IV. RELEVANCE/ER 404(b)

Next, Lake asserts that the trial court erred by overruling his objection to SL's testimony that Lake had called her and AM "sluts" and "whores." Br. of Appellant at 17. At trial SL testified, without objection, that Lake had told her and AM that they would grow up to be "sluts and whores" if he did not touch them. RP at 178. Because Lake did not object to this testimony at trial, he waived any objection to it on appeal. RAP 2.5(a). The State later asked SL if Lake called her or AM any derogatory names, to which defense counsel objected "as it being not relevant and 403(b)."[5] RP at 214. After the trial court overruled defense counsel's objection, SL testified that Lake called her and AM "[s]lut" and "whore." RP at 214.

[5] For the sake of Lake's argument on appeal, we assume that his defense counsel meant to object under ER 404(b) not ER 403(b).

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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before admitting ER 404(b) evidence, a 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. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "This analysis must be conducted on the record." *Foxhoven*, 161 Wn.2d at 175.

We review the erroneous admission of evidence under ER 404(b) under the nonconstitutional harmless error standard. *State v. Gresham*, 173 Wn.2d 405, 425, 269 P.3d 207 (2012). Under this standard, an error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Gresham*, 173 Wn.2d at 425 (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Assuming without deciding that the trial court erred in admitting this evidence, we hold that the error was harmless. The admission of evidence that Lake called SL and AM "[s]lut" and "whore" did not have a material effect on the outcome of Lake's trial in light of SL's previous testimony that Lake had stated AM and SL would grow up to be "sluts and whores" if he did not touch them, to which Lake did not object.

IV. ADMISSION OF LAKE'S WRITTEN STATEMENT TO THE POLICE

Next, Lake contends that the trial court erred by admitting his handwritten statement to the police as a trial exhibit.[6] We hold that Lake failed to preserve this contention for appeal. At trial, Lake objected to his handwritten statement being admitted as a trial exhibit, but did not object to the statement being read to the jury. When the trial court asked for legal authority supporting Lake's position that the statement could be read to the jury but not be admitted as a trial exhibit, defense counsel asked the court to reserve its ruling until he could research the issue. Then, when the trial court revisited the issue of admitting Lake's handwritten statement as a trial exhibit, defense counsel merely renewed his previous objection, but did not provide the trial court with any additional legal authority to support his position that the statement was inadmissible as a trial exhibit. Because Lake failed to articulate a specific objection to the admission of his statement to the police as a trial exhibit, we hold that he has waived any objection to its admission on appeal. RAP 2.5(a); *Guloy*, 104 Wn.2d at 422.

V. CUMULATIVE ERROR

Finally, Lake contends that cumulative errors by the trial court resulted in a fundamentally unfair trial requiring reversal of his convictions. Under the cumulative error doctrine, a defendant may be entitled to a new trial if several trial errors, standing alone, are not grounds for reversal, but, when combined, the error denied the defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because the only potential error here was the trial court's failure to conduct an ER 404(b) analysis on the record when admitting evidence that

[6] Lake did not designate this exhibit in the record on appeal.

Lake had called AM and SL "[s]lut" and "whore," which we have held to be harmless, the cumulative error doctrine does not apply.

VI. Statement of Additional Grounds (SAG) Issues

In his SAG, Lake first repeats several of his appellate attorney's contentions with the trial court's evidentiary rulings. Because we have resolved those issues as argued by his appellate counsel, we do not address them again here.

Next, Lake asserts in his SAG that the trial court erred by denying his motion to sever his charges for trial as to each victim. We review a trial court's denial of a motion to sever charges for a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990). Washington law disfavors separate trials. *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005 (2002). But under CrR 4.4(b), the trial court "shall grant a severance of offenses whenever . . . the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." A defendant seeking severance of charges must show that a trial on multiple counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *Bythrow*, 114 Wn.2d at 718. Although the record on appeal contains Lake's motion to sever his charges and the State's response thereto, it does not include any record of the trial court's decision denying his motion to sever. Accordingly, on this record we cannot determine the trial court's reasons for denying Lake's severance motion and, thus, we cannot review Lake's claim that the trial court manifestly abused its discretion by denying his severance motion.

Next, Lake contends that the trial court erred by allowing a witness to testify about a "black cylinder" object made of rubber found in Lake's dresser, asserting that the evidence was

not relevant and was highly prejudicial. RP at 450. We disagree. Testimony regarding the object found in Lake's dresser was relevant to support AM's testimony that Lake used a sex toy when giving her massages, which in turn was relevant to prove that Lake massaged AM for the purpose of satisfying his sexual desire. Although the witness's description of the black cylinder object differed in certain respects from AM's descriptions of Lake's sex toys, the differences in the descriptions goes to the evidence's weight and not its admissibility. Judgments regarding the weight of evidence are within the exclusive function of the trier of fact and not subject to review. *State v. Rogers*, 44 Wn. App. 510, 517, 722 P.2d 1349 (1986). Further, we do not view the evidence's prejudicial effect as outweighing its probative value in light of AM's previous testimony regarding Lake's sex toys.

Next, Lake contends that the trial court erred by overruling his objection to hearsay testimony from his ex-wife, AL, regarding Lake's opinion about SL participating in counseling. The trial court properly overruled the hearsay objection because the testimony concerned a statement made by the defendant, which is not considered hearsay under ER 801(d)(2).

Finally, Lake contends that his convictions should be reversed because the police investigation into his crimes was flawed. Specifically, Lake argues that the police investigation into his crimes was flawed because the police did not interview all potential witnesses, did not record their interviews with AM and SL, and conducted its interview of SL while AM was present. Lake fails, however, to show that these alleged flaws resulted in any violation, constitutional or otherwise, requiring reversal of his convictions. Rather, Lake's SAG argument goes to the weight of the evidence and the credibility of witnesses, as his trial counsel argued

during closing. Again, we do not weigh evidence or make credibility determinations, as this is left to the jury. *Thomas*, 150 Wn.2d at 874.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, J.

We concur:

PENOYAR, J.

WORSWICK, C.J.

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