ORIGINAL

No. 44324-4-II

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

ABBIGAIL GUTIERREZ,
individually and as Guardian for N.L., a minor,

Respondent,

vs.

OLYMPIA SCHOOL DISTRICT,
a municipal corporation,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

N.L. was 6-years-old in the fall of 2010 when Olympia School District ("District") bus driver Gary Shafer began molesting her on a school bus. Shafer had access to N.L. while he was "riding along" with fellow bus driver Mario Paz without any purpose for being on the bus. Shafer molested N.L. and her best friend V.M.V. in the seat immediately behind Paz, which was the only seat on the bus that Paz could not see. On August 18, 2011, Shafer was convicted of multiple counts of child molestation in the first degree and sentenced to 175 months to life in prison for each count.

Abbigail Gutierrez, N.L.'s mother, filed this lawsuit against the District individually and on behalf of N.L. At trial, Gutierrez presented overwhelming evidence that the District failed to use reasonable care in its duty to protect N.L. from Shafer's molestations. The District systematically failed to acknowledge obvious red flags that Shafer was a risk of harm, including the fact that he was routinely riding along on buses without a purpose and in lieu of driving a bus for pay.

Even though Paz knew that Shafer was sitting with N.L. and V.M.V. and knew that he should not be sitting with them, Paz chose not to take steps to protect the children. As he later admitted, "[Shafer] broke the rules, and I was supposed to enforce the rules." Paz also ignored glaring red flags that Shafer posed a risk of harm, such as how Shafer would sit with N.L. and V.M.V. in the only blind spot seat, how he would change seats when the bus approached the school, and how he would

engage with kindergarten girls on a peer-to-peer level by telling them knock-knock jokes and talking to them about their day. According to Paz, both Shafer's requests to ride along and his conduct on the bus was "strange." In fact, in Paz's 18 years of bus driving experience, he could not remember a single driver who ever asked just to ride around on a bus because that is how he or she wanted to spend free time.

Shafer molested N.L. in the seat directly behind the bus driver to an extent so serious that she suffered post-traumatic stress disorder ("PTSD") with lifelong disability. According to psychological experts offered by both Gutierrez and the District, N.L. suffered PTSD from the molestation, requiring future psychological treatment ranging from the $33,000 estimated by the District's psychologist to $329,000 estimated by Gutierrez's psychologist. The jury found that the District was negligent for failing to protect N.L. from harm and awarded her $1,150,000 in general damages and $125,000 for future psychological treatment. The jury also awarded $150,000 in general damages for N.L.'s mother, Abbigail Gutierrez.

The District appeals, claiming several evidentiary errors that lack merit. The District received a more than fair trial and this Court should affirm

II. RESTATEMENT OF ISSUES

1. Did the District fail to preserve for appellate review its right to argue that the trial court erred in admitting N.L.'s "twenty times" statement without performing an ER 403 balancing? In the alternative, did the trial court exercise proper discretion by admitting N.L.'s "twenty times" statement, subject to an appropriate limiting instruction, when experts relied on the statement in forming their opinions?

2. Did the District fail to preserve for appellate review its right to argue that the trial court erred in showing the jury a 20 second video clip that included N.L.'s "twenty times" statement? Did the District invite any error regarding the video clip when it previously represented to the trial court that the jury viewing a different video of N.L. making out-of-court statements was the best means for the jury to evaluate those statements? In the alternative, did the trial court exercise proper discretion in allowing the jury to view the 20 second video clip when N.L. did not testify as a witness at trial and the District was able to cross-examine the experts relying on the statement regarding the bases of their opinions?

3. Did the District fail to preserve for appellate review its right to argue that experts "vouched" for N.L.'s credibility? Did experts "vouch" for N.L.'s credibility in light of the totality of the evidence?

4. Did the trial court exercise proper discretion in admitting V.M.V.'s and N.L.'s out-of-court statements about the nature of Shafer's relationship with them as circumstantial evidence of their state of mind?

5. Did the District affirmatively waive its objection to the admissibility of Shafer's judgment and sentence and testimony thereon for tactical reasons? In the alternative, did the trial court exercise proper discretion by admitting this evidence under ER 404(b) when it was relevant to and highly probative of the District's notice that Shafer posed a molestation risk?

6. Did the District fail to preserve for appellate review its contention that McGoey was unqualified to testify as an expert witness? In the alternative, did the trial court exercise proper discretion in finding McGoey qualified to testify as an expert witness when his opinion was based on 28 years of practical experience as a security consultant and independent evidence in the record supported his opinion?

7. Were the trial court's evidentiary errors, if any, harmless when overwhelming evidence established that molestation on a school bus was within the general field of danger and that the District should have known that Shafer posed a risk of harm to a student?

8. Did the trial court properly deny the District's motion for judgment as a matter of law when substantial evidence and all inferences therefrom, taken in the light most favorable to Gutierrez, established that molestation on a school bus was within the general field of danger and that the District should have known that Shafer posed a risk of harm to a student?

9. Did the trial court exercise proper discretion in denying the District's motion for a new trial when substantial evidence and all inferences therefrom, taken in the light most favorable to Gutierrez, established that molestation on a school bus was within the general field of danger and that the District should have known that Shafer posed a risk of harm to a student?

10. Is Gutierrez entitled to attorney fees and costs for defending this frivolous appeal brought only to delay justice?

III. COUNTER-STATEMENT OF THE CASE

A. The District Ignored Red Flags That Shafer Was Targeting Midday Bus Routes And Riding Along Without A Purpose.

Shafer was hired as a school bus driver in 2005 by the District's Transportation Director Fred Stanley and its Transportation Coordinator

Barbara Greer. RP 477, 520, 527, 549, 579, 1147; Ex. 2.[1] In hiring Shafer, the District did not perform reference checks, did not look into past employers, and did not look into Shafer's brief stint with the military. RP 521-522, 527. Shafer stated in the interview that he would make a good bus driver because of his "love of children," but when asked whether he was ready for the responsibility of driving children, Shafer stated, "Yes. But it's kind of scary." RP 526; Ex. 39.

Immediately after being hired in 2005, Shafer began targeting as many kindergarten, preschool, and special needs bus routes as possible. RP 480, 527-29; *see* Ex. 43. Stanley claimed at trial that the midday routes provided valuable earning opportunities and that Shafer needed the extra work. RP 527-28. But Shafer was not riding the buses for the money, and in fact, he abandoned an opportunity in 2006 to earn more money as a long-haul truck driver. RP 537-38. Shafer completed the truck driver training but returned quickly to riding along on other bus drivers' kindergarten, preschool, and special needs routes because he "missed the children." RP 537-39. And true to form, during the period of molestation in 2010, Shafer was not riding on midday routes for pay; instead, he was "volunteering" his time without pay to, according to the District's story at trial, "learn" routes and help with driver efficiency. RP 591, 607.

[1] The transcript for the pretrial proceedings on August 17 and September 5, 2012, is not sequentially numbered with the trial transcripts. For clarity, we cite to the pretrial proceeding transcript as "RP (Aug. 17, 2012)" and the trial transcripts as "RP."

Between 2005 and 2010, Shafer drove numerous midday kindergarten routes, including the Centennial Elementary route that N.L. rode, and knew the various areas that the routes served. RP 144, 480; *e.g.*, 74-75; Exs. 1, 43. To drive a new route, Shafer had route sheets that identified the stops for that school year, and he always had the option to radio transportation dispatch and ask a specific question if he was unsure. RP 110, 118, 370, 680. Even if Shafer actually needed to "ride along," he could have "learned" the route by riding it only once. RP 144.

Despite having driven nearly every midday kindergarten route in the District, RP 480, and despite his widely known need to earn extra money, RP 534, 537-38, Shafer would forego paid driving assignments and, instead, spend his time "riding along" with other bus drivers to allegedly "learn" their midday routes or help the drivers. RP 534-35. Between 2005 and 2010, for example, Shafer rode along with fellow bus driver Dale Thompson on his midday kindergarten route between 60 and 70 times. RP 257, 264. Shafer was able to ride along as much as he wanted because District Transportation Director Stanley chose to have no controls in place to monitor midday ride alongs. RP 487; Exs. 48-52.[2]

Stanley provided contradictory evidence at trial. On one hand, documentary evidence showed that Stanley had altogether no idea that Shafer rode along on buses. Ex. 43; *see also* Exs. 48-52 (Stanley had to

[2] In a survey after Shafer's arrest, Stanley wrote: "The event leading to his arrest did not happen while he was being paid to drive a route. He was volunteering to ride as a helper. We have no records of when or how often he may have done this." Exs. 48-52.

request a survey to determine where Shafer was "riding along."). On the other hand, Stanley claimed to have approved Shafer for *every single ride along* that he requested on the basis that Shafer was going to "learn" the route and/or help the bus driver. RP 487-89, 1304-05. Stanley made this claim even though evidence indicated that Shafer was not "learning the route" or "helping" anyone. RP 85-86 (Shafer not on Paz's bus to learn the route or help), 258 (not on Thompson's bus for an educational purpose), RP 264 (riding on Thompson's bus up to 70 times). Despite lacking a purpose to be on the bus, Stanley stated that he approved Shafer to ride along on Thompson's bus 60 to 70 times. RP 1304-05.

Indeed, Stanley conceded that he did not monitor Shafer's performance as a helper, did not ask for feedback about what Shafer was doing on the bus, did not ask whether Shafer was interacting with children, did not ask where Shafer was sitting on the bus, did not ask whether Shafer's efficiency was actually improving, and did not otherwise monitor Shafer's performance in assisting or volunteering on the bus. RP 537, 560, 607. Stanley let Shafer ride along on buses even though Shafer knew or should have known the route, *see* RP 264, 74-75, the driver could handle the bus without help, RP 327, 330, and the driver did not ask Stanley to assign extra help, RP 330.

The evidence before the jury was that the District's policy for ride alongs was a complete lack of policy or control: The drivers could ride along with whomever they wanted and whenever they wanted. RP 146, 264, 327, 330, 391, 537, 562. The jury had substantial evidence to believe

that Stanley did nothing to monitor ride-alongs, and all it took was for a bus driver to hop on a bus—no questions asked as to the purpose for being there. RP 487 (no controls); RP 562 ("They asked for permission to ride and I allowed it"; that is all it took.).[3]

The extent of Shafer's ride-alongs was particularly troubling because riding along was not a bus driver's regular job duty and responsibility. RP 590. Had it been a duty, the collective bargaining agreement with the bus drivers' union would have required the work to be paid. RP 1224. In fact, Shafer was not being paid for riding along because Stanley was not directing him ride along for an official purpose. RP 561, 535-36, 1305; *accord* 258 (not being paid). Nor did Stanley give Shafer expectations of his role on the bus, tell him where to sit, designate him as a monitor assigned to a student, or designate him as a trainer for a driver. RP 536, 1305-06. Stanley also did nothing to track which buses Shafer was riding or make records of who he was riding with. RP 532, 547, 99, 1304. Stanley had no written records of how many times Shafer rode along midday routes from 2005 until his arrest in 2011. RP 1304. And Stanley had no record of which routes, which drivers, or any written confirmation of having given Shafer permission to "ride along" each time. RP 1304. As a result of his careless approach, the District could not accurately identify what buses Shafer was riding on or whether he was

[3] Stanley stated that he gave Shafer permission for each route, but Stanley could not remember the buses Shafer rode on with any particularity, raising the distinct inference that Stanley actually gave him carte blanche authority to ride along whenever he wanted or simply had no institutional control whatsoever on potential child molesters getting on buses full of kindergarten students to access them.

there to "learn the route" or act as a monitor. RP 532.

Indeed, identifying Shafer's specific purpose for his ride-alongs would have been impossible to ascertain because he did not have one. Shafer asked to ride along on bus driver Thomas Reeves's midday kindergarten or preschool bus route because Shafer "was bored and didn't have anything to do." RP 335-36, 341. Likewise, Shafer's reason for riding along on John Bakewell's midday route was to "[j]ust hang out." RP 1126-1127. Shafer also gave no reason for wanting to ride Thomas Engle's midday kindergarten bus route, simply asking whether he could do so. RP 362-63, 365-66, 368. Even Shafer's behavior on his ride-alongs was notable; for example, Engle did not remember a single person other than Shafer who would ride along and get out of the front right passenger seat that was customarily reserved for a ride-along passenger to move around the bus and sit with kindergarten children. RP 391.

Riding along was not common and Shafer's extreme number of ride-alongs was concerning. Bus driver Jim Wall never had a ride-along passenger on a single one of his midday routes. RP 1254. Teachers who saw Shafer on the bus—and principals who knew of the same—thought that it was "unusual" that Shafer was on Paz's bus. RP 447. Even the District's standard of care expert, Janet Barry, agreed that a driver riding along on a bus to familiarize him or herself with the route would be "outside the norm." RP 1476. In fact, "if [] Shafer rode along ten times and was not being paid for any work as an assistant or supervisor," she would consider that "grossly outside the norm." RP 1480. Barry would

"want to know why" a bus driver was "habitually riding around" on buses. RP 1481. And she agreed that "[i]f you see that happening, you have to ask why. That's the rule." RP 1476, 1477.

Yet the District did not ask why, which was a huge cause for concern at trial for another one of the District's experts. Daniel Payne, the District's own security expert, stated that child safety is the number one priority in every decision about what adults will be allowed to get on a bus, and that the District must make a "conscious decision about whether it's a safe practice to let that person ride along on the bus." RP 1592. He continued, "the school district should only be allowing people on buses if there's a reason to have them on the bus." RP 1593. If you have a concern about how to deal with a situation, ask why. RP 1594. The school bus driver is the ultimate authority and responsibility to protect the children, and he or she is the District's representative to get that done. RP 1595. According to Payne, the transportation director is the one responsible for seeing the bigger picture, the patterns of behavior that may cause concern. RP 1595. He opined that the District should have in its procedures questions such as, "Why are you on the bus?" and "Why do you want to be on the bus?" RP 1598. Without these questions and controls, the District allowed Shafer to access the children despite a cause for concern that he was foregoing paid bus riding opportunities to "ride along" on buses that he did not need to be on. RP 74-75, 85-86; *e.g.*, Exs. 43, 50 (Shafer foregoing a paid midday driving route to instead ride along with Todd Adams, who was the one who took the paid substitute position

on the Centennial route in the fall of 2010).

B. Mario Paz Ignored Red Flags That Shafer Was A Danger To The Children And Failed To Enforce Safety Rules By Allowing Shafer To Sit With Children In A Seat He Could Not See.

In the 2010-2011 school year, Mario Paz was assigned to drive the Centennial Elementary bus route like he had been for 10 years before. RP 58, 73. As the assigned bus driver with 18 years of experience, RP 55, Paz knew very well that he was in charge of the safety and welfare of the children on his bus, including N.L. and V.M.V., who were best friends and rode his bus to kindergarten each day. RP 58, 59, 62, 65. N.L. and V.M.V. sat together in the seat directly behind Paz, which is a unique seat because it is the only blind spot on the entire 44 foot standard bus where the driver could not see with the overhead mirror. RP 58, 72, 76-77, 79; *see* Ex. 65.

Sometime in the fall of 2010, Shafer began riding along with Paz on his midday kindergarten Centennial route. RP 107. Paz and Shafer were friends outside of work, RP 56, and he knew that Shafer was an experienced driver familiar with the area that the Centennial route served. RP 74, 75. In fact, according to official route logs, Shafer had driven the Centennial route multiple times since he had been a bus driver. Ex. 43. Paz knew that Shafer was not on his bus to learn the route, and he also agreed that Shafer was not there as a monitor to help manage the kindergarten girls. RP 85-86; *see also* RP 262 (Shafer could not have been a monitor if he was concentrating on particular children and playing with them). Instead, Shafer used his free time to ride along on buses,

without pay, typically claiming he was doing so because he was bored. RP 107; 341, 347, 356, 219-220. Notably, in his 18 years of bus driving experience, Paz could not remember a single driver who ever asked just to ride around on a bus because that is how he or she wanted to spend free time. RP 86, 107, 141-42, 144, 163.

Despite these red flags, Paz still allowed Shafer to ride along on his bus in the fall of 2010 for no less than three different occasions. RP 90. On at least one of those occasions, Paz knowingly allowed Shafer to with N.L. and V.M.V. despite the fact that Shafer was sitting with girls in his blind spot. RP 62, 157; *cf.* RP 261, 322 (experienced bus driver Dale Thompson would not have allowed Shafer to just sit with kindergarten girls because he wanted to; would not have allowed Shafer to sit in blind spot). On the way to school, Shafer would sit in the seat behind Paz with either N.L. or V.M.V. in his lap, RP 201, 203, 217-18, 222, 234, until Paz pulled the bus into the school, at which point Shafer would move to the front right seat of the bus. RP 146. When Shafer was sitting with N.L. and V.M.V., Paz knew that he would tell the girls jokes and talk about what they were going to do at school that day. RP 79-80; *cf.* RP 321-323 (such behavior would not have been tolerated by Thompson), 343 (Reeves would not have allowed this sort of behavior).

Paz allowed Shafer to sit in the same seat with N.L. and V.M.V. even though he admitted that he had been trained to prohibit adults from sitting with children. RP 59, 61-62, 65-66. Paz agreed that the training he received made it clear that no adults were to sit with children and this was

a safety rule; in Paz's own words, "Policy states that you are not allowed to sit with kids, period." RP 67. Paz understood that this safety rule was designed to protect children from harm, specifically including sexual abuse. RP 61-63, 65-67. Paz also knew that according to the District's Transportation Policies and Procedures, his mission was to safely transport children to and from school:

> As a school bus driver, you bear a degree of responsibility imposed on no other group of professional drivers. Also the nature of your work requires that it be performed without the immediate presence or guidance of supervisory personnel.

RP 158; Ex. 70.[4] Paz was aware of this language and agreed that a bus driver's degree of responsibility is higher because their role is to transport children. RP 158-59. As a bus driver, Paz was in charge of enforcing safety rules and protecting the children, yet he knowingly allowed Shafer to sit in the blind spot seat with N.L. and V.M.V. in violation of the clear safety rule. RP 59, 60, 62, 65, 76. As Paz later admitted, "[Shafer] broke the rules, and I was supposed to enforce the rules." RP 66.

Paz allowed Shafer to break the clear safety rule because he "trusted him [and] figured he wouldn't do anything to the kids." RP 67, 78. But the safety rule was not discretionary and did not allow a driver to override the rule because he or she might "trust" the adult to sit with the children. RP 68, 78-79; *accord* RP 246-47. The safety rule was black and

[4] The District supplies each employee with a copy of the written policies and rules. 163. Each employee signs that they have read and understood the policies at the beginning of each year. 163.

white. RP 68. Adults do not sit with children on their seats, especially with children in their lap, because there is a danger of inappropriate conduct. RP 68. Paz simply chose not to enforce the safety rule. RP 68.

Equally significant is that Paz admitted that his authorized supervisors who rode along would sit in the front passenger side so they could see the route and talk to the driver. RP 84; *accord* RP 323 (Dale Thompson saying the same), 374 (Thomas Engle saying the same). Paz agreed that the front right seat was the only seat where any other adult who has an official reason for being on the bus should be. RP 146. According to Paz's experience, it would not make sense if someone was trying to claim they were trying to learn the route by sitting in the back of the bus or by sitting in the seat behind the driver. RP 84-85.

Paz also knew that it was "strange" that Shafer was asking to ride on the bus. RP 86, 144; *accord* RP 445-46 (Centennial Elementary Principal Alice Drummer thought that it was "unusual" that there was a man riding N.L.'s bus). He also knew that it was strange because Shafer was violating one of the basic rules about sitting with children. RP 87, 144. Despite his own observation that Shafer's behavior was "strange," Paz ignored his training and the clear safety rule and allowed Shafer to ride along anyway, possibly because the two were good friends. RP 86. And Shafer, a bus driver who should know the rules, chose to break them right in front of Paz, another red flag that something "strange" was afoot.

As a result of his actions, Paz conceded to the jury that he did not exercise common sense by allowing Shafer to ride along on the bus and sit

with N.L. and V.M.V. RP 85, 158-59. Paz's concession highlighted an important violation of the transportation handbook:

> Every effort has been made to make this handbook as complete and up to date as possible; however, no single publication can anticipate and cover every possibility that might arise. ***It's therefore necessary that in addition to the information in this handbook, the application of mature judgment and common sense be an essential part of your responsibility***.

RP 159; Ex. 70 (emphasis added). Paz knew from his training that using common sense was a critical component of keeping children safe. RP 159; *accord* RP 251. Indeed, longtime bus driver Dale Thompson had rules and common sense practices that he employed every day to make sure the children he was transporting were safe and free from sexual abuse. RP 247, 250. But Paz did not exercise common sense and instead allowed his friend Shafer to ride along for no real reason, sitting in the same seat as kindergarten girls, telling them jokes, tickling them, and talking about their day. In violation of the transportation handbook's clear guidelines, Paz admitted to the jury that he failed to exercise his common sense in supervising the children on the bus:

> Q: Common sense should have told you [Shafer] should not have been in that seat where you couldn't see what he was doing, correct?
>
> [. . .]
>
> A: Yes. Common sense, yes.

RP 160; *cf.* RP 246-47 (Thompson viewed it as a safety concern to allow adults to ride along on the bus whenever). N.L. was a victim of Paz's negligent supervision and disregard for her safety; Paz put his friendship

with Shafer above his own common sense duty to prohibit Shafer from sitting with N.L. in a seat where Paz could not see. RP 157, 160. Paz ignored clear red flags that Shafer was on his bus for an improper purpose and was a risk to the children. *E.g.*, RP 251-52 (Thompson stated that an adult just wanting to ride along on a bus to spend time with children would be a red flag, especially if the adult sat in a seat with children where the bus driver could not see what they were doing); RP 261 (Thompson would not have allowed Shafer to sit with kindergarten girls); RP 352, 371 (no other driver had asked to ride bus driver Thomas Reeves' bus because they were bored). Recognizing his responsibility, Paz admitted that he "failed somewhere" in preventing Shafer from violating a clear safety rule by allowing Shafer to sit with N.L. and V.M.V. RP 153.

C. Shafer Rode Along With Paz And Sat With N.L. Longer Than One 20-25 Minute Ride.

At trial, Paz testified that Shafer rode along only three times and that there was only one 20-25 minute trip where Shafer was interacting with N.L. and V.M.V. RP 90, 95. Paz's testimony, though, ran contrary to the evidence before the jury and the record as a whole, including evidence that Shafer extensively groomed N.L. and evidence that he was on the Centennial bus multiple times.

For example, the jury heard testimony from Thurston County Sheriff's Office Sergeant Cheryl Stines indicating that N.L. was with Shafer multiple times. Specifically, in her interview with N.L., Sergeant Stines learned that Shafer tickled N.L. on multiple days, allowed her to sit

on his lap on multiple days, and told knock-knock jokes from his phone on multiple days. RP 217, 218, 236, 222; *e.g.*, RP 204 (N.L. said that Shafer was on her bus "some days," plural); 418 (elementary school teacher Melanie Evans testified that "I saw [an adult on Paz's bus] multiple times."). This testimony also accords with evidence submitted to the jury that Shafer also rode along with Todd Adams on the Centennial route twice in the fall of 2010. Exs. 43, 50. Notably, Adams was a substitute driver on these occasions, discrediting the District's position that Shafer was learning routes to drive them and earn more money. Exs. 43, 50.

Sergeant Stines recognized Shafer's conduct on the multiple ride-alongs as clear grooming behavior, or peer-to-peer level involvement designed to appeal to kindergarten children like N.L. to get closer to them. RP 217-18. Indeed, after Shafer was arrested, N.L. would pray for Shafer because she was concerned about him getting in trouble. RP 1071-72. N.L.'s mother, Abbigail, recalled:

> We started praying for him every night I know the first two weeks, or there was about a two-week period we prayed every night. And I did not bring that – that was upon her request that our nighttime prayers that – that we pray for him and his family [. . . .] [because] she felt bad for his wife and she felt bad for her friend that she had to tell on him. She felt bad that he was going to jail so she wanted him to be safe.

RP 1071-72. In similar form, V.M.V. began drawing pictures of Shafer and her, referring to him as her friend. Ex. 120. Gutierrez's forensic psychiatrist agreed that this level of grooming was the result of prolonged and extensive contact. RP 991.

Precisely due to the extent of contact, N.L. suffered extensive psychological trauma stemming from grooming and molestation. Dr. Jon Conte, an expert in the effects of child sexual trauma, opined that sexually abused children routinely manifest symptoms, such as fear, anxiety, nightmare, and avoidance of where the abuse took place. RP 909, 911-12, 922. Sometimes these symptoms disappear for a period of time; however, abuse victims are at a high risk of experiencing recurring symptoms because the child's understanding of the abuse and the meaning attached to it deepens and changes over time. RP 919-920. As Dr. Conte testified,

> A little child who's touched by somebody who they thought was a friend, was a grownup boy, later in life when they begin to learn what that really meant when that part of the body was touched, then you see all kinds of symptoms . . . like symptoms in sexual dysfunction that weren't even relevant when the child is present.

RP 920. On a more probable than not basis, Dr. Conte opined that N.L. faced a future risk of recurring Post-Traumatic Stress Disorder ("PTSD"), RP 924-25; cognitive distortions (feelings of excessive self-criticism, hopeless, and preoccupation with danger), RP 925-27; emotional alteration (depression, anger, and development of phobias or panic disorders), RP 928; dissociative periods, RP 929; and self-esteem issues and attendant academic or employment performance problems, difficulties in maintaining healthy relationships, revictimization, avoidance behaviors (such as substance abuse), and major mental illnesses. RP 924-36, 939-41.

Similarly, Dr. Mark Whitehill, Gutierrez's expert psychologist, opined that N.L. was suffering from PTSD. RP 1011-12. Part of this was

the result of the manipulation and trust that is inherently part of a sexual molester's grooming strategy. RP 1004. "[G]rooming refers to efforts made by an offender to get close to the child to set the child up for offending." RP 1004. In Dr. Whitehill's review, he noticed that N.L. referred to Shafer in a friendly way, as if he had ingratiated himself to N.L., connoting extended contact. RP 991. As a result of an extended grooming period, Shafer was able to build a significant degree of trust and implement various manipulation strategies. RP 1004. As an extensively groomed and molested victim, N.L. suffered a large break in trust when Shafer, who was seemingly friendly, turned out to be an abuser and hurtful person. RP 1004. This grooming process, the hurtful effects of abuse, and the breaches in trust were significantly damaging to N.L. As a result, N.L. became more emotional, was more irritable, and would cry and scream at trifles. RP 1006. She exhibited a variety of sleep deficits or disturbances, ranging from nightmares to difficulty falling asleep. RP 1006. N.L.'s response to men has also changed, and she fears riding the bus. RP 1006-07.

In addition to this evidence indicating that Shafer was grooming N.L. for much longer than one 20-25 minute bus ride, Paz himself gave contradictory testimony calling into question his assertion that Shafer rode his bus only three times, particularly when his testimony is juxtaposed against other testimony that Shafer habitually and regularly rode along on other buses. At first, Paz testified that Shafer was on the bus only two times. RP 90. Later, he testified that Shafer was on the bus three times.

RP 93. In response to this confusion, the jury asked Paz to confirm which it was. RP162-63. Paz testified that he could not remember, "So three times." RP 162-63. Paz also gave conflicting testimony as to why Shafer was on the bus. At one point, Paz testified that the only reason Shafer rode the third time was "because I was going to be gone the next day." RP 109. However, in response to a jury question, Paz stated that Shafer was not scheduled to be the substitute driver for Paz's bus in the next week. RP 163. The jury had many reasons to reject Paz's discredited testimony and infer that Shafer was riding on his bus more than three times.

Similarly, Paz's testimony itself suggests that Shafer was either on the bus more than the three times Paz stated or, at the very least, sitting with N.L. and V.M.V. more than once. Paz heard not only Shafer's jokes but also his conversations with N.L. and V.M.V. about "what they *do*" "*depending on what day.*" RP 79 (emphasis added). This raises the clear inference that there were multiple days in which these conversations occurred, further discrediting Paz's recount of events.

D. The District Ignored Prior Notice From A Parent Who Raised Concerns About Shafer Directly Before N.L. Was Molested.

In the fall of 2009, District Transportation Coordinator Barbara Greer received a phone call from Kevin Gearheart, a parent who was concerned that his kindergarten daughter S.G. said that she was never going to ride the bus again. RP 756. The District did nothing to investigate this matter. RP 757-59. As it turned out, Shafer was the substitute bus driver on the day that S.G. came home saying that she never

wanted to ride the bus again. RP 753.

S.G. was a kindergartener at McLane Elementary in 2009, RP 746, and began the school year "happy to get on the bus and go to school." RP 752. On October 19, 2009, S.G. was dropped off from her school bus 30 minutes late and was not "her chipper self." RP 746, 750-51, 753. At the time, S.G.'s regular bus driver, Karen Nelson, was sick and a substitute was driving the bus. RP 754.

At dinner later that evening, Gearheart asked S.G. how school was that day. RP 753. She looked at him and, "out of the clear blue," said, "Daddy, I'm not riding the bus home no more." RP 753. Gearheart asked her several times that night what happened to her on the bus, but S.G. replied by only shaking her head. RP 753-54. The next morning, Gearheart called the District and spoke with Joseph Bremgartner, S.G.'s school principal. RP 754. He explained how his five-year-old daughter unexpectedly said she was done riding the bus after the bus arrived 30 minutes late. RP 754. Bremgartner responded that the bus was probably late because the regular driver, Nelson, was having medical problems and a substitute was driving. RP 754.

Seeking more answers, Gearheart also called Greer, who was in charge of the bus driver scheduling and routing. RP 756. Gearheart told Greer the same thing: S.G.'s bus was 30 minutes late and now she no longer wanted to ride the bus. RP 757. The remainder of the conversation was not productive:

> It – at one point in time, you know, the conversation got a little heated between both of us because I didn't like the answer that I was getting. I just said how can my five-year-old daughter be happy and chipper about riding the bus to school and home from school and all of a sudden stop? I said something happened on the bus. She got yelled and screamed at, she saw something she didn't want to see, you know, I don't know. And she won't tell me. But I'm concerned that my bus route took an extra 30 minutes plus that day and my daughter is saying I'm not riding the bus home any more. And then again [Greer] proceeded to go back to well, you know, it's a substitute driver. The route's tough. It's – you know, the kids get out of school later. Just gave me all the things that, you know, I think that they would want a parent to hear. And I told her that's not acceptable.

RP 757-58. Thereafter, Gearheart made repeated phone calls to Greer, hoping that she would investigate the matter. RP 758-59. Nothing happened, and Gearheart chose to pick up his daughter from school every day. RP 759.

The next school year, in January 2011, Gearheart learned from the local news that Shafer was arrested for molesting children on District school buses. RP 761-63. Gearheart immediately called Bremgartner and Greer to determine whether Shafer was in fact a substitute driver on S.G.'s bus. RP 762-63. Greer wrote a memo to transportation supervisor Stanley on February 2, 2011, stating:

> Last school year I spoke with a dad (Kevin) about the length of ride his daughter had on the bus in the middle of the day. His daughter was in am kindergarten at the time. The family lives in Ken Lake and his daughter was on the bus for over an hour sometimes, especially if there was a sub-driver on the bus. His daughter was also the last student off the bus. He was concerned that a male bus

> driver was on the bus with his daughter alone and that the bus was sometimes 15 to 20 minutes late. I explained that all employees working for the district had background checks before they could work for the district.
>
> I spoke with the dad several times. When I told him there was nothing we could do about the length of the ride he was not very happy. His daughter's name is [S.G.].
>
> I spoke with Joe Bremgartner this morning regarding another issue on the bus that happened this morning. At the end of that conversation he asked if he could speak to me about another issue. I shut my door and our conversation continued. The dad believes that Gary Safer [sic] was one of the bus-drivers that drove his daughter's kindergarten route and was alone on the bus with his daughter. The father is very concerned especially because his daughter became terrified of riding the bus.
>
> The father has called the police and they are investigating.

Ex. 18. Despite its access to route sheets, the District never investigated or gave Gearheart an answer. RP 762-63. It was not until he talked to his daughter's kindergarten teacher that he was able to confirm that Shafer drove his daughter's bus on October 19, 2009. RP 764. Subsequently, Gearheart saw the official route sheet confirming the same.[5] Ex. 128.

E. The District Could Not Implicitly Trust Drivers Because It Had Evidence That At Least One Bus Driver Recently Had Inappropriate Contact With A Child Passenger.

The District's repeated assertion at trial was that it had no reason to be concerned about what Shafer might be doing on the bus because the

[5] On cross-examination, the District attempted to suggest that Gearheart received the date and then worked backwards. But Gearheart rejected this notion: "***I knew that [sic] the date that my daughter stopped wanting to ride the bus. You remember stuff like that . . . as a father protecting my children.***" RP 790, 795-96 (emphasis added).

District trusted its drivers. RP 544, 1206. But the District's line that it had the right to unreservedly trust its drivers failed in light of evidence that another driver, Sam McGee, had recently been terminated for inappropriately touching a young girl on a bus.

On October 16, 2008, Stanley wrote to bus driver Sam McGee that he was placing him on administrative leave because, in Stanley's own words, "several students complained that you touched them in a manner that either hurt them or made them feel uncomfortable." RP 543; Ex. 117. After the 2008 warning letter, another incident occurred with McGee in the fall of 2009 where he inappropriately touched a student on his bus who he had nicknamed "Smiley" and left two bizarre messages at her parents' home phone. RP 542, 554-56; Exs. 53-54. Based on his inappropriate touching, Stanley terminated McGee. RP 556-57; Ex. 54. The District knew that it could not implicitly trust bus drivers and should have had policies and procedures in place regarding ride-alongs and training in place to recognize nascent child molesters amongst them.

F. Gutierrez's Properly Qualified Expert, Chris McGoey, Confirmed That The District's Conduct Fell Below The Accepted Standard of Care.

Chris McGoey, a professional security consultant with 28 years of experience, testified as an expert witness for Gutierrez. RP 649. McGoey specialized in the "anticipation, recognition and prevention of crime on properties open to the public" and had been consulted by school districts around the country. RP 649-651. After reviewing the evidence in this case, McGoey had reached three conclusions: (1) "trusting the drivers is

not enough . . . you have to have systems in place to monitor your employees and to watch for changes in behavior that are at least unusual or might be suspicious or potentially dangerous"; (2) "you must have policies and procedures. If you don't know what's normal or have a way of everybody acting the same way so you can monitor deviation from that behavior, you have no way of knowing"; and (3) "if you're responsible, especially for children, you have a duty to report, act, intervene, or report so that the behavior doesn't become . . . dangerous or harmful." RP 658-660. McGoey ultimately opined:

> [This case was] protracted. This one spanned many years, many occurrences, many opportunities to cure a situation, many opportunities to discover a situation. And as I said, typically, ordinary policies and procedures and systems would have caught the unusual behavior, when it required some type of reporting and some type of inquiry into the behavior.

RP 666.

Over the District's objection, McGoey testified about the underlying facts forming the bases of his opinion, including N.L.'s out-of-court statement to Sergeant Stines that Shafer rode Paz's bus "sometimes" and another out-of-court statement by N.L. that Shafer rode her bus twenty times. RP 668, 672. After reviewing these statements and the other evidence in the case, McGoey concluded that Shafer rode Paz's bus "definitely more than three times" because Shafer's pattern was riding "multiple times with many drivers." RP 673. McGoey explained that Paz's testimony that he had never had another male riding along other than

a supervisor evaluating his driving "[spoke] volumes . . . this was unusual to have an adult want to ride on his bus in his spare time for no pay multiple times." RP 679. McGoey also reviewed the statement of Dawn Cooper, the bus barn dispatcher and a former bus driver, who also said that Shafer's ride-alongs were "unusual." RP 680. Thus, having policies and procedures in place for monitoring ride-alongs would have allowed detection of something unusual, such as "a ride-along multiple times." RP 679.

McGoey was also "astounded" at the lack of rules prohibiting or limiting Shafer's number of ride-alongs and the lack of any rules specifying whether, when, and where adults could sit with kindergarten children. RP 682-83. McGoey opined that there should have been procedures in place so the District could "set the standard of care" and monitor for deviations from those procedures; for instance, the lack of a rule prohibiting adults from sitting in a blind spot with children "certainly [gave] the opportunity for inappropriate acts to occur." RP 683. Finally, McGoey opined that whether under the District's boundary invasion policy or common sense, there should have been some specific educational purpose required for an adult riding a bus. RP 734.

G. The District Failed To Train Its Staff On Recognizing Sexual Grooming Behaviors And Other "Red Flags" Of Child Molestation.

In 2006, the Washington Office of Superintendent of Public Instruction distributed a statewide publication entitled "What every employee must be told in school districts," a publication concerning the

warning signs of sexual grooming of children. RP 148, 268-69; Ex. 91. Neither Paz nor other District bus drivers received training on this publication or the information contained within it. RP 147-48, 268-69.

In the spring of 2010, the school year before Shafer was arrested for his molestation of N.L., the District's superintendent and other administrative-level personnel received professional boundaries training. RP 270. This training included a PowerPoint presentation on awareness of the dangers school personnel pose as potential child molesters, RP 449, Ex. 115A, and included slides emphasizing that District employees had to "be on guard" regarding the behavior of their fellow District personnel, "even though they're school employees who have gone through background checks." RP 451; Ex. 115A. In particular, one of the slides stated that 12 percent of ***all*** school-related molestation charges each year involved school bus drivers, even though they comprised a relatively small percentage of the total number of District employees. RP 451-52, 1379; Ex. 115A. Another slide was entitled "Five-Step process" and discussed sexual grooming behaviors of which District employees needed to be aware. RP 452; Ex. 115A. One of the steps consisted of identifying a vulnerable child and engaging that child in peer-like involvement. RP 452; Ex. 115A. Other steps identified by the slide were desensitizing the child to touch and isolating the child in out-of-sight spots. RP 453; Ex. 115A.

Failing to appreciate the importance of such training, the District chose against ever training Paz or other bus drivers on child molestation

dangers and the danger directly posed by school personnel. RP 149, 269-70, 348, 418-19, 1386, 1394. The District specifically chose not to train its employees on the PowerPoint presentation or the information contained therein because it "felt people would reject some of the negativity of the message." RP 1386. Instead, the District developed a one-page "pyramid" that lacked the specific and valuable information contained within the PowerPoint presentation, such as the risk of child molestation posed by certain groups of school personnel. RP 1388-1389; Ex. 36. The District failed to train its bus drivers on even this obtuse "pyramid" until after Shafer's arrest. RP 1394. According to one veteran District bus driver, Dale Thompson, knowing that 12 percent of school personnel molesting children were bus drivers would have been useful because he otherwise "couldn't imagine" and would not suspect a fellow bus driver of committing such an act. RP 271-73. This underscores exactly the problem with District bus drivers never having received any training on "patterns of behavior which might give the red flag" that a fellow District employee was sexually grooming and molesting a child. RP 267-269, 271, 348-49, 377.

Similarly, the District adopted a "professional boundaries" policy in spring of 2010 but failed to advise bus drivers that any such policy existed. RP 277-79; Exs. 73-74. The policy's stated purpose was to "provide all staff, students, volunteers and community members with information to increase their awareness of their role in protecting children from inappropriate conduct by adults." RP 274-75. The policy defined

"[i]nappropriate boundaries" as "acts, omissions or patterns of behavior by a school employee that do not have an educational purpose and result in abuse." RP 279. It also provided, "All employees and volunteers will receive training on appropriate staff/student boundaries." RP 280. But like the earlier ignored training sessions on sexual molestation, Paz and other District bus drivers never received these policies or procedures or any training on them. RP 70, 274, 279-81, 349-50, 420-22, 600.

H. N.L. Disclosed Shafer's Molestation, And Shafer Was Convicted Of First Degree Child Molestation.

Early on the morning of December 30, 2010, N.L. disclosed to her mother, Abbigail Gutierrez, that Shafer had molested her. RP 1064. Abbigail immediately reported N.L.'s disclosure to law enforcement. RP 1064. On January 4, 2011, Sergeant Stines interviewed N.L. RP 189, 194. N.L. said that the molestation had occurred after Halloween but before Thanksgiving the previous fall. RP 200, 204. She had been sitting in the lap of a "grown-up boy named Gary" who was a "helper on the bus"; N.L. clarified that she meant that "Gary" was a "grown-up boy" like her father. RP 198-99, 201. "Gary" reached inside N.L's pants and underwear with his hand, touched her "private part," and "kept tickling N.L." RP 201-02. When shown a photograph of Shafer, N.L. immediately identified him as her abuser. RP 195-96.

Shafer was suspended from District employment and charged with and convicted of three counts of first degree child molestation—of N.L., V.M.V., and another girl riding another District bus, T.M.C.—that Shafer

committed between November 1, 2010 and December 17, 2010, and one count of possession of depictions of a minor engaged in sexually explicit conduct. RP 185; Ex. 12.

I. Gutierrez Filed This Lawsuit Against The District.

Abbigail, individually and on behalf of N.L., filed a lawsuit against the District to recover damages caused by its failure to properly supervise and protect N.L. She also alleged that the District did not exercise reasonable care to protect N.L. from Shafer by failing to properly supervise and train its agents and employees. CP 10-16. Litigation was intense, and the District fought to exclude much of Gutierrez's evidence that she had gathered throughout discovery.

J. The Trial Court Excluded Significant Portions Of Evidence Showing That The District Should Have Known That Shafer Was A Threat To Children.

The trial court excluded extensive evidence that the District knew or should have known of Shafer's repeated grooming and molestation activities. For example, the trial court excluded Shafer's post-arrest psychosexual evaluation by Sue Batson, in which he admitted to, among other things, grooming girls during his ride-alongs by "tickling them, and then tickling his way down into their pants"; committing 10-20 sexual acts on the job during 2010 alone, including masturbating on school buses, taking sexual pictures and videos up girl's dresses on buses, accessing child pornography on his cell phone while waiting on the school bus for children to come to him; and molesting at least five kindergarten girls on District buses between 2008 and 2010. RP at 12-14; Ex. 4 at 3-4, 8, 10.

The trial court also excluded Shafer's presentence investigation report, in which he admitted to fondling a 4-year-old's vagina and buttocks and attempting oral sex with her, all while on a school bus; grooming N.L. and V.M.V. during the fall and winter of 2010 on Paz's bus by tickling them all over, scratching their backs, and allowing them to sit in his lap; and fondling another student during the winter of 2010 while waiting at a bus stop for children to board. RP at 14-15, 949; Ex. 5 at 1, 14-15. Further, the trial court excluded a 2012 email to Fred Stanley stating that, before Shafer's arrest, another bus driver had caught Shafer viewing child pornography on a computer in the bus barn. RP at 19-20; Exs. 19, 20. Finally, the trial court excluded Sergeant Stines's video interview with Shafer, in which he admitted to multiple bus trips with girls on his lap. Ex. 98A.

K. The Jury Found That The District Was Negligent.

The jury found that the District was negligent for failing to protect N.L. from harm and awarded her $1,150,000 in general damages and $125,000 for future psychological treatment. CP at 1107. The jury also awarded $150,000 in general damages for N.L.'s mother, Abbigail Gutierrez. CP at 1107.

IV. ARGUMENT AND AUTHORITY

A. Standard Of Review.

This court reviews the trial court's evidentiary rulings for an abuse of discretion. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). Abuse of discretion occurs when the trial court's

decision rests on untenable grounds or when no reasonable judge would have reached the same conclusion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Byerly v. Madsen*, 41 Wn. App. 495, 499, 704 P.2d 1236, *review denied*, 104 Wn.2d 1021 (1985).

B. The District Mischaracterizes The Liability Standard.

The District argues that Washington law requires that an employer must "have prior *employee-specific* notice in order to be found negligent in supervising an employee who committed a sexual assault." Br. of App. at 31. The District also cites jury instruction 12[6] to support its position. Contrary to the District's contention, however, Washington law required a jury to find only that the "actual harm fell within a general field of danger which should have been anticipated." *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953).

"A duty to protect another from sexual assault by a third party may arise where the defendant has a special relationship with the tortfeasor which imposes a duty to control the third person's conduct, or it may arise where the defendant has a special relationship with the other which gives the other a right to protection." *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, __ Wn. App. __, __ P.3d __ 2013 WL 3864307, at *3 (July 22, 2013) (citing *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997)). "The requirement for prior specific knowledge of the tortfeasor's dangerous propensities applies to

[6]The District incorrectly cites jury instruction 12 because instruction 13 is actually the one that the District is referring to. *Compare* CP 1094 *with* CP 1095.

the first type of special relationship identified in *Niece* but not to the second." *Id.* It is well settled that the existence of a duty predicated on a protective relationship requires knowledge only of the "general field of danger" within which the harm occurred. *Id.* (citing *McLeod*, 42 Wn.2d at 321).

It is well-established in Washington "that a school district has an enhanced and solemn duty to protect minor students in its care." *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005); *accord McLeod*, 42 Wn.2d at 319; *J.N. v. Bellingham Sch. Dist.*, 74 Wn. App. 49, 57, 871 P.2d 1106 (1994); *Peck v. Siau*, 65 Wn. App. 285, 293, 827 P.2d 1108, *rev. denied*, 120 Wn.2d 1005 (1992). This duty includes anticipating dangers and taking precautions. *Carabba v. Anacortes School Dist. No. 103*, 72 Wn.2d 939, 955, 435 P.2d 936 (1967). In executing their duties, Washington holds school districts to a heightened "reasonableness" standard of care in light of their employees' particularized training and experience. *J.N.*, 74 Wn. App. at 57, 61.

The focus of the duty's scope is not on a specific harm or action that occurred; rather the focus is on the "general field of danger": "The pertinent inquiry is not whether the actual harm was a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated." *McLeod*, 42 Wn.2d at 321. Thus, the duty "is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the

pupils in its custody from such dangers." *McLeod*, 42 Wn.2d at 320. Foreseeability is typically a question for the jury. *Niece*, 131 Wn.2d at 50.

In the present case, the District had a "special relationship" with N.L. and owed her a duty to protect her from reasonably anticipated dangers. To prevail, Gutierrez needed only to prove by a preponderance of the evidence that the District should have reasonably perceived that molestations on a bus were "within the general field of danger which should have been anticipated." *Niece*, 131 Wn.2d at 50.

Gutierrez did not, under Washington law, have the burden to prove that the District should have known Shafer posed a risk of harming a student. However, the District relies on the last paragraph of jury instruction 13 to characterize this appeal:

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

As explained above, this paragraph is an incorrect statement of Washington law: under a protective relationship theory, the scope of the District's duty was to foresee those acts "within the general field of danger which should have been anticipated," *Niece*, 131 Wn.2d at 50, not that it should have foreseen a particular employee posed a risk of harm.[7]

[7] For example, one of Gutierrez's liability theories was that the District negligently failed to train its employees to recognize the warning signs of grooming and child molestation. Instruction 13 perverts the law by allowing a school district to argue that, because it failed to train its employees on these issues, they could not foresee a particular employee posed a child molestation risk and that district is not liable for the molestor's abuse of students. This instruction should not be cited with impunity; to do so would confuse litigants and run contrary to decades of Washington law.

Gutierrez vigorously argued against this last paragraph and objected to this language. RP 1637. At the last minute, the trial court allowed it as a concession to the District. *Id.*

But even under this higher standard, the jury found that the District was negligent. The jury made this finding because the overwhelming evidence was that the District knew or should have known that Shafer posed a risk of harm to a student. Despite the District's inconsistent testimony, and its contrived excuses, the jury found the truth in the variety of red flags shown to have been present for the District to see and to take action against. Gutierrez presented not only direct evidence on this point, but she also presented ample circumstantial evidence from which the jury could reasonably infer that the District knew or should have known about Shafer's risk of harm. The foregoing analysis considers this appeal under the higher, albeit incorrect standard.

C. The Trial Court Did Not Abuse Its Discretion In Allowing McGoey And Whitehill To Testify About N.L.'s "Twenty Times" Statement.

N.L.'s "twenty times" statement was first introduced during security expert Chris McGoey's testimony. Gutierrez asked McGoey whether the record contained evidence that Shafer actually rode Paz's school bus up to twenty times, the District objected, and the trial court excused the jury to hear arguments. RP 667. The District argued,

> Your Honor, it's hearsay to start with. And it's not – it's not the kind of evidence that is traditionally relied upon by experts. It's just an attempt for this witness to recite hearsay to this jury. And [N.L.] – we saw [N.L.'s]

> testimony. She testified about the times that she recalled, and she said one event. So now we're talking about something that she made not to Dr. Whitehill I think but to someone else in his office. It's rank hearsay, Your Honor.

RP 668-69. Gutierrez responded that N.L.'s "twenty times" statement is ER 703 evidence that is routinely relied upon by experts. RP 669. The trial court ruled:

> I'm going to allow limited. I allowed the interview of what [N.L.] told the detective, and so just I think – just a limited inquiry of the witness. . . . Without a lot of – let the doctor testify whatever he has to say.

RP 669. The trial court then elaborated:

> Here's what we're going to do: I think ask your question, [Gutierrez]. Ask [McGoey] if this will help explain his opinion and the basis. He'll respond by saying yes, and then let's just go into it.

RP 670. Before McGoey testified about N.L.'s statements, the trial court provided the jury with the following limiting instruction approved by the District:

> Certain evidence has been admitted in this case only for a limited purpose. This evidence consists of testimony today by this expert regarding an interview that he reviewed and the interview was regarding the victim [N.L.]. This evidence is not offered for the truth of the matter asserted but is offered to explain this witness's testimony to you.

RP 671-72.

Gutierrez next sought to introduce N.L.'s "twenty times" statements through a video clip of her interview with Dr. Whitehill's assistant. RP 973-75. The District objected, arguing:

> [T]he court has ruled that the expert can say that's – you know, "Based on information I have that that's what I was told," and I think that's the proper way to have this

> evidence, if it comes in at all, because I still object to it, that it come in. I don't think it's appropriate to show a clip from the videotape interview at this point, and I object to that.
>
> . . . .
>
> The evidence that the expert relies on is hearsay and admissible, but it does not mean that that evidence can be shown to the jury. He can say that that's the evidence he relied on.

RP 973-75. The trial court ruled, "I am going to allow this because it's [N.L.] talking, and it's Dr. [Whitehill], a psychologist, for his purposes, and it's very limited . . . [b]ecause it's [N.L.], and in the context in which the statement was taken by the doctor's assistant." RP 975.[8] The trial court further clarified that it would allow Dr. Whitehill to discuss out-of-court statements, such as the "twenty times" statement, for purposes of explaining his opinion on damages, as the extent of N.L.'s sexual grooming by Shafer was relevant to his damages opinion. RP 1002-1003, 1005-1006. Before the jury viewed the video clip, the trial court read the following limiting instruction—that the District proposed—to the jury:

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

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[8] The District misrepresents the record when it states that "the trial court cited ER 803(a)(3) as its basis for allowing Dr. Whitehill to show N.L. making the statement." Br. of App. at 35 (citing RP 1000). In the portion of the record cited by the District, the trial court was explaining to Dr. Whitehill that it had admitted out-of-court statements made to Sergeant Stines "for the purpose of describing the nature of the relationship that Gary Shafer had with these victims." RP 1000. Thus, the District creates a straw man argument that the trial court abused its discretion in ruling that N.L.'s "twenty times" statements were admissible under ER 803(a)(3) because the trial court made no such ruling. Br. of App. at 34-36.

RP 975-76, 988-89.

1. The trial court properly admitted N.L.'s "twenty times" statement under ER 703 and ER 705 to explain the bases of McGoey's and Dr. Whitehill's expert opinions.

The District argues that the trial court abused its discretion in admitting N.L.'s "twenty times" statement under ER 703 and ER 705 because the trial court was required to conduct an ER 403 balancing test before doing so. Br. of App. at 36-39. But this court may affirm on any basis supported by the record, *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), and the District's position ignores the well-settled rule that "[a] trial court may allow an expert to reveal the underlying basis for her opinion if doing so will help the jury understand the expert's opinion . . . even if the information would be inadmissible as substantive evidence."[9] *In re Det. of Coe*, 175 Wn.2d 482, 513, 286 P.3d 29 (2012)

[9] The District argues that "McGoey's and Whitehill's professed reliance on N.L.'s hearsay statement was admissible only at *the District's* option under ER 705, on cross-examination." Br. of App. at 38 n. 17 (citing *State v. Nation*, 110 Wn. App. 651, 661, 41 P.3d 1204 (2002), *review denied*, 148 Wn.2d 1001 (2003), and *State v. Anderson*, 44 Wn. App. 644, 652, 723 P.2d 464 (1986).

Gutierrez notes that the District's assignments of error, issue statements, and supporting argument (other than the one passing reference in a footnote) pertain to the trial court's alleged error in not conducting an ER 403 balancing as part of its ER 703 and ER 705 analysis, not whether the trial court categorically erred in admitting McGoey's and Dr. Whitehill's testimony on direct examination. Br. of App. at 1, 3, 36-39. Thus, this court should not consider the argument. RAP 10.3(a)(6); RAP 10.3(g);*West v.Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (passing treatment of an issue is insufficient to merit appellate review).

Moreover, the District cites *Nation*, 110 Wn. App. at 661, and *Anderson*, 44 Wn. App. at 652, for the proposition that "ER 705 cannot be used by the party calling the expert to make hearsay admissible." Br. of App. at 38 n. 17. But *Nation* actually states that "if these requirements [of ER 703] are not met, ER 705 may not be used as a mechanism for admitting otherwise inadmissible evidence as an explanation of an expert's opinion." 110 Wn. App. at 662. Here, the District does not argue that the evidence did not meet ER 703's requirements, nor could it; McGoey testified that the information was of a type relied on in his field as a security consultant and the District did not argue below that the information did not meet ER 703's requirements as to Dr. Whitehill's opinion. RP 673.

(citing ER 705); *In re Det. of Marshall*, 156 Wn.2d 150, 162, 125 P.3d 111 (2005) (ER 705 "grants the court discretion to allow the expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for his or her expert opinion, subject to appropriate limiting instructions."); *GroupHealth Co-op of Puget Sound v. Dep't of Rev.*, 106 Wn.2d 391, 399, 722 P.2d 787 (1986) ("The trial court may allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of the expert's opinion."); *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170 Wn. App. 279, 314, 284 P.3d 749 (2012) (stating the same); *State v. Lucas*, 167 Wn. App. 100, 108-09, 271 P.3d 394 (2012) (stating the same).

Moreover, our Supreme Court has clearly stated the requirements for admitting evidence under ER 703 and 705, and an ER 403 balancing is not among them. "The trial court ***need only*** give an appropriate limiting instruction explaining that the jury is not to consider this revealed information as substantive evidence."[10] *Coe*, 175 Wn.2d at 513-14

Likewise, *Anderson* actually states that "ER 705 addresses the disclosure of the underlying facts, which may be required *either by the court or the cross-examiner*." 44 Wn. App. at 652. Here, consistent with ER 705, the trial court exercised its discretion to allow disclosure of the facts underlying McGoey's and Dr. Whitehill's opinions on direct examination. Moreover, the *Anderson* court concluded that the trial court properly allowed the State's experts to testify about Anderson's out-of-court statements to them as statements not offered for the truth of the matter asserted. 44 Wn. App. at 652-53. Per the limiting instructions given by the trial court in this case, N.L.'s statements were admitted for the same permissible purpose.

[10] Indeed, in addition to our Supreme Court's express statement of what the trial court is required to do when admitting otherwise inadmissible evidence under ER 705, none of the cases cited above (nor the cases on which they, in turn, rely) contain the slightest reference to the trial court being required to conduct an ER 403 balancing as part of an ER 703 and 705 analysis.

Further, the cases that the District cites for the notion that ER 403 balancing is always required under ER 703 and ER 705 are distinguishable and not persuasive. The

(emphasis added) (citing *Marshall*, 156 Wn.2d at 163); *see also Lucas*, 167 Wn. App. at 108-09 (discussing how out-of-court statements admitted under ER 705 are not hearsay or substantive evidence because they are not offered for their truth, but for a limited purpose of explaining the expert's opinion). Here, before the jury heard evidence about N.L.'s "twenty times" statements, the trial court gave limiting instructions that the District either approved or proposed and that were materially identical to the one provided in *Coe*. Because the trial court complied with the requirements set forth in *Coe*, it did not abuse its discretion in admitting these statements under ER 703 and ER 705.

Additionally, the District never argued that the "twenty times" statement was unduly prejudicial under ER 403, and it raises this argument

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thrust of this court's holding in *State v. Martinez*, 78 Wn. App. 870, 880-81, 899 P.2d 1302 (1995), *rev. denied*, 128 Wn.2d 1017 (1996), *rev'd on other grounds*, *State v. Kinneman*, 155 Wn.2d 272, 287-288, 119 P.3d 350 (2005), was that ER 703 and ER 705 "should not be construed so as to 'bootstrap' into evidence hearsay that is not necessary to help the jury understand the expert's opinion." This court reasoned that the trial court properly excluded certain portions of an expert's testimony because they were "the hearsay statements of third parties and [were] not necessary to explain the basis of [the expert's] opinion." Unlike in *Martinez*, in this case N.L.'s "twenty times" statement helped to explain how McGoey reached his opinion on how the District's complete lack of policies and monitoring of bus ride-alongs led to N.L.'s molestation and how Dr. Whitehill reached his opinion on N.L.'s damages.

The District also cites an unpublished federal district court decision, *Roth v. Amtrak*, 1999 U.S. District LEXIS 20173 *3 (N.D. Ill. Dec. 29, 1999). Br. of App. at 38. Although Gutierrez has been unable to locate the case cited by the District, Gutierrez has located *Roth v. Nat. Railroad Passenger Corp*, No. 97-C-6503, 1999 WL 1270706 (N.D. Ill. Dec. 29, 1999), also an unpublished federal district court opinion involving the same parties, filed on the same day, and lacking the language parenthetically quoted by the District in its brief. Regardless, this court should not consider the *Roth* opinion cited by the District as the language of Federal Rule of Evidence (FRE) 703 materially differs from that of Washington's ER 703. *Compare* ER 703 ("the facts or data need not be admissible in evidence"), *with* FRE 703 ("if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect").

for the first time on appeal. RAP 2.5(a)(3) generally precludes parties from raising issues for the first time on appeal. Specific to evidentiary issues, ER 103(a)(1) provides that error may not be predicated on a ruling admitting evidence unless "a timely objection or motion to strike is made, stating the ***specific ground*** of objection, if the specific ground was not apparent from the context." Emphasis added. Thus, "[a] party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). A party who fails to object on such specific grounds at trial fails to preserve the issue for appellate review. *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987).

Here, the District did not object on the basis of or otherwise argue to the trial court that it was required to conduct an ER 403 balancing test as part of the ER 703 and 705 inquiry. *See, e.g.*, RP 993. Having failed to object on this specific basis below, the trial court did not have the opportunity to consider the issue now raised, and the issue was not preserved for appellate review.[11]

2. The trial court did not abuse its discretion by showing the jury a 20 second video clip of N.L.'s interview with Dr. Whitehill's assistant that included her "twenty times" statement.

The District next argues that showing the short video clip of N.L.

[11] Further, the District failed in its opening brief to argue that this issue is a "manifest error affecting a constitutional right" which may be considered for the first time on appeal, RAP 2.5(a)(3), and the District may not argue that it meets its burden under RAP 2.5(a)(3) for the first time in its reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court does not consider arguments made for the first time in reply briefs).

saying "twenty times" was error because N.L.'s competency was never assessed. Br. of App. at 40-42. The District also suggests that showing the video clip was error because it could not cross examine N.L. Br. of App. at 42.

But the District failed to object at trial on the specific grounds of N.L.'s competency or its inability to cross-examine N.L., and it fails to argue in its opening brief that such error, if any, may be raised for the first time on appeal. RP 973-74. The District failed to preserve these issues for appellate review. RAP 2.5(a)(3); ER 103(a)(1); *Cowiche*, 118 Wn.2d at 809; *Black*, 109 Wn.2d at 340.

Even if the District had not waived the competency issue, its argument is logically inconsistent. The District claims that the trial court was required to ascertain N.L.'s competency to ***testify as a witness*** even though N.L. did not testify nor were her statements admitted as sworn testimony or substantive evidence; rather, they were admitted under ER 703 and 705 for the limited purpose of explaining Dr. Whitehill's and McGoey's opinions. Likewise, this court has roundly rejected arguments that a party is unfairly prejudiced by an inability to cross-examine the declarant of out-of-court statements admitted under ER 703 and 705. *E.g,. Lucas*, 167 Wn. App. at 110; *State v. Eaton*, 30 Wn. App. 288, 291-95, 633 P.2d 921 (1981). A party has a fair opportunity to respond by "'test[ing] the reliability of the [expert's] opinion . . . through cross-examination of the [expert]," *Lucas*, 167 Wn. App. at 110 (first, second, and third alterations in original) (quoting *Eaton*, 30 Wn. App. at 292), on

such matters as whether the expert took the declarant's statements "at 'face value' with no means to verify them." *Lucas*, 167 Wn. App. at 110. Thus, the trial court did not abuse its discretion in admitting the video clip because the District had every opportunity to cross-examine McGoey and Dr. Whitehill on such matters.

Finally, the District invited any error in showing this extremely short video clip. Before the jury viewed the video clip of N.L.'s interview with Dr. Whitehill's assistant, the jury had earlier viewed a video of N.L.'s interview with Sergeant Stines. RP 197; Ex. 97A. The District never objected to playing the video of N.L.'s interview with Sergeant Stines to the jury; quite the opposite, the District affirmatively argued that the video should be shown as "the best evidence" of N.L.'s statements. RP 194. Later, after the jury viewed the video clip of N.L.'s interview with Dr. Whitehill's assistant, the trial court clarified why it allowed that video to be shown: "[C]onsistent with the court's prior rulings, the best information that this jury has been able to hear is that of the victim herself describing what happened, and the weight and credibility of that is for them to assess." RP 1052-1053.

The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *Nania v. Pac. Nw. Bell Tel. Co., Inc.*, 60 Wn. App. 706, 709, 806 P.2d 787 (1991). Here, the District seeks a windfall by representing to the trial court that actually observing N.L. making her statements provided the jury with the best means for assessing those statements, but complaining on appeal that

viewing a similar video was prejudicial.[12] The District invited the error, if any, and this court should not review it.

3. The so-called "vouching" testimony was not improper and the District failed to preserve the issue for appellate review.

The District argues that both McGoey and Dr. Whitehill impermissibly "vouched" for the credibility of N.L.'s statements.[13] Br. of App. at 42-44. Yet, again, the District did not object at trial to any of the so-called "vouching" testimony it cites in its opening brief and fails to argue in its opening brief that such error, if any, is manifest constitutional error that may be raised for the first time on appeal. Therefore, the District failed to preserve these issues for appellate review. RAP 2.5(a)(3); ER 103(a)(1); *Cowiche*, 118 Wn.2d at 809; *Black*, 109 Wn.2d at 340.

Further, the District's argument appears to rely on bootstrapping

[12] Notably, the District wanted the jury to see the video of N.L.'s interview with Sergeant Stines because N.L. described Shafer's molestations as occurring only once. RP 202. The District challenged showing N.L.'s interview with Dr. Whitehill's assistant because N.L. commented that Shafer rode her bus 20 times. RP 990; Ex. 139. The District complains on appeal that this was error because the jury should have known that the second video came later and something could have been suggested to N.L. in the interim. However, as argued above, the District had the opportunity to make these arguments on cross but failed to do so. *See Lucas*, 167 Wn. App. at 110. This is not an issue to complain about on appeal.

[13] The District also argues that having Dr. Whitehill provide N.L.'s statement and showing the video excerpt in which N.L. made the statement "implicitly vouched" for N.L.'s credibility. Br. of App. at 43. But the District fails to provide any citation to authority supporting this conclusory argument. This court does not consider conclusory arguments. RAP 10.3(a)(6), .4. "Such '[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *West*, 168 Wn. App. at 187 (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). And this court does not consider claims unsupported by citation to legal authority. RAP 10.3(a)(6); *Cowiche*, 118 Wn.2d at 809. And the District may not cure its conclusory argument unsupported by authority through providing further argument or citation to authority in its reply brief. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012).

into this context case law that prohibits one witness from testifying as to the credibility of another ***witness***. But such case law is inapposite; as discussed above, N.L. did not testify at trial as a witness providing sworn testimony admitted as substantive evidence. Rather, McGoey and Dr. Whitehill related her statements as information they relied on in forming their opinions under ER 703 and ER 705, and the reliability of such information was an issue fairly subject to inquiry by counsel.[14] *See Lucas*, 167 Wn. App. at 110.

4. There can be no error because the trial court gave a limiting instruction before each time that the jury heard N.L.'s "twenty times" statement.

The District contends that, had the trial court conducted an ER 403 analysis of McGoey's and Whitehill's testimony about relying on N.L.'s statements in forming their opinions, it would have concluded that a limiting instruction could never cure the prejudicial effect of N.L.'s "twenty times" statements, even as non-substantive evidence offered for the limited purpose of explaining their opinions. Br. of App. at 44-46. But, again, the District did not raise a timely ER 403 objection to such

[14] If this court reaches the merits of the issue, however, neither the specific statements by McGoey nor Dr. Whitehill cited by the District were improper "vouching" testimony. First, the District argues that McGoey's statement that "I have to accept the evidence I see on its face, twenty times or – but, you know, definitely more than three times," constituted improper vouching. Br. of App. at 44. But McGoey's statement was not that he believed N.L. or believed that she was telling the truth; rather, he explained that "I have to accept the evidence I see on its face," i.e., that he accepted her statements at face value and assumed their truth. RP 673. This is the substantial equivalent of the procedure recommended in the Tegland treatise cited by the District. Br. of App. at 43. Likewise, Dr. Whitehill's statement that "we saw the clip with the twenty . . . and that seemed to be factually correct information" was not a bare assertion that he believed N.L., but a statement that he found the "twenty times" statement reliable enough in light of other evidence he reviewed to serve as a basis for his opinion. RP 987, 1045-1047 (other evidence Dr. Whitehill reviewed in forming his opinion).

evidence at trial. Thus, the District failed to preserve for appellate review any claim that the trial court erred in failing to conduct an ER 403 analysis in whole or in part. RAP 2.5(a)(3); ER 103(a)(1); *Cowiche*, 118 Wn.2d at 809; *Black*, 109 Wn.2d at 340.

Even if this court concludes that the District did not waive this issue, the limiting instruction was sufficient. Washington courts presume that the jury follows the trial court's lawful instructions. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 136, 875 P.2d 621 (1994). Here, the limiting instructions given by the trial court materially complied with the instruction described by our Supreme Court in *Coe* and were, thus, lawful instructions. *Coe*, 175 Wn.2d at 513-14. Accordingly, this court must presume that the jury followed them. That presumption controls "until it is overcome by a showing otherwise." *Nichols v. Lackie*, 58 Wn. App. 904, 907, 795 P.2d 722 (1990). The District neither cites to any evidence in the record nor provides any supporting argument that the jury failed to follow this particular instruction; for this reason alone, the District's claim fails. RAP 10.3(a)(6); *Cowiche*, 118 Wn.2d at 809.

Additionally, the District suggests that the admission of certain kinds of evidence, regardless of any limiting instruction given by the trial court, is so prejudicial that it amounts to per se reversible error; however, both of the cases that the District cites are inapposite. *Bertsch v. Brewer*, 97 Wn.2d 83, 84, 640 P.2d 711 (1982), was a case involving medical malpractice and the informed consent doctrine. The challenged evidence there was an extremely negative personality profile given to Bertsch, the

suing patient; the trial court admitted the personality profile, and the jury returned a verdict in favor of Bertsch's treating physician. *Bertsch*, 97 Wn.2d at 85.

On appeal, our Supreme Court held that the personality profile was erroneously admitted by the trial court and rejected the treating physician's argument that the erroneous admission of the personality profile was harmless because the document was relevant only to damages issues not reached by the jury. *Id.* at 88. The Court reasoned that several factors rendered it "unrealistic to conclude the jurors related the contents of the personality profile solely to the damages issue": (1) the personality profile was a separate exhibit, making it "even more noticeable and damaging" than other evidence; (2) the profile was taken into the jury room during deliberations; (3) the profile's "derogatory description" of Bertsch prejudiced the jury as to Bertsch's credibility, which was directly relevant to "many crucial issues" in the case; and, "especially," (4) the trial court did not give a limiting instruction. *Id.* at 88.

Unlike the personality profile in *Bertsch*, N.L.'s statements at issue here were properly admitted under ER 703 and 705. Because N.L.'s statements were properly admitted, the *Bertsch* court's harmless error analysis is inapplicable, as there is no error to evaluate. Moreover, unlike the personality profile in *Bertsch*, N.L.'s statements were not admitted as a separate, physical exhibit; they were not taken as a physical object into the jury room; they were but a blip on the radar in the context of all the other evidence that the District should have known about the risk of harm Shafer

posed to students; and, most importantly, the trial court gave the jury appropriate limiting instructions.[15] Accordingly, the District's argument fails.

Similarly, *State v. Justesen*, 121 Wn. App. 83, 84, 86 P.3d 1259 (2004) is inapposite. There, the trial court admitted evidence at trial, subject to a limiting instruction, that a key witness had taken and passed a polygraph test. *Id.* at 85. On appeal, Division One held that the trial court abused its discretion in admitting the polygraph results, an "inherently unreliable . . . indicator of deception," without a stipulation between the parties. *Id.* at 85, 95. Division One further held that the limiting instruction's language was "ineffective" because it not only "told the jury not to consider the polygraph as reliable evidence that KS did or did not commit sexual abuse," but also "explicitly invited" the jury to use the polygraph evidence for the inconsistent and impermissible purpose of using polygraph evidence "to establish that one party's version of events is the truth." *Id.* at 95.

Unlike in *Justesen*, the evidence admitted in this case was not polygraph evidence, a fact clearly central to Division One's reasoning, and rightfully so. *Id.* at 86, 93. There is a clear distinction between admitting

[15] The *Bertsch* court proceeded to state that assuming the jurors could have considered the personality profile only in relation to Bertsch's damages, even if a limiting instruction had been given, was "naïve and unrealistic." *Berstch*, 97 Wn.2d at 88. The *Bertsch* opinion, not exactly a model of judicial clarity, appeared to have included this language to in relation to its observation that ER 403 requires consideration of the effectiveness of limiting instructions and its holding that the personality profile was inadmissible under ER 403. *Id.* at 87. As discussed above, the District failed to preserve an ER 403 issue for appellate review in relation to N.L.'s statements.

evidence of a witness's polygraph results—evidence that is relevant only for the truth of those results, and their inherently unreliable and prejudicial fortification or diminution of the witness's credibility—and admitting evidence to explain how and why an expert reached his particular conclusions, thus allowing the jury to assess whether the expert's opinion reasonably and logically flowed from its underlying facts, regardless of the underlying facts' truth.[16] *See id.* at 95 (polygraph evidence relevant solely because a polygraph was administered, regardless of the results, may be admissible, but polygraph evidence offered for its results is offered for its substantive value).

Further, unlike the limiting instruction in *Justesen*, the limiting instructions in this case did not explicitly invite or authorize the jury to use N.L.'s statements for inconsistent purposes. Rather, the limiting instructions at issue here explicitly, plainly, and correctly instructed the jury on the purpose for which N.L.'s statements were ***not*** admitted—"the truth of the matter asserted" and "proof that the testimony relied upon is true"—and the purpose for which they ***were***—"to explain this witness's testimony to you" and "deciding what credibility or weight to give [the experts'] opinion." RP 672, 989. The District either proposed or accepted these instructions, and the instructions were the substantive equaivalent of the one approved by our Supreme Court in *Coe*. Accordingly, the District

[16] Of course, an expert's reliance on and the verifiability of the information underpinning his opinion bears on the credibility and weight of his opinion. This is not a novel concept, and, as Washington courts have recognized, the proper approach is for counsel to cross-examine on these matters at trial, not to claim error on appeal. *See Lucas*, 167 Wn. App. at 110.

cannot show error and its claim fails.

D. Neither V.M.V.'s Statements To Sergeant Stines Nor N.L.'s Statements To Gutierrez Were Inadmissible Hearsay.

At trial, Sergeant Stines testified without objection to numerous out-of-court statements made by N.L. about her abuse. However, when Gutierrez asked Sergeant Stines to summarize what she had learned from N.L.'s friend V.M.V. during Sergeant Stines's investigation of the molestation cases, RP 205, the District objected on hearsay grounds, RP 206-07, and Gutierrez responded that V.M.V.'s statements were not hearsay because they were not offered for their truth, but as evidence of N.L.'s and V.M.V.'s state of mind under ER 803(a)(3), which in turn was relevant to "establishing the level of relationship they had with Gary Shafer," a level of relationship that could only be established through repeated grooming. RP 207-08. Ultimately, the trial court ruled that V.M.V.'s statements were admissible under ER 803(a)(3). RP 210-11. It elaborated, "[The statements] go to the circumstantial evidence related to the relationship that apparently he cultivated with these two girls." RP 213.

Likewise, N.L.'s mother, Abbigail Gutierrez, also testified at trial. Without objection from the District, Abbigail testified about numerous statements N.L. made to her progressively disclosing the details of Shafer's molestation of her and Shafer's relationship with her and VMV. RP 1064-1072. For example, N.L. at first told Abbigail that "this guy tickled me, and . . . we used to sit on his lap." RP 1066. After Shafer's

arrest, N.L. wanted to pray for Shafer; she told Abbigail that she "felt bad for [Shafer's] wife and she felt bad for her friend that she had to tell on him. She felt bad that he was going to jail so she wanted him to be safe." RP 1072. When describing her friendship with Shafer, N.L. said, "He was really funny, and he rubbed her back and rubbed her friend's back and . . . they were friends." RP 1072.

Immediately after Gutierrez adduced this testimony, Gutierrez asked Abbigail whether N.L. had ever said anything about how many times Shafer rode her bus. RP 1072-1073. Only then did the District object on hearsay grounds and because Abbigail was not testifying as an expert. RP 1073. Gutierrez responded, "It's not hearsay," and the trial court ruled, "I'm going to allow." RP 1073.

The District argues that the trial court abused its discretion in admitting V.M.V.'s statements to Sergeant Stines[17] and N.L.'s statements to Gutierrez. Br. of App. at 49-50. As Gutierrez correctly argued below, however, these statements were "not hearsay" because they were offered as circumstantial evidence of N.L.'s state of mind, not for the truth of the matter asserted.

This court may affirm on any ground supported by the record. *LaMon*, 112 Wn.2d at 200-01. Out-of-court statements are not hearsay

[17] The District also appears to argue that Sergeant Stines gave improper expert opinion testimony that Shafer's behavior constituted grooming. Br. of App. at 50. Yet again, the District did not object on this basis at trial. And the District fails to support its argument with citation to authority. Accordingly, this court should not consider the District's argument that Sergeant Stines's testimony about grooming constituted improper expert testimony. RAP 2.5(a)(3); RAP 10.3(a)(6); ER 103(a)(1); *Cowiche*, 118 Wn.2d at 809; *Black*, 109 Wn.2d at 340.

and are admissible when offered for a purpose other than the truth of the matter asserted. ER 801(c). One such other purpose is offering a statement as circumstantial evidence of the declarant's state of mind. "[Out-of-court] statements may be admissible as circumstantial evidence of the *declarant's* state of mind." Karl B. Tegland, 5C Wash. Prac.: Evidence Law and Practice § 803.16 (5th ed.). For example, in *Betts v. Betts*, 3 Wn. App. 53, 59, 473 P.2d 403 (1970), the trial court admitted a child's out-of-court statements to her foster mother that her stepfather was "mean" and had "killed [her] brother] and [would] kill [her] mommie too." On appeal, this court held that the child's statements were admissible because they "were not admitted to prove the truth of the assertions she made, but merely to indirectly and inferentially show the mental state of the child at the time of the child custody proceedings." *Betts*, 3 Wn. App. at 59. And the child's mental state was relevant to the determination of whether to award custody to the child's mother, who lived with the child's stepfather. *Id.* at 56, 59-60.

As in *Betts*, V.M.V.'s statements to Sergeant Stines and N.L.'s statements about the number of times Shafer rode her bus were circumstantial evidence of N.L.'s state of mind, i.e., that she felt Shafer was her "friend." N.L.'s statement indirectly and inferentially demonstrated N.L.'s feeling familiar enough with Shafer to consider him her friend to the extent that she wanted to pray for Shafer because she "felt bad for her friend that she had to tell on him" and "wanted him to be safe" in jail. RP 1071-1072. Likewise, as the trial court correctly recognized,

V.M.V.'s statements to Sergeant Stines regarding Shafer's behavior toward and relationship with the girls—tickling them, having them sit in his lap, telling them peer-level knock-knock jokes from his phone, and scratching their backs, and V.M.V. considering Shafer as her friend—was corroborative circumstantial evidence that N.L., who was V.M.V.'s friend and sat in the same seat with her on Paz's bus, also was familiar with Shafer enough to feel that they were friends. N.L.'s feeling of friendship with Shafer, in turn, was probative to demonstrating that Shafer had ridden her bus frequently enough to cultivate a friendship and groom her for sexual molestation, and ultimately toward establishing the damages caused by Shafer's grooming. RP 1004-1007. Accordingly, N.L.'s statements to Gutierrez and V.M.V.'s statements to Sergeant Stines were properly admitted, and the District's claim fails.

E. The Trial Court Did Not Abuse Its Discretion In Admitting Shafer's Judgment And Sentence And Testimony Thereon Under ER 404(b), An Issue That The District Waived At Trial.

Although the District filed a motion in limine to exclude evidence of Shafer molesting girls other than N.L. under ER 403 and ER 404(b), CP 64-66, the District affirmatively waived its objection at trial.

The District stated during a sidebar conference regarding the admissibility of Shafer's out-of-court statements, "***The convictions are clearly admissible, and in the -- that comes in.*** But some statement that Gary Shafer now says well, it was this many times or that many times is hearsay." RP 36-37 (emphasis added). The District chose to concede the admissibility of Shafer's convictions, thereby expressly or implicitly

waiving its objection, for the tactical advantage of using that evidence as a rhetorical point against the admission of Shafer's out-of-court statements, and, when Gutierrez moved to admit Shafer's judgment and sentence, the District stated, "No objection." RP 226. Indeed, the District later repeated this tactic by objecting on hearsay grounds to Sergeant Stines' testimony about V.M.V.'s out-of-court statements to her: "The court has ruled the judgment and sentences can come in, and ***I think that's appropriate***." RP 206-07. (Emphasis added). The District also agreed that Sergeant Stines could testify as to the victims' identities, whether they were District students, and whether their abuse occurred on District buses; the District sought only to limit Sergeant Stines's testimony about other details about the abuse.[18] RP 206-07

> As our Supreme Court has observed,
>
> > [W]aiver is the intentional and voluntary relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 409-410, 259 P.3d 190 (2011). Here, the District waived[19] its objections to

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[18] Testimony about these other details is not part of the District's assignments of error. *See* Br. of App. at 2 ("The trial court erred in admitting . . . (a) Ex. 12, the record of Shafer's criminal conviction of and sentence for molesting three girls and possessing child pornography, and (b) testimony by Stines that Shafer stands convicted of molesting V.M.V. and another girl, T.M.C., in addition to N.L., on OSD buses.").

[19] Even if the District's actions below did not amount to waiver, they certainly constituted invited error. *Nania*, 60 Wn. App. at 709.

admission of Shafer's judgment and sentence and Sergeant Stines's testimony thereon for its own tactical advantage. The District must not be granted a windfall on appeal by having this alleged error reviewed.[20]

F. McGoey Was Qualified To Testify As A Safety Expert And His Opinion Was Supported By Admissible, Substantive Evidence

[20] Even if this court reached the merits, the trial court properly admitted Shafer's judgment and sentence and Sergeant Stines's testimony thereon. ER 404(b)'s plain language excludes evidence of prior bad acts only when offered to prove the character of a person in order to demonstrate action in conformity therewith, but not when such evidence is offered for "other purposes." As our Supreme Court has recognized, ER 404(b)'s list of "other purposes" is merely illustrative, and a trial court may admit evidence under ER 404(b) for "***any*** other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (emphasis added). Thus, evidence is admissible in civil cases under ER 404(b) when (1) offered for an identifiable "other", relevant purpose and (2) the evidence's probative value outweighs its prejudicial effect. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 444-46, 191 P.3d 879 (2008).

One such "other" purpose is demonstrating the District's actual or constructive "notice" of Shafer's proclivities, i.e., whether the District knew or should have known that Shafer "presented a molestation risk." Br. of App. at 51. Here, Shafer's judgment and sentence stated that Shafer molested the two other girls within the same timeframe as he molested N.L. Ex. 12. And Sergeant Stines's testimony confirmed that those molestations were of other District students on buses. RP 205, 216-17, 220, 225-26, . Thus, this evidence established that, during the same time frame that Shafer groomed and molested N.L., he had established a practice of riding District buses with impunity and was in fact molesting multiple girls; this evidence was not just relevant, but highly probative of the District's constructive notice that Shafer presented a molestation risk to students, including N.L.

Furthermore, the ER 404(b) admissibility test incorporates ER 403. *Gresham*, 173 Wn.2d at 421. The District does not argue that it meets its burden of showing that the probative value is "***substantially*** outweighed by the danger of unfair prejudice," nor can it. ER 403 (emphasis added); *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). Here, the evidence is "prejudicial" only in the sense that it tends to inculpate the District in its systematic failure to exercise reasonable care with regard to hiring, training, retaining, and monitoring its employees and implementing policies. The District can provide no basis under which this evidence would invoke a decision based on anything but its negligence and, thus, be "unfairly" prejudicial. *Lockwood v. AC & S. Inc.*, 109 Wn.2d 235, 257, 744 P.2d 605 (1987) (evidence is only considered overly, unfairly prejudicial if it has "an undue tendency to suggest decision on an improper basis, commonly, but not necessarily, an emotional one."). Further, the ability of any prejudice to outweigh the evidence's probative value was slim-to-none because the evidence was undeniably probative of the District's notice of Shafer's molestation risk, a central issue in the case. *See Carson*, 123 Wn.2d at 224 ("The ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is 'quite slim' where the evidence is undeniably probative of a central issue in the case."). The trial court did not abuse its discretion in admitting Shafer's judgment and sentence and Sergeant Stines's testimony thereon.

The District next contends that the trial court abused its discretion in finding that McGoey was qualified to testify as an expert witness on safety. Br. of App. at 52. The District further argues that no admissible evidence supported McGoey's opinions because "everything McGoey told the jury was predicated on N.L.'s 'twenty' statement to Dr. Whitehill being true." Br. of App. at 53-54. Both of the District's arguments fail.

At the outset, the District yet again fails to cite any authority to support its conclusory argument that it "had moved to exclude McGoey's opinions . . . and the court erred in denying the District's motions." This court should not consider this unsupported[21], conclusory argument, and the District may not cure its insufficient briefing in its reply brief. RAP 10.3(a)(6); *Cowiche*, 118 Wn.2d at 809; *Joy*, 170 Wn. App. at 629-30.

Furthermore, when the trial court ruled on the District's motion to exclude McGoey's testimony, it stated, "[I]t appears that both experts are qualified. Their opinions would be helpful to the jury. And as long as that proper foundation can be laid, [the District], if you feel it still hasn't been laid . . . just 'I renew my objection.' . . . I'm probably not going to change my mind, but it just preserves your objection." RP 645. When the trial court makes a tentative ruling on the admissibility of evidence or indicates

[21] In making this argument, the District improperly cites to its trial brief on its motion to exclude McGoey's testimony. The District may not incorporate its trial briefing on this issue, including its supporting legal authority, by mere reference in its appellate brief. *U.S. West Communications, Inc. v. Washington Util. & Transp. Comm'n*, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997); *Holland v. City of Tacoma*, 90 Wn. App. 533, 537-38, 954 P.2d 290 (1998) (appellant abandoned issue by merely incorporating arguments by reference to trial briefs or giving passing treatment to issue); RAP 10.3(a)(6).

that a further objection is required, "'the parties are under a duty to raise the issue at the appropriate time with proper objections.'" *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (quoting *State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989)). Here, the trial court plainly indicated that its ruling was general and tentative, and the District was required to make further objections to specific testimony on the basis that McGoey was not qualified to testify or that his testimony was not helpful to the jury.[22] Having failed to make further objections on either basis during McGoey's testimony, the District did not preserve this issue for appellate review.

Regardless, the trial court did not abuse its discretion in finding that McGoey qualified as an expert. ER 702 provides that "[if] scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The trial court has "broad discretion" in determining whether an expert's testimony is admissible under ER 702, and the trial court's decision should not be reversed absent an abuse of that discretion. *Philippides v. Bernard*, 151

[22] The District's objections during McGoey's testimony were as follows: hearsay, RP 652; "improper question"/lack of question, RP 664; relevance, RP 664-65; hearsay objection to testimony about N.L.'s out-of-court statements, RP 666, 669-69; leading, RP 674; leading, RP 679; leading, RP 681; testimony by counsel, RP 682; leading, RP 683-84; assuming facts not in evidence, RP 685; leading, RP 692; and leading, RP 694.

Wn.2d 376, 393, 88 P.3d 939 (2004). To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and the testimony will assist the trier of fact. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). Here, McGoey met both requirements.

First, McGoey had ample experience to testify as a security expert. In Washington, "Practical experience is sufficient to qualify an expert witness." *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). McGoey spent 28 years as a professional security consultant, including to school districts around the country, and specifically testified about how his experience and training qualified him to analyze to analyze sexual abuse of a child on a school bus. RP 649-652. With these qualifications, the trial court did not abuse its discretion in finding that McGoey was an expert.

Second, McGoey's testimony was helpful to the jury. McGoey testified that regardless of how many times Shafer rode the bus, Shafer should have never been sitting in a seat with kindergarten girls. Contrary to the District's complaint on appeal, this conclusion was not dependent on the number of times Shafer rode on the bus. And to the extent that McGoey's testimony was dependent on the number of times Shafer was riding along, McGoey had evidence other than N.L.'s "twenty times" statement to rely upon. Several of the District's bus drivers testified at trial that Shafer rode their kindergarten and preschool buses multiple times. RP 257, 264, 368, 1125-1127. Sergeant Stines also gave testimony

that Shafer had contact with N.L. multiple times. RP 217-18, 236. Bus route sheets show that Shafer rode Paz's Centennial route twice when Todd Adams was the substitute driver, in addition to the times when Shafer rode with Paz himself. Exs. 43, 50. And the jury saw, without objection from the District, N.L.'s videotaped statements to Sergeant Stines that Shafer rode the bus "[s]ome days," plural. RP 204. McGoey's testimony thus contains numerous other indicators that his opinions rested on evidence of Shafer's multiple bus rides, not just a bare assumption that N.L.'s specific "twenty times" statement was true.[23] The trial court did not abuse its discretion in finding that McGoey's testimony would be helpful to the jury, and the District's argument fails.

G. Any Evidentiary Error Was Harmless.

1. Standard of Review.

This court reviews evidentiary errors under the nonconstitutional harmless error standard. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Under this standard, an "error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Bourgeois*, 133 Wn.2d at 403.

2. The record contains ample unchallenged evidence that the risk of harm Shafer posed to a student was reasonably foreseeable.

[23] *See, e.g.*, RP 679 ("a ride-along multiple times, twenty times, sixty times, whatever the number is, is unusual, and there should be some system in place to monitor that . . . unusual behavior"); RP 679 ("this was unusual to have an adult want to ride on his bus in his spare time for no pay multiple times").

Even if the trial court excluded all the challenged evidence, Gutierrez produced ample evidence to sustain the verdict under the jury instructions given in this case. Evidence may be either direct or circumstantial, and the law does not distinguish between the two in terms of weight. CP 1089.

It is well-settled that circumstantial evidence can be used to prove negligence. *Lichtenberg v. City of Seattle*, 94 Wn. 391, 393-94, 162 P. 534 (1917); *Wise v. Hayes*, 58 Wn.2d 106, 108, 361 P.2d 171 (1961); *see also Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn. App. 326, 966 P.2d 351, 353 (1998) (explaining that "[t]he plaintiff need not establish causation by direct and positive evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable"). Further, "all elements of a negligence action including proximate cause may be established by inferences based upon circumstantial evidence." *Raybell v. State*, 6 Wn. App. 795, 801, 496 P.2d 559, *rev. denied*, 81 Wn.2d 1003 (1972).

Here, the trial court provided instruction 13, which stated:

> Harm is reasonably foreseeable if the Olympia School District knew or should have known of the risk that resulted in the harm to plaintiffs.
>
> It is not necessary that the exact sequence of events be anticipated. It is only necessary that the actual harm fell within a general field of danger which should have been anticipated.
>
> With regards to the criminal actions of any employee of the District, these actions are reasonably forseeable only if the District and its employees knew or in

> the exercise 'of reasonable care should have known that the employee was a risk to harm a student.

Even under this instruction, which as explained above is an incorrect statement of law, the unchallenged evidence at trial is more than sufficient to sustain the verdict. When read as a whole, the instruction required evidence that the District knew or should have known that the "actual harm" committed by Shafer, sexual abuse of a student, fell within a "general field of danger which should have been anticipated." CP at 1095. The District did not have to foresee "the exact sequence of events," i.e., a specific risk that Shafer would molest N.L. on Paz's bus; rather, it had to foresee that Shafer posed "a risk of harm to a student."

The general field of danger in the present case was overwhelming. The District knew that sexual molestations of students by District personnel was a real threat and that specific action needed to be taken to protect the students. The District also knew that drivers committed 12 percent of such molestations; indeed, the District had specific experience in 2008 when bus driver Sam McGee was terminated for inappropriately touching a student.

It is in the context of this general field of danger that, even without the challenged evidence, the District knew or should have known that Shafer "was a risk to harm a student."[24] CP at 1095. Shafer was targeting

[24] The District, in arguing that Gutierrez's case prevails or fails on proving that Shafer rode Paz's bus twenty or more times, implicitly interprets this instruction to mean that the District should have known that Shafer posed a risk of molesting N.L. on Paz's bus. But such an interpretation ignores instruction 13's language that "[i]t is not necessary that the exact sequence of events be anticipated," as well as instruction 13's non-specific language that the District should have known merely that Shafer posed "a risk to harm a student."

and riding along on multiple kindergarten and preschool buses without a purpose, sometimes upwards of 60 to 70 times. Shafer had no reason or justification for these ride-alongs, and Stanley did not ask for any reasons. Instead, Stanley knowingly allowed Shafer to ride along on whatever buses he wanted for no real purpose. This fell below the standard of care, even according to the District's expert witness, Janet Barry, who stated that riding a bus 10 times would be "grossly outside the norm." RP 1480. Likewise, Barry said she would "want to know why" if a bus driver was "habitually riding around" on buses. RP 1481.

Even District employees knew that Shafer's ride-alongs were "strange" and "unusual." Alice Drummer, the principal of Centennial Elementary School, and Melanie Evans, N.L.'s kindergarten teacher, agreed that it was "unusual" when they saw Shafer riding Paz's bus. Paz thought it was "strange" that Shafer was riding his bus and "strange" that he was sitting with children. RP 87, 144. Paz also witnessed Shafer get up from his seat with N.L. and move to the front right passenger seat as they approached the school. And he heard Shafer telling jokes to kindergarten girls and asking about their day, even though Shafer was allegedly riding along to "learn the route" or help the driver. Similarly, Engle did not remember a single person other than Shafer who would move around the bus and sit with kindergarten children. RP 391. Based on this behavior, the District knew or should have known that Shafer was a risk of harm.

The District also had specific notice as early as October 2009 from

Kevin Gearhart that his daughter, S.G., had been dropped off 30 minutes late from a bus driven by Shafer and refused to ride the bus again. Because S.G. was the last student dropped off, it is a reasonable inference that Shafer and S.G. were alone the bus together for some amount of time. The District disregarded this red flag and kept allowing Shafer to ride along on whatever midday buses he wanted for no real purpose. This alone could support the jury's liability finding.

The tragedy is that Paz, the bus driver charged with ensuring the safety of children, ignored clear red flags that Shafer was a risk of harm to the children. Paz let Shafer on his bus without an official purpose and then let him sit with kindergarten girls in his blind spot. Dale Thompson, another District bus driver with 18 years of experience, testified that he would consider Shafer's behaviors on Paz's bus a red flag. But Paz ignored these Shafer's red flags and failed in enforcing a clear safety rule and otherwise exercising his common sense by allowing Shafer to ride along on his bus and sit with the girls. This unchallenged evidence overwhelmingly established that Paz, as the District's representative, should have known that Shafer posed a "risk to harm" a student on his bus.[25]

[25] The District hangs this appeal on the "twenty times" evidence. But the "twenty times" evidence is a red herring because Gutierrez presented other evidence showing that Paz's three times testimony was an untruth: N.L. told Sergeant Stines that Shafer rode the bus "some days"; Sergeant Stines referred to "multiple" instances of grooming contact; N.L. described Shafer's interactions were of such significant degree that N.L. felt the need to pray for his safety; and Paz's own descriptions of Shafer's interactions on the bus with the girls strongly suggested interactions with the girls spanning multiple days.

Even had the trial court excluded the challenged evidence, it would not have, within reasonable probabilities, affected the trial's outcome. The error, if any, was harmless. Likewise, even when N.L.'s "twenty times" statements[26]; McGoey's and Dr. Whitehill's so-called "vouching" testimony[27]; V.M.V.'s statements to Sergeant Stines and N.L.'s statements to Abbigail[28]; and McGoey's expert testimony[29] are considered in

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[26] Even if the trial court was required to conduct an ER 403 balancing before allowing McGoey and Dr. Whitehill to testify about N.L.'s out-of-court statements under ER 703 and ER 705, the failure to do so was harmless. "Where the trial court has not balanced probative value versus prejudice on the record, the error is harmless" where the trial court nonetheless likely would have admitted the evidence under ER 403. *Brundridge*, 164 Wn.2d at 446-47. Here, the trial court likely would have admitted N.L.'s statements because they were probative of the basis of McGoey's and Dr. Whitehill's expert opinions. This probative value outweighed any prejudicial effect, as the trial court instructed the jury that the statements were not admitted as substantive evidence and that the jury was not required to accept an expert's opinion. CP at 1090. This court presumes the jury followed those instructions. *Tincani*, 124 Wn.2d at 136.

Moreover, even if the trial court would have excluded the statements, the error is still harmless if it likely did not affect the trial's outcome. *Brundridge*, 164 Wn.2d at 447. Here, the evidence likely did not affect the trial's outcome because, as discussed above, other admissible evidence supported McGoey's and Dr. Whitehill's opinions, and the jury heard numerous evidence from multiple witnesses demonstrating that Shafer rode Paz's bus multiple times. Accordingly, any error in admitting N.L.'s statements was harmless.

[27] Here, the trial court instructed the jurors that they were the sole judges of credibility and of "the value or weight given to the testimony of each witness" and that the jurors were not required to accept an expert's opinion. CP at 1081, 1090. This court must presume that the jury followed these instructions. *Tincani*, 124 Wn.2d at 136. Accordingly, these instructions neutralized any improper "vouching" testimony regarding the credibility of N.L.'s out-of-court statements.

[28] V.M.V.'s statements to Sergeant Stines concerned Shafer tickling her and N.L., that he told her and N.L. knock-knock jokes, that they sat on Shafer's lap, that Shafer scratched their backs, and that V.M.V. considered Shafer her friend. RP 217-19. But they jury also heard from Abbigail, without objection from the District, that N.L. told her that Shafer had tickled her, Shafer was her friend, she and V.M.V. sat on Shafer's lap, Shafer was "really funny," and Shafer had rubbed her and V.M.V.'s backs. RP 1066, 1072. Thus, V.M.V.'s statements to Sergeant Stines, which were not admitted for their truth, were merely cumulative of N.L.'s statements these statements to Abbigail, which were not objected to and, thus, ***were*** admitted for their truth. The admission of evidence that is cumulative in nature is harmless error. *Brown v. Spokane County Fire Prot. Dist. No. 1.*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) ("[T]he evidence, being merely cumulative in nature, was harmless error.").

Likewise, N.L.'s statements to Gutierrez concerning how many times Shafer rode her bus, to which the District did object, were cumulative of Sergeant Stines's unobjected-to testimony that N.L. told her Shafer rode her bus "some days" and N.L.'s

isolation, any error in admitting each of them was harmless.

H. The Trial Court Properly Denied A Motion For Judgment As A Matter Of Law.

1. Standard of Review.

The District contends that the trial court erred in denying its motion for judgment as a matter of law because "not even a scintilla of admissible evidence supports the negligence and causation findings in the verdict."[30] Br. of App. at 55. The District misrepresents the law to the extent that it argues that this court should review whether the evidence at trial supported the verdict only after determining whether some or all of the evidence challenged by the District on appeal was inadmissible. *See* Br. of App. at 55. The proper vehicle for factoring in the effects of improperly admitted evidence, if any, is in the harmless error analysis above. In contrast, when considering whether the evidence supports the verdict, this court necessarily must consider ***all*** the evidence adduced at trial and determine whether, as matter of law, that evidence could support

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properly-admitted "twenty times" statement introduced through McGoey and Dr. Whitehill.

[29] Generally, "expert testimony is not required to establish a standard of care in an action for negligence." *Petersen v. State*, 100 Wn.2d 421, 437, 671 P.2d 230 (1983). Here, McGoey's testimony primarily focused on the need for policy and procedures governing adult ride-alongs and behavior on school buses, how the District's completely lack of ride-along policy and procedures failed to meet this need, and how the lack of policy and procedures contributed to N.L.'s molestation. Moreover, Paz's own testimony established that a common sense standard applied to his actions in protecting the children on his bus. Even absent McGoey's testimony, a layperson was fully capable of understanding that lacking any procedures governing how many times an adult could ride along on a bus and in what seats they could sit, as well as allowing an adult male to sit in a blind spot with kindergarten girls, violated common sense or any other applicable standard of care. Accordingly, any error in admitting McGoey's testimony was harmless.

[30] The District styles its motion below as a motion for a directed verdict. Br. of App. at 28. But motions for a directed verdict were renamed motions for judgment as a matter of law in 1993. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

the verdict. Here, when the proper evidence is considered and the proper standards of review are applied, it is evident that the trial court properly denied the District's motion for a directed verdict.[31]

"'Overturning a jury verdict is appropriate only when [the verdict] is clearly unsupported by substantial evidence.'" *Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009) (alteration in original) (quoting *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107–08, 864 P.2d 937 (1994)). Thus, this court reviews whether substantial evidence supports the verdict. *Faust*, 167 Wn.2d at 537. Moreover, this court "must accept as true the nonmoving party's evidence *and all favorable inferences* arising from it." *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996) (emphasis added). "[This court] interpret[s] the evidence 'against the [original] moving party and in a light most favorable to the opponent.'" *Faust*, 167 Wn.2d at 537–38, 222 P.3d 1208 (alteration in original) (quoting *Davis*, 63 Wn.2d at 254, 386 P.2d 958). This court defers to the trier of fact on issues involving conflicting testimony,

[31] Even assuming arguendo that the trial court erred in denying the District's motion, this court should not remand for dismissal. CR 50(2)(d) provides that, in an appeal from the trial court's denial of a motion for a judgment as a matter of law, "nothing in this rule precludes [the appellate court] from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." As discussed earlier, the trial court excluded a slew of evidence favorable to Gutierrez, including Shafer's own admissions to multiple bus rides and grooming N.L. on the basis that Shafer was neither deposed nor disclosed as a witness. RP 308-09. Gutierrez notes that, for purposes of V.M.V.'s upcoming trial against the District, they have secured Shafer's testimony by deposition. By remanding for dismissal, this court would be improperly prejudging the outcome of Gutierrez's efforts to introduce this evidence and other evidence adduced at a new trial. Should this court determine that the trial court erred in denying the District's motion to dismiss, Gutierrez would gladly provide further supplemental briefing to this court or the trial court on why a new trial is the proper remedy.

credibility of the witnesses, and the persuasiveness of the evidence. *See Faust*, 167 Wn.2d at 537–38.

2. The jury heard substantial evidence that supports the verdict.

In addition to the unchallenged evidence extensively discussed above in the harmless error analysis, this court must also consider the challenged evidence heard by the jury when determining whether substantial evidence supports the verdict. For the reasons already extensively briefed, Gutierrez produced substantial evidence even without the challenged evidence. Including in the analysis the challenged evidence and all favorable inferences drawn therefrom just further tips the scales overwhelmingly in favor of affirming the trial court.

I. The Trial Court Properly Denied The District's Motion For A New Trial.

1. Standard of review.

This court reviews the trial court's denial of a motion for a new trial for abuse of discretion when the motion was not predicated on legal error. *Edwards v. Le Duc*, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010). When interpreting the evidence on appeal, this court reviews the denial of a motion for a new trial under the same standard as a motion for judgment as a matter of law. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 768-69, 260 P.3d 967 (2011), *review denied*, 173 Wn.2d 1029 (2012).

2. Substantial evidence supports the jury's verdict.

The District argues that both damages and liability should be retried should this court order a new trial. Br. of App. at 55. Although both Gutierrez and this court are left to speculate as to the District's

authority for or basis for this argument, an error that Gutierrez urges precludes appellate review, the District appears to include this argument in support of its assignment of error to the trial court's denial of its motion for a new trial. Br. of App. at 2, 28.

CR 59(a) enumerates nine grounds on which the trial court may order a new trial. The District fails to specify in its opening brief under which provision of CR 59 that the trial court erred in ordering a new trial. The thrust of the District's argument, however, is that the evidence adduced at trial did not support McGoey's or Dr. Whitehill's expert opinions, which in turn left the jury's verdict without evidentiary support. Br. of App. at 55-56.

As thoroughly discussed above, substantial evidence supported the jury's liability verdict. The same is true for damages. Shafer rode Paz's bus numerous times and repeatedly groomed N.L. Dr. Conte testified to the numerous and extensive traumatic effects of molestation that N.L. was likely to experience as she developed throughout her entire life, and the necessity for continuing treatment as she developed. RP 924-36, 939-41. Even the District's damages expert, Dr. Daniel Rybicki, diagnosed N.L. with PTSD. RP 1518. When viewed in the light most favorable to Gutierrez, substantial evidence supported the jury's damages award, and the trial court did not abuse its discretion in denying the District's motion for a new trial.

J. This Court Should Award Gutierrez Her Attorney Fees And Costs On Appeal

Gutierrez requests her attorney fees and costs on appeal under RAP 18.1 and RAP 18.9. RAP 18.9(a) authorizes this court to "order a party . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply."

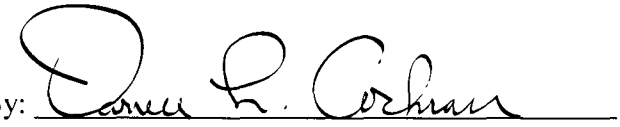
Here, the District has failed to preserve, affirmatively waived or invited, and/or failed to sufficiently brief (despite filing a 57-page overlength brief) nearly every issue it raises on appeal, forcing Gutierrez to highlight both these preservation issues and the lack of merit of the District's arguments in its briefing. Of the remaining issues, the out-of-court statements to Sergeant Stines and Abbigail were clearly admissible under well-settled case law and were cumulative of other unchallenged and properly-admitted evidence. This leaves Gutierrez and this court to review over 2,000 pages of trial transcripts and over 1,000 pages of clerk's papers for what is, essentially, a sufficiency challenge in which there is no hope of reversal. Because the District's appeal is frivolous or brought for purposes of delay and because the District's failure to comply with the RAPs has imposed an unnecessary burden on both Gutierrez and this court, Gutierrez respectfully requests that this court award Gutierrez her attorney fees and costs on appeal.

V. CONCLUSION

For the foregoing reasons, Gutierrez respectfully asks this court to

affirm and award her attorney fees and costs for this appeal.

RESPECTFULLY SUBMITTED this 23rd day of August 2013.
PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

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CERTIFICATE OF SERVICE

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

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

That on August 23, 2013, I delivered via Email and sent for delivery via U.S. Mail a true and correct copy of the above document, directed to:

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

Daniel Ferm
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601 Union St., Ste. 4100
Seattle, WA 98101

DATED this 23rd day of August 2013.

Laura Neal
Legal Assistant to Darrell Cochran

4826-5381-0964, v. 6