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Supreme Court No. 95641-3

COA No. 34110-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA GATHERER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF ASOTIN COUNTY

The Honorable Scott Gallina

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Joshua Gatherer, appellant in COA No. 34110-1-III, in which the Court of Appeals affirmed his bench trial conviction.

II. COURT OF APPEALS DECISION.

The Court issued its decision January 23, 2018.

III. ISSUES PRESENTED ON REVIEW

Because it inadequately addressed Mr. Gatherer's argument that the Read presumption (that the court in a bench trial cannot be influenced by evidentiary error, see State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002)), can and was rebutted, and because it incorrectly assessed the degree of reversible prejudice carried by each of the individual multiple errors in the case, the Court of Appeals wrongly affirmed Joshua Gatherer's Asotin County bench trial judgment on a charge of indecent liberties, where:

1. the trial court erred in admitting opinion testimony by Asotin County Detective Nichols as to victim believability and the defendant's deceptiveness and guilt, and opinion testimony by Idaho Detective Eylar, including "Reid technique" testimony, in violation of the Sixth Amendment jury trial right and State v. Barr, 123 Wn. App. 373, 382, 98 P.3d 518 (2004),

2. where the prosecutor engaged in misconduct in violation of 14th Amendment Due Process by eliciting the opinion testimony,

3. where the prosecutor engaged in misconduct in violation of Due Process, and the Fifth Amendment right to silence, by remarking on the defendant's courtroom demeanor, and

4. where the court, contrary to the holding of the Court of Appeals, erroneously admitted ER 404(b) evidence of a recorded “confrontation call” arranged by Idaho police to be made by one Summer Smith, to Mr. Gatherer, where Smith confronted the defendant by accusing him of raping her in the past?

5. Alternatively, did the prejudicial effect of cumulative error, even considering only the assignments of error agreed with by the Court of Appeals, deny Gatherer a constitutionally fair trial?

IV. STATEMENT OF THE CASE

(1) Bench Trial. Joshua Gatherer, age 29, was charged with indecent liberties with forcible compulsion pursuant to RCW 9A.44.100(1)(a). The offense, in which his friend Katie Watkins was the complainant, was alleged to have occurred in the Big Beach Area of the Snake River, in Asotin County, in August of 2014. CP 1, 4-5. Mr. Gatherer proceeded to a bench trial before the Asotin County Superior Court in December, 2015. RP 12.

According to the affidavit of probable cause, Detective Jackie Nichols of the Asotin County Sheriff’s Department was contacted by a Clarkston, Washington police officer who stated that Watkins wanted to report a sex offense that had occurred in Asotin County. CP 4. Later in October, Detective Nichols heard directly from Watkins, who claimed a sexual assault occurring at the Snake River in August. CP 4. Watkins stated that she, Joshua Gatherer, and a number of other friends had

attended a camping and drinking party at the river on the night of August 16, and Gatherer had touched her private areas against her will, by holding her down. CP 5-7. Watkins claimed that when she resisted Gatherer's kissing or any sexual contact with him, she claimed that Mr. Gatherer threw her over his shoulder, and carried her from the campsite to the beach area. RP 107-113. She alleged that Gatherer held her down on the beach, and touched her breasts and had other sexual contact with her against her will. RP 107-113. See CP 15-19 (CrR 6.1 Findings of Fact).

Idaho police detective Nick Eylar set up a recorded "confrontation call," in which a former girlfriend of Gatherer's, Summer Smith, telephoned Gatherer and accused him of now engaging in acts toward Watkins similar to acts he had engaged in toward her. This evidence was admitted over defense objection that the evidence violated ER 404(b). RP 12, 14, 65, 213, 226; RP 226; Exhibit P4; RP 230-31, 237-39.

At trial, two detectives testified to their opinions of the complainant's credibility, and the defendant's lack of credibility, and commented that Mr. Gatherer took his coat off when the "confrontation call" was being played during his law enforcement interview. As the Court of Appeals described:¹

¹ The Court of Appeals used pseudonyms for the present complainant and the past, ER 404(b) complainant.

During trial, the State called Detective Jackie Nichols of the Asotin County Sheriff's Office. The State asked Detective Nichols to describe the training she received in discerning signs of deceptiveness of interviewees. Detective Nichols described her training. The State then asked Detective Nichols to describe whether she saw signs of deceptiveness when she interviewed Ms. Williams. Detective Nichols said that she saw no signs that Ms. Williams was being deceptive during the interview.

The State asked similar questions regarding deception about Detective Nichols's interview with Mr. Gatherer. Detective Nichols testified to multiple signs tending to corroborate her conclusion that Mr. Gatherer was being deceptive.

Defense counsel did not object to most of these questions, except responses where Detective Nichols was describing her conclusions of truthfulness or untruthfulness. The trial court sustained one of defense counsel's objections and noted that Detective Nichols could not comment on the "ultimate veracity of any statement," but that she could "testify what you observed and your impression." VRP at 55.

The State also called Detective Eylar. The State similarly asked Detective Eylar about his training in discerning signs of deceptiveness of interviewees. Detective Eylar testified about his training. The State then asked Detective Eylar whether he saw any signs of deceptiveness when he interviewed Mr. Gatherer. Without objection, Detective Eylar testified that he noticed Mr. Gatherer's demeanor change when he played the confrontation call and that Mr. Gatherer asked to take his coat off. During redirect, the State asked Detective Eylar whether he had noticed that Mr. Gatherer took off his coat during trial after hearing the confrontation call. Detective Eylar responded that he noticed that Mr. Gatherer was wearing a coat at trial, that he did not see when Mr. Gatherer removed his coat, but noticed "it's off now." VRP at 255.

Court of Appeals decision, at pp. 4-5. The Court of Appeals, although noting that the defense objected to some of these instances of error, later

addressed all of them under the manifest constitutional error doctrine, and the flagrant and incurable doctrine for misconduct. Court of Appeals decision, at pp. 9-10.

After the evidence phase, and closing argument, the trial court found Mr. Gatherer guilty of indecent liberties with forcible compulsion. RP 369-74. The court entered findings. CP 15-19. At sentencing, the court imposed a standard range indeterminate term with a 51 month minimum. CP 22; RP 393-98. Mr. Gatherer appealed. CP 34.

(2) Appeal – Affirmance Despite Recognition of Multiple Errors. The Court of Appeals agreed that two law enforcement witnesses in this case gave opinion testimony that would invade the province of a jury and violate Mr. Gatherer’s right to a trial by an impartial jury in a jury trial. U.S. Const. amend. 6. Although Mr. Gatherer made arguments that the testimony was adequately objected to, the Court of Appeals reached the issues because it deemed them to be both constitutional, and manifest. Decision, at pp. 9-11.

As to the improper opinions on credibility, the Court recognized the constitutional nature of the errors, and the Court also commenced its analysis of multiple instances of prosecutorial misconduct in the case by noting that the mere elicitation of this evidence was misconduct. Court of Appeals decision, at pp 9-10 (and stating, “Here, the prosecutor went too

far when he asked both detectives to testify about their training and elicited testimony that strongly suggested that Ms. Williams was truthful whereas Mr. Gatherer was deceptive.”).

The Court assumed that the prosecutor’s *elicitation* of the detective’s testimony was also flagrant, incurable *misconduct*. Court of Appeals decision, at p. 12. As to the additional misconduct of the prosecutor that built upon the detective’s discussion of the defendant taking off his coat, the Court of Appeals again reached the issue because it assumed it met the flagrant and incurable standard, although, as will be argued, it incorrectly concluded there was no prejudice because this was a bench trial. Court of Appeals decision, at pp. 12-13.

Despite agreeing with most of Mr. Gatherer’s assignments of error, the court affirmed under the Read presumption, by (A) relying on the reasoning that bench trial courts are not influenced by evidentiary error, and (B) failing to assess the great prejudice that occurred as a result of these errors during the trial.

But these four errors individually and cumulatively require reversal. As Mr Gatherer argued in the Court of Appeals, the errors were tremendously prejudicial, and further, the Read presumption can be rebutted. “[T]he Read presumption is only that—an assumption that appellate courts begin with, but do not necessarily end with, depending on

the case.” State v. Gower, 179 Wn.2d 851, 855, 321 P.3d 1178 (2014).

Mr. Gatherer argues that this Court should accept review.

V. ARGUMENT

THE EVIDENTIARY AND PROSECUTORIAL MISCONDUCT ERRORS IN THIS CASE, EVEN INCLUDING JUST THOSE ACKNOWLEDGED BY THE COURT OF APPEALS, REQUIRE REVIEW TO BE GRANTED, BECAUSE THEIR PREJUDICE WAS OUTCOME-DETERMINATIVE AND THE READ PRESUMPTION WAS REBUTTED.

1. Review is warranted because of individual constitutional errors, because of the constitutional nature of the cumulative error doctrine, and because the Court of Appeals decision fails to follow decisions of this Court and other decisions of the Court of Appeals.

The Read presumption is based on the notion that the trial judge necessarily knows and correctly applies the law, even absent a recitation of the correct legal rule. State v. Gower, at 855-56 (citing State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970)). It is, therefore, inapplicable when the judge actually considers matters which are inadmissible when making his or her findings. Read, at 245-46.

But a trial riddled with constitutional errors, about which the trial court says nothing, or worse – where the court affirmatively condones some of the errors and enters findings that cannot but be influenced by those errors, is one in which the Read presumption is rebutted on appeal and is not a fair trial under Due Process because of cumulative prejudice.

The failure to correctly apply Read and Court of Appeals decisions relating to the prejudice of the identified errors warrants review, under RAP 13.4(b)(1) and (2).

However, more importantly, review of this case is necessary to address the question whether a defendant can have a fair trial under Due Process if the Read presumption allows affirmance, despite multiple witnesses violating the constitution with impunity by uttering testimony opining on credibility, despite a prosecutor eliciting such testimony in disregard of the fact that it is prohibited by established case law, and despite further misconduct by the prosecutor in commenting on the defendant's in-court demeanor, also banned by established case law. Review in this case is therefore warranted under RAP 13.4(b)(3) because it presents significant constitutional questions.

2. The Court of Appeals reasoning relying on the fact that the trial court found the complainant's side of the case more credible than the defendant's was by definition a reason to reverse, not a reason to find that the errors were of no impact.

The Court of Appeals erroneously reasoned that reversal was not required because the trial court decided the case based on its assessment of the relative believability of the complainant and the defendant. But this analysis by the Court of Appeals begs the question. Such a significant part of the State's case was its elicitation of the two detectives' opinions as to

complainant Watkins' believability, and as to Mr. Gatherer's untruthfulness and his guilt, as shown by "signs of deception," during his interview, including by removing his coat when the Summer Smith telephone call was played for him in his November 2014 interrogation.

If the trial court decided the case based on **Katie Watkins' believability**, that is also no answer to the argument that the errors affected the bench trial. Detective Nichols was first permitted to testify, based on her training and experience, about reasons a person like Katie might delay reporting a sexual assault by someone they know, including fear of reprisal. RP 36-38. This testimony was given over two defense objections to speculation, to which the prosecutor responded that this was a detective who had been doing sexual assault investigations for eight years, thus, "[h]er opinion is not just speculation." RP 37-38.

The court allowed the questioning, stating that the witness should testify not about why somebody would delay, but could testify about what reasons Nichols had perceived for people's delay. RP 37-38.

When the prosecutor followed up his questioning about why Watkins stated she had waited to report the alleged indecent liberties, Nichols said Watkins said she was fearful. RP 50. Nichols then stated that the victim was "believable, straightforward, didn't show signs of deception," and she was also appropriately emotional. RP 50.

Next, the prosecutor asked whether Detective Nichols observed Katie Watkins exhibiting any of the “indicators of deception, that you’ve talked about-?” RP 50. The answer was, “No.” RP 50.

Finally, the prosecutor asked the detective to overall compare victim Watkins’ credibility, as “contrasted” to defendant Gatherer’s credibility, from their separate interviews. RP 91-92. Nichols stated that while Katie Watkins’ behavior was not suggestive of deception, Mr. Gatherer’s “was consistent with deception.” RP 91-92.

And at the end of the case, the bench trial court’s Findings of Fact specifically and favorably endorse these ‘explanations’ for Katie Watkins’ delay in reporting, such as fear of reprisal from friends -- therefore using the detective’s testimony in an improper way – to specifically bolster the believability of Watkins. CP 17-18, Finding of Fact 15. Therefore, the Read presumption (that bench trial courts do not consider inadmissible evidence in reaching their decision) is expressly rebutted.

As to the defendant, the prosecutor next went on to elicit extensive, further opinion testimony from Detective Nichols, asking her to detail her long experience and “cues that you look for” when interviewing suspects in these sorts of acquaintance “rape” cases. RP 38. First, the detective stated that she had learned how to look for “signs of deception [and] signs of truthfulness,” particularly regarding how the defendant

refers to the victim in a way that tries to “discredit [the] victim.” RP 38-39. The prosecutor then continued to elicit testimony from Nichols regarding her training that allowed her to opine on “the credibility of the statements that have been made [by Gatherer].” RP 39-40. Nichols described how a person will often use body language such as fidgeting, RP 40, and inconsistency in the manner of their admissions and denials:

People basically when they’re being deceptive they are uncomfortable, and because they’re uncomfortable that starts to come out in various physical ways. They’ll be fidgety. They may not make eye contact. They – their speech may change and they talk more rapidly, softly, louder – there’s just some noticeable change in behavior. They may become – their posture may become closed. They may – nod their head when they’re saying no, or shake their head negatively when they’re saying yes.

RP 40. Detective Nichols thoroughly gave her improper opinion of Gatherer’s lack of truthfulness, and his guilt. The detective opined, in answer to questioning, that she “knew the answers he [Gatherer] was giving [during the interview] were not truthful,” or were at least inconsistent with statements he made in the confrontation call. RP 50.

Of course, the defense objected that the court should instruct the witness to not “make generalized conclusory statements about whether or not Mr. Gatherer was telling the truth.” RP 50-51. The court told Detective Nichols that she could not comment on the “ultimate veracity of any statement,” but also told the witness, “You can testify what you

observed and your impressions.” RP 51. But, as we *now know* from the Court of Appeals opinion, the bench trial court was wrong to allow this “Reid technique”– type testimony. Court of Appeals decision, at pp. 9-10; see State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985) (in a bench trial, opinions on guilt improperly invade the province of the fact finder); see Barr, supra.

Yet, the bench trial court’s Findings of Fact repeatedly base the verdict of guilt on the conclusion that Mr. Gatherer was not a truth-teller as shown by his denial of the victims’ claims that he continued with contact after she said no, and the alleged *inconsistency* of his explanations, such as what he said to Chas Bolon and to the detectives. CP 18 (Finding of Fact 16); CP 18-19 (Finding of Fact 18. 19). The Read presumption is rebutted, because the trial court’s findings plainly rely on and endorse the detective’s improper opinion analysis of Gatherer’s believability.

As to demeanor, Detective Nichols described how she had noticed a change in Mr. Gatherer’s behavior when the Summer Smith confrontation call was played for him during the interview – he took his coat off. RP 64. The prosecutor played the recorded interview of Mr. Gatherer, in which Mr. Gatherer is listening to the Summer Smith confrontation call. RP 67-79; Exhibit P4. The prosecutor then stopped the interview recording, and asked the witness, Nichols, if this was the

juncture where Mr. Gatherer was being made to listen to the confrontation call recording, and asked to take his jacket off:

Playback stopped

Q: And that's – that's the point at which he took off his jacket – asked to take his jacket off?

A: Yes.

RP 78; see Exhibit P4. All of this mountain of opining on credibility shows that, in this case, the Court of Appeals reasoning -- that the trial was decided by the bench based on the relative believability of the complainant and the defendant -- in fact shows why the Read presumption, that a bench trial court always inherently employs an understanding that incompetent evidence is not to be considered, - is completely *rebutted* in this case.

3. Next, the prosecutor elicited Detective Eylar's opinions on Summer Smith's truthfulness, and on Mr. Gatherer's guilt and deceptiveness – including, again, as shown by Gatherer removing his coat.

We now know from the Court of Appeals decision that it was improper when Detective Eylar explained that he had undergone federal training in interviewing and interrogation, and had been trained in the Reid interview technique, all of which allowed him to identify “clues” of deception. RP 215; see Court of Appeals decision, at pp. 10-11.

However, at trial (to summarize just a few of the objectionable points of his testimony, thoroughly discussed in the Opening Brief), Detective Eylar explained how he had applied his special training and

expertise to (a) prior, ER 404(b) rape accuser Summer Smith and (b) to the defendant Joshua Gatherer. RP 220-23. When asked whether he noticed anything about Mr. Gatherer's overall demeanor in the interview, Eylar opined that Gatherer would not "come forth with everything," and he felt that Mr. Gatherer was "minimizing, and not kind of telling the whole truth." RP 241. Based on what Smith had alleged in the telephone call about his conduct toward her, Eylar felt Gatherer was "not being completely truthful about it." RP 242. Specifically, drawing upon his statements that people reveal clues such as body language when they are being deceptive, the detective noted that Mr. Gatherer showed physical signs of nervousness when asked about Smith's rape allegations. RP 243. Significantly, Mr. Gatherer asked to take his coat off in the interview room. RP 243. This was noticeable because the detective was not warm himself, and the "temperature hadn't changed" in the room. RP 243.

Misconduct. Next, in trial, the prosecutor personally remarked that Mr. Gatherer removed his coat during trial the previous day, when the "confrontation call" was played in the court room. Detective Eylar had testified that it is a clue of deception when suspects become fidgety and uncomfortable, which was shown by Mr. Gatherer removing his coat when confronted with the Smith confrontation call. RP 215-16, 243-56.

(Detective Nichols had testified similarly, that her training and experience

allowed her to detect when a person is being deceptive, as revealed by Mr. Gatherer removing his coat. RP 40, 64.).

During continued examination of Detective Eylar, the deputy prosecutor personally commented on Mr. Gatherer's demeanor in the courtroom. He asked Detective Eylar if he had noted that Mr. Gatherer was wearing the same jacket in court that he took off during his police interview when the confrontation call was played for him. RP 255. The detective stated that this was true. RP 255. The prosecutor then remarked, and the witness answered, as follows:

Q: Did you notice that he took the jacket off after hearing the confrontation call in this courtroom?

A: I notice it's off now.

(Emphasis added.) RP 255. The detective stated that he saw that the defendant's jacket was off now, but said he did not see when he took it off. RP 255. Mr. Gatherer argued that this violated his Fourteenth Amendment right to a fair trial. U.S. Const., amend. 14; see United States v. Pearson, 746 F.2d 787, 796 (11th Cir.1984), and his 5th Amendment right to be free from compelled examination. The Court of Appeals agreed that this was misconduct, and reached the issue because it met the flagrant and incurable test, yet at the same time deeming the error non-prejudicial, including because this was a bench trial:

Mr. Gatherer claims he is entitled to a new trial because the prosecutor committed misconduct by commenting that he took off his coat after the confrontation call was played in court. We agree with Mr. Gatherer that it is generally improper for a prosecutor to comment on a defendant's courtroom demeanor. See State v. Barry, 183 Wn.2d 297, 305 n.4, 352 P.3d 161 (2015); State v. Klok, 99 Wn. App. 81, 85,992 P.2d 1039 (2000). But we disagree that the prosecutor's improper comment entitles Mr. Gatherer to a new trial. Again, because Mr. Gatherer failed to object to the alleged misconduct, he must show that the comment was "so flagrant and ill-intentioned that it evince[d] an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." See Stenson, 132 Wn.2d at 726-27. There is no evidence that the trial court's verdict was tainted by the prosecutor's improper comment.

Court of Appeals decision, at pp. 13-14.

This was error on the part of the Court of Appeals. Credibility was the basis on which the bench trial court decided the case, and this misconduct went directly to the credibility of the defendant. The record shows that the Read presumption is applicable, the record shows that the case turned on credibility, and the presumption is rebutted.

Further, crucially, the record also shows that when the court had an opportunity to note the utter impropriety of the issue of the defendant's courtroom demeanor as an inadmissible comment on credibility, the court noted the controversy, but not the impropriety: During final cross-examination, defense counsel tried again to ask if being interviewed by

police about a recorded telephone call was inherently stressful. RP 92.

When the State objected on the basis of speculation, the court stated:

THE COURT: If it helps both counsel, I didn't just land here from Mars. I understand that they're saying that - he was uncomfortable and taking off his coat because he was being deceptive; the defense is saying he took off his coat because he was being questioned about rape by a couple of cops, and that made him understandably nervous. I get it.

RP 92. This statement by the court is yet another indication that, in this case, *rebutts* the Read presumption that a bench trial court always inherently employs an understanding that incompetent evidence is not to be considered. This Court should accept review based on the above, even if it agrees with the Court of Appeals decision that there was no ER 404(b) error.

4. Additionally, the dictates of ER 404(b) are deemed crucial to admission, but here, they were not followed, and the *Read* presumption can be rebutted.

It is not enough for the Court of Appeals to simply state that the trial court “did not consider” the accusations of Summer Smith to be “other crimes, wrongs, or acts.” Court of Appeals decision, at p. 7. The trial court’s evidentiary ruling failed to identify a proper, non-propensity purpose or otherwise conduct any ER 404(b) analysis on the record. When the justification for offering evidence lacks logic or necessity, the evidence carries only prejudice.

The Court of Appeals was incorrect to affirm the prosecution's claim that the evidence of Summer Smith being raped by the defendant was "not" ER 404(b) evidence in the first instance. Court Appeals Decision, at p. 7. The evidence was not properly admitted for context as "part of" the telephone call, because no such evidence was necessary – even considering the general rule that the prosecution is entitled to prove its case. See RP 19-20,65, 213, 226 (State's arguments; court's rulings).

Remarkably, the Court of Appeals conceded that this evidence, had it been admitted in a jury trial with the paucity of analysis offered by the trial court, was reversible error, when it stated: "**We would not be able to discern that the verdict was based on proper evidence.**" Court of Appeals Decision, at p. 9 (Emphasis added.).

At the same time, the Court of Appeals summarily dismissed Appellant's extensive argument that the Read presumption, which presumes that the judge in a bench trial does not consider inadmissible evidence, can, and in this case was, rebutted. It was erroneous to admit the Summer Smith evidence, both the recorded call and the law enforcement witnesses' testimony about the Summer Smith allegations. The trial court did not identify a proper non-propensity purpose for admission of this evidence, and failed to address the evidentiary rule on the record.

That was error. The entire ER 404(b) analysis must be conducted *on the record*. State v. Foxhoven, 161 Wn. 2d 168, 175–76, 163 P.3d 786 (2007) (citing State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984)).

Had the analysis been conducted, it would have shown that there was no need for the evidence relating to Summer Smith’s claims and her accusations regarding what she thought the defendant might have done to Watkins. The trial court had already admitted evidence of Katie Watkins’ “hue and cry,” that is to say, her initial claim of sexual misconduct as revealed to Detective Nichols and Officer Adelsbach, and to Chaz Bolon. See State v. DeBolt, 61 Wn. App. 58, 63, 808 P.2d 794 (1991).

As Mr. Gatherer squarely addressed – in connection with the evidentiary errors, and the errors of misconduct in this case as described above – the nature of the presumption in bench trials is that the court, when serving as fact-finder, implicitly *understands the law* and will disregard any inadmissible evidence. See Read, 147 Wn.2d at 245.

Yet the Court of Appeals, despite admitting that “the trial court included a detailed description of the confrontation call in one of its findings,” (Decision, at p. 7), dismissed the agreed legal tenet of Gower that this shows that the presumption is rebutted. The Court wrote only that the trial court “did not consider Ms. Thompson’s [Summer Smith’s]

accusations against Mr. Gatherer in rendering its verdict.” Court of Appeals decision, at p. 7.

This is untenable. The court allowed a detective to opine on the believability of Summer Smith and her claims of past forced sex by Gatherer – something that *should not matter* unless the court was failing to outright reject the State’s offer of Gatherer’s past conduct as improper ER 404(b) accusations. And, as the Court of Appeals recognized, the Court of Appeals addressed Smith’s accusations at length in its Findings. Court of Appeals decision, at pp. 7-8. Ultimately, as argued, the Court reasoned that the trial court decided the case on the believability of Watkins compared to Gatherer – but each of these errors went to the heart of that issue of credibility. This Supreme Court can have no confidence that the fact that this was a bench trial meant that the defendant had a fair trial.

VI. CONCLUSION

Based on the foregoing, Mr. Gatherer requests that this Court accept review.

Respectfully submitted this 22ND day of February, 2018.

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APPENDIX A

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

STATE OF WASHINGTON,)	No. 34110-1-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
JOSHUA A. GATHERER,)	
)	
Appellant.)	

LAWRENCE-BERREY, A.C.J. — Joshua Gatherer appeals his bench trial conviction for indecent liberties with forcible compulsion. He argues the trial court committed reversible error when it admitted propensity evidence. He also argues he is entitled to a new trial because the State introduced improper opinion evidence and committed prosecutorial misconduct. We disagree and affirm.

FACTS

In August 2014, Mr. Gatherer attended a beach party with a large group of friends on the Snake River approximately 15 miles south of Asotin, Washington. Rebecca

Williams¹ also attended the party. The attendees drank alcohol from afternoon and into the night. Many of the party-goers stayed in camp tents.

Prior to that night, Ms. Williams and Mr. Gatherer were good friends, and Ms. Williams thought of Mr. Gatherer as an older brother. They had never had a romantic relationship. Once everyone had gone to sleep, Mr. Gatherer began trying to kiss Ms. Williams. Ms. Williams pulled away and protested.

Shortly thereafter, Mr. Gatherer carried Ms. Williams to the beach away from their sleeping friends. Ms. Williams resisted. Mr. Gatherer set her down on a blanket and straddled her pelvis. He attempted to kiss her while pulling her hair. Mr. Gatherer then pulled up her shirt and swimsuit top and kissed her breasts. Ms. Williams continued to tell him no and told him to stop. He then put his hand down her shorts over her swimsuit rubbing her vaginal area. When he attempted to put his hand inside her swimsuit, she threatened to scream if he did not stop. He then stood up and held his hands up. None of their friends heard or saw what happened.

The confrontation call

At trial, the State offered in evidence a recorded telephone call between Mr. Gatherer and his ex-girlfriend, Gina Thompson. Ms. Thompson, an Idaho resident, had

¹ We use pseudonyms throughout this opinion to refer to victims and alleged victims of sexual assaults.

gone to Idaho authorities and complained that Mr. Gatherer had raped her during their relationship. Detective Nicholas Eylar of the Lewiston, Idaho Police Department, employed a technique lawful in Idaho. The technique, known as a “confrontation call,” involved recording an alleged victim’s call to the alleged perpetrator. The purpose of a confrontation call is to corroborate the victim’s accusations and to invoke admissions by the alleged perpetrator.

As a pretext for the call, Ms. Thompson compared Ms. Williams’s recent accusations against Mr. Gatherer to what Mr. Gatherer had supposedly done to her. In response to the accusation that he assaulted Ms. Williams, Mr. Gatherer admitted what he did to Ms. Williams was “‘horrible’” and apologized for it. Clerk’s Papers (CP) at 18. Ms. Thompson stated that she believed he would have raped Ms. Williams if nobody was around, and when she asked if this was true, he responded, “I don’t know.” Verbatim Report of Proceedings (June 15, 2015, Nov. 16, 2015, Dec. 7, 9, 10, and 14, 2015, Feb. 16, 2016) (VRP) at 238.

Denial of Mr. Gatherer’s pretrial motion

The State charged Mr. Gatherer with indecent liberties with forcible compulsion. Mr. Gatherer brought a motion to exclude the confrontation call. He argued that the evidence was improper propensity evidence. The State responded that it would not be offering Ms. Thompson’s statements during the call to prove the truth of Ms. Thompson’s

allegation of rape. Rather, her statements would give context to the statements made by Mr. Gatherer during the call. The State explained, “[s]o we’re not offering it for—as evidence of propensity or evidence that he acted in conformity with prior incidents of misconduct.” VRP at 20-21. The State emphasized that the trial was to the bench and that the trial judge would be “fully capable of parsing out the probative value and the proper purposes for which that information might be offered from the prejudicial impact and any improper purposes for which the court is forbidden from using it.” VRP at 21. The trial court denied Mr. Gatherer’s motion and ruled that the recording was admissible.

Trial questions and testimonies alleged to be improper

During trial, the State called Detective Jackie Nichols of the Asotin County Sheriff’s Office. The State asked Detective Nichols to describe the training she received in discerning signs of deceptiveness of interviewees. Detective Nichols described her training. The State then asked Detective Nichols to describe whether she saw signs of deceptiveness when she interviewed Ms. Williams. Detective Nichols said that she saw no signs that Ms. Williams was being deceptive during the interview.

The State asked similar questions regarding deception about Detective Nichols’s interview with Mr. Gatherer. Detective Nichols testified to multiple signs tending to corroborate her conclusion that Mr. Gatherer was being deceptive.

Defense counsel did not object to most of these questions, except responses where Detective Nichols was describing her conclusions of truthfulness or untruthfulness. The trial court sustained one of defense counsel's objections and noted that Detective Nichols could not comment on the "ultimate veracity of any statement," but that she could "testify what you observed and your impression." VRP at 55.

The State also called Detective Eylar. The State similarly asked Detective Eylar about his training in discerning signs of deceptiveness of interviewees. Detective Eylar testified about his training. The State then asked Detective Eylar whether he saw any signs of deceptiveness when he interviewed Mr. Gatherer. Without objection, Detective Eylar testified that he noticed Mr. Gatherer's demeanor change when he played the confrontation call and that Mr. Gatherer asked to take his coat off. During redirect, the State asked Detective Eylar whether he had noticed that Mr. Gatherer took off his coat during trial after hearing the confrontation call. Detective Eylar responded that he noticed that Mr. Gatherer was wearing a coat at trial, that he did not see when Mr. Gatherer removed his coat, but noticed "it's off now." VRP at 255.

Basis for the trial court's verdict

The trial court heard closing arguments and considered the evidence. The case involved a credibility determination between two witnesses, the only witnesses to the

alleged crime. The trial court explained why it found Ms. Williams more credible than Mr. Gatherer:

The Court finds [Rebecca Williams's] testimony to be credible concerning these events. Her statements concerning these events have been consistent throughout. There is no indication from the evidence of any motivation on Ms. [Williams's] part to fabricate the events she related. On the other hand, the Defendant's version of events has varied. He has reported that he lacked any first hand memory due to intoxication . . ., claimed that he had kissed Ms. [Williams] but stopped when she said "no," and characterized his behavior as "horrible" during the call with Ms. [Thompson].

CP at 19.

The trial court found Mr. Gatherer guilty of the charged crime and later entered a judgment of conviction and sentenced him. Mr. Gatherer timely appealed.

ANALYSIS

A. NO ERROR ADMITTING CONFRONTATION CALL

Mr. Gatherer claims that the trial court violated ER 404(b) in admitting portions of the confrontation call without weighing, on the record, the probative value of the evidence against its prejudicial effect. We disagree.

ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Whether a trial court erred in admitting evidence in violation of ER 404(b) is reviewed for an abuse of discretion. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). When a court admits prior bad acts under ER 404(b), it must (1) determine the purpose for which the evidence is offered, (2) determine the relevance of the evidence, and (3) balance on the record the probative value of the evidence against its prejudicial effect. *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995).

On appeal from a bench trial, the appellate court presumes that the trial judge only considered proper and admissible evidence. *State v. Read*, 106 Wn. App. 138, 145, 22 P.3d 300 (2001) (quoting *State v. Read*, 100 Wn. App. 776, 788, 998 P.2d 897 (2000)), *aff'd*, 147 Wn.2d 238, 53 P.3d 26 (2002). A defendant rebuts the “presumption by showing the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made.” *Read*, 147 Wn.2d at 245-46.

Here, the trial court did not err when it admitted the confrontation call without weighing the probative value of the evidence against its prejudicial effect. This is because the trial court did not consider Mr. Gatherer’s “other crimes, wrongs, or acts.” It is true that the trial court included a detailed description of the confrontation call in one of its findings. But read as a whole, it is clear that the trial court did not consider Ms. Thompson’s accusations against Mr. Gatherer in rendering its verdict. The trial court’s

basis for finding Mr. Gatherer guilty was not that Mr. Gatherer had done similar things in the past or that he was a bad person. Instead, the trial court focused on the consistency of Ms. Williams's description of the incident and the inconsistency of Mr. Gatherer's story. In its findings, the trial court noted that Mr. Gatherer told a third story during the confrontation call. Mr. Gatherer's third story was his admission during the confrontation call that what he did to Ms. Williams was "'horrible,'" and that he apologized. CP at 19.

Had the trial been to a jury, we would not be able to discern that the verdict was based on proper evidence. In a jury trial, the State would have been required to omit many portions of the confrontation call. But when a case is tried to the bench, we presume the trial court considered the evidence only for the proper purpose, such as in this case, only as context for the call. The trial court's explanation for its verdict, an explanation why it believed Ms. Williams instead of Mr. Gatherer, supports this presumption.

We conclude the trial court did not abuse its discretion because it did not consider "other crimes, wrongs, or acts" discussed during that confrontation call.

B. NO REVERSIBLE ERROR CAUSED BY IMPROPER WITNESS OPINIONS AND ARGUABLE PROSECUTORIAL MISCONDUCT

Mr. Gatherer claims he is entitled to a new trial because Detectives Nichols and Eylar provided improper opinion testimony about his lack of credibility and Ms.

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Williams's credibility. Mr. Gatherer also claims the prosecutor committed misconduct by eliciting such testimony. We agree with Mr. Gatherer that the detectives' opinions were improper and that the prosecutor improperly elicited such testimony. But we deny Mr. Gatherer's request for a new trial because there is no evidence that the improper opinions or the prosecutor's conduct prejudiced him.

We review whether a trial court improperly admitted witness testimony for an abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court. *Id.* If a party fails to preserve an issue with an objection below, this court generally declines to address the issue. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *see also* RAP 2.5(a).

At trial, defense counsel did not object to Detective Nichols describing her training in recognizing deception or in her description of Ms. Williams's and Mr. Gatherer's verbal and nonverbal cues that supported her implied opinions. Nor did defense counsel object to Detective Eylar's testimony describing his training and his testimony that Mr. Gatherer showed signs of deception.

But even if a defendant fails to preserve an issue below, he or she may raise an issue for the first time on appeal if the trial court error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Manifest error requires a plausible showing that the

error had practical and identifiable consequences at trial. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). “Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.” *Id.* at 936. For opinion testimony not objected to by defense counsel to constitute manifest error, a witness must make an explicit or nearly explicit statement on the defendant’s guilt. *Id.* at 936-37. A nearly explicit statement that the witness believed the accusing victim will constitute manifest error. *Id.* at 936.

In *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004), the court addressed police opinion testimony similar to the testimony that occurred here. There, the defendant was charged with rape and the credibility of the defendant and the victim were crucial to the State’s case. *Id.* at 381. The State elicited the testimony of an officer who interviewed the defendant about the alleged crime. *Id.* at 378. The officer testified that he had been trained to use the Reid Investigation Technique, a technique that discerns deceptiveness based on verbal and nonverbal cues. *Id.* The technique has never been accepted as admissible in this state. *Id.* at 380. The officer testified about the verbal and nonverbal cues given by the defendant during the interview. *Id.* at 379-80. Based on these cues, the officer strongly implied that the defendant was not being truthful. *Id.* at 382. The *Barr* court held that the officer’s opinions constituted manifest constitutional error that was not harmless and reversed the defendant’s conviction. *Id.* at 384.

What *Barr* teaches is that an officer cannot testify about his or her training in signs of deceptiveness. This training has no more basis in science than lie detector tests. Although the Reid Technique and lie detector tests have some validity, they are too subjective and a jury is prone to place too much weight on them. No Washington court has held that the Reid Technique is admissible. The State has not argued that the Reid Technique should be admissible. Nevertheless, any witness can testify about his or her observations of an alleged victim or an alleged perpetrator.

Here, the prosecutor went too far when he asked both detectives to testify about their training and elicited testimony that strongly suggested that Ms. Williams was truthful whereas Mr. Gatherer was deceptive.

In *Barr*, the case was tried to a jury, whereas here the case was tried to the bench. When the trial court sits as the trier of fact, it is presumed not to have considered inadmissible lay opinions. *Read*, 106 Wn. App. at 145 (quoting *Read*, 100 Wn. App. at 788). Had Detective Nichols's and Detective Eylar's testimonies been presented to a jury, their testimonies would have invaded the province of the jury and violated Mr. Gatherer's right to trial by an impartial jury. *See Barr*, 123 Wn. App. at 380. However, because Mr. Gatherer's case was tried to the bench, we presume that the judge only considered admissible evidence. In reviewing the trial court's findings of fact, it is clear that the trial court did not consider the detectives' improper opinions.

Mr. Gatherer also contends that eliciting the detectives' improper opinions constitutes prosecutorial misconduct. To prove prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

When the defendant fails to object to the prosecutor's conduct at trial, it will only constitute prosecutorial misconduct if the remark is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 726-27, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show (1) that no curative instruction would have obviated any prejudicial effect, and (2) the conduct resulted in prejudice that had a substantial likelihood of affecting the outcome of the case. *Emery*, 174 Wn.2d at 761. The presumption that a trial court judge sitting as trier of fact will consider only admissible evidence still applies. *See Read*, 106 Wn. App. at 145 (quoting *Read*, 100 Wn. App. at 788).

Assuming without deciding that the prosecutor's conduct was improper under the heightened standard applicable when no objection is made at trial, we confidently conclude that the conduct was not prejudicial. The trial court's findings do not mention the detectives' opinions that Ms. Williams was credible, or that Mr. Gatherer was

deceptive. Instead, the trial court's basis for discerning credibility was based on the fact that Ms. Williams's story never changed, whereas Mr. Gatherer had three stories.

We conclude that the detectives' improper opinion evidence had no practical and identifiable consequences at trial and that the prosecutor's conduct was not prejudicial.

C. PROSECUTOR'S COMMENT ON DEFENDANT TAKING OFF HIS COAT
DURING TRIAL

Mr. Gatherer claims he is entitled to a new trial because the prosecutor committed misconduct by commenting that he took off his coat after the confrontation call was played in court. We agree with Mr. Gatherer that it is generally improper for a prosecutor to comment on a defendant's courtroom demeanor. *See State v. Barry*, 183 Wn.2d 297, 305 n.4, 352 P.3d 161 (2015); *State v. Klok*, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000). But we disagree that the prosecutor's improper comment entitles Mr. Gatherer to a new trial.

Again, because Mr. Gatherer failed to object to the alleged misconduct, he must show that the comment was "so flagrant and ill-intentioned that it evince[d] an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *See Stenson*, 132 Wn.2d at 726-27.

There is no evidence that the trial court's verdict was tainted by the prosecutor's improper comment. The trial court's findings of fact show that the trial court did not give

the prosecutor's comment any significance. Instead, the trial court's verdict was based on appropriate evidence. It found that Ms. Williams was credible based on the consistency of her statements, whereas Mr. Gatherer was not credible based on the inconsistencies of his statements, including his admission that what he did to Ms. Williams was horrible.

We conclude that the prosecutor's comment about Mr. Gatherer taking off his coat during trial was improper, but not prejudicial and does not require a new trial.

D. CUMULATIVE ERROR

Mr. Gatherer claims that cumulative errors require him to receive a new trial. We disagree.

Reversal may be required due to the cumulative effects of errors even if each error examined on its own would otherwise be considered harmless. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994). The reviewing court may review the claim of cumulative error even when the individual errors were not preserved if the alleged cumulative errors satisfy RAP 2.5(a)(3). *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, the trial court did not abuse its discretion by admitting the confrontation call. The recording was admitted to offer inconsistencies in Mr. Gatherer's story and to assist the trial judge in determining the credibility of Ms. Williams and Mr. Gatherer. Next, as borne out by the trial court's findings of fact, the opinion testimonies of the detectives and

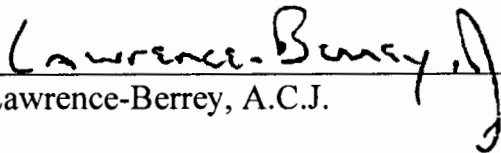
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the prosecutor's conduct in eliciting the opinions had no discernable effect on the verdict. Finally, the prosecutor's comment about Mr. Gatherer taking off his coat during trial had no discernable effect on the verdict either.

Our conclusions are based on the trial court's written findings of fact that show us what evidence the trial court relied on in reaching its verdict. Had this case been presented to a jury, we would not be so confident that the trier of fact based its decision only on proper evidence.

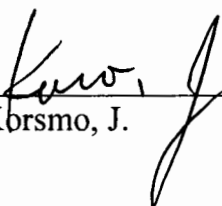
Affirmed.

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




Lawrence-Berrey, A.C.J.

WE CONCUR:



Kbrsmo, J.



Pennell, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.) COA NO. 34110-1-III
)
JOSHUA GATHERER,)
)
APPELLANT.)

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