Supreme Court No. 96843-8
Division III, No. 35402-4-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL M. GOMEZ,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Judge Alex Ekstrom

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Gabriel M. Gomez asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for one count of third degree child molestation.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on January 22, 2019. A copy of this opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should accept review under RAP 13.4(b)(1) or (2), because the trial court erred by admitting ER 404(b) evidence, when such evidence was irrelevant to establish the res gestae of the crime or rebut a defense.

Issue 2: Whether this Court should accept review under RAP 13.4(b)(1) or (3), because Mr. Gomez was denied his right to effective assistance of counsel when defense counsel failed to request a limiting instruction addressing the ER 404(b) evidence admitted at trial.

Issue 3: Whether this Court should accept review under RAP 13.4(b)(1) or (3), because the State committed prejudicial misconduct in its closing argument by using ER 404(b) evidence as propensity evidence, arguing "[a]nd you know, [Mr. Gomez] likes girls significantly younger than him."

D. STATEMENT OF THE CASE

Gabriel Gomez was a longtime member of the Word of Faith Church in Kennewick, Washington, and often volunteered in the children's youth programs. (RP 232-34, 253). In 2015, he worked with teens, including N.A., who was 15, in the church's media program. (RP 253, 275, 285). This occasionally involved working in a small sound board room with the youth. (RP 253).

In January 2016, N.A. told a youth pastor that Mr. Gomez had hugged her in the sound room and touched her breasts. (RP 299). N.A. waited a few weeks

to disclose the incident because she feared her parents and Mr. Gomez's family would be angry with her for reporting the incident. (RP 298).

Detective Holly Baynes interviewed N.A. shortly after the incident and recorded her statement. (RP 269, 319). N.A. told the detective that Mr. Gomez touched her breasts "a little bit" and speculated the touching may have been accidental. (RP 319). The State charged Mr. Gomez with one count of child molestation in the third degree. (CP 97).

Before trial, the State moved to admit evidence under ER 404(b) that Mr. Gomez was repeatedly asked to modify his behavior around young women in the church, maintaining it was relevant to show absence of mistake. (CP 87-88). Defense counsel objected to the admission of the evidence as irrelevant character evidence, arguing the state was trying to show that "because [Mr. Gomez] hugs people it is likely that he is a child molester." (CP 94).

The court admitted the evidence as "res gestae" evidence to show absence of mistake. (RP 18). In balancing the prejudice and probative value, the court concluded, "[t]he act of hugging an individual is not itself a criminal act …. the risk of unfair prejudice is outweighed by probative value." (RP 14).

The State also moved to present testimony that Mr. Gomez attempted to enter into a dating relationship with Christie Walker, an 18-year-old member of the church, to explain why N.A. did not immediately report the abuse. (RP 18, CP 18). The prosecuting attorney explained that a church leader contacted N.A. after Ms. Walker complained of Mr. Gomez's behavior, which, in turn, prompted N.A.'s disclosure. (RP 21).

Mr. Gomez indicated he had no intention of making an issue of the circumstances of N.A.'s disclosure and objected that the evidence was irrelevant and prejudicial. (RP 19-20, 24, CP 95). The State responded that credibility was central to its case and the evidence was needed to show that N.A. had no "agenda" or motive to lie about the abuse. It explained the evidence was "part of the res gestae of how this case came about." (RP 22-23).

The court admitted the evidence, reasoning that without it, the jury would "speculate erroneously as to how it is this young lady was contacted and what it was that prompted that disclosure." (RP 24).

At trial, the State elicited detailed testimony about Mr. Gomez's conduct with young women in the church. Koni Kincaid, a youth pastor at the church, testified that she had to repetitively ask Mr. Gomez to modify his behavior around young girls. (RP 235-37). She also testified that she had asked Mr. Gomez to replace front hugs with side hugs. (RP 237).

Eric Slater, the director of youth education, testified that he also had to repeatedly ask Mr. Gomez to modify his behavior around young girls: "I had to constantly bring it to Koni's attention…that [Mr. Gomez] would go behind girls and tickle their sides, or he would become a jungle gym and have kids hanging all around him when he was supposed to be monitoring the entire classroom." (RP 248). Mr. Slater also had to tell Mr. Gomez to stop holding the hands of young women: "[Mr. Gomez] was just hovering over them and just kind of – the girls felt extremely uncomfortable. And he would grab their hand and move the

keyboard around and just things that are just borderline completely inappropriate." (RP 249).

Mr. Slater testified that he eventually removed Mr. Gomez from the church due to concerns about his texting and involvement with Ms. Walker. (RP 257, 266). He explained, "[w]e felt he used his position of leadership to persuade a relationship with someone directly involved, directly underneath him in the ministry." (RP 265).

N.A. testified that she had known Mr. Gomez as a youth leader in the church for many years. (RP 283). She stated that he occasionally invaded her personal space in the media sound room by putting his arms around her or putting his hand on top of hers and moving the computer mouse. (RP 285, 287).

Defense counsel objected to anticipated questions about a FaceTime communication in which Mr. Gomez asked N.A. to clean his house. (RP 291). The State argued the communication was relevant to prove sexual motivation and absence of mistake. (RP 293). When the court questioned the prosecutor about the time frame of the communication, the prosecutor explained that the charged offense occurred in late December or early January and that the communication at issue occurred in "August, September, October, November, something like that." (RP 292).

The court overruled the defense objection, reasoning "[i]n light of the time frame involved I would find that it is res gestae…[a]ny probative value is not outweighed by unfair prejudice in light of the fact that these are the defendant's own statements close in time to the charged act." (RP 293).

After some prompting by the prosecutor, N.A. recalled that the FaceTime communication occurred a few weeks after the youth group obtained a "LINE app", which N.A. testified was "probably" between August and October. (RP 293-94). N.A. then stated that sometime between December 2015 and January 2016, Mr. Gomez entered the sound booth room where she was typing on a computer. (RP 294, 310). According to N.A., he proceeded to wrap his arms around her and then touched her breasts for 20 to 30 seconds. (RP 296-97).

During closing argument, the state emphasized Mr. Gomez's failure to modify his behavior at the church:

> [Y]ou can take into consideration when you think about the sexual contact that he was asked to modify his behavior on numerous occasions by this church. Don't pick up young ladies. Don't give full front hugs. Give side hugs. Don't hover over them on the computer. Don't touch their hands while they are manipulating the mouse. He was told to modify his behavior and continued to not.

(RP 357).

The prosecutor then added, "And you know, [Mr. Gomez] likes girls significantly younger than him. You learned that during trial. You learned that he asked out an 18-year-old Christie Walker when he was 32 years old." (RP 362).

The jury found Mr. Gomez guilty as charged. (RP 373). Mr. Gomez appealed. (CP 204-205). He argued the trial court erred when it admitted three different instances of ER 404(b) evidence; that he received ineffective assistance of counsel when defense counsel failed to request a limiting instruction and a

pretrial order addressing the ER 404(b) evidence admitted at trial; and the prosecutor committed misconduct during closing argument.[1]

The Court of Appeals affirmed Mr. Gomez's conviction. *See* Appendix A. He now seeks review by this Court.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Whether this Court should accept review under RAP 13.4(b)(1) or (2), because the trial court erred by admitting ER 404(b) evidence, when such evidence was irrelevant to establish the res gestae of the crime or rebut a defense.

Review by this Court is merited because the Court of Appeals' decision finding the trial court did not err in admitting ER 404(b) evidence conflicts with decisions of the Supreme Court addressing ER 404(b) evidence. *See State v. Saltarelli*, 98 Wn.2d 358, 360, 655 P.2d 697 (1982); *State v. Lough*, 125 Wn.2d

[1] Mr. Gomez also argued the cumulative error doctrine warrants a new trial, and challenged two community custody conditions and specified costs imposed by the trial court. These additional arguments are not raised here.

847, 853, 889 P.2d 487 (1995); *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); RAP 13.4(b)(1). Review by this Court is also merited because the Court of Appeals' decision conflicts with other decisions of the Court of Appeals addressing ER 404(b) evidence. *See State v. Tharp*, 27 Wn. App. 198, 204-05, 616 P.2d 693 (1980); *State v. Holmes*, 43 Wn. App. 397, 401, 717 P.2d 766 (1986)*; State v. Roth*, 75 Wn. App. 808, 819, 881 P.2d 268 (1994), *abrogated on other grounds by State v. Hampton*, 182 Wn. App. 805, 332 P.3d 1020 (2014); RAP 13.4(b)(2).

Evidence of other crimes or bad acts for which the defendant is not on trial is among the most damaging and unfairly prejudicial evidence that a jury may hear in a criminal trial. *Saltarelli*, 98 Wn.2d at 360. Accordingly, evidence of a defendant's prior misconduct is categorically barred under ER 404 to demonstrate a defendant's propensity to commit the charged offense. *Holmes*, 43 Wn. App. at 401. Pursuant to ER 404(b), "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." ER 404(b).

To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) find by a preponderance of the evidence that the prior misconduct occurred; (2) identify a non-propensity purpose for the evidence; (3) determine the relevance of the prior misconduct to prove an element of the crime

or rebut a defense; and (4) weigh the probative value against the prejudice. *Lough*, 125 Wn.2d at 853.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

The trial court erred when it admitted three different instances of ER 404(b) evidence. First, the trial court erred by permitting ER 404(b) evidence that Mr. Gomez was reproached for hugging young women at church to rebut a non-existent defense of mistake.

Prior bad acts may be admitted under ER 404(b) to rebut a claim of accident or mistake. *Roth*, 75 Wn. App. at 819. But such evidence is admissible only if (1) the defendant actually claims that the charged crime was an accident or mistake and (2) the proffered evidence directly negates the defense of mistake. *Id*.; *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1986).

Mistake is never a material issue unless first raised by the defendant. *State v. Harris*, 36 Wn. App. 746, 751, 677 P.2d 2021 (1984). "[A] material issue of accident arises where the defense is denial and the defendant affirmatively asserts that the victim's injuries occurred by happenstance or misfortune." *Roth*, 75 Wn. App. at 819. In a sex offense case, it is the defendant's claim of accidental touching that triggers the absence of mistake theory of admissibility. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Mr. Gomez did not raise a claim of mistake in this case. During his opening statement, defense counsel conceded "[t]here was contact" between Mr. Gomez and N.A., but maintained the case had been "blown out of proportion" and

denied any evidence of sexual motivation. (RP 230, 231). There was no mention of accidental or mistaken touching.

Admittedly, the word "accidental" came up when defense counsel cross-examined N.A. about her initial statement to Detective Baynes that Mr. Gomez had only briefly touched her and that she thought the touching may have been accidental. (RP 306). However, the purpose of this questioning was not to support a defense of mistake, but to undermine N.A.'s claim at trial that Mr. Gomez touched her breasts for as long as 20 to 30 seconds. During closing argument, Mr. Gomez argued that N.A. contradicted herself and "[came] up with new stuff in front of you", but did not use the contradictions to support a defense of mistake. (RP 366-67).

The crux of Mr. Gomez's case was that N.A. contradicted herself and that the evidence was insufficient to support a finding of sexual motivation, not that he mistakenly touched her. Even if mistake had been a genuinely disputed issue in this case, something Mr. Gomez does not concede, Mr. Gomez's history of nonsexual contact with young women in the church would not directly negate the defense. Evidence that Mr. Gomez was frequently admonished for nonsexual behavior with youth is entirely irrelevant to whether he mistakenly touched N.A. The probative value of this evidence was far outweighed by its prejudicial effect. The trial court erred in admitting this prejudicial ER 404(b) evidence.

Second, the trial court erred by admitting evidence that Mr. Gomez communicated with N.A. via FaceTime as res gestae evidence when the communication at issue was remote in time and place from the charge.

Evidence may be admissible under ER 404(b) if it is part of the res gestae of the offense charged. *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). Res gestae evidence is admissible to "complete the story of the crime" by proving its immediate context in time and place; however, the state must show it is an "inseparable" part of the whole crime. *Tharp*, 27 Wn. App. at 204-05; *State v. Schaffer*, 63 Wn. App. 761, 769, 822 P.2d 292 (1991), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993).

The FaceTime communications here were remote in time to the charge. The Court of Appeals agreed, ruling "the trial court erred in admitting the FaceTime conversation under the res gestae rule[,]" but then ruled the error did not require reversal. *See* Appendix A. pgs. 12-14.

An error in admitting evidence under ER 404(b) is harmless unless there is a reasonable probability that the result of the trial would have been different had the error not occurred. *Jackson*, 102 Wn.2d at 695. Here, the State cannot establish that any reasonable jury would have reached the same conclusion absent the erroneous admission of the ER 404(b) evidence. The State's case contained weaknesses that were likely overcome by the prejudicial testimony. The jury was inundated with repetitive and cumulative evidence of Mr. Gomez's inappropriate contact with young girls in the church. Testimony that Mr. Gomez asked N.A. to clean his house over FaceTime strongly suggested that he had an inappropriate interest in N.A. Admission of FaceTime communications, especially when viewed along with the other erroneously admitted ER 404(b) evidence, was not harmless.

Third, the trial court erred in admitting evidence that Mr. Gomez asked an 18-year-old member of the church (Christie Walker) for a date as "res gestae" evidence when the circumstances of N.A.'s disclosure were not at issue.

While res gestae evidence may be allowed to explain why an alleged victim delayed reporting sexual abuse, such evidence is generally irrelevant and inadmissible if the defendant does not make an issue of the delay. *Fisher*, 165 Wn.2d at 745.

Mr. Gomez did not make an issue of the circumstances of N.A's disclosure. Despite the State's argument that the evidence was crucial to show that N.A. did not have an agenda in coming forward, nothing in the record suggests that N.A. had any reason to fabricate the incident. N.A. adequately explained the reason she hesitated to disclose, and Mr. Gomez explicitly told the court he had no intention of questioning N.A. about the circumstances of her disclosure. (RP 124).

Eventually, the State's argument was revealed to be no more than a propensity argument. During closing argument, the state exposed its true purpose when it argued that the Ms. Walker evidence showed Mr. Gomez "liked girls significantly younger than him." (RP 362). The trial court erred in admitting this prejudicial ER 404(b) evidence.

Issue 2: Whether this Court should accept review under RAP 13.4(b)(1) or (3), because Mr. Gomez was denied his right to effective assistance of counsel when defense counsel failed to request a limiting instruction addressing the ER 404(b) evidence admitted at trial.

Review by this Court is merited because the Court of Appeals' decision finding Mr. Gomez did not receive ineffective assistance of counsel conflicts with decisions of the Supreme Court. *See State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 13.4(b)(1). Review by this Court is also merited because the issue raises a significant question of law under the United States Constitution and the Washington Constitution, a defendant's right to effective assistance of counsel. *See* U.S. Const., amend. VI, XIV; WA Const. Art. 1, § 22; RAP 13.4(b)(3).

Effective assistance of counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State* v. *Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. Amend. VI; Wash. Const. Art. 1, sec. 22. A claim that counsel was ineffective is a mixed question of law and fact that is reviewed de novo. *Strickland*, 466 U.S. at 698.

To reverse a conviction for ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687. Legitimate trial strategy or tactics do not count as deficient performance, but the presumption of reasonable performance can be rebutted by showing "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130. A defendant is prejudiced by

counsel's deficient performance if, but for counsel's errors, there is a reasonable probability the outcome of the proceeding would have been different. *Kyllo,* 166 Wn.2d at 862.

Generally, a failure to request a limiting instruction is deemed a legitimate trial tactic to avoid reemphasizing the damaging evidence. *State v. Dow,* 162 Wn. App. 324, 335, 162 Wn. App. 324 (2011); *State v. Kloepper,* 179 Wn. App. 343, 317 P.3d 1088 (2014).

Here, defense counsel twice declined the court's offer to give a limiting instruction, explaining that he avoids limiting instructions "at all costs" and that a cautionary instruction in this case had the potential to "backfire" by highlighting the damaging evidence. (RP 24-25, 339).

The Court of Appeals held that defense counsel's performance was not deficient, because "Mr. Gomez's decision to forego a limiting instruction was a legitimate trial strategy or tactic, and he has failed to show otherwise." *See* Appendix A, pgs. 15-16.

However, because the prior misconduct evidence was repeatedly referenced and used to generate a theme throughout trial that Mr. Gomez had a propensity for young girls, no legitimate strategy can be discerned. Multiple pages of trial transcript are devoted to this damaging character evidence, while direct testimony regarding the charge at issue spans roughly two pages. (RP 296-97). A decision to forgo a limiting instruction may be appropriate where ER 404(b) evidence is incidental to the State's case, but where, as here, the evidence is the focus of the state's case, the decision cannot by any measure be deemed

reasonable. Once the court admitted the evidence, defense counsel should have requested an order strictly limiting the testimony of the extrinsic misconduct to that necessary to make the point for which it was admitted. Without such an order, the State introduced an avalanche of repetitive and damaging evidence that far exceeded the basis for its admission.

It is likely that the court would have given a limiting instruction. If the jury had been instructed to confine the use of the evidence to its proper purpose, there is a reasonable probability the outcome of the trial would have been different. Mr. Gomez was denied his right to effective assistance of counsel when defense counsel failed to request a limiting instruction addressing the ER 404(b) evidence admitted at trial.

Issue 3: Whether this Court should accept review under RAP 13.4(b)(1) or (3), because the State committed prejudicial misconduct in its closing argument by using ER 404(b) evidence as propensity evidence, arguing "[a]nd you know, [Mr. Gomez] likes girls significantly younger than him."

Review by this Court is merited because the Court of Appeals' decision finding Mr. Gomez did not prove the State committed misconduct conflicts with decisions of the Supreme Court addressing prosecutorial misconduct. *See In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 704, 708, 286 P.3d 673 (2012); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011)*; State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995); RAP 13.4(b)(1). Review by this Court is also merited because the issue raises a significant question of law under the United States Constitution

and the Washington Constitution, a defendant's right to a fair trial. *See* U.S. Const., amends. VI, XIV; WA Const. Art. 1, § 22; RAP 13.4(b)(3).

The prosecuting attorney represents all of the people and is presumed to act only in the interest of justice. *Fisher*, 165 Wn.2d at 727 (citing *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)). This means that prosecuting attorneys also represent defendants and have a duty to defendants to ensure their right to a constitutionally fair trial. *Monday*, 171 Wn.2d at 676.

Prosecutorial misconduct is grounds for reversal if "the prosecuting attorney's conduct was both improper and prejudicial." *Fisher*, 165 Wn.2d at 747. The prosecutor's allegedly improper comments are reviewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given." *Monday*, 171 Wn.2d at 675 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Prejudice is established if there is a substantial likelihood that the misconduct affected the jury's verdict. *Glassman*, 175 Wn.2d at 704. Defense counsel's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Prosecutors are accorded wide latitude in closing arguments and are allowed to draw reasonable inferences from the evidence, but "arguments calculated to inflame the passions or prejudice of the jury" constitute misconduct. *Glassman*, 175 Wn.2d at 704; *Gentry*, 125 Wn.2d at 641.

The prosecuting attorney here committed misconduct in closing argument by using the evidence that Mr. Gomez asked Ms. Walker for a date to argue that Mr. Gomez "likes girls significantly younger than him." (RP 362).

The prosecutor's argument openly violated the court's pre-trial orders. Given the exhaustive pre-trial discussions regarding the admissibility of the evidence, the prosecutor was well aware of the court's rulings. Nevertheless, she then used the evidence to appeal to the prejudices of the jury by portraying Mr. Gomez as a man who preyed on young women in the church. *See Glassman*, 175 Wn.2d at 704; *Gentry*, 125 Wn.2d at 641. In the context of the entire record, the prosecutor's use of this evidence can only be seen as a deliberate attempt to appeal to the emotions of the jury. This was misconduct.

During oral argument at the Court of Appeals, the State admitted this argument was improper. *See* Wash. Court of Appeals oral argument, *State of Washington v. Gabriel M. Gomez*, No. 35402-4-III (Dec. 5, 2018), at 14 min., 54 sec. to 15 min. 18 sec., https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a03&docketDate=20181205. Nonetheless, the Court of Appeals held the State did not commit misconduct, reasoning "[i]n light of the entire argument, the issues in the case, and the evidence that came in at trial, it was not flagrant or ill intentioned for the prosecutor to argue that Mr. Gomez likes women 'significantly younger than him.'" *See* Appendix A, pgs. 18-19. The Court of Appeals characterized the comment as a reasonable inference from the evidence. *See* Appendix A, pg. 19.

However, the State's argument that Mr. Gomez "likes girls significantly younger than him" does reach the standard of being "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice." *Stenson*, 132 Wn.2d at 719. It allows the jury to use the evidence that Mr. Gomez asked out Ms. Walker as propensity evidence, i.e., to infer that because Mr. Gomez sought to date Mr. Walker, he preys on younger women, and therefore, committed the charged act against N.A.

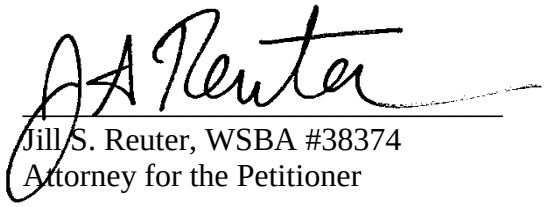
Reviewing prejudice is not a matter of determining whether there is sufficient evidence to convict. *In re Glassman*, 175 Wn.2d at 710. Rather, the standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. *Id.* Here, the State's use of the ER 404(b) evidence unduly influenced the jurors. Fully aware that the defense had declined a limiting instruction, the prosecutor nevertheless used the evidence to taint Mr. Gomez as a virtual child predator, thereby depriving him of a jury capable of objectively and critically evaluating the evidence.

Viewed in the context of the entire trial, the prosecutor's use of the ER 404(b) evidence to demonstrate propensity to commit the charged crime had a substantial likelihood of affecting the jury's decision. The branding of Mr. Gomez as the "creepy guy at church" irrevocably tainted his character and prejudiced him. (RP 13, 14). Mr. Gomez's conviction should be reversed and remanded for a new trial.

F. CONCLUSION

For the reasons stated herein, Mr. Gomez respectfully requests that this Court grant review pursuant to 13.4(b).

Respectfully submitted this 13th day of February, 2019.



Jill S. Reuter, WSBA #38374
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

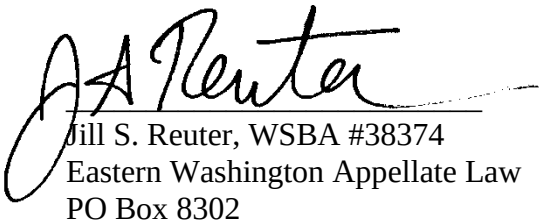
STATE OF WASHINGTON Plaintiff/Respondent	)	COA No. 35402-4-III
vs.	)	Benton Co. No. 16-1-00648-9
GABRIEL M. GOMEZ Defendant/Appellant	)	PROOF OF SERVICE

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 13, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Gabriel M. Gomez
1632 Broadway Box 127
Eureka, CA 95501

Having obtained prior permission, I served the Benton County Prosecutor's Office at prosecuting@co.benton.wa.us by email using the Washington State Appellate Courts' Portal.

Dated this 13th day of February, 2019.



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APPENDIX A

FILED
JANUARY 22, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. GABRIEL M. GOMEZ, Appellant.	)))))))))	No. 35402-4-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Gabriel Gomez appeals his conviction for third degree child molestation. He argues: (1) the trial court erred when it admitted three different instances of ER 404(b) evidence, (2) he received ineffective assistance of counsel, (3) the prosecutor committed prosecutorial misconduct during closing argument, (4) the cumulative error doctrine warrants a new trial, (5) two community custody conditions are vague and should be struck, (6) appellate costs should not be imposed if the State is the prevailing party, and (7) his criminal filing fee and other discretionary costs should be reversed and struck. We affirm his conviction but remand for the trial court to strike the contested community custody conditions and court costs.

FACTS

Background facts

In 2006, Gabriel Gomez, then in his early 20s, began attending the Word of Faith Church. Soon after, he began volunteering in the church's youth programs, including overseeing children's ministry and supervising teenagers in youth ministry.

Around 2007 or 2008, N.A. began attending Word of Faith Church. At the time, she was 7 or 8 years old. It was around this time when she met Mr. Gomez in his role as a volunteer with children's ministry.

As N.A. became older, she joined the youth ministry team. As part of the youth ministry team, N.A. assisted with the media team that Mr. Gomez supervised. This is when their relationship began to change.

Mr. Gomez began commenting to N.A. how she looked when she wore a skirt or how pretty and beautiful she was. Mr. Gomez would make comments to N.A. about other girls he liked in the youth ministry, and he discussed with her a formula to determine whether two people could date if they had a significant age difference. Mr. Gomez bought N.A. a stuffed animal and developed nicknames for her such as, "little pretty," "little rabbit," and "little bunny." Report of Proceedings (RP) at 295.

The two of them began working even more closely in 2015 when N.A. started working in the sound room. The sound room was a close, tight space, which contained media equipment for the church. While working in the sound room, Mr. Gomez would put his hand on top of N.A.'s while she moved the computer mouse, purportedly to show her how to do something. He also would put his arms around her body to show her something on the computer.

Shortly before her 16th birthday in January 2016, N.A. was working in the sound room when Mr. Gomez came up behind her, wrapped his arms under hers, and put his palms on each of her breasts. N.A. did not tell anyone right away. She was afraid Mr. Gomez would call her a liar, everyone would look at her differently, or people would think she was a troublemaker.

Around this time, church leadership received a complaint from a church member, 18-year-old Christie Walker. Ms. Walker reported that Mr. Gomez recently had asked her out, and she wanted leadership to tell Mr. Gomez to stop texting her. Church leadership promptly asked Mr. Gomez to resign from youth ministry while it investigated. Later, leadership removed Mr. Gomez from the church.

N.A. heard that Mr. Gomez resigned from youth ministry because of Ms. Walker's complaint. She then spoke with church leadership about what Mr. Gomez recently did to her. The report prompted church leadership to contact Child Protective Services.

Detective Holly Baynes interviewed N.A. and recorded her statement. N.A. said that Mr. Gomez touched her breasts "'a little bit'" and said the touching may have been accidental. RP at 319.

The State charged Mr. Gomez with third degree child molestation. To prove its case, the State had to prove beyond a reasonable doubt that Mr. Gomez (then 32 years old) had "sexual contact" with N.A (then 15 years old). RCW 9A.44.089. "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Pretrial motions to admit ER 404(b) evidence

Before trial, the State moved to admit ER 404(b) evidence that the church had repeatedly asked Mr. Gomez to modify his behavior of hugging young people in the church. The State argued that the evidence was necessary to show absence of mistake or accident. Mr. Gomez responded that the evidence was highly prejudicial and created the impression that "because he is kind of the creepy guy at church he has got to be a child

molester." RP at 14. The trial court granted the State's motion, and explained, "The act of hugging an individual is not itself a criminal act . . . . [T]he risk of unfair prejudice is outweighed by probative value." RP at 14-15.

Mr. Gomez also moved to exclude ER 404(b) evidence that he attempted to date Christie Walker. The State argued that the evidence was admissible to explain why N.A. reported the molestation when she did. Mr. Gomez responded that he had no intention of making an issue over N.A.'s delay in reporting. The court commented that the State had a right to explain why N.A. spoke to church leadership and, unless a fuller version of the story was told, the jury would be unable to understand the link. The court preliminarily ruled that the evidence would come in and asked whether the evidence could be presented in a neutral way and whether a limiting instruction should be given. In response, Mr. Gomez responded that there was no evidence that what he did was a crime, and the State again was simply trying to present him as "the creepy guy at church who is molesting and grooming children when that's just simply not the case." RP at 19. Mr. Gomez suggested the State simply say, "[N.A.] came forward with an allegation and go from there." RP at 19. The trial court granted the State's motion and explained: Without the evidence, the jury would be left to "speculate erroneously as to how it is this young lady was contacted and what it was that prompted the disclosure." RP at 24.

Trial

At trial, the State elicited testimony about Mr. Gomez's conduct with teenage girls/women in the church. Koni Kincaid, a youth pastor at the church, testified that she repeatedly asked Mr. Gomez to modify his behavior around young women. She cited an incident where a college-age woman reported that she and Mr. Gomez were in the sound room, and he stood very close to her and touched her sides. This prompted Ms. Kincaid to ask Mr. Gomez to not hug minors, but instead give side hugs.

Eric Slater, the director of youth education, testified that he repeatedly asked Mr. Gomez to modify his behavior around young women and girls. "I constantly had to bring it to Koni's attention . . . that [Mr. Gomez] would go behind girls and tickle their sides." RP at 248. He also would see Mr. Gomez hovering over girls or touching their hand while they manipulated the computer mouse. He testified that he told Mr. Gomez to stop this behavior, which he described as "borderline completely inappropriate." RP at 249.

Mr. Slater testified he eventually removed Mr. Gomez from the church due to concerns about his texting and involvement with 18-year-old Ms. Walker. He explained, "[W]e felt that he used his position of leadership to persuade [sic] a relationship with someone directly involved, directly underneath him in the ministry." RP at 265 (alteration in original).

N.A. testified that she had known Mr. Gomez as a youth leader in the church for many years. She said he occasionally invaded her personal space in the media sound room by putting his arms around her or putting his hand on top of hers and moving the computer mouse.

Defense counsel objected to anticipated questions about a FaceTime call in which Mr. Gomez asked N.A. to clean his house. The State argued that the communication was relevant to prove sexual gratification, a component of sexual contact, an element of the crime. The State also argued that the communication was relevant to prove absence of accident or mistake. The State explained that the FaceTime communication occurred two to four months prior to the alleged molestation. The trial court overruled Mr. Gomez's objection and explained: "In light of the time frame involved I would find that it is res gestae. . . . Any probative value is not outweighed by unfair prejudice in light of the fact that these are the defendant's own statements close in time to the charged act." RP at 293.

N.A. then testified about the FaceTime communication. She testified that Mr. Gomez showed her the inside of his house during their FaceTime conversation and asked if she wanted to clean it. She declined.

After this testimony, N.A. testified about the purported molestation. N.A. testified that Mr. Gomez entered the sound room where she was typing on a computer and wrapped his arms around her and touched her breasts for 20 to 30 seconds.

Mr. Gomez cross-examined N.A. and questioned her version of events. He noted the discrepancy between her direct testimony and her statement to Detective Baynes months earlier that he had touched her a little bit and it may have been accidental. He further questioned her failure to tell Detective Baynes that the touching lasted 20 to 30 seconds.

The State closed, and Mr. Gomez unsuccessfully moved to dismiss at the close of the State's case. Mr. Gomez did not testify, but he did call Detective Baynes to testify.

During closing argument, the State emphasized Mr. Gomez's failure to modify his behavior at church:

> [Y]ou can take into consideration when you think about the sexual contact that he was asked to modify his behavior on numerous occasions by this church. Don't pick up young ladies. Don't give full front hugs. Give side hugs. Don't hover over them on the computer. Don't touch their hands while they are manipulating the mouse. He was told to modify his behavior and continued [his behavior].

RP at 357.

The prosecutor added: "And, you know, [Mr. Gomez] likes girls significantly younger than him. You learned that during trial. You learned that he asked out an 18-year-old Christie Walker when he was 32 years old." RP at 362. Mr. Gomez mostly argued that N.A. was not credible and that her stories were inconsistent.

The jury returned a guilty verdict for third degree child molestation. The trial court imposed a lower end standard sentence of seven months. Mr. Gomez appeals.

ANALYSIS

A. ER 404(b) EVIDENCE

Mr. Gomez argues the trial court erred when it admitted three instances of ER 404(b) evidence. Generally, a trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999). "An abuse of discretion occurs only when the decision of the court is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

1. Requests to not hug girls/young women at church

Mr. Gomez argues the trial court erred in permitting ER 404(b) evidence that he was repeatedly told not to hug girls/young women at church. Mr. Gomez asserts that the evidence was improperly allowed to rebut a nonexistent defense of mistake or accident.

The State agrees that evidence offered to rebut accident or mistake is irrelevant until a claim of accident or mistake is made by a defendant. The State argues that Mr. Gomez sufficiently interjected the defense of accident into the case to make the evidence admissible. We agree.

"[A] material issue of accident arises where the defense is denial and the defendant affirmatively asserts that the victim's injuries occurred by happenstance or misfortune." *State v. Roth*, 75 Wn. App. 808, 819, 881 P.2d 268 (1994). As explained below, although Mr. Gomez asserted a general denial defense, he also tried to convince the jury that his touching of N.A.'s breasts was accidental and misconstrued.

During voir dire, defense counsel attempted to examine jurors on the issue of "accidental touchings that happen in our society." RP at 193. Later, during opening, defense counsel implied that the touching was misconstrued and declared "[t]his case is blown out of proportion." RP at 231. Defense counsel cross-examined N.A. about her telling the detective that the touching of her breasts might have been accidental. Defense

counsel questioned Detective Baynes, and repeatedly asked her whether "she thought [the touching of N.A.'s breasts] might have been an accident." RP at 319. Mr. Gomez's true defense was not general denial. That is, he did not argue he never touched N.A.'s breasts. Rather, his true defense was that the touching of N.A.'s breasts was accidental and misconstrued.

2. Asking out 18-year-old Ms. Walker

Mr. Gomez argues the trial court erred in admitting evidence that he asked out 18-year-old Ms. Walker. At the time, Ms. Walker was only two years older than N.A.

The trial court ruled that the State would be permitted to have N.A. explain the timing of her disclosure coincided with her learning that Mr. Gomez had been removed from youth ministries because he asked out Ms. Walker. The trial court asked how the evidence could be presented neutrally and possibly with a limiting instruction. But this was not how the evidence came to the jury.

Instead, during Mr. Gomez's cross-examination of Mr. Slater, he asked whether Mr. Slater had misinformed a church member of why Mr. Gomez was removed from youth ministries. Mr. Slater admitted that he had misinformed a church member. This question and answer left the jury with the false inference that Mr. Slater was biased against Mr. Gomez.

On redirect, the prosecution may clear up confusion from cross-examination, rehabilitate the witness, or otherwise rebut the testimony on cross-examination. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). To remove the false inference Mr. Gomez created, the State asked Mr. Slater the true reason why Mr. Gomez was removed from youth ministries. Mr. Slater answered that Mr. Gomez was removed because Ms. Walker, then 18, had complained that Mr. Gomez had asked her out. Mr. Slater further explained that he had lied to the church member to protect Mr. Gomez from embarrassment.

Whether the court's pretrial ruling was correct is not properly before us. The ruling did not cause the evidence at issue to be admitted. Rather, Mr. Gomez's cross-examination of Mr. Slater caused the ruling to be admitted. Mr. Gomez does not contend the trial court erred in allowing the evidence during Mr. Slater's redirect.

3. FaceTime communication

Mr. Gomez argues the trial court erred by admitting the FaceTime conversation between him and N.A. in which he asked if she wanted to clean his house. Mr. Gomez argues the testimony was highly prejudicial and lacked any relevance. The State did not respond to this argument. We agree with Mr. Gomez.

The trial court admitted the testimony as res gestae. Courts have recognized a "res gestae" or "same transaction" exception to ER 404(b) "in which 'evidence of other crimes is admissible '[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (alteration in original) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)). "[E]vidence of other crimes or misconduct is admissible to complete the story of the crime" and "'in order that a complete picture be depicted for the jury.'" *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (quoting *Tharp*, 96 Wn.2d at 594).

The FaceTime conversation occurred two to four months prior to the purported molestation. We have found no case extending the res gestae rule to similar remote-in-time events. We conclude the trial court erred in admitting the FaceTime conversation under the res gestae rule.

Evidentiary errors under ER 404(b) are not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such errors do not require reversal of a criminal conviction unless, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. *Id.*

The outcome of the trial depended on the State persuading jurors that Mr. Gomez's touching of N.A.'s breasts was not accidental, but instead, was done for purposes of sexual gratification. Although the FaceTime conversation was a piece of the puzzle, there were several other pieces. These pieces include: (1) Mr. Gomez commenting how N.A. looked in a skirt and how pretty she was, (2) Mr. Gomez talking with N.A. about a formula to determine whether a girl is not too young to date, (3) Mr. Gomez buying N.A. a stuffed animal and calling her pet names, (4) Mr. Gomez, then 32 years of age, asking out an 18-year-old woman, (5) Mr. Gomez often touching teenage girls on their hands, tickling their sides, and being unable or unwilling to stop this sort of behavior. In light of all of this other proper evidence, we cannot conclude the erroneous admission of the FaceTime conversation changed the outcome of the trial.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Gomez argues he received ineffective assistance of counsel when his attorney failed to request a limiting instruction advising the jury of the limited purpose for which it may consider the ER 404(b) evidence, i.e., to show whether Mr. Gomez touched N.A.'s breasts for his or her sexual gratification.

To protect a defendant's right to counsel, a defendant has the right to receive effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An allegation of ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *Id.* at 698. To determine whether counsel provided effective assistance, we apply a two-pronged test: (1) whether counsel's performance was deficient, and (2) whether that deficient performance prejudiced the defendant to an extent that changed the result of the trial. *Id.* at 687.

To determine whether counsel's performance was deficient, the defendant has the burden to show that counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 332-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel performed sufficiently and effectively. *Strickland*, 466 U.S. at 689. Counsel's deficient performance cannot be tied to a reasonable trial strategy or tactic. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that counsel performed effectively can be overcome if the defendant shows there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, Mr. Gomez's challenge fails on the first prong. After both sides had rested, the trial court discussed the possibility of a limiting instruction with Mr. Gomez. The trial

court gave Mr. Gomez time to discuss it with counsel. In the end, it was a trial strategy for Mr. Gomez to forego a limiting instruction because he did not want to draw attention to the evidence that was supposed to be disregarded. Specifically, he stated:

> [Defense counsel]: Your Honor, we have discussed and in a brief summary of my client's feelings, they are the same feelings as mine; that when you sit there and tell somebody not to pay attention to it on a jury they might then say, well, why aren't I supposed to pay attention to this and give any weight to it and actually start thinking about it more than they shouldn't be. So that's my feeling on limiting instructions. If I can avoid them at all costs I do and my client is in agreement.
>
> THE COURT: All right. Mr. Gomez, is what [your attorney] just said correct; that he has spoken with you regarding this tactical decision in the case and you feel you have had enough time to talk with him about it?
>
> MR GOMEZ: Correct.
>
> THE COURT: All right. And you understand the basis for the decision and, in fact, you agree with him. Is that—
>
> MR. GOMEZ: Yes.

RP at 339. Mr. Gomez's decision to forego a limiting instruction was a legitimate trial strategy or tactic, and he has failed to show otherwise.

Mr. Gomez also argues he received ineffective assistance of counsel because his attorney failed to obtain a pretrial order limiting "needlessly repetitive misconduct evidence" to infer guilt. Appellant's Br. at 26. Mr. Gomez argues, without such an order, "the [S]tate introduced an avalanche of repetitive and damaging evidence that far exceeded the basis for its admission." Appellant's Br. at 28. Mr. Gomez further argues that such an order would have been granted because the court expressed a desire for

"structuring [the ER 404(b) evidence] in some way to attempt to remove potential prejudice or limiting instruction making clear that this is not illegal conduct." RP at 24. We disagree with this last point.

To show prejudice for counsel's failure to make a motion, a defendant must show the motion likely would have been granted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004). Although the record shows the trial court was willing to admit the ER 404(b) evidence in a neutral manner to lessen its prejudice, not once did the trial court imply that any ER 404(b) evidence would *not* come in. Mr. Gomez's argument that an order in limine would have kept some repetitive evidence out is pure speculation.

Although the repetitive ER 404(b) evidence was powerful, it was powerful because it provided persuasive evidence on the central issue: whether Mr. Gomez's touching of N.A. was done for sexual gratification or whether it was accidental and misconstrued. The repetitive directives from church leadership to Mr. Gomez to not touch teenage girls and Mr. Gomez's repetitive choice to disregard those directives were powerful evidence that he intentionally and inappropriately touched N.A.'s breasts.

C. PROSECUTORIAL MISCONDUCT IN CLOSING

Mr. Gomez argues that the State committed misconduct by stating Mr. Gomez likes women "significantly younger than him" during its closing argument. Allegations

of prosecutorial misconduct during closing argument are reviewed "in light of the entire argument, the issues in the case, the evidence discussed during closing argument, and the court's instructions." *State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 458, 406 P.3d 658 (2017), *review denied*, 190 Wn.2d 1013, 415 P.3d 1189 (2018). Mr. Gomez bears the burden to show the prosecutor's conduct was improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). "If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. Prosecutors have wide latitude in closing arguments to draw reasonable inferences from the evidence at trial and to express those inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

Here, Mr. Gomez did not object to the statement in closing argument. The prosecutor's statement that Mr. Gomez likes women "significantly younger than him" may raise an eyebrow, on its own, but in context it is not the kind of flagrant, ill intentioned statement that warrants reversal. The prosecutor explained that the evidence showed Mr. Gomez was 32 years old and asked out an 18-year-old member of the church in which he had a position of authority over her. The prosecutor stated that this was not illegal, but the church took issue with it. The prosecutor then revisited the evidence that

showed Mr. Gomez's intentions with N.A.: Mr. Gomez made comments to N.A. about how she looked in a skirt, he said she was pretty, he bought her a stuffed animal, he had pet names for her, he often touched her sides or her hand, and he called her using FaceTime and asked her if she wanted to clean his house. The prosecutor also revisited the evidence that showed Mr. Gomez's intention with girls/young women in general. He told N.A. other girls in youth ministry that he liked, they discussed appropriate dating age ranges, and he asked out an 18-year-old woman. The discussions between Mr. Gomez and N.A. helped to explain the nature of Mr. Gomez's interest in N.A. And an 18-year-old woman is significantly younger than a 32-year-old man. In light of the entire argument, the issues in the case, and the evidence that came in at trial, it was not flagrant or ill intentioned for the prosecutor to argue that Mr. Gomez likes women "significantly younger than him." The prosecutor is allowed to draw reasonable inferences from the evidence at trial and to express those to the jury.

D. CUMULATIVE ERROR DOCTRINE

Cumulative error claims are constitutional issues, which the court reviews de novo. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). In order to receive relief based on the cumulative error doctrine, "the defendant must show that while multiple trial errors, 'standing alone, might not be of sufficient gravity to constitute grounds for a new

trial, the combined effect of the accumulation of errors most certainly requires a new trial.'" *Id.* (quoting *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). Cumulative error does not apply where there are no errors or the errors are few and have little or no effect on the trial's outcome. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because there was only one evidentiary error, the cumulative error doctrine does not apply.

E. COMMUNITY CUSTODY CONDITIONS

Mr. Gomez challenges the community custody condition that prohibits him from having contact with minor males and the condition that prohibits him from engaging in a romantic relationship without prior approval of his community custody officer (CCO). The State properly concedes these arguments. The first challenged condition is not crime related. The second challenged condition is unconstitutionally vague.[1]

[1] *See State v. Dickerson*, 194 Wn. App. 1014, 2016 WL 3126480, at *5 (community custody condition requiring CCO prior approval of any "romantic relationship" unconstitutionally vague). *But see State v. Nguyen*, 191 Wn.2d 671, 681-83, 425 P.3d 847 (2018) (community custody condition requiring CCO prior approval of any "dating relationship" not unconstitutionally vague, partly because the phrase is defined by

F. APPELLATE COSTS

Mr. Gomez requests that we deny the State an award of appellate costs in the event the State substantially prevails. We deem the State the substantially prevailing party. The State has conceded this issue and does not request costs.

G. FILING FEE AND DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS (LFOS)

Mr. Gomez asserts the $200 criminal filing fee and the $250 jury demand fee should be struck. House Bill 1783, which became effective June 7, 2018, prohibits trial courts from imposing discretionary LFOs on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 6(3); *State v. Ramirez*, 191 Wn.2d 732, 745-46, 426 P.3d 714 (2018). This change to the criminal filing fee statute is now codified in RCW 36.18.020(2)(h). As held in *Ramirez*, these changes to the criminal filing fee statute apply prospectively to cases pending on direct appeal prior to June 7, 2018. *Ramirez*, 191 Wn.2d at 747. Accordingly, the change in law applies to Mr. Gomez's case. Because Mr. Gomez was indigent in the trial court and still indigent on appeal, the $200 criminal filing fee should be struck pursuant to *Ramirez*.

Also, the $250 jury demand fee is a discretionary cost. RCW 10.01.160(2). As such, the fee falls under the *Ramirez* umbrella and should be struck.

RCW 26.50.010(2)).

Affirmed, but remanded to strike two community custody conditions and two court costs.

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, C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

February 13, 2019 - 3:06 PM

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Appellate Court Case Title:	State of Washington v. Gabriel M. Gomez
Superior Court Case Number:	16-1-00648-9

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