FILED
Court of Appeals
Division I
State of Washington
5/22/2019 11:56 AM

SUPREME COURT NO. 97244-3

NO. 77518-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSÉ FLORES GÓMEZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ellen Fair, Judge

PETITION FOR REVIEW

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT IN SUPPORT OF REVIEW 8

1. UNDER THE COURT OF APPEALS DECISION, ANY UNTIMELY COMPLAINT EVIDENCE IS AUTOMATICALLY ADMISSIBLE, CONTRARY TO MORE THAN A CENTURY OF AUTHORITY 8

2. THE COURT OF APPEALS' ERRONEOUS ANALYSIS OF THE MISTRIAL MOTION WARRANTS REVIEW...... 12

3. PROPENSITY EVIDENCE THAT FLORES GÓMEZ HAD COMMITTED SEXUAL ASSAULT AGAINST A THIRD PARTY WAS NOT ADMISSIBLE FOR ANY VALID PURPOSE, NECESSITATING REVIEW OF THE COURT OF APPEALS CONTRARY CONCLUSION 14

E. CONCLUSION 20

TABLE OF AUTHORITES

Page

WASHINGTON CASES

State v. Alexander
64 Wn. App. 147, 822 P.2d 1250 (1992). 9

State v. Carleton
82 Wn. App. 680, 919 P.2d 128 (1996). 20

State v. Chenoweth
188 Wn. App. 521, 354 P.3d 13 (2015) 9, 10

State v. Dickerson
69 Wn. App. 744, 850 P.2d 1366 (1993) 19

State v. Escalona
49 Wn. App. 251, 742 P.2d 190 (1987) 12, 13

State v. Estes
188 Wn.2d 450, 395 P.3d 1045 (2017) 17

State v. Ferguson
100 Wn.2d 131, 667 P.2d 68 (1983) 9, 10

State v. Fisher
165 Wn.2d 727, 202 P.3d 937 (2009) 14

State v. Gamble
168 Wn.2d 161, 225 P.3d 973 (2010) 12, 13

State v. Gipson
191 Wn. App. 780, 364 P.3d 850 (2015) 13

State v. Griffin
43 Wash. 591, 86 P. 951 (1906) 9, 10

State v. Harper
35 Wn. App. 855, 670 P.2d 296 (1983) 11

TABLE OF AUTHORITES (CONT'D)

Page

State v. Kyllo
166 Wn.2d 856, 215 P.3d 177 (2009) 18

State v. Lynch
176 Wash. 349, 29 P.2d 393 (1934) 9, 11

State v. Magers
164 Wn.2d 174, 189 P.3d 126 (2008) 14, 16, 19

State v. McFarland
127 Wn.2d 322, 899 P.2d 1251 (1995) 18

State v. Pendleton
8 Wn. App. 573, 508 P.2d 179 (1973) 11

State v. Salteralli
98 Wn.2d 358, 655 P.2d 697 (1982). 14, 20

State v. Swan
114 Wn.2d 613, 790 P.2d 610 (1990) 13

State v. Wade
98 Wn. App. 326, 989 P.2d 576 (1999). 14

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 17

RULES, STATUTES AND OTHER AUTHORITIES

4 J. WEINSTEIN, EVIDENCE 801(d)(1)(B)[01] (1981) 11

ER 403 14

ER 404 ..... 1, 3, 14, 15, 17, 18

TABLE OF AUTHORITES (CONT'D)

Page

RAP 13.4 .... 10, 11, 13, 14, 19, 20

U.S. CONST. amend. VI 17

CONST. art. I, § 22 17

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner José Flores Gómez, the appellant below, seeks review of the Court of Appeals decision in State v. Flores Gomez, noted at ___ Wn. App. 2d ___, 2019 WL 1785609, No. 77518-9-I (Apr. 22, 2019) (Appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Because the complaining witness did not disclose the alleged rape until nine years after it occurred, should all evidence of her complains have been excluded from trial and should the Court of Appeals decision that erroneously holds otherwise be reviewed?

2. Flores moved for a mistrial following a violation of a motion in limine. Did the Court of Appeals and trial court err in concluding that the violation was not prejudicial enough to warrant a mistrial?

3. The complaining witness testified she agreed not to report the rape on condition she never hear that Flores committed similar crimes against others. She then testified she was "trigger[ed]" to confront/report Flores based on information she received. Was it ER 404(b) error to admit evidence of alleged sexual misconduct against and, to the extent defense counsel acquiesced in the admission of such evidence, was counsel's representation ineffective?

C. STATEMENT OF THE CASE

The State charged Flores Gómez with one count of first degree rape of a child for conduct with J.F.L, his daughter. CP 57-58. The charges arose from J.F.L.'s 2015 accusation that when she was 11 years old, Flores came and lay down next to her in her bed, "hugging [her] like normal." RP 53-56. J.F.L. said "out of nowhere" Flores put his hand in her pants and underwear, touched her vagina and "fingered" her with one finger. RP 56, 59.

J.F.L. stated that she confronted Flores about the alleged childhood abuse in 2013, when she was 18. RP 69-70. According to J.F.L., Flores stated "the devil tempted" him and asked her for her forgiveness. RP 73. J.F.L. testified that, when she was calmer a few days later, she told Flores, "I will forgive you, but I better never hear that you do this to anyone ever again." RP 74-75. J.F.L. said Flores agreed, "Okay, I won't ever do this again." RP 75.

The defense moved to exclude all evidence of J.F.L.'s complaint about sexual abuse to her mother. CP 78-79; RP 16-17. Flores pointed out that the disclosure occurred some eight to nine years after the abuse allegedly occurred and was not timely. CP 79; RP 16. The trial court ruled, "I think she [J.F.L.'s mother] can indicate that her daughter made a disclosure to her and what she did in response to that, but I don't believe that

she can talk at all about what she was told, because that would clearly be hearsay." RP 17. Thus, the trial court admitted the complaint evidence.

J.F.L.'s mother, Elba López Hernández, testified to J.F.L.'s disclosure of the alleged abuse at trial. RP 149-50. A police officer also testified, over defense objection, that López Hernández provided "general information . . . that her husband had assaulted their daughter." RP 39-40.

The defense also moved exclude any evidence of Flores's prior bad acts pursuant to ER 404. CP 79-82; RP 18-19. The State sought to introduce evidence that Flores's conduct with his daughter-in-law—allegedly attempting to kiss her and put his hands on her thigh—prompted J.F.L. to report the childhood abuse to her mother in 2015. RP 18-21. The State represented that when J.F.L. learned of the alleged issue with the daughter-in-law, J.F.L.

> went and had another confrontation with her father, said, "I told you, I forgave you. Everything was going to be fine. I told you I never wanted to hear about this again. Get out of the house," and that's when [J.F.L.] told her mom [about her father's alleged abuse of her]. That's when the disclosure came out. That's when all of this was precipitated.

RP 20. Although the State agreed that such evidence would normally be excluded, it argued the evidence was admissible here as "the precursor to why this disclosure came out." RP 21. As the trial court put it, "I think the reason why the State wants to use any of [the evidence pertaining to Flores's

daughter-in-law] is to explain the timing of" J.F.L.'s disclosure about her own abuse. RP 22. The State agreed, "Yes. Yes." RP 22. The trial court rejected the State's argument:

> I don't believe it's appropriate for [the daughter-in-law] to testify about what happened to her. I don't think that's relevant. I think it's highly prejudicial and I don't think that it relates to the purpose for which this is being used. I think it's much more likely it could be used for an improper purpose . . . .

RP 23. Nevertheless, the trial court permitted the State to elicit that a call from her mother prompted J.F.L. to finally disclose the abuse:

> So I think I would allow the victim to testify that she was told something by her mother but not specifically what it was, because I agree that it's highly prejudicial and really the truth of whether it happened or didn't is actually completely irrelevant . . . .
>
> So I think at most [J.F.L.] can say, I received a phone call from my mother. You know, there was information that was concerning to me and I felt it was now appropriate to disclose.

RP 23.

To reiterate, J.F.L. testified she would forgive her father on the condition that she "better never hear that [he did] this to anyone ever again." RP 74-75. After eliciting this testimony, the State asked to be heard outside the jury's presence, indicating it would lead J.F.L. so as not to violate the trial court's in limine ruling. RP 75-76. When the State returned to its examination of J.F.L., however, it merely elicited the same testimony and

then greatly expounded on it: "But you never want to hear about this happening again; correct?" to which J.F.L. responded, "Yes." RP 77. The State then asked, "Do you remember getting a call from your mother." RP 78. J.F.L. said she did receive a call, which "just made me really angry and sad and it made me feel really bad," prompting her "deci[sion] that [she] needed to confront [her] dad again." RP 78. J.F.L. said she

> waited until I was calm enough to talk to him, because at the moment that I received the call, I was just like a mess. I was mad. I was sad. I was just crying the whole way home while I was driving and I just stayed outside my house crying, . . . heartbroken . . . . that, you know, about the call that I received.

RP 79. The State also elicited that her mother's phone call "trigger[ed]" J.F.L. "wanting to confront [Flores] again." RP 79-80. When J.F.L. confronted Flores, "I just asked him, 'Do you remember what we talked about?' And he said yes. And I was like, 'What did I say? What did we talk about.'" RP 80.

Defense counsel argued, "So while she's not going to say the word, Irais, there seems to be this back way that the information is coming in and it's prejudicial and it's been ruled on by the Court." RP 81. The trial court indicated it was also "getting a little concerned about the direction of the conversation" and directed the State to move on from the topic of J.F.L.'s confrontation of Flores based on the call she received from her mother. RP

82. However, the court stated that there had not yet been a violation of the in limine ruling and defense counsel said, "I didn't say that." RP 82.

Upon further discussion about how to proceed, the State indicated it planned to elicit that J.F.L., when she was confronting Flores following her mother's telephone call, was angry and told Flores to leave. RP 84. Defense counsel agreed that this was not a violation of the in limine ruling. RP 84.

Prior to trial, Flores Gómez moved to suppress an illegally obtained recording under chapter 9.73 RCW, Washington's Privacy Act. CP 88-91. The recording apparently consists of J.F.L. confronting Flores about why he did not tell J.F.L.'s mother about her allegations. CP 89. The State agreed prior to trial that it would not attempt to introduce the recording in evidence. RP 15-16.

Nonetheless, J.F.L.'s mother, López Hernández, testified she confronted Flores about J.F.L.'s allegations and indicated she was going to call the police. López Hernández testified, "Then he [Flores] said, 'Okay, I'm going to let you know, but I don't want you to call the police.' And that's when he told me, but he didn't tell me everything that he did to my daughter until I heard the recording that . . . ." RP 151. Defense counsel objected, which the court sustained. RP 151.

At a break that occurred shortly thereafter, defense counsel moved for a mistrial, arguing that the reference to a recording that disclosed

"everything that [Flores] did to [López Hernández]'s daughter" was prejudicial. RP 152. The State responded, "The jury heard that there was -- about a recording, but they've heard nothing about the context . . . . there's nothing even about who the recording is of or what it's of." RP 152-53. The trial court determined that it was "clearly inappropriate that she referred to the recording" and that reference to the recording violated the in limine ruling, but denied the mistrial motion.[1] RP 154.

The jury found Flores Gómez guilty of first degree child rape. CP 42; RP 217. The trial court imposed an indeterminate standard range sentence of 93 months to life. CP 15; RP 232.

Flores appealed. CP 36. He asserted the trial court erred in denying Flores's motion for mistrial based on Hernández López's mention of the recording, erred in allowing evidence suggesting that Flores committed other sexual misconduct against another person, and defense counsel was ineffective for not moving for mistrial or taking other action after the other sexual misconduct evidence was elicited. Br. of Appellant at 10-28.

The Court of Appeals stated that the fact-of-complaint doctrine had no application and held that J.F.L.'s and her mother's testimony regarding disclosure was admissible. Appendix at 11. Although the Court of Appeals

[1] After another break, the State made a record that "the recording she was speaking of was she heard the recording of her daughter's interview with Detective Paxton. So that's the recording she was talking about." RP 156. Of course, all the jury heard was that a recording containing J.F.L.'s allegations against Flores Gómez exists.

agreed that an officer's repetition of the mother repetition of J.F.L.'s allegation was hearsay within hearsay, the court determined the error harmless given that J.F.L. testified about the rape and Hernández testified Flores admitted to the rape. Appendix at 11-12. As for the mistrial motion, the Court of Appeals determined that there was no prejudice. Appendix at 4. As for the evidence that Flores sexually assault an unknown third party, the Court of Appeals ruled that Flores waived the issue by not requesting a limiting instruction and rejected Flores's ineffective assistance claim by ruling that the evidence was properly admitted to explain the delay in J.F.L.'s disclosure. Appendix at 5-9.

D. ARGUMENT IN SUPPORT OF REVIEW

1. UNDER THE COURT OF APPEALS DECISION, ANY UNTIMELY COMPLAINT EVIDENCE IS AUTOMATICALLY ADMISSIBLE, CONTRARY TO MORE THAN A CENTURY OF AUTHORITY

The Court of Appeals decision claims the fact-of-complaint doctrine does not apply because the complaints were remote in time from the alleged rape. Appendix at 11. But the remoteness of the complaints is precisely what makes the admission of such hearsay evidence error.

Out-of-court complaints made by the complaining witness to third parties are not generally admissible because they are hearsay. "A witness may not fortify [her] testimony or magnify its weight by showing that [s]he

has previously told the same story on another occasion out of court." State v. Lynch, 176 Wash. 349, 351, 29 P.2d 393 (1934). Otherwise, "garrulity would supply veracity." Id. at 351-52.

An exception to this rule is the "fact of complaint" doctrine, which permits the State in a sex case to present evidence that the alleged victim made a timely complaint to someone after the alleged assault. State v. Chenoweth, 188 Wn. App. 521, 532, 354 P.3d 13 (2015). The exception is narrow, allowing evidence only of the fact of the complaint and that it was "timely made." Id. Details about the complaint, the identity of the offender, and the specifics of the act are not admissible. State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992). Assertions of the perpetrator's identity are not admissible, even if implied. Id. at 153; see also State v. Ferguson, 100 Wn.2d 131, 136, 667 P.2d 68 (1983) ("statement identifying the offender as the victim's 'father' should not have been admitted").

"[W]here there have been months of inexcusable delay, we think that justice demands that the complaint should be entirely excluded from the consideration of the jury." State v. Griffin, 43 Wash. 591, 599, 86 P. 951 (1906). As the Griffin court explained,

> If [the complaint is] unduly delayed, it would tend to discredit her. But, however that may be, since the only purpose of admitting evidence of the complaint is to show that the conduct of the prosecuting witness was consistent with her testimony, and to rebut any inference that might

> arise from silence or concealment, it would seem to follow, on principle, that evidence of the complaint should be excluded whenever from delay or otherwise it ceases to have corroborative force. In the nature of things there must be some limit of time beyond which such complaints cease to corroborate.

Id. at 598. "[D]isclosures made nearly a year later cannot reasonably be considered 'timely.'" Chenoweth, 188 Wn. App. at 533.

The Court of Appeals decision conflicts with these decisions, meriting review. RAP 13.4(b)(1)–(2). J.F.L.'s disclosure was not timely: the alleged assault occurred between 2005 and 2007, and the disclosure occurred eight to 10 years later, in 2015. CP 57; RP 39-39, 85, 149-50.

The Court of Appeals sidestepped the issue by claiming that neither J.F.L.'s testimony or López Hernández's testimony regarding disclosure related any statement and therefore neither was hearsay. Appendix at 12. But the "disclosure" J.F.L. made consisted of her allegation that Flores raped her. Whatever the "disclosure" was, it still was an out-of-court statement offered for the truth of J.F.L.'s allegation—her story was true because why else would she complain about it? Griffin, 43 Wash. at 598-99; Ferguson, 100 Wn.2d at 135-36; Chenoweth, 188 Wn. App. at 532-33. Because the Court of Appeals decision conflicts with these decisions, RAP 13.4(b)(1) and (2) review is warranted.

The Court of Appeals agreed that the officer's testimony that parroted López Hernández's statement—"her husband had assaulted their daughter," RP 40—was hearsay within hearsay. Appendix at 11-12. However, the Court of Appeals claimed Flores could show no prejudice given that J.F.L. testified Flores raped her and Hernández testified Flores admitted to the rape. Appendix at 11-12. This ignores the impact of the repetition of the disclosures. Particularly when the State alleges sexual misconduct, repetition is very prejudicial because it tends to corroborate the victim despite the fact that "mere repetition does not imply veracity." State v. Harper, 35 Wn. App. 855, 858, 670 P.2d 296 (1983) (quoting 4 J. WEINSTEIN, EVIDENCE 801(d)(1)(B)[01], at 801-116 (1981)). Repetition of such testimony is "highly prejudicial, perhaps devastating to the defense." Id. Multiple witnesses' statements repeating the substance of the complaining witness's allegation allows the State to unfairly multiply the impact of its evidence. Lynch, 176 Wash. at 351; State v. Pendleton, 8 Wn. App. 573, 575-76, 508 P.2d 179 (1973). The Court of Appeals decision also conflicts with these cases on the question of prejudice, meriting review. RAP 13.4(b)(1)–(2).

2. THE COURT OF APPEALS' ERRONEOUS ANALYSIS OF THE MISTRIAL MOTION WARRANTS REVIEW

In reviewing the denial of a motion for mistrial, the court considers (1) the seriousness of the claimed irregularity; (2) whether the information imparted was cumulative of other properly admitted evidence; and (3) whether the admission of the illegitimate evidence was cured by a jury instruction. State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987). When testimony is improper because it violates a pretrial order in limine, the question is whether the improper testimony, viewed in the context of all the evidence, deprived the defendant of a fair trial. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

The in-limine order precluded any mention of any recording. RP 15-16. Yet the mother of the complaining witness, López Hernández, testified she did not learn the full extent of J.F.L.'s allegations until hearing a recording. RP 151.

The alleged crime occurred more than a decade prior, contained no physical evidence, and was based entirely on the jury's assessment of witness credibility. It bolstered J.F.L.'s claim of rape for the jury to hear J.F.L.'s mother mention a recording that detailed what J.F.L. accused Flores of. Indeed, the testimony about the recording vouched for the truth of J.F.L.'s accusations and Flores's guilt: J.F.L.'s mother expressed that she

believed her child in part because it was corroborated by other physical evidence to which the jury had no access. The evidence of the recording was not cumulative of any other evidence. Nor was there any curative instruction that could have mitigated the prejudice of the mention of the recording.[2]

The Court of Appeals agreed with Flores that the mention of the recording was a trial irregularity, but disagreed that it was serious, conflicting with Escalona and Gamble. RAP 13.4(b)(1)–(2). The Court of Appeals' claim that "Hernandez did not describe the content of the recording, so the jury was not aware that it was a recording that corroborated J.F.L.'s allegations." Appendix at 4. This ignores the nature of the testimony. López Hernández testified she did not learn the full extent of "everything that he did to my daughter until I heard the recording." RP 151. This statement did indeed make the jury aware that there was a recording corroborating J.F.L.'s allegation, contrary to the Court of Appeals decision. Appendix at 4.

The mere existence of a recording corroborating J.F.L.'s accusations was "of such a nature as to likely impress itself on the minds of jurors." Escalona, 49 Wn. App. at 255. The mere mention of a recording tended to corroborate J.F.L. Combined with López Hernández's confirmation that the

---

[2] Although the trial court sustained the defense objection to the mention of the recording, the testimony was never stricken and thus remained for the jury to consider. State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990); State v. Gipson, 191 Wn. App. 780, 786, 364 P.3d 850 (2015).

recording informed her of the full extent of "everything that he did to my daughter" vouched for J.F.L.'s story and expressed an opinion on Flores's guilty. This was extremely prejudicial coming from Flores's wife. The Court of Appeals misapplies pertinent authority in reviewing the denial of of a mistrial motion, warranting RAP 13.4(b)(1) and (2) review.

3. PROPENSITY EVIDENCE THAT FLORES GÓMEZ HAD COMMITTED SEXUAL ASSAULT AGAINST A THIRD PARTY WAS NOT ADMISSIBLE FOR ANY VALID PURPOSE, NECESSITATING REVIEW OF THE COURT OF APPEALS CONTRARY CONCLUSION

Under ER 404(b), evidence of "other crimes, wrong, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). ER 404(b) is read in conjunction with ER 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even relevant evidence is inadmissible if its probative value is substantially outweighed by the risk of unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). To justify the admission of prior acts evidence under ER 404(b), the proponent of the evidence must show the evidence "(1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect." State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008).

Defense counsel successfully moved in limine to exclude all ER 404(b) evidence, including specifically evidence that Flores had acted in a sexually inappropriate manner with other relatives. CP 79-82; RP 18-23. However, the trial court permitted evidence that J.F.L. disclosed the alleged abuse because she obtained "information that was concerning" in a telephone call from her mother. RP 23. J.F.L. then testified repeatedly that she agreed never to disclose her abuse allegation on the condition that she "better never hear that [Flores did] this to anyone ever again." RP 74-75; <u>see also</u> RP 77 (confirming J.F.L.'s and Flores's agreement, "But you never want to hear about this happening again"). The State then elicited evidence that J.F.L. received a phone call from her mother that "just made me really angry and sad and it made me feel really bad," which led to her decision that she "needed to confront [her] dad again." RP 78. J.F.L. also testified that she was mad, sad, crying, and "heartbroken" "about the call that I had received." RP 79. J.F.L. was very clear that the particular phone call was what "trigger[ed]" her desire to "confront [Flores] again." RP 79-80. J.F.L. "asked [Flores], 'Do you remember what we talked about? And he said yes. And I was like, 'What did I say. What did we talk about?' RP 80.

From this, evidence that Flores Gómez had raped, molested, or committed some other sexual misconduct against another person was presented to the jury. J.F.L. conditioned her nondisclosure of abuse on never

hearing that Flores had raped, molested, or committed other sexual misconduct against anyone else. Then the jury heard that J.F.L. received a phone call that was extremely upsetting and triggered her to revisit her agreement with Flores not to disclosure. The testimony clearly told the jury that J.F.L. disclosed Flores's abuse because he had committed other sexual abuse against another person. In other words, the condition J.F.L. placed on her nondisclosure had been satisfied: J.F.L. only disclosed her allegations against her father because her father had done something similar again.

This evidence was classic propensity evidence. The fact that Flores had alleged committed a sex crime against a person other than J.F.L. served no legitimate purpose at trial. Such evidence was simply not relevant to any element of first degree child rape against J.F.L. that the State had to prove. The evidence therefore had no probative value. Given the utter lack of probative value to Flores's alleged, more recent sexual assault against another person, the probative value was greatly outweighed by the prejudicial effect of the evidence. The jury was left to believe not only had Flores raped J.F.L. but he had also raped at least one other person. Because this evidence served no legitimate purpose, was irrelevant to any element of the charged crime, and was extremely prejudicial, the evidence was admitted in error. Magers, 164 Wn.2d at 184.

The Court of Appeals acknowledged that J.F.L.'s "testimony did raise a reasonable inference that Flores-Gomez committed sexual misconduct against some other person because it strongly implies that she believed Flores-Gomez broke his promise not to do 'this' to anyone else again." Appendix at 7. Yet the Court of Appeals claims that Flores failed to preserve the error because he did not request a limiting instruction. Flores moved before trial to exclude all such evidence. CP 79-82. Flores objected to any evidence regarding Flores's alleged misconduct against a third party. RP 18-23. Yet, in denying allegations of specific conduct, the court permitted the same propensity evidence in a more general form. Flores's pretrial motion to exclude *all* ER 404(b) evidence of prior bad acts sufficed to preserve the issue for appellate review. The Court of Appeals' waiver decision is not supported by the record.

To the extent that the issue was not preserved, and because defense counsel did not move for a mistrial after introduction of this evidence, Flores received ineffective assistance of counsel. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants reasonably effective representation by counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To make out an ineffective of assistance claim, "the

defendant must show both (1) deficient performance and (2) resulting prejudicial to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58. "Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances."' Id. at 458 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different."' Id. (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The Court of Appeals held that evidence of Flores Gómez's sexual misconduct against an unnamed person was properly admitted for the purpose of explaining why J.F.L. disclosed the rape to her mother when she did, and therefore there was no deficient performance in failing to object. Appendix at 9. As discussed above, J.F.L.'s untimely disclosure was not admissible at all. Part D.1, supra. The Court of Appeals decision further conflicts with ER 404(b) cases cited above given that the evidence Flores was alleged to have committed another sex offense was not relevant to prove Flores assaulted his daughter. Even assuming the evidence had any probative value, such was greatly outweighed by the prejudicial effect of the evidence—the jury was left to believe that not only had Flores raped J.F.L. but he had also raped at least one other person. Because this evidence served

no legitimate purpose, was irrelevant to any element of the charged crime, and was extremely prejudicial, the evidence was admitted in error. Magers, 164 Wn.2d at 184. RAP 13.4(b)(1) and (2) review is warranted.

Review of the ineffective assistance claim is also warranted under RAP 13.4(b)(3). No reasonable attorney would fail to object to testimony that her client committed a separate, unrelated sexual assault to the one in issue at trial. No strategy could explain objecting to evidence regarding sex crimes committed against specific persons but not objecting to evidence regarding sex crimes against unnamed persons. To the extent that defense counsel acquiesced to the admission of evidence that Flores Gómez had committed other sex crimes or misconduct which prompted J.F.L. to come forward with her own allegations, defense counsel's performance was deficient.

It was also deficient performance not to move for a mistrial following the admission of such damaging evidence that Flores had sexually assault an unnamed person. Typically, counsel may have good reasons not to move for a mistrial as a matter of trial strategy. State v. Dickerson, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993). However, as discussed above, defense counsel later did move for a mistrial based on the evidence of a recording detailing Flores's alleged crime against J.F.L. After moving for a mistrial on another basis, there is no sound strategy for not incorporating the

damaging evidence of additional sexual assaults in the mistrial motion. Indeed, counsel had already determined her client was not receiving a fair trial. There was no legitimate strategy in not asserting all the reasons this was so, including the fact that the jury had heard that Flores Gómez had committed at least one other sexual assault against another, unnamed person.

"[P]rejudice potential of prior acts is at its highest" in sex cases. State v. Salteralli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982). Prior sex offenses are "inherently prejudicial." State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996). The admission of allegations that Flores had sexually assaulted another person prejudiced the outcome of trial within a reasonable probability, and the Court of Appeals contrary decision merits RAP 13.4(b)(1), (2), and (3) review.

E. CONCLUSION

Because he meets RAP 13.4(b)(1), (2), and (3) criteria, Flores Gómez asks that review be accepted.

DATED this 22nd day of May, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

FILED
4/22/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSE ARCIDES FLORES-GOMEZ, Appellant.	No. 77518-9-I DIVISION ONE UNPUBLISHED OPINION FILED: April 22, 2019

SMITH, J. — Jose Arcides Flores-Gomez appeals his conviction for first degree rape of a child based on sexual contact with his daughter, J.F.L., when she was 11 years old. The trial court did not abuse its discretion by denying Flores-Gomez's motion for a mistrial, admitting evidence about the circumstances under which J.F.L. reported the rape to her mother, Elba Hernandez, or admitting testimony about that report from J.F.L., Hernandez, and the responding police officer. Furthermore, Flores-Gomez's defense counsel was not ineffective for failing to move for a mistrial or object to J.F.L.'s testimony implying that Flores-Gomez committed a subsequent act of sexual misconduct. Finally, cumulative error does not warrant reversal. Therefore, we affirm.

FACTS

In 2016, the State charged Flores-Gomez with first degree rape of a child. The State alleged that sometime between February 2006 and February 2007, he had sexual intercourse with J.F.L.

During the jury trial, J.F.L. testified that when she was 11 years old, she was lying on a mattress in her younger sister's bedroom when Flores-Gomez came in to say goodnight. He laid down with J.F.L.'s sister until she fell asleep and then laid down with J.F.L. Flores-Gomez then put his hand in J.F.L.'s pants and underwear and "put his fingers inside" her.

Although J.F.L. did not report the rape to anyone when it happened, Hernandez and J.F.L.'s sister and brother testified that around the time of the rape, J.F.L.'s relationship with Flores-Gomez changed and she became more distant and rebellious toward him. J.F.L. testified that she confronted Flores-Gomez about the rape when she was 18 years old and told him that she would forgive him, but that she had "better never hear that [he did] this to anyone ever again." After that, J.F.L. received a call from Hernandez in which Hernandez stated someone had accused Flores Gomez of sexual misconduct. Although J.F.L. did not disclose the content of the call with Hernandez, at trial J.F.L. testified that the call upset her and made her decide to confront her father again. J.F.L. then disclosed the rape to Hernandez, who contacted the police. Hernandez testified that Flores-Gomez admitted to her that he raped J.F.L.

The jury found Flores-Gomez guilty as charged. Flores-Gomez appeals.

DENIAL OF MOTION FOR A MISTRIAL

Flores-Gomez argues that the trial court erred by denying his motion for a mistrial after Hernandez violated a ruling in limine by referring to a recording of Flores-Gomez. We disagree.

We review a trial court's denial of a mistrial for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). "There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). A mistrial is required when a defendant has been so prejudiced by a trial irregularity that only a new trial can ensure that the defendant will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). On appeal, we determine whether a mistrial should have been granted by considering (1) the seriousness of the trial irregularity, (2) whether the trial irregularity involved cumulative evidence, and (3) whether a proper instruction to disregard the irregularities cured the prejudice against the defendant. Johnson, 124 Wn.2d at 76.

Here, Flores-Gomez successfully moved in limine to exclude a recording made by J.F.L. without Flores-Gomez's permission. In that recording, Flores-Gomez stated, "'I know what I did and I know I'm going to pay for it somehow.'" Hernandez improperly referred to this recording during her testimony when asked what Flores-Gomez said to her when she confronted him about J.F.L.'s allegations:

> At the beginning, he refused to admit it, but I told him that it was better for him to tell me the truth, because I was going to be calling the police. Then he said, "Okay, I'm going to let you know, but I don't want you to call the police." And that's when he told me, but he didn't tell me everything that he did to my daughter until I heard the recording that –

Defense counsel immediately objected, and the trial court sustained the objection. The prosecutor asked two additional questions, neither of which

referenced the recording. During a break outside the presence of the jury, defense counsel moved for a mistrial, arguing that the disclosure was prejudicial to Flores-Gomez. The trial court agreed that Hernandez's reference to the recording violated the ruling in limine. But it denied the motion for a mistrial because Hernandez's testimony did not inform the jury about the content of the recording and the trial was not so tainted that Flores-Gomez could not receive a fair trial.

The trial court did not abuse its discretion in denying the motion for a mistrial. While Hernandez's violation of the ruling in limine was a trial irregularity, it was not a serious irregularity because she did not provide any details as to what was in the recording. No one testified that a recording was made of Flores-Gomez. The only recording that jurors knew about was a defense interview of J.F.L., which the jury could have assumed was the recording Hernandez referenced. Because there was no other evidence of the recording presented, the limited reference to the recording did not prejudice Flores-Gomez.

Flores-Gomez argues that the violation of the ruling in limine was a serious trial irregularity because "the introduction of the existence of a recording that corroborate[d] J.F.L.'s allegations was extremely serious." But Hernandez did not describe the content of the recording, so the jury was not aware that it was a recording that corroborated J.F.L.'s allegations. Without this crucial piece of information, there was no prejudice to Flores-Gomez by the mere mention of a recording.

ADMISSION OF EVIDENCE ON TIMING OF REPORT

Flores-Gomez argues that the trial court erred by admitting evidence explaining why J.F.L. confronted Flores-Gomez and disclosed the rape to Hernandez many years after it occurred. We disagree.

"We review a trial court's decisions as to the admissibility of evidence under an abuse of discretion standard." State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). "There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." Brown, 132 Wn.2d at 572.

Although "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," it may be admissible for some other proper purpose. ER 404(b). For evidence of other bad acts to be admissible, the trial court must find by a preponderance of the evidence that the misconduct occurred, identify the purpose for which the evidence is to be introduced, determine whether the evidence is relevant to an element of the crime charged, and weigh the probative value against the prejudicial effect. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). Where ER 404(b) evidence is admitted against a defendant for a limited purpose, the trial court is not required to issue a limiting instruction, unless such instruction is requested by the defendant. State v. Russell, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011).

Here, Flores-Gomez moved in limine to exclude evidence of his alleged improper conduct against his daughter-in-law, which was communicated to J.F.L.

by Hernandez. The State opposed the motion, arguing that Flores-Gomez's misconduct against his daughter-in-law should be admitted to explain why J.F.L. disclosed her own rape to her mother years after it occurred. The trial court granted the motion in part, explaining that while the underlying facts of the allegation were irrelevant, highly prejudicial, and inadmissible, evidence that J.F.L. was told something by Hernandez could be offered for the limited purpose of explaining what led to J.F.L.'s disclosure of the rape.

At trial, J.F.L. testified that when she was 18, she confronted Flores-Gomez about the rape and told him that she remembered what he did to her when she was 11. She later told him, "'I will forgive you, but I better never hear that you do this to anyone ever again.'" The State then asked:

> Q Okay. Do you remember getting a call from your mother?
> A Yes.
> Q And did that call make you angry?
> A Yes. It made me angry and sad.
> Q Okay.
> A And it, it just made, like, yeah, it just made me really angry and sad and it made me feel really bad.
> Q Okay. And did you decide that you needed to confront your dad again?
> A Yes.
> . . . .
> Q Okay. And when you confronted him, did you discuss what he had done to you when you were 11?
> A When I confronted him again?
> Q Um-hmm.
> A Sort of, not the same way that I did the first time. I didn't ask him, oh, why did you do those things to me? The only reason it was brought back up was because the phone call had to do with –
> Q Well, hold on.
> A – something, yeah.
> Q So the phone call kind of triggers your –
> A Yeah.
> Q – wanting to confront him again?

A Yeah.
Q Okay. And when you're confronting him again –
A Um-hmm.
Q – what's his response as far as all that?
A Well, when I confronted him again, I just asked him, "Do you remember what we talked about?" And he said yes. And I was like, "What did I say? What did we talk about?"

At that point, defense counsel asked to make a motion outside of the presence of the jury. Once the jury was excused, defense counsel argued that although the line of questioning did not expressly violate the court's ruling in limine because it did not elicit the details of J.F.L.'s conversation with Hernandez, it did violate the spirit of the order. The trial court confirmed with the prosecutor that there would be no further questions about J.F.L.'s confrontation with Flores-Gomez and agreed with defense counsel that the ruling in limine was not explicitly violated. Defense counsel did not request an instruction clarifying that J.F.L.'s testimony about her conversation with Hernandez could only be considered for the limited purpose of explaining the reason for her disclosure of the rape.

J.F.L.'s testimony did not violate the ruling in limine because she did not disclose the underlying facts of the daughter-in-law's allegations. But her testimony did raise a reasonable inference that Flores-Gomez committed sexual misconduct against some other person because it strongly implies that she believed Flores-Gomez broke his promise not to do "this" to anyone else again. But even assuming that the testimony was improper evidence of Flores-Gomez's propensity to commit sexual misconduct, he waived any alleged error by failing to ask for an instruction limiting the purpose of this evidence. "'A party's failure to request a limiting instruction constitutes a waiver of that party's right to such an

instruction and fails to preserve the claimed error for appeal.'" State v. Wilcoxon, 185 Wn. App. 534, 542, 341 P.3d 1019 (2015) (quoting State v. Newbern, 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999)), aff'd, 185 Wn.2d 324, 373 P.3d 224 (2016). Therefore, reversal is not warranted.

INEFFECTIVE ASSISTANCE OF COUNSEL

Flores-Gomez argues that defense counsel was ineffective for failing to object to or request a mistrial after J.F.L.'s testimony that implied Flores-Gomez committed sexual misconduct against another individual. Because the testimony was admitted for a proper purpose and it is unlikely the court would have granted an objection or request for a mistrial, we disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish prejudice, a defendant must show that there is a reasonable probability that the result of the trial would have been different absent the challenged conduct. Strickland, 466 U.S. at 694. "[T]here is no ineffectiveness if a challenge to admissibility of evidence would have failed." State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007).

State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991), is instructive here. In that case, the defendant appealed his convictions for statutory rape and indecent liberties against a 13-year-old victim. Division II of this court held that

the trial court did not abuse its discretion in admitting evidence of the defendant's physical assaults against the victim. Wilson, 60 Wn. App. at 891. The court explained that evidence of the assaults was not offered to show that the defendant "had a violent character or to show that he acted in conformity with that character" but instead to "explain the delay in reporting the sexual abuse and to rebut the implication that the molestation did not occur." Wilson, 60 Wn. App. at 891.

Here, as in Wilson, evidence that J.F.L. believed Flores-Gomez broke his promise to her never to do "this" to anyone else was not offered to prove that Flores-Gomez had a propensity for sexual abuse and acted in conformity with that propensity. Rather, it was offered to explain why J.F.L. disclosed the rape to Hernandez when she did. Because the evidence was properly admitted for this purpose, it is unlikely that the trial court would have granted a motion for a mistrial or an objection had defense counsel made one. This conclusion is supported by the fact that the trial court expressly stated J.F.L.'s testimony did not violate the ruling in limine. For these reasons, Flores-Gomez cannot show that defense counsel's performance was deficient and we need not address whether he suffered prejudice. His ineffective assistance of counsel claim fails.

HEARSAY EVIDENCE

Flores-Gomez argues that the trial court abused its discretion in admitting both J.F.L.'s disclosure of the rape to Hernandez and Hernandez's disclosure of the rape to law enforcement because the testimony was inadmissible hearsay. We disagree.

"We review a trial court's decisions as to the admissibility of evidence under an abuse of discretion standard." Pirtle, 127 Wn.2d at 648. "There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." Brown, 132 Wn.2d at 572.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless it falls within an exception to the rule. ER 802.

Flores-Gomez cites three pieces of testimony that he argues were improperly admitted hearsay. The first is from the police officer who responded to Hernandez's police call. The officer testified, "Well, when I arrived on-scene, [Hernandez] said that she had just recently received –" and defense counsel immediately objected. The trial court ruled that what Hernandez told the officer was hearsay and that the officer could only "say what the general nature is but not what she said specifically." The prosecutor then asked him what the general nature of the information Hernandez gave him was and he responded, "The general information was that her husband had assaulted their daughter."

"'When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible.'" State v. Chenoweth, 188 Wn. App. 521, 533, 354 P.3d 13 (2015) (quoting State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005)). Here, the prosecutor stated the officer's testimony was not offered to prove that Flores-Gomez assaulted J.F.L., but rather to explain how the officer conducted his investigation. For this reason, it was not hearsay and was properly admitted.

Flores-Gomez argues that this testimony was improperly admitted under the fact-of-complaint doctrine, an exception to the hearsay rule. That exception "allows the prosecution in sex offense cases to present evidence that the victim complained to someone after the assault. But '[t]he rule admits only such evidence as will establish that the complaint was timely made.'" Chenoweth, 188 Wn. App. at 532 (alteration in original) (footnote omitted) (quoting State v. Ferguson, 100 Wn.2d 131, 135-36, 667 P.2d 68 (1983)). The rule excludes "evidence of the details of the complaint, including the identity of the offender and the nature of the act." Ferguson, 100 Wn.2d at 136. Flores-Gomez argues that the officer's testimony exceeded the scope of the fact-of-complaint doctrine because the officer identified Flores-Gomez as the offender and identified the nature of the act complained of. But the prosecutor specified that the officer's testimony was offered to explain the officer's investigation. It was not offered to corroborate J.F.L.'s account by demonstrating that she made a complaint. Therefore, the fact-of-complaint doctrine is not applicable here and was not violated.

Flores-Gomez also argues that the police officer's testimony was improperly admitted because it contained hearsay within hearsay. Hearsay within hearsay is inadmissible unless both forms of hearsay are subject to one of the hearsay exceptions. ER 805. We agree that the admission of the officer's testimony was error on this basis. But Flores-Gomez cannot show that he was prejudiced by its admission because J.F.L. testified that Flores-Gomez raped her

and Hernandez testified that Flores-Gomez admitted to the rape. Therefore, reversal is not warranted.

The remaining statements identified by Flores-Gomez as inadmissible hearsay are not hearsay statements. During J.F.L.'s testimony, the prosecutor asked her if, after confronting her father the second time and asking him to leave the home, she told Hernandez about the rape. J.F.L. responded, "Yeah. That's why I asked him to leave, because I felt like I needed to tell my mom." Then, during Hernandez's testimony, the prosecutor asked Hernandez if J.F.L. "disclosed to you what she came to talk about here today?" Hernandez responded, "Yes." These statements were not hearsay because neither J.F.L. nor Hernandez relayed any out-of-court statement in their testimony. Therefore, both were properly admitted.

CUMULATIVE ERROR

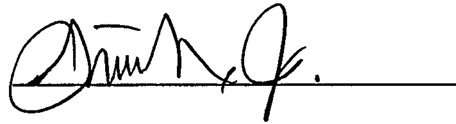
Flores-Gomez argues that cumulative error deprived him of a fair trial. We disagree.

The cumulative error doctrine applies when several trial errors occur that "standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It does not apply where the errors are few and have little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 929.

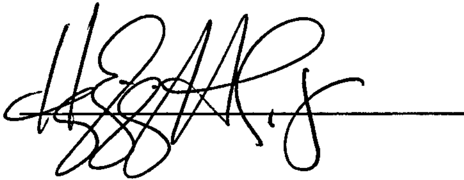
As described above, Hernandez did improperly testify that there was a recording and the police officer's statement regarding the reason for his investigation did contain hearsay within hearsay. But it is unlikely that this

testimony, even combined, denied Flores-Gomez a fair trial. J.F.L. testified in detail that Flores-Gomez raped her when she was 11 years old. She also explained why she did not immediately report the rape. Other members of J.F.L.'s family testified that J.F.L.'s relationship with her father changed around the time of the rape, and Hernandez testified that Flores-Gomez admitted to her that he raped J.F.L. Given this evidence of Flores-Gomez's guilt, it is unlikely that the errors described above had any effect on the outcome of the trial. Therefore, reversal is not appropriate.

We affirm.



WE CONCUR:



NIELSEN, BROMAN & KOCH P.L.L.C.

May 22, 2019 - 11:56 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77518-9
Appellate Court Case Title:	State of Washington, Res/Cross-App. v. Jose Arcides Flores-Gomez, App/Cross-Res.
Superior Court Case Number:	16-1-02697-9

The following documents have been uploaded:

- 775189_Petition_for_Review_20190522115434D1125851_4710.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 77518-9-I.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- kwebber@co.snohomish.wa.us
- nielsene@nwattorney.net

Comments:

Client copy withheld at clients request

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Kevin Andrew March - Email: MarchK@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190522115434D1125851