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No. 99173-1
Court of Appeals No. 79849-9-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAIRO DE LOS SANTOS-MATUZ,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jairo De Los Santos-Matuz asks this Court to accept review pursuant to RAP 13.4 of the opinion of the Court of Appeals in *State v. De Los Santos-Matuz*, 79849-9-I.

B. OPINION BELOW

Titling it evidence of his "disposition," the trial court admitted propensity evidence other acts by Mr. De Los Santos-Matuz. Finding significance in the words used to describe the other-acts evidence, the Court of Appeals concludes the trial court did not violate the plain limits of ER 404(b).

Further the court concluded that repeated redactions of the trial court record to shield the identity of Mr. De Los Santos-Matuz's accuser did not violate the requirements of Article I, section 10, was not an impermissible comment on the evidence, and did not violate Mr. De Los Santos-Matuz's presumption of innocence.

C. <u>ISSUES PRESENTED</u>

1. ER 404 categorically bars admission of evidence of other acts offered to show a person's propensity to act a certain way. Other acts evidence offered to prove "lustful disposition" is by definition evidence offered to show a person's propensity to act a certain way. Did the trial court err in permitting admission of this other acts evidence?

2. Article I, section 10 guarantees that "justice in all cases shall be administered openly." Courts may not redact or seal court documents without engaging in an on-the-record analysis as outlined in *Seattle Times Co. v. Ishikawa*. Did the redaction of the witness names in pleadings ad the court's instruction violate article I, section 10?

3. Article IV, section 16 prohibits judges from commenting on the evidence, including the credibility of witnesses. Did the trial court commit reversible error by concealing the alleged victim's identity in the jury instructions, signaling that she was in fact a victim of a sexual offense in need of protection?

4. Due process requires a presumption of innocence. Did the redacted to-convict instructions undermine this presumption?

D. <u>STATEMENT OF THE CASE</u>

Fifteen year-old Araceli's parent's severely limited her use of her phone and electronic devices. In March of 2017, her mother confronted

her about a note on her Snapchat account stating she had been abused. 1/23/19 RP 2099-2100. Araceli had written the note as a way to gain attention of boy she like. When pressed by her mother, Araceli said the abuse referred to the actions of her uncle, Mr. De Los Santos-Matuz, when she was 12. 1/23/19 RP 2105-06.

Araceli told her mother that abuse occurred when she had a sleepover at her cousin's house. She said she and her cousin were sleeping in the living room, as was her uncle. 1/23/19 RP 2078-79. When her cousins were asleep, her uncle put his finger inside her vagina. *Id.* at 2080-82. The next morning, Araceli stated, she woke up because her uncle was carrying her into his bedroom. *Id. at* 2086-87. Araceli said her uncle pulled down her pant and licked her vagina. *Id*. at 2089-90.

Araceli's cousin recalled having sleepovers with her cousin. 1/15/19 RP 1710-11. However she testified, the girls always slept in her room. *Id*. at 1781-82. She could not recall any time when Araceli was alone with her uncle. *Id.* at 1782

The State charged Mr. De Los Santos-Matuz with two counts of second degree rape of a child. CP 58-59.

During trial, and over Mr. De Los Santos-Matuz's objection, the court permitted the State to elicit testimony from Araceli about other acts

purportedly committed by Mr. De Los Santos-Matuz. 6/11/18 RP 155-56; 1/23/19 RP 2059.

A jury convicted him as charged. CP 119-20.

E. ARGUMENT

Mr. De Los Santos-Matuz's conviction was a product of any unfair trial. The court admitted evidence which merely showed Mr. De Los-Santos-Matuz's was a bad person. There were repeated violations of Article I, section 10. The court improperly told the jury the alleged victim was in fact the victim, that is, that Mr. De Los Santo-Matuz was guilty.

Mr. De Los Santos-Matuz is entitled to a new free of these errors.

1. The trial court erred and deprived Mr. De Los Santos-Matuz a fair trial when it admitted evidence of his other acts which had no relevance beyond establishing he was a bad person.

Evidence of other acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(b). "Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to

prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct).

> ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

> To admit evidence of other acts the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether that purpose is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

This Court has explained the necessary analysis to determine the relevance of such evidence. First, the trial court must identify a proper purpose for admission. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

> This has two aspects. First, the identified fact, for which the evidence is to be admitted, must be of consequence to the outcome of the action. The evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action. Second, the evidence must tend to make the existence of the identified fact more or less probable.

Id. at 362-63. Then, if the court determines the evidence is relevant it must weigh the probative value against the prejudicial effect.

Thus, there are two parts to the relevance analysis, the identification of a consequential purpose, and some tendency to make that consequential purpose more or less likely. Importantly, this second consideration cannot rely on propensity. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) *(*citing *Saltarelli*, 98 Wn.2d at 362). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

The trial court admitted evidence which by definition sought only to prove the Mr. De Los Santos-Matuz had a propensity to engage in the criminal act.

Mr. De Los Santos-Matuz faced two counts of second degree rape of a child involving Araceli. Both counts arose from a single occasion late in the summer of 2014 during which Araceli spent the night at Mr. De Los Santos-Matuz's house. Araceli testified to the events of that evening and the following morning.

But to bolster its case, the State sought to admit Aracila's claim that several months earlier while she was at Mr. De Los Santos-Matuz's house he tickled her and bit her above he breast. 6/11/18 RP 149; 1/23/19 RP 2059. The State claimed such evidence "shows that the Defendant had

an inclination toward that particular individual who was the victim in this case." *Id.* at 153. The Court found this evidence of "lustful disposition." *Id.* at 155-56

Washington courts have long repeated the same justification for the admissibility of evidence of lustful disposition. Courts have reasoned "[s]uch evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged." *State v. Thorne*, 43 Wn.2d 47, 60, 260 P.2d 331 (1953), *see also*, *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). That justification, first voiced prior to the adoption of ER 404, is wholly at odds with that rule.

By its very description, evidence of "lustful disposition" is character evidence offered to show the defendant acted in conformity therewith. "Disposition" is a "prevailing tendency" or an "inclination." https://www.merriam-webster.com/dictionary/disposition. Similarly "propensity" means "an often intense inclination or preference." https://www.merriam-webster.com/dictionary/propensity. Referring to this as evidence of disposition rather than propensity is simply semantics. A propensity to do an act and a disposition are one and the same. This evidence is squarely within the "categorical bar" that *Gresham* identified.

But the Court of Appeals concludes, despite authority to the contrary, a "propensity" and "disposition" are not the same thing. Opinion at 7. Thus, the Court concludes that will ER 404(b) plainly bars evidence that a person has "a propensity" to commit a crime it does not bar evidence that the person is "predisposed" to commit the crime. Such semantics eviscerate the rule.

No matter how it is labeled, the evidence invited the jury to conclude he had the same propensity and acted accordingly. That is the singular inference barred by ER 404(b). The trial court erred in admitting the evidence of Mr. De Los Santos De Los Santos-Matuz's other acts. This court should review under RAP 13.4.

2. Araceli's name was redacted in nearly all court documents without an *Ishikawa* analysis, in violation of article I, section 10.

The Washington Constitution guarantees that "[j]ustice in all cases shall be administered openly." Const. art. I, § 10. Despite that plain command, the State, trial court, and even defense counsel repeatedly concealed Araceli's identity in court documents. Although this court has held redactions in court filings require analysis under *Ishikawa*, the Court of Appeals concludes without any explanation they do not. Opinion at 9.

Transparency is critical in fostering understanding and trust in the judicial system and ensuring a fair trial. *State v. Duckett*, 141 Wn. App.

797, 803, 173 P.3d 948 (2007). Indeed, "[t]he open administration of justice is a vital constitutional safeguard," necessary to protect the integrity of the courts. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014) (internal quotation omitted).

It is the court's obligation, and not counsel's, to meet its "independent obligation to protect the open administration of justice" as required by Article I, section. 10. *Hundtofte*, 181 Wn.2d at 9. Court records, like courtrooms, are presumed open. *See Hundtofte*, 181 Wn.2d at 7. "Each time restrictions on access to criminal hearings or the records from hearings are sought, courts must follow these steps" *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716, 720 (1982).

Thus, a violation occurs by any improper redaction or sealed record even if the information might be shared in open court. *Id*. It does not matter under *Ishikawa* that other portions of the proceeding or record do not contain similar restrictions. Instead the Court made clear those requirements apply "each time restrictions on access" are sought. Further, *Ishikawa* made clear that the burden rests on the party seeking to restrict access. The Court explained "[o]ur open courts jurisprudence has always stressed the importance of transparency and access to court records. That is why we generally place the burden on the party who moves to seal court

records and why a court may order a sealing only in the most unusual of circumstances." *Id*. at 11.

Article I, section 10 applies to the concealment, alteration of the names of litigants, alleged victims or witnesses in court documents. *See Doe G v. Department of Corrections*, 190 Wn.2d 185, 202, 410 P.3d 1156 (2018). Indeed, the Court has found it unconstitutional to preclude disclosure of the identity of child victims of sexual assault absent an *Ishikawa* analysis. *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993). *Eikenberry* struck down RCW 10.52.100, which barred disclosure of names and other identifying information of child victims of sexual assault, finding it implicated Article I, section 10. 121 Wn.2d at 208-09.

Instead, whenever a party seeks to shield the identity of a witness or court participant the courts must engage in an on-the-record analysis the framework outlined in *Ishikawa*. 97 Wn.2d at 37-39; *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (adopting the same analysis for courtroom closures in criminal cases); *State v. Waldon*, 148 Wn. App. 952, 967, 202 P.3d 325 (2009) (adopting the same analysis to sealing of court documents in criminal cases).

From the very first document filed in this case, the Information, State used initials for the alleged victim. CP 1. That practice continued

throughout the case. *See*, CP 62-69 (Court's Order Memorializing Prior Trial Court's Ruling); CP 130-31 (Jury Instructions 6 and 7); CP 139-49 (State's Power Point for closing). At no point did the court conduct the inquiry *Ishikawa* demands. At no point did the court require the proponent of restricting public access to demonstrate the need. At no point did the court consider lesser alternatives. In short, the court never considered the demand of Article I, section 10, the open administration of justice.

The opinion of the Court of Appeals ignores all of this and merely pronounces the mistaken belief that redactions of court records do not violate Article I, section 10. They do. *Doe G.,* 190 Wn.2d at 202; *Allied Daily Newspapers*, 121 Wn.2d at 208-09. The surmises there is no constitutional violation so long as some other portion of the proceeding is open. That too is wrong. *Ishikawa*, 97 Wn.2d at 37.

The opinion is contrary to Article I, section 10 and long and well-established case law. Review is proper under RAP 13.4

3. Concealing Aracila's identity in the jury instructions constituted a comment on the evidence in violation of article IV, section 16 of the Washington Constitution.

Beyond the violation of the constitutional guarantee of open proceedings, the trial court's use of Araceli's initials in the to-convict instructions was a prejudicial comment on the evidence.

Article IV, section 16 of the Washington Constitution states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A jury instruction constitutes an improper comment on the evidence when it reveals the court's personal evaluation of the credibility, weight, or sufficiency of evidence presented at trial. *See State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). "[T]he court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Prior to trial, the court granted in part Mr. De Los Santos-Matuz's motion to prevent the State from referring to Araceli as a "victim." The court ruled the State would make its "best efforts" to avoid using that term and would instruct it witnesses to the do the same. 6/11/18 RP 114-15. Yet the court then instructed the jury in way that informed them she was in fact a victim of a crime.

Here, without explanation, the trial court used an instruction that conspicuously conceal Araceli's identity by using her initials in lieu of his name in the two to-convict instructions. CP 130-31. This was tantamount to declaring her a victim. *See* RCW 10.52.100; RCW 7.69A.030; RCW 10.97.130; RCW 42.56.240; Gen. Order 2011-1 of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash.

Ct. App.), *available at* http://www.courts.wa.gov/appellate_trial_courts/; Gen. Order of Division III, *In RE the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App.), *available at* https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

The Court of Appeals reasons no violation occurred because in *Levy* this Court concluded that including a victim's name in a "to-convict" was not a comment on the evidence. Opinion at 10. The Court next reasons that its own nearly 40-year old decision in State v. Alger, 31 Wn. App. 244, 248-50, 640 P.2d 44 (1982) found the use of the word "victim" was not a comment. Opinion at 10.

But here the court did not use Araceli's name nor even the generic term "victim." It instead chose to label her in way that plainly conveyed Araceli was the victim. That is fundamentally different than what was at issue in *Levy* or *Alger*. Indeed, had the trial court used either the generic term "victim" or Araceli's name there would be no error.

Although no Washington case has directly addressed this issue, several federal courts have found that the use of pseudonyms in civil sexual assault trials constitute a judicial comment on the evidence prejudicing the defendant. In *Doe v. Cabrera*, 307 F.R.D. 1 (D.D.C. 2014), while allowing a victim of sexual assault to proceed anonymously

pretrial, the court refused to extend the use of pseudonyms to the trial phase, reasoning,

> the defendant's ability to receive a fair trial will likely be compromised if the Court allows the plaintiff to continue using a pseudonym, ***as the jurors may construe the Court's permission for the plaintiff to conceal her true identity as a subliminal comment on the harm*** the alleged encounter with the defendant has caused the plaintiff.

Id. at 10 (emphasis added) (citing *E.E.O.C. v. Spoa, LLC*, No. Civ. CCB-13-1615, 2013 WL 5634337, at *3 (D. Md. 2013) for the proposition that "the court's limited grant of anonymity would implicitly influence the jury should this case advance to trial."); *see also Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).

> It is not difficult to appreciate that jurors may infer that the Court has an opinion about the harm the plaintiff has allegedly suffered by its decision to permit the plaintiff to conceal her true identity. The Court cannot afford the plaintiff that potential advantage at the expense of the defendant, who like the plaintiff is also entitled to a fair trial.

Cabrera, 307 F.R.D. at 10, n. 15.

Similarly, in *Doe v. Rose*, a California district court allowed a plaintiff in a sexual assault case to move forward anonymously pretrial, but precluded use of a pseudonym at trial, noting that several courts have concluded the practice may be interpreted as a comment on the evidence.

CV-15-07503-MWF-JCx, 2016 WL 9150620 at *3 (C.D. Cal. 2016).[1] Citing *Cabrera*, the *Rose* court went further, determining that, beyond a "subliminal suggestion," use of a pseudonym "is perhaps more accurately characterized as an overt suggestion" that the alleged harm occurred, the prejudice of which could not be overcome even by a limiting instruction. *Id*. This suggestion is even more alarming in criminal cases such as this one, where the defendant is facing an indeterminate sentence and potentially life-long deprivation of liberty.

To a jury, there is only one conceivable purpose for using an alleged victim's initials in a case involving a sex offense. Every juror who saw Araceli's initials in place of her name in the to-convict instructions could only logically conclude that the redaction was a method of protecting him not just as a victim, but as a victim of a sex offense.

The significant constitutional issue warrants review under RAP 13.4.

4. The redaction undermined Mr. De Los Santos-Matuz's presumption of innocence in violation of his right to due process.

[1] Under GR 14.1, a party may cite to unpublished cases from other jurisdictions as authority if citation is permitted in the jurisdiction of the issuing court. Pursuant to Federal Rule of Appellate Procedure (FRAP) 32.1, a court cannot restrict citation to unpublished federal judicial opinions issued after January 1, 2007.

Altering the jury instructions undermined Mr. De Los Santos-Matuz's presumption of innocence, depriving him of his constitutional right to due process and to a fair and impartial jury. U.S. Const. amends. VI, XIV; Const. Art. I, §§ 3, 22. "The presumption of innocence is the bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007). Jury instructions must accordingly convey the State's burden to prove every element beyond a reasonable doubt. *Id*. (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)). Reversal is required where the jury is instructed in a manner that relieves the State of this high burden of proof as to any element. *See Bennett*, 161 Wn.2d at 307.

Using Araceli's initials in the to-convict instructions effectively instructed the jury on her status as a victim. It was then up to Mr. De Los Santos-Matuz to prove his innocence, a burden he does not bear. This Court should reverse and remand for a new trial.

F. <u>CONCLUSION</u>

Mr. De Los Santos-Matuz's conviction was a product of any unfair trial. The court admitted evidence which merely showed Mr. De Los-Santos-Matuz's was a bad person. There were repeated violations of Article I, section 10. The court improperly told the jury the alleged victim was in fact the victim, that is, that Mr. De Los Santo-Matuz was guilty.

Mr. De Los Santos-Matuz is entitled to a new free of these errors. This Court should grant review to afford him that trial.

Dated this 28th day of October, 2020.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JAIRO R DE LOS SANTOS-MATUZ, Appellant.	No. 79849-9-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Jario De Los Santos-Matuz appeals his convictions for two counts of second degree rape of a child. De Los Santos-Matuz argues that the trial court deprived him of a fair trial by admitting improper propensity evidence barred by ER 404(b). He also claims that the trial court's use of initials in place of the alleged victim's name in court documents violated his constitutional rights, requiring reversal. We disagree and affirm.

I.

In March 2017, 15-year-old A.M.B. reported to her mother that her uncle, De Los Santos-Matuz, had touched her breasts and vagina and put his finger inside her vagina. Her mother took A.M.B. to the police station, where A.M.B. provided an audio and

video-recorded statement, as well as a written statement. Following an investigation, the State charged De Los Santos-Matuz with two counts of second degree rape of a child between June 13, 2014 and September 30, 2014, when A.M.B. was 12 years old.

At a pretrial hearing, the trial court considered the State's motion to admit evidence of six incidents under ER 404(b) to show De Los Santos-Matuz's lustful disposition toward A.M.B. and as res gestae. In particular, the State identified the following incidents: (1) while she was at his house for a sleepover with her cousin in June 2014, De Los Santos-Matuz bit A.M.B.'s breast; (2) during a sleepover visit in August 2014, De Los Santos-Matuz asked A.M.B. at the dinner table, "Can I eat you?" (3) when he drove her home after the August 2014 sleepover, De Los Santos-Matuz asked A.M.B. if she "liked" what had happened; (4) when she denied liking what happened while he drove her home, De Los Santos-Matuz told her he would not do it again, but not to tell anyone because they would get in trouble; (5) after she refused to go into a room with him at a family gathering in December 2014, De Los Santos-Matuz asked her, "Are you acting like this because of what happened?" and (6) at his home on another occasion, when a door opened into a room when she was sitting on his lap, De Los Santos-Matuz pushed her off his lap. The State presented an offer of proof on each incident and explained that the alleged rapes occurred at the August 2014 sleepover, at night after the comment at the dinner table and the next morning before the ride home. The State argued that the evidence of the six incidents was relevant to show De Los Santos-Matuz's lustful disposition toward A.M.B., even though the crime of rape does not require proof of sexual gratification.

In response, De Los Santos-Matuz argued (1) the State appeared to be relying on propensity rather than lustful disposition; (2) some of the incidents were benign and not necessarily sexual—such as the “eat you” comment and the lap incident; (3) the incidents that happened “after the fact” of the alleged rapes should not be admitted; and (4) the relevance of the incidents was “on the line,” such that they should be excluded as unduly prejudicial after a proper balancing test.

The trial court considered each incident on the record “one by one,” reviewed and clarified the State’s offer of proof and arguments, and observed that the incidents could be viewed “in three categories,” in that the first incident involved biting the breast; the second, third, and fourth allegedly occurred immediately before or after the alleged rapes; and the fifth and sixth were some time later. The trial court explained on the record its decision to admit evidence of some of the incidents and exclude others. As to the first incident of biting the breast at the June 2014 sleepover, the trial court found “by a preponderance of the evidence and based on the State’s offer of proof, that the misconduct occurred.” Citing State v. Ray, 116 Wn.2d 531, 537, 806 P.2d 1220 (1991), the trial court determined that the evidence was relevant to show lustful disposition toward “this particular victim” and that the probative value was not substantially outweighed by the danger of unfair prejudice.

As to the second, third, and fourth incidents, the trial court found the evidence relevant as res gestae, that is, “admissible to complete the story or provide immediate context for the events close in time and place to the . . . alleged rapes.” As to the fifth and sixth incidents, the trial court did not find that the incidents happened, and stated

that even had it so found, the evidence would not "go towards lustful disposition," such that a balancing test was not necessary and the evidence would not be admitted.[1]

At trial, A.M.B. testified, identifying herself by name to the jury. A.M.B. described the June 2014 sleepover, testifying that De Los Santos-Matuz came into the room where she and her cousin were playing and began tickling them both on their stomachs, over their clothes. A.M.B. testified that when her cousin left the room, De Los Santos-Matuz bit A.M.B.'s right breast over her clothes.

A.M.B. also testified about the August 2014 sleepover. While she and her cousins were watching a movie with De Los Santos-Matuz after dinner, she shared a blanket on the floor with De Los Santos-Matuz. She testified that he put his hand under her pajama bottoms and under her underwear and forced a finger into her vagina. She testified she was scared and embarrassed and asked him to stop. She testified he licked his finger and began "playing" with her vagina. He stopped after less than five minutes, after which A.M.B. went to sleep.

A.M.B. testified that, the next morning, De Los Santos-Matuz carried her into his room and put her down on the bed, where he pulled off her pajama bottoms, spread her legs, and licked her vagina. A.M.B. was scared and embarrassed; when he asked if she wanted to go to her cousin's room to sleep, she said yes and left the room. She also testified that when he drove her home later, De Los Santos-Matuz asked her if she "liked it," told her he would not do it again, and told her not to tell anyone because they "would get in trouble."

[1] After a jury trial resulted in a mistrial, the parties agreed that the trial court's pretrial rulings would be applied in the second trial.

Throughout the trial, the attorneys, and other witnesses referred to A.M.B. by name before the jury. But the “to convict” jury instructions referred to her as “A.M.B.”

The jury found De Los Santos-Matuz guilty of both counts of second degree rape of a child. De Los Santos-Matuz appeals.

II.

De Los Santos-Matuz first contends that the trial court erred by admitting A.M.B.’s testimony that he tickled her and bit her breast in June 2014, evidence he contends is nothing more than improper propensity evidence under ER 404(b). We disagree.

ER 404(b) prohibits admission of evidence offered to “show the character of a person to prove the person acted in conformity” with that character at the time of the crime. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)). A court may admit evidence of “other crimes, wrongs, or acts” under ER 404(b) for other purposes, as long as it (1) finds by a preponderance of evidence that the act occurred; (2) identifies the purpose for introducing the evidence; (3) determines the evidence is relevant to prove the crime charged; and (4) weighs the probative value against the prejudicial effect. Foxhoven, 161 Wn.2d at 175. When the trial court has correctly interpreted the rule, we review the admission of evidence under ER 404(b) for an abuse of discretion. Foxhoven, 161 Wn.2d at 174.

De Los Santos-Matuz does not contend that the trial court failed to properly interpret the rule or to complete the required four-part analysis. Instead, relying on similar dictionary definitions of “disposition” and “propensity” defining both as

"inclination," he argues that evidence of lustful disposition is "propensity evidence" that should be inadmissible under the "categorical bar" of ER 404(b) as described in State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). While acknowledging that Washington courts have repeatedly held that evidence of lustful disposition can be properly admitted under ER 404(b), De Los Santos-Matuz contends that any difference in the terms is "simply semantics" and the justification is "wholly at odds with" the rule.

But, in Gresham, the court described ER 404(b) as prohibiting the admission of evidence for "one improper purpose"—that is, to show propensity—and yet allowing trial courts to admit such evidence for "an undefined number of proper purposes," provided they apply the "thorough analytical structure" developed by Washington courts. Gresham, 173 Wn.2d at 420-21. Because the trial court properly interpreted and applied ER 404(b) to evidence offered to show a common scheme or plan, the Gresham court affirmed the admission of evidence that one defendant had molested "four other girls" because the circumstances of those other acts were "markedly similar to the charged crime." Gresham, 173 Wn.2d at 422-23.

In Ray, the court acknowledged that it had "consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female." It is not enough to "just reveal defendant's general sexual proclivities"; the evidence must be "directly connected" to the victim and show "a sexual desire" for that "particular" individual, "which in turn makes it more probable that the defendant committed" the charged offense against that particular individual. Ray, 116 Wn.2d at 547; see also State v. Medcalf, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990); State v. Ferguson, 100 Wn.2d

131, 133-34, 667 P.2d 68 (1983). In other words, Washington courts recognize a significant difference between a purpose of "showing [one's] character and action in conformity with that character" and a purpose of showing one's sexual desire for a specific individual and action in conformity with that individualized sexual desire. Gresham, 173 Wn.2d at 425. While the words used to describe those different purposes may be similar, De Los Santos-Matuz identifies no Washington authority requiring them to be viewed as identical or treated identically under ER 404(b).

Here, the trial court applied the required thorough analysis and exercised its discretion to admit the evidence about the June 2014 sleepover for a proper purpose under Washington case law, including Gresham and Ray. De Los Santos-Matuz demonstrates no abuse of discretion.

Moreover, error in admitting evidence under ER 404(b) "is harmless 'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" Gresham, 173 Wn.2d at 425 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). De Los Santos-Matuz claims that "a reasonable juror could entertain doubts as to the strength of the state's case," given that the first trial resulted in a hung jury after hearing the testimony about the June 2014 sleepover. This is unpersuasive, particularly given the jury's unanimous finding of guilt following the second trial.

De Los Santos-Matuz's reliance on State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014), is also misplaced. In Gunderson, the trial court admitted evidence of the defendant's prior acts of domestic violence against the alleged victim to impeach the credibility of the alleged victim's testimony that he did not assault her. Gunderson, 181

Wn.2d at 920-21. The court held that the trial court erred in admitting the evidence and the error was not harmless because minimal evidence showed that he had assaulted her. Gunderson, 181 Wn.2d at 919-20.

Here, the evidence of A.M.B.'s testimony about the rapes, independent of the June 2014 incident and including her description of De Los Santos-Matuz's comment immediately after the August 2014 sleepover about getting "in trouble" if she told about "what happened," persuades us that the outcome of the trial would not have been materially affected had the jury not heard about the June 2014 sleepover. The jury had an opportunity to assess A.M.B.'s credibility and weigh the evidence of De Los Santos-Matuz's comments suggesting his knowledge of his guilt for touching, penetrating, and licking A.M.B.'s vagina. There is no reasonable probability that the result would have been any different had the jury not heard testimony that he bit her breast two months earlier. See Gresham, 173 Wn.2d at 425 (any error in failing to give ER 404(b) limiting instruction regarding prior sex offenses was harmless, given overwhelming evidence of guilt).

II.

De Los Santos-Matuz also argues that use of A.M.B.'s initials in court documents (1) violated the guarantee of open administration of justice in article I, section 10 of the Washington Constitution; (2) constituted a judicial comment on the evidence in violation of the Washington Constitution article IV, section 16; and (3) undermined the presumption of innocence in violation of his right to due process. We disagree.

We review de novo an alleged violation of the constitutional guarantee of open administration of justice. State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014).

As De Los Santos-Matuz argues, a trial court's redaction of names in court documents with no analysis on the record under Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) may require reversal as a violation of this constitutional provision. Hundtofte v. Encarnacion, 181 Wn.2d 1, 6, 330 P.3d 168 (2014); Doe G. v. Dep't of Corr., 190 Wn.2d 185, 201, 410 P.3d 1156 (2018). But an Ishikawa analysis is not required if the appellant, who bears the burden, cannot show that the challenged redaction constituted a courtroom closure. Smith, 181 Wn.2d at 513-14; State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015). A courtroom closure occurs (1) "'when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave'" or (2) "where a portion of a trial is held someplace "inaccessible" to spectators." Love, 183 Wn.2d at 606 (quoting State v. Lomor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)).

A.M.B. testified under her full name in open court and the attorneys and other witnesses spoke her name, not her initials, in court. Her testimony was not someplace "inaccessible" to spectators; any member of the public would have been able to listen to her name. Because De Los Santos-Matuz fails to show a court closure occurred under the circumstances of this case, the trial court did not violate the constitutional guarantee of open administration of justice by failing to conduct an Ishikawa analysis.

A jury instruction may constitute a judicial comment on the evidence in violation of the Washington Constitution article IV, section 16, if it reveals the court's personal evaluation of the credibility, weight, or sufficiency of the evidence presented at trial. See State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). We review jury

instructions de novo, in context and as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

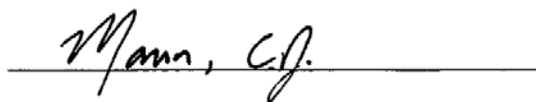
De Los Santos-Matuz contends that, after granting in part his motion to prevent the State from referring to A.M.B. as a "victim," the trial court's use of initials "to conspicuously conceal [her] identity" in the "to convict" instructions, "without explanation," was "tantamount to declaring her a victim." Acknowledging that no Washington appellate court has addressed such a claim in a published opinion, De Los Santos-Matuz claims that federal courts have "found that the use of pseudonyms in civil sexual assault trials constitute a judicial comment on the evidence." However, the federal court cases described in his brief appear to involve trial court decisions denying plaintiffs' requests to proceed to trial under a pseudonym rather than analysis of language in any particular jury instruction. His citation to such authority is not persuasive.

Our Supreme Court has held that the use of a victim's full name in the jury instructions does not constitute a comment on the evidence. Levy, 156 Wn.2d at 722. This court has also held that, in the context of a criminal trial, using the word "victim" does not ordinarily convey the court's personal opinion of the case to the jury. State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44 (1982). Thus, we reject De Los Santos-Matuz's challenge to the jury instruction; we hold that the use of initials in the to-convict instruction was not a judicial comment on the evidence.

De Los Santos-Matuz also claims that the use of initials in the to-convict instruction identified A.M.B. as a victim, thereby undermining the presumption of innocence and relieving the State of its burden of proof in violation of his constitutional

right to due process. We are not persuaded that a juror would presume that a person who testified at trial, identifying herself by name, and to whom other witnesses and the attorneys referred by name, was a victim simply because of the use of her initials. And, De Los Santos-Matuz does not argue or show that the jury was not properly instructed on the presumption of innocence, the burden of proof, or the elements of the crimes charged. When viewed as a whole, the instructions did not lower the burden of proof or violate due process.

Affirmed.



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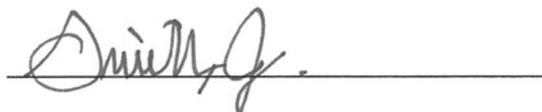

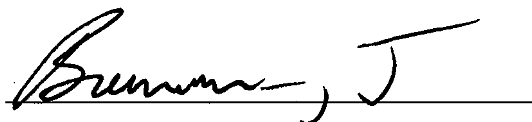

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