Supreme Court No. 99396-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

Patrick Crossguns,

Appellant/Respondent

Court of Appeals No. 37079-8-III

Spokane County Cause No. 16-1-03681-32

The Honorable Judge Julie McKay

ANSWER TO PETITION AND CROSS-PETITION

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Patrick Crossguns got into a fight with his adult stepson, which was so bad the stepson broke Mr. Crossguns's jaw. RP 706.[1] After that punch had been thrown, the stepson accused Mr. Crossguns of improper sexual conduct with his teenage daughter, R.M. RP 707. Mr. Crossguns was shocked to be accused of molesting his daughter. RP 707. Mr. Crossguns's wife threatened him against reporting to the police that her son had broken his jaw. RP 408.

A few months later, Mr. Crossguns and R.M. were watching TV on the living room couch when his son came in and told him to turn the volume down. RP 719. Mr. Crossguns reached past R.M. to grab the remote control and his cup of coffee. RP 720. He touched R.M.'s leg as he reached past. RP 720.

But the son claimed that he had seen Mr. Crossguns touch R.M.'s vaginal area. RP 449. He told his mother (Mr. Crossguns's wife) about the allegation and she confronted Mr. Crossguns. RP 451. Mr. Crossguns called R.M. into the room and she confirmed to both parents that Mr. Crossguns had never touched her inappropriately. RP 721.

[1] All citations to the Verbatim Report of Proceedings refer to the chronologically paginated volumes spanning 7/15/19 through 9/13/19.

Mr. Crossguns relationship with the whole family deteriorated after that allegation was made. RP 722. He moved back to Montana (from which the family had moved about a year prior), leaving the family behind. RP 715.

After Mr. Crossguns had left, R.M.'s stepmother (who later adopted her) asked her directly whether Mr. Crossguns had ever touched her in a sexual manner and she said no. RP 618. When her stepmother asked her again later, she claimed that he had done so, but she said that it had only happened a couple of times. RP 618-19.

At first, R.M. only claimed that Mr. Crossguns had touched her outside of her clothing. RP 648. Then she claimed that the touching was inside her clothing but over her underwear. RP 648. Then she later claimed that he had penetrated her vagina with his fingers. RP 648.

Mr. Crossguns was in Montana when he learned that he was being charged with second-degree rape of a child and second-degree child molestation. RP 722-23; CP 80-81. The state also alleged that the abuse was part of an ongoing pattern and that Mr. Crossguns had abused a position of trust. CP 80-81.

Mr. Crossguns's niece, S.R., was a year younger than R.M. RP 661. They went to the same school during the year after Mr. Crossguns left the family. RP 661. A few months after Mr. Crossguns was charged,

R.M. told her cousin that she had lied about the allegations against her father, at the direction of her stepmother. RP 662. S.R. later told her grandmother about that conversation and memorialized it in writing. RP 663; Ex. D 101.

The child molestation charge against Mr. Crossguns was based on the allegation that he had touched R.M.'s vaginal area while sitting on the couch, before his son came and told him to turn down the TV volume. *See* RP 829-31. The son testified at trial that he had seen Mr. Crossguns's hand inside R.M.'s pants. RP 449. But he had only told the police that he had seen Mr. Crossguns's hand "near her groin." RP 543.

During the first day of her testimony, R.M. claimed only that Mr. Crossguns had touched her inner thigh. RP 614, 617. After the trial recessed for the weekend, however, R.M. came back and said that Mr. Crossguns's hand had been about 1 ½ inches from her vagina, in the area usually covered by her underwear. RP 637-38.

The rape of a child charge was based on an alleged incident taking place in a bedroom in the basement of the family home, during with R.M. claimed that he had put his fingers inside her vagina. RP 607, 826.

At trial, the state sought to admit testimony regarding numerous alleged incidents of sexual abuse by Mr. Crossguns against R.M., none of which were the basis for the charges. CP 42-47. The state argued that the

evidence was relevant to the aggravating factors, which been added to the Information right before trial. CP 42-47. The state also argued that the evidence was admissible under ER 404(b). CP 42-47.

Mr. Crossguns strenuously objected. RP 60-64, 216-19; CP 70-74. He argued that the testimony would constitute pure propensity evidence. CP 72.[2]

The trial court granted the state's motion, finding the evidence admissible, *inter alia*, under the "lustful disposition" exception to ER 404(b). CP 119. Pursuant to this ruling, R.M. testified at length about her allegations regarding how the abuse started in the car on a road trip with Mr. Crossguns on the way to Montana, continued while they were in Montana, and resumed when they got back to Spokane. RP 582-90.

R.M. claimed that Mr. Crossguns first touched her vaginal area while he was driving, she was in the front seat of the car, and her brother was in the back seat. RP 582-83. Her brother only saw Mr. Crossguns put his hand on R.M.'s leg. RP 440. R.M. described those alleged incidents to the jury at length. RP 582-90.

[2] In the alternative, Mr. Crossguns moved for the trial on the "ongoing pattern of sexual abuse" aggravator to be bifurcated from the issue of guilt so the jury would only hear the evidence if he had already been convicted of the charges. RP 62, 217, 222; CP 60. The court denied that motion because it ruled that the evidence of the uncharged allegations was admissible in the state's case-in-chief. CP 119-20.

R.M. also alleged that Mr. Crossguns would sneak into her room at night to touch her. RP 594-97. She described those alleged incidents and their effect on her to the jury. RP 594-600. R.M. shared a bedroom with her sister. RP 576. The sisters' beds were only a few feet apart. RP 577. But the state did not call R.M.'s sister as a witness at trial. *See* RP *generally*.

Mr. Crossguns called his niece – R.M.'s cousin – as a witness for the defense. RP 660-81. S.R. testified that R.M. told her at school that she had lied about the allegations against her father. RP 661-62.

Mr. Crossguns also testified. RP 683-766. He denied ever having touched his daughter in a sexual manner. RP 684-724.

During closing argument, the prosecutor informed the jury that it was their "job" to decide whether S.R. was lying or whether R.M. was lying:

> [S.R.] told you about an alleged conversation that she had with [R.M.] in which [R.M.] said she was lying, none of this happened. You heard from [R.M.] earlier, that that conversation never happened. Somebody's lying. It's your job to determine who's lying. Is [R.M.] lying or is [S.R.] lying?
> RP 815.

The prosecutor provided the same two options for the jury regarding Mr. Crossguns's testimony, arguing that the jury was "going to have to" decide that either R.M. was lying or that Mr. Crossguns was:

> But, again, you have the testimony of [R.M.], on one hand, and [Mr. Crossguns's] testimony on the other hand. Somebody's not telling the truth, and, again, you're going to have to make that decision. Who is lying and who is telling the truth.
> RP 817

The jury convicted Mr. Crossguns of both of the charges and answered yes to each of the special verdicts on the aggravating factors. CP 109-12. Mr. Crossguns timely appealed. CP 192. The Court of Appeals reversed Mr. Crossguns's convictions on prosecutorial misconduct grounds in an unpublished decision. *See* Appendix.

ARGUMENT

I. THIS COURT SHOULD DENY THE STATE'S PETITION BECAUSE THE COURT OF APPEALS' HOLDING REGARDING PROSECUTORIAL MISCONDUCT SIMPLY APPLIES WELL-ESTABLISHED PRECEDENT. THE ISSUE DOES NOT MEET ANY OF THE CRITERIA FOR REVIEW AT RAP 13.4(B).

The Court of Appeals held that the prosecutor committed misconduct at Mr. Crossguns's trial by misstating the state's burden of proof to the jury. Appendix, pp. 17-26. The Court applied longstanding precedent to hold that the prosecutor's "false choice argument" – requiring the jury to decide that the state's witnesses were lying in order to acquit Mr. Crossguns – was improper. Appendix, pp. 18-21 (*citing State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010); *State v. McKenzie*, 157 Wn.2d

44, 59, 134 P.3d 221 (2006); *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 2269 (2007)).

The Court of Appeals then carefully applied this Court's prior holdings to find that the prosecutor's misconduct at Mr. Crossguns's trial was prejudicial and so flagrant and ill-intentioned as to require reversal despite defense counsel's failure to object below. Appendix, pp. 21-26 (*citing State v. Loughbom*, 196 Wn.2d 64, 75, 470 P.3d 499 (2020); *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015); *State v. Berry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015); *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)).

Specifically, the Court of Appeals noted that "any prosecuting attorney should know not to instruct the jury that it must find the victim to be lying." Appendix, p. 26.

This court has already addressed the issues raised in the state's petition – some as recently as last year. *See Loughbom,* 196 Wn.2d at 75; *Walker*, 182 Wn.2d at 478; *Berry*, 183 Wn.2d at 303; *Emery*, 174 Wn.2d at 762; *McKenzie*, 157 Wn.2d at 59. The Court of Appeals' holding regarding the prosecutorial misconduct issue in Mr. Crossguns's case does not mee any of the criteria for review under RAP 13.4(b).

II. IF THIS COURT GRANTS THE STATE'S PETITION, THE COURT SHOULD ALSO GRANT REVIEW OF MR. CROSSGUNS'S CHALLENGE TO THE "LUSTFUL DISPOSITION" DOCTRINE PURSUANT TO RAP 13.4(B)(4). WASHINGTON SHOULD ABANDON THAT DOCTRINE BECAUSE IT IS INCOMPATIBLE WITH ER 404(B)'S BAR ON PROPENSITY INFERENCES.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformtity therewith." ER 404(b). This rule must be read in conjunction with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

ER 404(b) reflects a long-standing policy against character evidence because "it is said to weigh too much with the jury and to so overpersuade them...." that the accused must be guilty of a particular offense if he has been shown to have a propensity toward that type of misconduct. *State v. Slocum*, 183 Wn. App. 438, 456, 333 P.3d 541 (2014) (*quoting Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948)).

The protection against propensity evidence must be given particularly careful consideration in sex cases because, "the prejudice potential of prior acts is at its highest" in such cases. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Specifically:

> Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to

> arrive at the conclusion that he must be guilty, he could not help but be otherwise.

Id. (*quoting* Slough and Knightly, *Other Vices, Other Crimes,* 41 Iowa L. Rev. 325, 333–34 (1956)).

Even so, evidence of uncharged crimes or misconduct may be admissible to prove, *inter alia*, "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

But courts must give "careful consideration" in sex cases of whether evidence, even if relevant, requires exclusion because its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). This is because the danger of an improper propensity inference by the jury is "at its highest" in such cases. *Id.*

In Mr. Crossguns' case, the trial court found that the lengthy evidence regarding the uncharged abuse allegations were admissible under the "lustful disposition" exception to ER 404(b). CP 119.[3] The court also explicitly instructed the jury that the evidence could be considered to

[3] The court entered a blanket ruling finding that, in addition to the "lustful disposition" doctrine, the evidence was also admissible under each of the other exceptions to ER 404(b): intent, plan, motive, opportunity, absence of mistake, and state of mind for R.M's delayed disclosure. CP 93.

As argued at length in Mr. Crossguns's brief before the Court of Appeals, however, none of those exceptions apply to the facts of his case. *See* Appellant's Opening Brief, pp. 15-22.

consider whether Mr. Crossguns had a "lustful disposition" toward R.M. CP 93.

But the "lustful disposition" doctrine is simply a vehicle through which courts have long permitted propensity evidence in sex cases. As such, the doctrine directly contradicts the mandate of ER 404(b). Washington courts should abandon the doctrine as inconsistent with the prohibition on propensity evidence in criminal cases.

A. The history of the "lustful disposition" doctrine demonstrates that it represents the continuation of an antiquated rule permitting propensity evidence in sex cases, in direct contradiction to the prohibition of ER 404(b).

The lustful disposition doctrine has its roots in English ecclesiastical law. Zachary Stirparo, *Reconsidering Pennsylvania's Lustful Disposition Exception: Why the Commonwealth Should Follow Its Neighbor in Getz v. Delaware*, 23 Widener L. Rev. 65, 68 (2017) (*citing* Michael Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 Am. Crim. L. Rev. 321, 338-39 (2015)).

In England, most sex crimes were under the jurisdiction of church courts, not secular criminal courts. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J. Crim. L. 127, 164 (1993) (*citing* Morris Ploscowe, Sex

and the Law 1-3 (1951); 1 Richard Burn, Ecclesiastical Law 662-65 (London, H. Woodfall & Strahan 1763)).

In church courts – unlike in English common law -- there was no prohibition on propensity evidence because such courts were concerned only with "morality of duty." Stirparo, 23 Widener L. Rev. at 68. Church courts also followed other evidentiary rules in sex cases, which have long been abandoned, such as allowing evidence that a victim had a history of consenting to sexual encounters with other men as a defense to a rape charge. *Id.*

America has never had ecclesiastical, church courts. Reed, 21 Am. J. Crim. L. at 166. But the colonies, nonetheless, imported some of the English ecclesiastical rules for sex cases, including the lustful disposition doctrine. *Id.* Originally, the doctrine was used in adultery cases to permit evidence of uncharged sexual activity between two consenting adults to show that they had a "lustful disposition" toward one another and were, thus, more likely to have engaged in the charged adultery offense. *Id.*

"Statutory rape" offenses were the first codified sex crimes against children in the U.S. *Id.* at 168. Courts expanded the lustful disposition doctrine to permit the admission of character evidence against people accused of statutory rape as well. *Id.* (*citing* Charles T. McCormick,

McCormick on Evidence §§ 186, 187, 188, 190 (John W. Strong ed., 4th ed. 1992)).

The lustful disposition doctrine explicitly permitted the conclusion that the accused had a propensity to commit sex offenses based on his/her character. *Id.*; Stirparo, 23 Widener L. Rev. at 69 (*citing Disposition*, Black's Law Dictionary 539 (9th ed. 2009); L.S. Tellier, Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses,* 167 A.L.R. 559, 565 (1947)); Michael L. Smith, 52 Am. Crim. L. Rev. at 338.

Washington Courts adopted the lustful disposition doctrine for the specific purpose of establishing the character of the accused in order to demonstrate that s/he had acted in conformity therewith. *See e.g. State v. Wood*, 33 Wash. 290, 292, 74 P. 380 (1903) ("It is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity than between those whose behavior has been modest and decorous").

More recently, however, numerous jurisdictions have abandoned the lustful disposition doctrine (also referred to as the "depraved sexual instinct" or "lewd disposition" rule), holding that the rule does nothing more than permit improper propensity evidence, in violation of ER 404(b). *See e.g. State v. Grist*, 147 Idaho 49, 54, 205 P.3d 1185 (2009); *People v.*

Sabin, 463 Mich. 43, 68, 614 N.W.2d 888 (2000); *State v. Nelson*, 331 S.C. 1, 6, 501 S.E.2d 716 (1998); *State v. Osier*, 569 N.W.2d 441 (N.D. 1997); *State v. Winter*, 162 Vt. 388, 392, 648 A.2d 624 (1994); *Lannan v. State*, 600 N.E.2d 1334, 1335 (Ind. 1992); *Mitchell v. State*, 539 So.2d 1366, 1372 (Miss.1989); *Getz v. State*, 538 A.2d 726, 733–34 (Del. 1988).

No published Washington appellate case, however, has considered whether the lustful disposition doctrine can stand in light of the adoption of 404(b) and the this Court's repeated admonition that the risk of an unfair and improper propensity inference is "at its highest" in cases charging sex offenses.

B. Washington courts should abandon the lustful disposition doctrine because it violates ER 404(b)'s categorical bar on propensity evidence.

In the 1990's, the federal legislature and numerous other jurisdictions took steps to codify the lustful disposition doctrine into statute or court rule. The Washington legislature followed suit in 2008, passing former RCW 10.58.090. But this Court struck that statute down, holding that it had been passed in violation of the separation of powers doctrine because it was irreconcilable with ER 404(b). *See State v. Gresham*, 173 Wn.2d 405, 429, 269 P.3d 207 (2012).

If the codification of the lustful disposition doctrine is irreconcilable with ER 404(b), then so is the doctrine itself. Washington

courts should abandon the lustful disposition doctrine because it violates the categorical bar on propensity evidence.

In 1994, Congress adopted federal rules of evidence (as part of a broader crime bill) explicitly permitting admission of evidence that the accused had committed uncharged acts, similar to the one(s) charged, in criminal and civil cases. *See* Fed. R. Evid Rules 413-415. Federal rules 413-15 were adopted as specific exceptions for sex cases to the ER 404(b) prohibition on propensity evidence and explicitly codified the lustful disposition doctrine. *See e.g. United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998); Lisa M. Segal, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 Suffolk U.L. Rev. 515, 517 (1995).

These federal rules were based on understandings regarding sex offender recidivism, which have been largely disproven by research. Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence*

Law: A Critical Look at the Admission of Prior Sex Crimes, 81 U. Cin. L. Rev. 795, 807–08 (2013).[4, 5]

Several states followed congress's lead, enacting statutes or court rules like Federal Evidence Rules 413-415. *See* Michael L. Smith, 52 Am. Crim. L. Rev. at 323–24; Former RCW 10.58.090.

The Washington legislature also followed suit, passing former RCW 10.58.090, which explicitly permitted evidence of prior sex offenses, "notwithstanding Evidence Rule 404(b)." *Former* RCW 10.58.090. RCW 10.58.090 provided that evidence of the commission by the accused any other sex offense was admissible in sex cases "notwithstanding Evidence Rule 404(b)." *Former* RCW 10.58.090.

In *Gresham*, however, this Court held that that statute "cannot be harmonized with ER 404(b)" because ER 404(b) "is a categorical bar to

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[4] For example, sex offenders are less likely than almost any other type of criminal offender to be re-arrested for a similar crime within three years of release from prison. Lave, 81 U Cin. L. Rev. at 817. In fact, they are less likely than non-sex offenders to be re-arrested for any offense at all. *Id.* at 818. Sex offenders found guilty of offenses against children in their own families have the lowest recidivism rates of all. *Id.* at 825.

[5] Federal rules 413-15 were also based on arguments that prior uncharged sexual misconduct evidence was necessary to corroborate the testimony of the alleged victim, to protect the defendant from a conviction based solely on that testimony, and to prevent the trial from becoming a swearing match between the victim and defendant. *See* Segal, 29 Suffolk U.L. Rev. at 535 (*citing* President's Message to Congress Transmitting Proposed Legislation, Entitled the "Comprehensive Violent Crime Control Act of 1991", H.R. Doc. No. 102-58, 102d Cong., 1st Sess. 100 (1991)).

Notably, admission of evidence of uncharged misconduct does nothing to achieve these purposes in cases, such as Mr. Crossguns's, in which all of the evidence of uncharged allegations comes from the testimony of the alleged victim.

the introduction of evidence of prior misconduct for the purpose of showing the defendant's character and action in conformity with that character." *Gresham*, 173 Wn.2d at 429. The *Gresham* court emphasized that "there are no exceptions to this rule." *Id.*

If the codification of the lustful disposition doctrine cannot be harmonized with ER 404(b), then logic dictates that the doctrine, itself, cannot be harmonized with the rule, either.

This is particularly true given this Court's repeated warning that the potential for unfair prejudice from propensity evidence is "at its highest" in sex cases. *See State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014); *Gresham*, 173 Wn.2d at 433; *Smith*, 106 Wn.2d at 776.

This Court has, similarly, cautioned lower courts to be on guard against the tendency toward lenient application of the rules of evidence in cases involving sex offenses:

> When deciding the issue of guilt or innocence in sex cases, where prejudice has reached its loftiest peak, our courts have been most liberal in announcing and fostering a nebulous exception, offering scant attention to inherent possibilities of prejudice. Just when protection is most needed, the rules collapse.

Saltarelli, 98 Wn.2d at 364–65 (*quoting* Slough, 41 Iowa L.Rev. 325).

The lustful disposition doctrine is irreconcilable with ER 404(b). *Gresham*, 173 Wn.2d at 429. It is also incompatible with this Court's repeated admonishment that lower courts remain on guard against the very

high risk of unfair prejudice resulting from the admission of propensity evidence in sex cases. *See e.g. Saltarelli*, 98 Wn.2d at 364–65. Washington courts must abandon the lustful disposition doctrine.

The Court of Appeals agreed in Mr. Crossguns's case that "[o]ne might question the logic behind the lustful disposition doctrine." Opinion, p. 13. Nonetheless, the Court of Appeals found itself bound by this Court's prior acceptance of that doctrine as an exception to ER 404(b). Opinion, p. 13.

This Court should grant review because the continuation of the antiquated and harmful "lustful disposition" doctrine affects a large number of cases alleging sex offenses. But the Court of Appeals is powerless to abrogate the doctrine, despite its "question[able]" logic. *See* Opinion, p. 13. Accordingly, it is of substantial public interest that this Court grant review of Mr. Crossguns's cross-petition. RAP 13.4(b)(4).

C. The improper admission of lengthy and repeated propensity evidence against Mr. Crossguns requires reversal of his convictions.

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *Gunderson*, 181 Wn.2d at 926. Improperly admitted evidence is only harmless if it is "of little significance in light of the evidence as a whole." *State v. Fuller*,

169 Wn. App. 797, 831, 282 P.3d 126 (2012) (*citing State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002)).

The analysis does not turn on whether there was sufficient evidence to convict. *Gower*, 179 Wn.2d at 857. Rather, "the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence." *Id.*

The improper admission of evidence results in unfair prejudice to the accused when it encourages the jury to convict based on an improper propensity inference. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012).

Additionally, as noted above, the risk of prejudice as "at its highest" in cases alleging sex offenses. *Slocum*, 183 Wn. App. at 457; *Gower*, 179 Wn.2d at 857; *Saltarelli*, 98 Wn.2d at 363.

Evidence that bolsters the testimony of the alleged victim and detracts from that of the accused also carries a high risk of prejudice. *Slocum*, 183 Wn. App. at 457. This is particularly true when credibility is the main issue in the case. *Gower*, 179 Wn.2d at 858.

Mr. Crossguns was prejudiced by the improper admission of extensive evidence of uncharged alleged sexual abuse against R.M. The evidence was, by no means, "of little significance in light of the evidence

as a whole." *Fuller*, 169 Wn. App. at 831. Instead, it constituted a significant portion of R.M.'s lengthy testimony. RP 582-600.

Moreover, Mr. Crossguns testified at trial and denied all of the allegations against him. RP 683-766. He also called R.M.'s cousin as a witness, who testified that R.M. had confessed to fabricating the allegations against Mr. Crossguns. RP 660-81. This defense evidence (in addition to the prosecutor's arguments, which the Court of Appeals found to constitute misconduct) painted the case as a pure credibility contest between R.M. and the defense witnesses.

The 404(b) evidence, which encouraged the jury to convict based on some perceived "biological inclination" on the part of Mr. Crossguns, was particularly prejudicial given the nature of this case. *Saltarelli*, 98 Wn.2d at 363.

The trial court also explicitly instructed the jury that the evidence of the uncharged misconduct could be considered for the purposes of determining, *inter alia*, Mr. Crossguns's "lustful disposition toward [R.M.]." CP 93. Accordingly, there is no valid concern that the jury could have only considered the evidence for some non-propensity purpose.

In Mr. Crossguns's case, there is "a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence." *Gower*, 179 Wn.2d at 857. The improper admission of

extensive evidence of uncharged abuse allegations, in violation of ER 404(b), requires reversal of Mr. Crossguns's convictions. *Id.*

CONCLUSION

For the reasons set forth above, this Court should deny the state's Petition for Review.

In the alternative, if this Court grants the state's petition, the Court should also review Mr. Crossguns's challenge to the "lustful disposition" doctrine pursuant to RAP 13.4(b)(4).

Respectfully submitted on February 2, 2021.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of this Answer to Petition/Cross-Petition, postage pre-paid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, via email to:

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

I filed the Answer to Petition/Cross Petition electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 2, 2021.

_____
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LAW OFFICE OF SKYLAR BRETT

February 02, 2021 - 4:52 PM

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