

68327-6

68327-6

NO. 68327-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RONALD HUBBARD, JR.,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A juror has an actual bias when her state of mind relative to the case prevents her from trying the case impartially and without prejudice to the challenging party. Where a juror can put aside preconceived notions and decide the case on the basis of the evidence, the court need not disqualify her. Here, juror 18 indicated she had a bias in child molestation cases because she was a mom with children, and told the defense attorney that he did not "want" her on the jury. She also stated that she could follow the law, her juror questionnaire, which was under oath, contained no reason that she could not be fair and impartial. Did the court act within its discretion when it denied Hubbard's challenge for cause against juror 18?

2. ER 608(b) permits cross examination regarding a witness' prior acts where the court finds that those specific acts are relevant to the witness' truthfulness on the stand and are more probative than prejudicial. Here, the court barred Hubbard's attorney from questioning B.O., the named victim in his three counts of Child Molestation in the Third Degree, about prior incidents involving shoplifting, cheating, and forgery. Where Hubbard's attorney had numerous other means of impeachment

against B.O., the allegations were not relevant to her credibility, and the alleged misconduct was remote in time, did the trial court act within its discretion when it suppressed the questions?

3. ER 404(b) allows a trial court to admit evidence of prior acts of misconduct by a witness where those acts are proof of motive, if the priors are proven by a preponderance of the evidence are relevant, and are more probative than prejudicial. Here, Hubbard's lawyer sought to admit evidence regarding allegations that B.O. shoplifted, cheated, and forged documents under ER 404(b), claiming that Hubbard's punishment of B.O. for each of those acts spurred her "motive to lie" and fabricate the current allegations. The trial court found that the specific acts allegedly committed by B.O., even if proven by a preponderance, were not relevant, and were more prejudicial than probative, but allowed B.O.'s general bias against Hubbard for punishing her to come in as a potential motive for her to fabricate the allegations against him. Did the trial court act within its discretion?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

In the Second Amended Information, the State charged Ronald Hubbard, Jr. with three counts of Child Molestation in the Third Degree, all against B.O., the daughter of his girlfriend at the time of the incidents. CP 39-41. The jury convicted him of Count II and acquitted him of Counts I and III. CP 94-96. The trial judge sentenced Hubbard to 10 months in custody, two months shy of the high end of his standard range. CP 275-85.

2. SUBSTANTIVE FACTS.

Siobhan Cuddihy, began dating Hubbard in 2006 when her daughter B.O. was 12 or 13 years old. 11RP 123; 12RP 19.¹ About one year later, Hubbard moved in with Cuddihy, B.O. and B.O.'s younger brother. 11RP 135. On the stand, Cuddihy described Hubbard as "the man of the house" and a strict disciplinarian. 11RP 135; 12RP 21.

¹ The Verbatim Report of Proceedings consists of 22 non-consecutive paginated volumes and is referenced as follows: 1RP (9/20/10, 5/9/11, 10/4/11); 2RP (6/17/11); 3RP (10/13/11); 4RP (10/17/11); 5RP (10/17-18/11); 6RP (10/19/11); 7RP (10/26/11); 8RP (10/31/11); 9RP (11/1/11); 10RP (11/2/11); 11RP (11/3/11); 12RP (11/7/11); 13RP (11/8/11); 14RP (11/9/11); 15RP (11/10/11); 16RP (11/14/11); 17RP (11/15/11); 18RP (11/16/11); 19RP (11/16-17/11); 20RP (11/17/11); 21RP (11/18/11); 22RP (1/27/12).

Cuddihy testified on direct examination that Hubbard disciplined B.O. excessively and unjustifiably, like grounding her for a lengthy period of time for such transgressions as “wearing two bras.” 12RP 20. But on cross-examination, Cuddihy admitted that sometimes the punishments against B.O. were for behavior that would “actually cause a teenager to get grounded.” 12RP 91. Cuddihy also testified that Hubbard would tease B.O. in ways that seemed inappropriate but that she did not consider sexual, like slapping B.O.’s “butt” or “snapping her bra.” 12RP 26, 111.

B.O. described her relationship with Hubbard from the witness stand, saying they got along very well at first; she also said that when she was 13 years old, while her mother was at work, Hubbard gave her a back massage which, in retrospect, seemed inappropriate. 16RP 60. During the massage, B.O. was wearing only her robe and Hubbard was in his underwear while he straddled her back. 16RP 61-62.

When B.O. was 16 years old, Hubbard asked her if she had ever had an orgasm, and told her that she should “see what an orgasm feels like.” 16RP 79. B.O. testified that one week later, Hubbard held her down, pulled down her pants and pressed a vibrating back massager against her vagina, telling her that he

wanted to show her what an orgasm felt like. 16RP 80. This was the basis for Count I, Child Molestation in the Third Degree. CP 39.

B.O.'s younger brother testified that when he was in the third grade, he walked into Hubbard's bedroom and saw him holding B.O. down on the bed while she "was kicking and screaming, yelling at him to let go of her." 15RP 11-12. B.O.'s brother saw Hubbard holding the back massager in his hand and watched as his sister bolted out of the room; he heard her crying for a "long time" afterward. 15RP 17-21. B.O. testified that this incident happened a few days after the first incident, and this was the basis for Count II. CP 39-40.

B.O. also testified that some time later, Hubbard took her to a hot tub studio in Federal Way where he paid for a private room for the two of them. 16RP 111-12. While in the hot tub, B.O. told the jury that Hubbard pushed her against the jets of the hot tub, pressing her vagina against the rushing water; she could feel his penis become erect against her back and she thought he "was going to rape" her. 16RP 113-14. This was the basis for Count III. CP 40-41.

About one year later, when B.O. was 17 years old, the family, along with Hubbard, had just moved to Oregon to stay with

B.O.'s uncle. 16RP 125. Most of B.O.'s personal items were still in a storage locker. 12RP 49; 16RP 128. At the Oregon home, B.O.'s uncle became upset at how Hubbard was speaking with B.O., and they began arguing. 12RP 50; 16RP 125. In the midst of this argument, B.O. screamed to Hubbard, "I hate you! You've made my life a living hell! You molested me!" This prompted her uncle to call the police. 12RP 51-52; 16RP 125.

Yamhill County Sheriff's deputies arrived and spoke with B.O., her mother, and Hubbard. 12RP 162-65. B.O. provided an initial statement regarding the three incidents that were eventually charged and also spoke with Detective Geist, the Yamhill County Sheriff's detective who was the lead investigator on the case before it was transferred to King County. 12RP 163; 13RP 67. Detective Geist assisted in setting up an interview for B.O. with a professional child interviewer, who eventually took a formal statement from B.O. 13RP 100. Cuddihy and B.O. later accused Hubbard of stealing their items from the storage locker and Detective Geist assisted in that investigation as well. 13RP 102.

When Detective Geist asked Hubbard if he knew why the police had been called, Hubbard told him that he had done some things with B.O. that "weren't okay then and aren't okay now."

13RP 73. Asked what he meant, Hubbard said that he and B.O. had played "six-hand grab-ass," a game where he and B.O. grabbed each other's "asses." 13RP 73-74. When Detective Geist told Hubbard that B.O. had reported some incidents from a few years prior, Hubbard said that he believed those had been dealt with "as a family" and had been "taken care of." 13RP 74. When asked specifically about the back massager, Hubbard said that he had used it once on Bridget and "accidentally dropped it" so it "touched her butt." 13RP 76-77. He denied touching her vagina with the massager and denied molesting her in the hot tub. 13RP 77-79. After the exchange, Detective Geist told Hubbard he could not stay at the home. 13RP 82.

3. FACTS REGARDING JURY SELECTION AND JUROR 18.

Based on a mutual request by the parties, the trial court submitted a one-page questionnaire to the prospective jurors. CP 202-52. The questionnaire asked the jurors "yes or no" questions regarding their experience with sexual abuse. CP 205-52. The opening paragraph of the questionnaire included the following:

JURORS: PLEASE READ THE FOLLOWING CAREFULLY

This questionnaire is designed to obtain information regarding your qualifications to sit as a juror in this case. As you answer the questions, remember that there are no "right" or "wrong" answers, only complete and incomplete answers. Answers that are complete and answered as fully and honestly as possible not only are consistent with your duty as a juror, but also shorten the time it takes to select a jury. You should answer "yes" to any question where you believe your response would be "yes" or "maybe." A failure to disclose any of the requested information could impact the right to a fair trial for both the State and the defendant. Your answers must be truthful and given without consulting others. **You are under oath as you complete this questionnaire and your responses are made under penalty of perjury. You must not discuss the questions or your answers with anyone, including any other prospective juror. If anyone tries to discuss the questionnaire or the case with you, please notify the court staff immediately...**

CP 202-52 (emphasis in original).

Among other things, the questionnaire asked jurors whether they knew anybody who had ever committed an act of sexual misconduct, whether they themselves had ever been victims of sexual abuse or knew anybody that had, and whether or not they knew anyone who had been accused of a sex crime. CP 202-52. The questionnaire also asked if the prospective juror, a close friend, or a relative, had any "special interest, specialized training, education, or experience in the area of... sexual abuse..."

misconduct... or assault," or whether they, a close friend, or relative was a mandatory reporter for such crimes or had ever had any contact with a "rape crisis center, battered women's shelter or similar organization." CP 202-52. Questions 9 and 10, the last two questions of the questionnaire, asked:

9. Is there any reason that you would be unable to be fair and impartial to both sides in a case that involves an accusation of sexual abuse, sexual assault or sexual misconduct?

10. Would you like the opportunity to respond to additional questions regarding any of the answers in this questionnaire outside the presence of the other jurors?

CP 202-52. Juror 18 answered the questionnaire, affixing her initials and the date at the bottom; she answered "no" to every question. CP 220.

After swearing in the prospective jurors, the trial judge asked if any had any "hardships"; juror 18 raised her hand to say that she worked three jobs and was very busy. 8RP 54. Then the parties questioned jurors who indicated that they wanted to discuss their answers outside the presence of the other jurors, and those whose affirmative answers indicated they had some potentially personal experiences. 8RP 74-185; 9RP 1-109.

The parties asked juror 16 about her responses on the questionnaire. CP 218; 9RP 3. She answered that when she was five years old, a 12-year-old boy raped her, her sister, and a young neighbor girl. 9RP 4-5. When asked by the court if she could still be impartial (as she had indicated in her questionnaire, CP 218), juror 16 said that she would “like to think” so, but that if the victim of a sex crime was a small child, it would “break [her] heart.” 9RP 8. She was asked again if she could keep an open mind and make a decision based on the evidence, and 16 again said she believed that she could. 9RP 9. Then Hubbard’s attorney elicited responses regarding details of the rapes – they involved all three girls, were only reported years later, and involved purposeful grooming by the assailant who was in a position of trust. 9RP 14-15. Both parties spoke extensively with juror 16, who eventually said that she could not assure that her “emotions won’t get in the way...” 9RP 16.

Hubbard’s attorney moved to strike juror 16 from the panel, arguing that her experiences created a bias, and that she appeared emotional while describing them. 9RP 30. In response, the court excused juror 16, finding that although she gave the court some assurances of her impartiality, she did begin to get “emotional” and told the court that this experience may “cause her to open that book

and think about it more.” 9RP 108. The court added that her experiences might not rise to the level of presumptive bias, but that her experiences were unusual enough to create the “potential of prejudice.” 9RP 109.

Another juror, number 15, told the parties that she was the victim of sexual abuse when she was three years old, but, after further questioning, added that she had been digitally molested by her stepfather “more than 100 times” between the ages of three and eleven. 9RP 74-75. Juror 15 told the court that she believed that her victimization had “nothing to do with” why she was in court, and that it was a “separate issue,” not affecting her ability to be “fair and impartial.” 9RP 69, 79.

Hubbard’s defense lawyer moved to strike juror 15 “for cause,” arguing that she had not been honest with the court because she had minimized her responses initially and appeared to be misleading the court and the lawyers with respect to the prior abuse. 9RP 104-06. Despite juror 15’s assurances of her impartiality, the trial court agreed with defense counsel and struck juror number 15. 9RP 106.

After completing its inquiry of individual jurors, the court began its general voir dire of the entire jury panel. 9RP 143. When

the judge asked, “[l]s there any juror who for any reason believes that he or she could not be fair and impartial as a juror in this case?” juror number 18 raised her placard. “What is your concern?” the judge asked. 9RP 143. “Just a bias, I guess,” she responded. 9RP 143. The judge then countered with, “[w]hat sort of bias?” to which she responded, “I guess a mother with daughters.” 9RP 143-44. The judge followed up by saying: “So you’re just concerned because of the subject matter and because you have daughters that this might be – we don’t know anything about the facts yet, but you’re just anticipating that it might be a difficult subject for you, correct?” 9RP 144. Juror 18 responded, “correct.” 9RP 144. When the judge sought to clarify, asking if she could explain a little better whether she was “just uncomfortable with the subject” or whether she did not believe that she “could be fair to both the State and Mr. Hubbard?” she said: “Your Honor, I’m not sure I could be fair and that concerns me... And I want to be honest about that.” 9RP 145.

During the State’s voir dire questions, juror 18 discussed her views on why a child victim of a sex crime might delay in reporting, offering the child’s “fear” as a possible explanation. 9RP 158-60. Later, a juror mentioned that she was offended by the defense

counsel having closed his eyes during court proceedings; juror 18 defended him, acknowledging that she also closes her eyes when she thinks. 9RP 167.

Outside the jury's presence, Hubbard's attorney moved to strike juror 18 because of her alleged bias. 9RP 184. The court responded by saying that the record was not complete enough to warrant striking her:

Juror 18 has asserted she's biased. There's [sic] no specifics to support it. I don't believe the record would support a challenge for cause as yet. I would note that she is someone who wanted to be excused. [discusses her work]...It is the Court's view that if counsel wish to pursue Juror 18, they should do so in the next round.

9RP 184-85.

Hubbard's lawyer countered by saying that she was "unequivocal" and stated very clearly that she could "not be impartial," but the judge ruled that there was "[n]othing in her responses... other than the assertion that she had a bias – that caused concern." 9RP 185. Defense counsel argued that juror 18 should be believed when she stated that she had a bias, and that she should therefore be stricken. 9RP 185. But the judge said that the "record reflects no more than a bare assertion that she has a bias and that she's – and her reason was that she's a mother of

daughters” and again denied the motion “without prejudice.”

9RP 185.

During the next round of voir dire, juror 18 was asked what her “sentiment” was regarding being a juror on a sex case. 9RP 208. She responded by saying “very concerning,” and stated that she was still “concerned.” 9RP 209. Later, outside the presence of the jurors, the trial court commented on the fact that juror 18 answered “no to every single question on the questionnaire [and] gave no indication of any problem whatsoever,” while also mentioning her hardship request. 9RP 230.

The following day, Hubbard’s attorney again raised his objection to juror 18, arguing that if she was telling the truth regarding her impartiality, she was biased, and if she was not, then she was perjuring herself; either way she should not be on the jury. 10RP 5-6. He also stated that her body language revealed that she was “uncomfortable.” 10RP 5. The court then made a record regarding juror 18:

Juror 18 briefly answered all the questions on our questionnaire “no”... There is – I think fairly, there is some discomfort. I don’t think she particularly wants to be in this trial. She – previously, she is also a person though who had a hardship request. I think she [has], as I’ve indicated several times... three jobs, apparently all at Costco, but the court believes that

she'd indicated she would not experience any financial hardship. ... In any event, the Court did not excuse her for hardship.

...[S]he has ... indicated that she did not think that she could be fair in this case, I think essentially because of the subject matter. The Court at one point inquired why. She said, "because I'm a mother with daughters." I guess the Court's inquiry is what specific indications, what bias do we have of these assertions... everybody dislikes the subject matter. Her daughters appear from her bio form to be adults, ages 23 and 18.

10RP 12. Hubbard's attorney said that he agreed with "everything [the judge] said," but added that juror 18 appeared "uncomfortable. ... and she has provided a reason as to why she cannot be fair and impartial, and that reason is 'I'm the mother of daughters.'"

10RP 12.

The trial judge ruled that he disagreed with the defense attorney's original contention that any of juror 18's statements would "rise to the level of perjury," and that "no juror... has expressed any hesitation to promise that he or she would follow the Court's instructions," adding that this was true even though the court asked the question in "multiple ways." 10RP 23. The court again cited the fact that 18 had answered "no" to all the questions on the questionnaire:

18 I think is pretty straightforward, just the Court has never found it very convincing that she can't be fair and impartial. She answered 'no' to everything. As the State points out, she participated appropriately in questions by both counsel on other subjects, but she still, you know, adhered to the notion that she would have trouble being fair. But again, under the factors the Court's previously discussed, I again, don't think it rises to the level of the Court finding that it's probable that she's not going to be able to follow the Court's instructions and consider the evidence fairly and impartially.

The Court will deny the motion to exclude Juror 18 for cause.

10RP 29-30. The court then granted defense counsel additional time on voir dire to further question juror 18 and any other jurors he had concerns with. 10RP 35-36.

Before completing voir dire, the judge told the parties that he was "mindful of the need to move forward," but added that if they needed more jurors he would "do [his] duty," which is ultimately to "make sure that overall we have a fair trial for both parties."

10RP 37.

During his additional time on voir dire, Hubbard's defense attorney asked some more questions of juror 18, including asking her if she can "follow the law, listen to the facts, make determinations about the facts, what you believe is true... and what isn't, and then apply it to the law?" 10RP 38, 45. Juror 18

responded by saying, "Well, I always abide by the law," but she added "... I just want to be fair to Mr. Hubbard and I'm concerned." 10RP 45. Then the attorney said, "You don't want to do this," and she responded, "I don't think you want me." 10RP 46.

In his final motion to excuse juror 18, Hubbard's attorney argued that this last response further supported his request to discharge her. 10RP 99. The court relied on its prior rulings in denying the motion, and added that "she's expressing a desire to be fair to Mr. Hubbard and is expressing her views in that context." 10RP 99-100.

Juror 18 was not excused by defense in the final jury selection, where Hubbard's attorney "accepted the panel" subject to his prior objections but after having used all of his peremptory challenges. 10RP 124.

4. FACTS REGARDING PRIOR BAD ACTS OF B.O.

During the course of the trial, Hubbard's defense attorney attempted to admit various bad acts that he believed were committed by B.O. Some of these were initially listed in a Motion to Admit ER 608 Evidence, submitted to the trial judge on November 2, 2011 where Hubbard alleged the following:

- B.O. stole in Mt. Vernon, WA in 2004.
- B.O. shoplifted from Walmart in 2005.
- B.O. shoplifted at Chandler's Bay.
- B.O. shoplifted from Lee's Towing.
- B.O. forged Hubbard's name at school.
- B.O. sold tests and did other students' work for pay in 2009.

CP 130; 16RP 135-40. Hubbard's attorney also moved orally to admit evidence of some additional instances of misconduct by B.O.:

- She hit a dog and injured it.
- She slapped a fish tank.
- She spilled nail polish on a carpet.
- She texted at school.
- She smoked at school.
- She was suspended at school for using a computer she was not supposed to use and for cheating.

All of the incidents noted by the defense attorney supposedly occurred while B.O. was still a teenager and none resulted in conviction. 16RP 134-38.

Prior to jury selection, Hubbard's counsel told the court that he anticipated calling three defense witnesses: Jennifer Hubbard,

Jason Plank, and Boyd Speer, all to testify concerning Hubbard's sexual morality and B.O.'s reputation for dishonesty under "ER 608 and ER 609." 17RP 9-11. The prosecutor indicated that as long as the proper foundation and script were followed under the rule, he would not object to the reputation evidence under 608(a), but added that he did not believe the rule permitted Hubbard to "[get] into specifics," nor had he received an offer of proof regarding how Hubbard intended to establish his foundation for any of the evidence or the witnesses' opinion. 7RP 11.

The court agreed that if a proper foundation could be laid for the reputation evidence, it could come in, but hesitated regarding the admissibility of evidence of B.O.'s dishonesty through one of these witnesses: "I guess I have to have a better understanding as to why they can speak to the alleged victim's reputation within a neutral and generalized community." 7RP 12, 14.

Later in the trial, the trial judge handed case law cites to both parties addressing the admissibility of evidence about a witness' honesty. 13RP 3. Without ruling on the admissibility against B.O., the trial judge asked for an offer of proof regarding what the defense witnesses would say or their basis of knowledge. 13RP 2. Hubbard's attorney said that Plank and Speer were friends of

Hubbard's and Cuddihy's, and that Jennifer Hubbard is Hubbard's ex-wife; they would be called to testify regarding Hubbard's "moral character," and to say that B.O.'s reputation for honesty is bad. 13RP 6-7. Without formally ruling, the trial judge expressed concern over whether "friends and family" would be considered members "of a neutral and generalized community" as required under ER 608(a).² 13RP 7.

Before his cross examination of Cuddihy, Hubbard's lawyer sought leave to inquire regarding the specifics of some of B.O.'s bad behavior, to show the jury that Hubbard's discipline of B.O. was not unreasonable. 12RP 83. Hubbard's lawyer further argued that the punishments meted by Hubbard because of her transgressions formed the motive for B.O.'s supposedly false accusations against Hubbard resulting in the current charges, and he wanted to explore this on cross. 12RP 75-84.

The court permitted some limited inquiry as to the reasonableness of the punishments, and the general nature of the bad acts (e.g., misbehaving at school, "going with the wrong

² ER 608(a): Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

crowd”), but prohibited any questions meant to elicit the specific bad acts themselves. 12RP 83-85. In his cross examination of Cuddihy, the defense counsel asked her if B.O.’s conduct would sometimes deserve punishment, and Cuddihy responded, “yes.” 12RP 91.

After B.O.’s direct examination, Hubbard’s lawyer renewed his motion to admit her prior misconduct via cross examination. 16RP 132-47. He argued that B.O.’s shoplifting, cheating and forgery were indicative of her general disposition to truthfulness, and were therefore relevant. 16RP 135-45. He also repeated his arguments that Hubbard’s punishments created the motive for B.O. to invent the current allegations, making the misbehavior that prompted the punishment admissible as proof of motive, and that he needed to counter any presumption that his discipline of B.O. was somehow unreasonable, when, “in fact... she was doing things that most kids would be grounded for. 16RP 132-40.

The State pointed out that during the time of some of the allegations against B.O., Hubbard was not even in the picture: their relationship began in the summer of 2006, and two of the shoplifting incidents alleged in Hubbard’s motion occurred in 2004 and 2005. 16RP 141. The trial judge ruled that, under ER 608(b),

the “very specific incidents of theft or even the forgery cannot be properly inquired about” because they do not show a “general disposition for truthfulness or untruthfulness.” 16RP 144-45. The court did find that evidence regarding B.O.’s anger against Hubbard was admissible to show motive and bias, but found that her prior instances of misconduct, even if proven, were “too remote from the point of disclosure to police” to become admissible as motive evidence: “the motive is too old.” 17RP 1, 16.

The trial judge conducted an ER 403 test, balancing the probative value of the evidence of B.O.’s prior misconduct against the danger of unfair prejudice, and found that such evidence “would tend to distract the jury, mislead the jury,” and “confuse issues.” 17RP 21-24.

Then the court reiterated the various impeachment options that Hubbard’s lawyer had available, including asking B.O. about her reaction to Hubbard taking her items from the storage locker, how “she felt about the discipline,” and about the reasonableness of the discipline. 17RP 25-26. When the defense attorney asked if he was permitted to ask if B.O.’s “bad behavior was typical of things kids do,” the judge said, “yes.” 17RP 26. Addressing the forgery separately, the court found that “evidence of previous forgeries

attacks the witness' reputation for honesty; it does not attack her veracity," and excluded it as well under 608(b). 17RP 28.

During his cross examination of B.O., Hubbard's lawyer elicited that, prior to her disclosure of the molestations to police, she was angry with Hubbard, who had said he was going to "kick her ass" and kick her out of the home when she turned 18. 17RP 158. To address the reasonableness of Hubbard's grounding of B.O., his attorney asked, "you were a normal teenage child," and "your actions should have had consequences, right?" B.O. responded "yes." 17RP 163. B.O. also admitted that she "resented" Hubbard and that she felt that life was "freer" when it was just her and her mother. 17RP 164. During cross examination, B.O. acknowledged that she was very upset with Hubbard for stealing their items from the storage locker. 17RP 124-26.

Hubbard's lawyer cross examined the investigating detectives and the child interviewer, all witnesses who had interviewed B.O. regarding the charged incidents. 13RP 110-15; 14RP 119-47; 18RP 130-40 . Through his cross examination of each witness, Hubbard's lawyer elicited numerous inconsistencies between the various versions provided by B.O. during the course of

the investigation. These included a variance in the description of the molestation itself, discrepancies in the dates the molestations occurred, B.O.'s potential bias in reporting, and areas where her testimony had changed. 13RP 112-15; 14RP 133-46; 18RP 130-40.

Later, Hubbard's attorney addressed the court regarding his defense witnesses, saying that he would be withdrawing Jason Plank as a witness, but that he still wanted to call Boyd Speer and Jennifer Hubbard to testify about Hubbard's sexual morality and B.O.'s specific instances of dishonesty under ER 608(b). 16RP 29. The court barred any inquiry into B.O.'s specific acts under ER 608 and 609, finding that there were no convictions triggering ER 609 and that "an act of theft is not directly relevant to the [witnesses'] propensity for truthfulness and veracity as a witness." 16RP 39-40.

In his closing arguments, Hubbard's lawyer detailed the inconsistencies in B.O.'s testimony and previous statements, arguing that they rendered her testimony not credible. 20RP 49-59. Using a PowerPoint presentation, he pointed out each discrepancy in B.O.'s testimony, and argued that "[t]here should be some level of consistency, ladies and gentlemen, some level of consistency." 20RP 62; CP 66-83. Each of B.O.'s statements, he continued, was

“consistent with the amount of time she had to make them up, every single one.” 20RP 68.

He told the jury that B.O. had a strong “motive to lie,” particularly because she was angry at Hubbard for taking her items out of the storage unit:

There was a sense of betrayal that she conveyed in her body language... [Hubbard] betrayed her. He took her diaries, all her papers, letters... [She] wanted him to go to jail over the storage unit. This hasn't changed, she still wants him to go to jail.

20RP 66-67. Each of his arguments attacking B.O.'s credibility and arguing her bias was buttressed with a PowerPoint slide highlighting the same. CP 66-83.

C. ARGUMENT

1. JUROR 18'S STATED BIAS AS A "MOTHER WITH DAUGHTERS" DID NOT PREVENT HER FROM IMPARTIALLY TRYING THE CASE.

Hubbard contends that juror 18 should have been stricken from the jury panel and that the trial court's failure to do so was a manifest abuse of discretion that prejudiced him. But the record does not contain sufficient evidence that juror 18 had an actual bias that stopped her from impartially trying the issues in the case. This claim should be rejected.

Every criminal defendant has the right to a fair and impartial jury. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The failure to provide a defendant an impartial jury violates due process. State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds by State v. Fire, 145 Wn. App. 152, 34 P.3d 1218 (2001). A juror with actual bias should be disqualified; actual bias arises when the juror's state of mind relative to the case satisfies the trial judge that the challenged person "cannot try the issues impartially and without prejudice to the substantial rights of the challenging party." State v. Wilson, 141 Wn. App. 597, 606, 171 P.3d 501 (2007).

When a prospective juror is challenged for bias, the trial court must assess the juror's state of mind and apply its own discretion. State v. Jackson, 75 Wn. App. 537, 542-43, 879 P.2d 307 (1994). This involves a "question of preliminary fact," and the party challenging the juror bears the burden of showing the facts necessary to sustain the challenge by a preponderance of the evidence. Wilson, 141 Wn. App. at 606. As long as a juror can put aside his or her preconceived notions and decide the case on the basis of the evidence given at trial and the law as given by the court, that juror need not be disqualified. State v. White, 60 Wn.2d

551, 569, 374 P.2d 942 (1962). Denial of a challenge for cause is reviewed under a manifest abuse of discretion standard. Fire, 145 Wn.2d at 158.

Hubbard argues that juror 18 demonstrated actual bias because she told the court that she had “just a bias” as a “mother with daughters” and told defense counsel, “I don’t think you want me.” 9RP 144. But while juror 18 expressed distaste for the particular charges of child molestation, and made that clear, the trial court “assessed her state of mind” and found that she did not show any evidence of actual bias. 10RP 29-30.

Hubbard invokes State v. Gonzalez, 111 Wn. App. 276, 45 P.3d 205 (2002), to support his position that juror 18 had actual bias. Gonzalez was charged with brutally assaulting his victim, and the evidence consisted almost entirely of his own statements to a police officer (the victim could not identify his assailant). Id. at 277. During voir dire, one juror told the parties that, because of the way she was raised, she would “have a very difficult time deciding against what the police officer says.” Id. at 278. After the juror said she would presume that a police officer was telling the truth, the defense attorney asked her, “What if the Court instructed you that it’s actually the opposite, that you’re supposed to presume that the

defendant is innocent unless and until the State, through its witness, the police officer, can prove to you otherwise?” Id. at 279. But the juror insisted, saying that, because she had been raised to trust the police, she could not “keep those separate.” Id. Even after the State attempted to rehabilitate the juror by asking some more questions, she still said “I don’t know” when asked if the defendant retained the presumption of innocence even when a police officer testified against him. Id. at 278.

The trial court denied Gonzalez’s motion to discharge the juror, but this Court found actual bias because the juror admitted a bias regarding a class of persons (police), indicated it would likely affect her deliberations, admitted she did not know if she could presume the defendant was innocent in the face of police testimony to the contrary, and never expressed “confidence in her ability to deliberate fairly or to follow the judge’s instructions regarding the presumption of innocence.” Gonzalez, at 279.

In State v. Noltie, 57 Wn. App. 21, 786 P.2d 332 (1990), also a child sex case, this Court discussed two examples of juror bias. One juror told the court that she was a board member of an organization that worked for the prevention of child abuse and neglect, and initially indicated that she “could not be fair.” Id. at 25.

After further inquiry, however, that same juror said that she would listen to the evidence and make her decision based on the evidence. Id. at 26. The trial court denied Noltie's motion to disqualify the juror and this Court upheld the trial court's decision, finding that the trial court did not abuse its discretion when it denied the challenge for cause. Id. at 26-27.

Another juror in Noltie repeatedly told the parties during voir dire that she "'might' have difficulty being fair because she had two granddaughters, but that she 'hoped' that she could be fair." Id. at 27. After further inquiry, the juror said that the more she participated in the process, the easier it became, but acknowledged that she still had some "doubt" regarding her capacity to be fair. Id. While the juror never affirmatively stated that she could be fair, this Court held that the issue "was whether she was able to put [any preconceived ideas] aside and decide the case on the basis of the evidence presented," and found that the trial court did not err in keeping her in the panel. Id. at 27, citing State v. Gosser, 33 Wn. App. 428, 433, 656 P.2d 514 (1982). Because the trial court was in the best position to judge whether the juror's comments manifested some actual bias, this Court did not find an abuse of discretion. Noltie, 57 Wn. App. at 28-29.

Here, juror 18 did state that she had a bias when the court specifically asked if anyone had any reason to believe that they could not be “fair or impartial,” but when asked what sort of bias she had, she replied, “I guess a mother with daughters.” 9RP 143-44. When the parties inquired further, she assured them that she could “always follow the law.” 10RP 45.

Here, when the trial judge assessed the state of mind of juror 18 to determine whether or not her bias was such that she could not put aside her preconceived notions, the trial judge noted that whatever her bias was, it was denied in her juror questionnaire, where she assured the court, under oath, that there was no reason she would be “unable to be fair and impartial to both sides” in a sex case. 10RP 12, 29-30; CP 220. The court also noted that it had asked, in “multiple ways,” whether the jurors could follow the instructions of the court even if they believed the instructions were “incorrect,” and juror 18 never expressed any concerns. 10RP 23. After an assessment of her responses in both voir dire and the juror questionnaire, the trial court further ruled that juror 18 responded “appropriately to questions” by both parties “and express[ed] a desire to be fair” to Hubbard. The court believed that she was “able

to follow the court's instructions and consider the evidence fairly and impartially." 10RP 29-30.

The facts here are closely parallel to those in Noltie. In both cases, although the juror indicated some bias or uneasiness with certain aspects of a case, the trial court determined that the bias could be set aside and the juror provided an assurance that he or she could follow the law. Retaining the juror thus was within the court's discretion.

The facts of this case contrast with Gonzalez, where the juror articulated an actual bias in favor of a class of people who were testifying against the accused. Gonzalez, 111 Wn. App. 279. Here, juror 18's only stated bias was a vague general bias that a "mother with daughters" would have in a case of child molestation. She never articulated the effect of that bias, or how that bias was any different than the natural repulsion any individual, mother or otherwise, has toward the molestation of children as a general proposition. That the bias was not a deep one, or one that inhibited her ability to put aside her preconceived notions, was made manifest in her own questionnaire, where, in relative privacy and under an admonishment to answer the questions honestly and completely, she stated explicitly that there was no reason she could

not be fair or impartial. CP 220. The questionnaire, coupled with juror 18's assurance that she could follow the court's instructions, informed the trial court's decision to deny the motion to discharge her.

Hubbard argues that one explanation for the trial court's refusal to grant his motion to disqualify juror 18 was the "court's concern over the small pool of prospective jurors." Appellant's Brief at 10. But the trial judge addressed this issue head on prior to making its ultimate ruling denying Hubbard's motion:

If the Court is persuaded, you know, we can excuse one juror for cause and still have 27. If the Court is ultimately persuaded to excuse two jurors for cause and again something occurs the Court finds compelling, you know, I'll do my duty, but that will mean we'll have to bring some additional jurors up here. And the Court is prepared to do that however, based on the present record, the Court is comfortable with the rulings that it has made. ...the court's ultimate duty is to make sure that overall we have a fair trial for both parties.

10RP 37.

It is not only the trial judge's explicit acknowledgment that he would not let the limited jury pool affect the fairness of his rulings that counters Hubbard's suggestion, but also the trial judge's rulings with respect to Hubbard's other challenges. After all, jurors 15 and 16 were in the same pool as 18, and the trial judge

readily granted for cause challenges against them after he had concluded that they might not be able to put aside their preconceived notions. 9RP 104-09. The trial court's thoughtful consideration of the prejudices evidenced by jurors 15 and 16 should also inform this Court when assessing the trial court's thoughtful consideration of each juror's biases.

The jury's verdicts themselves also counter Hubbard's argument. If Hubbard's contentions are accurate and juror 18 had an actual bias against him, the verdict should reflect that bias. But here, the jury found Hubbard *not guilty* of counts I and III, and only guilty of count II, the count where B.O.'s testimony was buttressed by her brother, who witnessed the event and testified about it. 15RP 11-21. The verdict then, appears rooted in the jury's consideration of the evidence, not in actual bias. This court should affirm the jury's conviction.

2. THE TRIAL COURT PROPERLY APPLIED ITS DISCRETION IN SUPPRESSING EVIDENCE OF B.O.'S ALLEGED PRIOR BAD ACTS UNDER ER 608(b).

Hubbard contends that the trial judge erred when he prohibited Hubbard's trial attorney from eliciting B.O.'s specific acts

of misconduct under ER 608(b). But B.O.'s prior acts, even if they would have been admitted by B.O. on the witness stand, were not germane or relevant to the crimes charged, they were far more prejudicial than probative, they did not speak to B.O.'s untruthfulness on the stand, and the trial judge here acted well within his discretion. Further, the admissible aspect of the prior incidents, namely the bias that may have resulted from Hubbard punishing B.O. for her misbehavior, was admitted and used to impeach her. Finally, any error was harmless.

Evidence Rule 608(b) reads:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The admissibility of specific acts of misconduct by a witness under ER 608(b) is up to the discretion of the trial court. State v. Harris, 97 Wn. App. 865, 868, 630 P.2d 476 (1981). In conducting an ER 608(b) analysis, the trial court considers whether the specific instances of misconduct were relevant to the witness' veracity on

the stand, whether the misconduct was too remote in time, and whether it was relevant to the issues presented at trial. State v. O'Connor, 155 Wn.2d 335, 349, 119 P.3d 806 (2005); State v. McSorely, 128 Wn. App. 598, 613-14, 116 P.3d 431 (2005).

The court abuses its discretion only when it bars cross examination under ER 608(b) where the witness is crucial and the misconduct is the only available impeachment. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). Admitted prior acts must be probative of truthfulness, not remote in time, and subject to an ER 403 analysis, weighing their probative value against their potential for undue prejudice. State v. Wilson, 60 Wn. App. 887, 891, 808 P.2d 754 (1991).

Hubbard argues that proof of B.O.'s prior acts was "probative of her untruthfulness, her bias, and her motive to lie." Appellant's Brief at 17. While Hubbard's attorney mentioned many specific acts, including hitting a dog, slapping an aquarium, and spilling nail polish, the specific acts raised in his appeal are only those that could be perceived as acts of dishonesty potentially admissible under 608(b): four allegations of shoplifting; one incident involving a forged document at school; and one accusation that she cheated

and sold school exams. 16RP 135-38. None of these incidents resulted in an adjudication or a conviction. 16RP 134.

ER 608(b) does not permit extrinsic evidence of prior bad acts. Hubbard contends that because B.O. testified that her frequent groundings for misbehavior would sometimes “deserve punishment,” we should presume that she was prepared to admit to her misconduct regarding his specific allegations. Appellant's Brief at 17; 12RP 91. But this presumption is unsupported; the record never states one way or another whether B.O. would have admitted any of Hubbard's specific allegations, only that she believed that some of Hubbard's punishments were justified.³ The arguments in Section II of Hubbard's brief rely wholly on an unsupported and tenuous presumption.

Even if this Court presumes that the misconduct could have been proven, either by admission or otherwise, Washington case law supports the trial court's exercise of discretion in suppressing

³ Hubbard also suggests that witnesses Jason Plank, Boyd Speer and Jennifer Hubbard were prepared to testify regarding these bad acts, but Hubbard withdrew Jason Plank as a witness of his own accord, and he never made an offer of proof as to how any of these witnesses had actual knowledge of the particular incidents. 13RP 7-8; 16RP 29. While Hubbard's lawyer did initially suggest that some of his witnesses could testify as to B.O.'s reputation for truthfulness under ER 608(a), once the court questioned whether any of them were part of a "neutral community" under the rule, the issue was never raised again. 13RP 3-8. At no time was there an offer of proof regarding how these three friends of Hubbard could testify to specific bad acts committed by B.O., some of which occurred even prior to Hubbard knowing B.O.

the alleged misconduct. In Harris, the court summarized the reasons for the high level of discretion granted to the trial judge when reviewing evidentiary rulings:

A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence...

The deferential abuse of discretion standard gives a trial judge wide latitude on a variety of trial questions... And that is because the trial judge is in the middle of, and part of, the ongoing drama that is the jury trial. An appellate court, on the other hand, reads a record. ...Therefore, as long as the trial court's grounds for its decision are reasonable or tenable, they should not be subject to appellate meddling. Only in those instances where the trial court's discretionary decision clearly falls beyond the pale should we reverse.

97 Wn. App. at 869, 870 (internal citations omitted).

As is evidenced in the court's language in Harris, Washington courts have consistently granted a high level of discretion to trial judges in their evidentiary rulings, specifically regarding ER 608(b) evidence. In State v. Cummings, a murder case cited repeatedly by the trial judge here, the State was permitted to cross examine the defendant regarding her prior theft of money from the victim. 44 Wn. App. 146, 152-53, 721 P.2d 545 (1986). Under an ER 608(b) analysis, the court found that the trial

court erred in permitting questions regarding the theft because “an act of theft is not directly relevant to the defendant’s propensity for truthfulness and veracity as a witness.”⁴ Id. at 152.

As the trial judge for Hubbard noted, Cummings is directly on point. The allegations that B.O., years before her testimony, had shoplifted or forged documents, revealed little about her ability to tell the truth under oath on the witness stand: “these very specific incidents of theft [and] forgery” did not show a “general disposition for truthfulness or untruthfulness.” 16RP 144-45. Further, these same allegations would also not have been admissible under ER 609 because they did not result in any convictions.⁵

The Washington Supreme Court has provided some guidance for a trial court’s application of discretion when conducting

⁴ The court did find the evidence admissible under 404(b) as proof of motive. 44 Wn. App. at 152.

⁵ ER 609:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been *convicted* of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(emphasis added). Part (d) of the rule adds that Juvenile Adjudications are “generally not admissible under this rule.” ER 609(d). B.O. was a juvenile during all of the alleged misconduct, further rendering the allegations inadmissible under this rule.

a 608(b) analysis. In State v. Clark, a jailhouse informant testified against Clark at trial, claiming that Clark had essentially confessed to him by claiming that his DNA was inside the murdered victim. 143 Wn.2d at 765-66. The informant had numerous prior crimes, including convictions for forgery and theft, which Clark sought to use during cross examination pursuant to ER 608(b). Id. at 766. The court reiterated that allowing or disallowing “such testimony is within the discretion of the trial court,” and is only an abuse of discretion if the witness is crucial and there are no other means of impeaching that witness. Id. The informant here was not a crucial witness (DNA evidence pointed to Clark as the culprit), but he was impeached with numerous other convictions, and this informed the court’s ruling: “Once impeached, there is less need for further impeachment on cross.” Clark, (citing State v. Martinez, 38 Wn. App. 421, 424, 685 P.2d 650 (1984)). Because Clark had other means available to attack the informant’s credibility (and because the witness was not “crucial”), the court found no error in the suppression of the evidence of the prior convictions. Clark, 143 Wn.2d at 766.

The trial court here merely limited the scope of Hubbard’s lawyer’s cross examination to exclude specific mention of the

various allegations initially presented by Hubbard. As the trial judge reminded Hubbard, he could still perform an effective cross examination impugning B.O.'s credibility; he could elicit the fact that B.O. had been misbehaving at school or "going with the wrong crowd," and show that Hubbard's extensive discipline of B.O. was appropriate given her misbehavior. 12RP 83-85.

But Hubbard's impeachment of B.O. was not limited to her inconsistencies or her bad behavior; he was also permitted to inquire about her bias against Hubbard, including B.O.'s anger regarding Hubbard's theft of her items from the storage locker and her feelings regarding Hubbard's strict discipline. 17RP 26. In fact, the only limitation on the scope of Hubbard's cross examination was with respect to the actual specifics of B.O.'s prior bad acts. 12RP 83-85. Like in Clark, Hubbard's attorney had multiple methods of impeaching B.O., and so, while she was a "crucial witness," the allegations of misconduct made by Hubbard's attorney were not the only means available to attack her credibility, leaving the ultimate decision squarely within the discretion of the trial court.

Further, the multiple means of impeachment available to Hubbard's attorney were successful in giving him ammunition to attack B.O.'s credibility on the witness stand. After Hubbard's

defense counsel argued in closing that B.O.'s statements were inconsistent and therefore not credible, and that they were fueled by angry bias against Hubbard, who had been the disciplinarian at the home, had taken her items from storage, and had threatened to kick her out of the home, the jury returned "not guilty" verdicts on counts I and III. That the jury acquitted Hubbard on the two charges that relied exclusively on B.O. as a witness also illustrates the success of Hubbard's impeachment using the various methods still available to him.

Because the jury clearly relied on the testimony of B.O.'s younger brother, and not exclusively on B.O., in reaching its verdict on Count II, it is clear that B.O.'s credibility was sufficiently impeached, which also renders any potential error on the trial judge's part harmless, as further impeachment of B.O. would have not affected the verdict. See Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 436-37, 167 P.3d 1193 (2007).

The trial court's suppression of the alleged acts of misconduct was also proper because the acts themselves were

more prejudicial than probative in violation of ER 403.⁶ Here, at least two of the prior bad acts Hubbard sought to admit (the first two shoplifting allegations) occurred prior to Hubbard having met B.O. or her mother, but even those that allegedly occurred while Hubbard was dating B.O.'s mother were in no way connected to the crimes themselves, as the trial court noted:

[S]uch evidence would tend to distract the jury, mislead the jury, and confuse issues. This court believes that going through all these incidents will be extremely time consuming and amount to mini trials... [the priors] are extremely remote in time. There's really no obvious nexus between any of these incidents and some sort of motive to make up these allegations.

17RP 21-24.

As part of its relevance analysis, the trial court also considered the remoteness of the acts themselves. In State v. McSorely, 128 Wn. App. 598, 613-14, 116 P.3d 431 (2005), the court held that the victim's prior acts *should* have been admitted because the victim was the only witness to the crime, his prior bad acts showed dishonesty in similar circumstances, and the prosecutor argued extensively that there was no reason to

⁶ ER 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

disbelieve him. But even with those facts, the court found that if the acts themselves had been "remote in time," they could have been excluded. Id. In the case at hand, years went by between most of the incidents and B.O.'s disclosure to the police, and even more time transpired between the incidents and B.O.'s trial testimony. On this basis alone, the prior incidents could have been rightly excluded.

Finally, even if this Court finds that the trial court erred in suppressing Hubbard's attacks against B.O.'s credibility using specific acts of misconduct, any error is harmless. As already argued above, the jury convicted Hubbard only on Count II, the only verdict which did not require sole reliance on B.O.'s credibility. There is no reasonable probability that the outcome of the trial would have been different merely because further impeachment against B.O. was elicited, as the jury did not appear to rely on B.O.'s credibility for its verdict. Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. at 436-37.

The evidence proposed by Hubbard's attorney, that B.O. shoplifted, forged a school document, and cheated at school, would have really served only to smear B.O. before the jury, and would

have proved very little about her credibility regarding the charges of sexual molestation against Hubbard. They were, therefore, more prejudicial than probative and were rightfully excluded.

3. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT SUPPRESSED THE ALLEGATIONS OF PRIOR BAD ACTS AGAINST B.O. UNDER ER 404(b).

Hubbard also contends that B.O.'s alleged prior acts of misconduct should have been admitted pursuant to ER 404(b)⁷ as proof of her motive to lie. But ER 404(b) is a rule of exclusion, and the prior acts alleged by Hubbard against B.O. do not satisfy any of its exceptions.

Evidence of prior crimes, wrongs, or acts is presumptively inadmissible. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012). Under the trial court's discretion, an exception may be made to prove, among other things, "proof of motive." State v. Mee, 168 Wn. App. 144, 157, 275 P.3d 1192 (2012). Before admitting such evidence of other crimes, a trial court must (1) find

⁷ ER 404(b) reads, in part:

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

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 the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); State v. Yarbrough, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009). The standard for review remains abuse of discretion, and great deference is given to the trial court on the issue of the admission of prior acts evidence. Harris, 97 Wn. App. at 870.

Here, B.O.'s alleged prior bad acts were never proven by a preponderance of the evidence, as required by ER 404(b). Even assuming that they could have been, Hubbard's allegations fail the other prongs required to satisfy admissibility of evidence under ER 404(b). As argued in Section 2, the trial court, whose discretion is granted "deference" here, found that the evidence was not relevant to the charges and further found that it was more prejudicial than probative. 16RP 144-48; 17RP 1-32.

To the extent that Hubbard's disciplining of B.O. *because of* her alleged misbehavior was relevant to prove any potential bias or motive for B.O. to invent the allegations, Hubbard's lawyer explored

this thoroughly in his cross-examination of both Cuddihy and B.O. At trial, Hubbard's lawyer made B.O.'s inconsistencies and biases a theme of his case, and invoked them from his cross examination to his closing. 20RP 49-58, 66-67. Hubbard's argument that the court's ruling suppressing B.O.'s specific acts of misconduct somehow precluded him from exploring her motive or bias against him is contrary to the facts. This Court should defer to the trial court's discretion and uphold Hubbard's conviction.

D. CONCLUSION

For the foregoing reasons, the defendant's conviction should be affirmed.

DATED this 22nd day of January, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

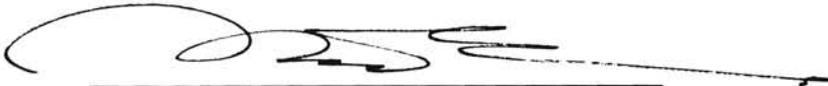
By: 
TOMÁS A. GAHAN, WSBA #32779
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the RESPONDENT'S BRIEF, in STATE V. RONALD HUBBARD, Cause No. 68327-6 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 22 day of January, 2013

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington