

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LONI VENEGAS,

Appellant.

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

The Honorable Frederick Fleming, Judge

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STATE OF WASHINGTON
PIERCE COUNTY

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COURT OF APPEALS
STATE OF WASHINGTON

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to present a complete defense in excluding her witness from offering an expert opinion.

2. The trial court erroneously allowed irrelevant and unduly prejudicial character testimony to be considered by the jury.

3. Ineffective assistance of counsel deprived appellant of her constitutional due process right to a fair trial.

4. Prosecutorial misconduct deprived appellant of her constitutional due process right to a fair trial.

5. Cumulative error deprived appellant of her constitutional due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. The basis for second degree child assault under Count II was the child's accusation that appellant stomped his head into the floor, cutting his chin. Because defense counsel did not endorse the treating physician as an expert on her witness list, the trial court prohibited the physician from testifying the injury could not have been caused as described by the child. Is reversal of Count II required because the trial

court's basis for excluding testimony was invalid and violated appellant's right to present a complete defense?

2. Even if the trial court correctly excluded the physician's expert testimony, was defense counsel ineffective in failing to endorse the physician as an expert witness?

3. Did the trial court err under ER 404(b) and deny appellant a fair trial when it allowed the State to introduce irrelevant and unduly prejudicial character evidence?

4. Was defense counsel ineffective in failing to properly object to numerous instances of bad character evidence and in neglecting to request a limiting instruction that would have prevented the jury from considering appellant's bad acts as evidence of her propensity to commit the charged crimes?

5. Did the trial court deny appellant a fair trial when it allowed the prosecutor, over defense objection, to argue in closing that the jury had to disbelieve the State's witnesses in order to believe appellant did nothing and that the presumption of innocence had already disappeared?

6. Did cumulative error, as specified above, deprive appellant of her constitutional due process right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged appellant Loni Venegas with one count of first degree child assault and two counts of second degree child assault against her step grandchild, J.V. (d.o.b. 11/4/94). CP 6-7; 2RP¹ 1250, 1470. A jury found Venegas guilty on all counts. CP 69, 72, 73. The court sentenced her to concurrent, standard range sentences of 171 months confinement for first degree child assault and 68 months on the other counts. CP 115. This appeal timely follows. CP 123.

2. Substantive Facts

After J.V.'s mother died in a car accident Venegas took J.V. into her home to live with her husband, Remil "Benji" Venegas, and their children as part of the family. 2RP 1251-52, 1350, 2488, 2567. J.V. was six years old at the time. 2RP 1249-50. According to J.V., Venegas often beat him and generally treated him terribly over the course of the past few years. 2RP 1254, 1265-79, 1287. Venegas said she loved J.V. like a son and never hurt him. 2RP 2796, 2954.

¹ The verbatim report of proceedings is contained in 34 volumes referenced as follows: 1RP - 2/7/08, 3/5/08, 3/17/08; 2RP - 4/10/08, 4/14/08, 4/16/08, 4/21/08, 4/22/08, 4/23/08, 4/24/08, 4/29/08, 4/30/08, 5/1/08, 5/5/08, 5/6/08, 5/7/08, 5/8/08, 5/12/08, 5/13/08, 5/14/08, 5/15/08, 5/19/08, 5/20/08, 5/21/08, 5/22/08, 5/29/08, 6/2/08, 6/3/08, 6/4/08, 6/5/08, 6/6/08, 6/13/08.

J.V. said Venegas stomped his head into the kitchen floor on one occasion as he lay on his stomach. 2RP 1287-91. This allegation formed the basis for second degree assault in Count II. CP 7; 2RP 3247-48. J.V. told Dr. Douglas Attig, the family physician who stitched up his chin, that he slipped and fell on the kitchen floor. 2RP 1292-93, 2033-35. At trial, J.V. claimed Venegas made him tell that cover story. 2RP 1292-93. Dr. Attig testified J.V.'s injury was consistent with slipping and falling onto the floor. 2RP 2035. The cut was 2.75 centimeters in length. 2RP 2035. Attig did not see any other injuries on J.V.'s head or face. 2RP 2035, 2043.

J.V. also claimed Venegas punched him in the face on one occasion when he did not bend low enough while doing squats as a form of punishment. 2RP 1282-86. The punch loosened a tooth. 2RP 1282-84. This allegation formed the basis for second degree assault in Count III. CP 7; 2RP 3248.

As the predicate assault in Count I, J.V. alleged Venegas punched and choked him, leaving nail marks on his throat. CP 6; 2RP 1279, 1294, 3249-50, 1418-20. J.V. said most of time Venegas had no fingernails because she bit them away, but that her nails happened to be longer on that occasion. 2RP 1422-29. A family friend testified Venegas' fingernails were always chewed down to the nubs. 2RP 2112, 2118. J.V. further

alleged Remil Venegas punched him in face and choked him with his shirt that same day. 2RP 1336-38, 1365-73, 1382-83.

J.V. ran away on the day of the alleged choking to the home of neighbor Rosa Johnson-Broadnax. 2RP 292-93, 318, 1294. J.V. and her son, Marquis Johnson, were best friends. 2RP 282-83. Johnson-Broadnax noticed a little bit of redness and swelling on J.V.'s cheek and scratch marks on the side of his neck. 2RP 294-95, 298-99. He looked scared. 2RP 300. Johnson-Broadnax further testified that, since moving into the neighborhood in 2006, she did not see any injury on J.V. aside from a scratch on his chin. 2RP 302, 323.

Police officer Tom Weathers spoke with J.V. when he was taken to the police station. 2RP 11230-31. J.V. cried and told him he had been hit and did not want to go home. 2RP 1231. There were fingernail or crescent-shaped marks on J.V.'s neck. 2RP 1813. Forensic investigator Clarence Mason took photographs of J.V. in July 2007. 2RP 132-33, 136. He observed skin discoloration on left side of J.V.'s neck and the front of his Adam's apple. 2RP 136. Mason also saw a small, older abrasion under J.V.'s chin and a small mark on his hand. 2RP 138-49.

J.V. testified that Venegas also hit him in chest and stomach on the day he ran away. 2RP 1336, 1406-11. Mason did not photograph any other injuries, although he would have done so if they were present. 2RP

152. J.V. said Venegas hit and choked him that day because she thought he had been involved with vandalizing a neighbor's car the night before, he had broken the family's leaf blower, and he did not do his chores fast enough. 2RP 1404-05, 1417. Venegas' daughter, Ja.V., pointed out J.V. had a crush on a girl at the time and was planning on going to see her at a party. 2RP 2300, 2305. J.V. was not allowed to go to the party after Remil discovered J.V. broke the leaf blower. 2RP 2305. This angered J.V. because he had been planning to go for a month. 2RP 2305. Later that day, J.V. said he was running away. 2RP 2312.

J.V. claimed Venegas made him do a lot of chores and that she beat him when he did not do them. 2RP 1254-55, 1263-66. He alleged a number of assaults that occurred during the past few years, including (1) on more than one occasion, Venegas kicked him in stomach if did not correctly sweep the floors (2RP 1265-66); (2) on more than one occasion, Venegas turned on the hot water and burned him while he scrubbed the tub (2RP 1266-68); (3) Venegas scraped a metal fork down the back of his legs and poured vinegar into the wounds (2RP 1278-79, 1438); (4) Venegas kicked him in testicles, stomach, and legs when he did not correctly clean the bathroom (2RP 1287, 1439); (5) on more than one occasion, when J.V. forgot to feed the dog, Venegas hit him with a stick on his head, hands, tops of feet, calves, arms, butt, which left marks,

bruises, welts, and cuts and sometimes caused him to limp (2RP 1269-73, 1276); (7) Venegas hit him with a serving spoon, ladle, paper towel rod and hammer (2RP 1276-77, 1332-33); and (8) Venegas punched him in the face, leaving bruises and a swollen lip (2RP 1279).

J.V. also claimed Remil Venegas abused him on different occasions. For example, Remil hit the bottoms of his feet with a bamboo stick. 2RP 1274 1274-75, 1353-57. Venegas did not use bamboo stick on him, but J.V. told someone that Venegas did so because he wanted to protect Remil. 2RP 1275, 1350-51. Remil also punched him in the stomach on different occasions. 2RP 1360-62.

A.C. (d.o.b. 7/5/92) was Remil Venegas' biological daughter, although she did not meet he father until she was 12 years old and the two no longer had a relationship at the time of trial. 2RP 165-66. She spent the summer with the Venegas family in 2005. 2RP 170-71. She said one time Venegas ordered J.V. downstairs because he did not finish his chores. 2RP 202. After Venegas went downstairs, A.C. heard a sound like twirl of a bat. 2RP 206. She saw red marks across top of J.V.'s hands when he returned upstairs. 2RP 207. A.C. saw bruises and cuts on J.V. at other times. 2RP 207. A.C. also described a time when J.V. repeatedly jumped face first into a plastic wading pool with hands behind his back, which caused his nose to bleed. 2RP 188-89. J.V. said he did this because

Venegas told him to do it. 2RP 1316-18. On another occasion, J.V. sucked up cat feces while vacuuming the floor. 2RP 185. Venegas picked up the feces with a napkin and shoved them into J.V.'s face. 2RP 185. J.V. did not remember this event at trial. 2RP 1269-70.

K.P. is A.C.'s cousin and was 13 years old at the time of trial. 2RP 198, 590. She spent a few days in the Venegas household that same summer. 2RP 198, 591. She testified that she saw Venegas slamming J.V.'s face into the pool table downstairs, which bloodied his mouth and chin. 2RP 596-98.

Neither K.P. or A.C. said or did anything in response to what they saw that summer. 2RP 228, 597-99, 609-10. A.C. had falling out with Venegas family. 2RP 583. She later contacted a television station after hearing Venegas and her husband had been charged with abusing J.V. 2RP 228. K.P. did not tell anyone about what she saw until A.C. went on the news. 2RP 610. The defense argued A.C. and K.P. were not credible witnesses because A.C. was a publicity seeker and, contrary to K.P.'s account, J.V. did not even remember being slammed into the pool table. 2RP 3332-33.

Pediatrician Daniel Friedman treated J.V. in May 2001 through August 16, 2004. 2RP 1467, 1471-72. He never saw any unusual injuries that raised suspicion. 2RP 1516, 1520-21, 1524-25, 1528-29, 1539-43.

Friedman received a request for transfer of medical records to Dr. Attig on February 2, 2007. 2RP 1473. Friedman did not otherwise know where J.V. was treated since Friedman last saw him in 2004. 2RP 1473-75. Venegas attributed the gap in care to improvement of J.V.'s asthma. 2RP 2862.

J.V. had a number of absences from school starting in 2001. 2RP 651-52, 674, 685-86, 708-09, 953, 960, 981, 1015, 1056-61, 1068, 1124, 1176, 1181, 1308. Venegas homeschooled J.V. for a few weeks around November 2004. 2RP 2576-77, 2615-17. She denied withdrawing J.V. from school because the school notified her that doctor's note would be required for future absences. 2RP 2865-66, 2926-27.

J.V. had asthma and was excused from school on a number of occasions due to this condition when he was younger. 2RP 1477, 1483, 1548-49, 1532-38, 2861. J.V. acknowledged there were times he stayed home due to asthma or sickness, but other times he stayed home because Venegas beat him. 2RP 1306-08, 1641.

Teachers in third grade through sixth grade saw various injuries on J.V., ranging from marks and bruises on his face, swollen lips, a cut on his nose, puncture wounds on his foot, bruising on his shins, and a limp. 2RP 237-39, 245-48, 666-71, 687-89, 929-34, 946, 962, 989-90, 1001-02, 1006-07, 1013, 1018, 1019-20, 1026-27, 1117-21, 1165, 1180-82, 1186,

1193. When asked what happened, J.V. gave plausible stories of accidental injury or inconsistent stories. 2RP 246-47, 692-94, 707-08, 716, 945-47, 1003, 1007-08, 1013-14, 1120-22, 1179-80, 1182, 1186, 1281-82. J.V. said he did not tell his teachers the truth about what caused his injuries and used excuses Venegas told him to use. 2RP 1280. But when a sheriff came to school to speak with J.V. after teacher David Larkey notified authorities of an injury, J.V. did not accuse Venegas of hurting him. 2RP 1281-82.

Eleven-year-old next-door neighbor Caleb Collins went over to the Venegas house every day. 2RP 1862-64. He was friendly with J.V. and the rest of the family. 2RP 1863. He testified J.V. was always getting into fights but lied and told everyone Venegas beat him up. 2RP 1981-82. J.V. gave inconsistent stories about how he lost his tooth, at one point saying he lost it while playing and another time blaming Venegas. 2RP 1882. Collins testified J.V. injured himself while playing around. 2RP 1886-87, 1897-98, 1983-86. There was also a time in 2007 when Marquis Johnson and other children beat J.V. up, leaving bruises on neck, face and legs. 2RP 1883-84, 1995.

Venegas maintained J.V. received his injuries through ordinary activities, such as wrestling, a snowball fight, playing football, falling downstairs, and fighting with neighborhood kids. 2RP 2656-57, 2661-62,

2937, 2788, 2957-59. Ja.V. testified J.V. was getting beat up outside the home and getting hurt from playing football or a rugby-like game called "smear the queer." 2RP 2262-65, 2266, 2336, 2345-48. On one occasion J.V. dropped a board with nails in it on his foot. 2RP 2267-70.

Venegas' brother in law, Robert Deters, saw bruises on J.V. but nothing suspicious. 2RP 835, 879. J.V.'s best friend, Marquis Johnson, never saw Venegas hit J.V. 350. Venegas' 10-year-old son, D.V., testified Venegas punched J.V. in the arm once or twice and kicked him on one occasion. 2RP 1659, 1684, 1707-08. Ja.V., never saw Venegas hit J.V. 2RP 2296.

Next door neighbor Shannon Roque closely interacted with the Venegas family for five years. 2RP 354, 364, 414-15. She saw the mark on J.V.'s neck in July 2007, but never saw any injuries that appeared out of ordinary for an active, young boy. 2RP 410, 419-20, 509-10.

Family members and friends testified J.V. was not treated badly or treated differently than the other children. 2RP 2048, 2051, 2098-2101, 2112-14, 2701-02. Backed up by photographic and video evidence, witnesses testified J.V. was included in enjoyable family and childhood activities. 2RP 1449-50, 1457-59, 1586-1605, 1613-14, 1866-80, 2125, 2236-47, 2272-74, 2277-78, 2294, 2434-37, 2452-56, 2586-89, 2591-2612, 2621-26, 2632-33, 2748, 2756-58.

Venegas denied beating J.V. 2RP 2954. The defense theory was that J.V. made up the abuse allegations. 2RP 3352. Ja.V. testified J.V. was a normal boy when he first came to live with the family, but that he started to change beginning in the fifth grade. 2RP 2261-63, 2413. He became more aggressive towards boys, starved the dog, and started hurting himself. 2RP 2262, 2291. He did strange things like storing Gatorade bottles full of urine in the refrigerator. 2RP 2291-92. Venegas also saw changes in J.V. starting in the fifth grade. 2RP 2633-34. Collins confirmed J.V. became weirder over time. 2RP 1898. Venegas and next-door neighbor Roque discussed whether J.V. was becoming a psychopath. 2RP 371-72.

The defense argued J.V.'s allegations were inspired by two books he read: "A Child Called It" and "The Lost Boy, A Foster Child's Search For Love." 2RP 2283-85, 3325-27, 3334-35, 3346-47. On cross-examination, J.V. said he only read part of "The Lost Boy" and, when asked, could not remember various forms of punishment meted out by the mother in these books.² 2RP 1618-22. But Ja.V. testified J.V. became obsessed with these books, which depicted a family dynamic similar to the one alleged by J.V. 2RP 2459. The mother in those books treated the boy

² J.V. also like to watch violent Japanese anime movies involving people being hit with bamboo sticks. 2RP 2132-33.

differently than her other children. 2RP 1620. The mother said he was bad boy and deserved to be punished. 2RP 1620. She called him a lot of names. 2RP 1620. She beat the boy all the time, constantly made him do chores, and beat him if he did not do the chores. 2RP 1619-20, 1624, 2458-59. She hit him with a broomstick and slammed his face into things. 2RP 1624, 2458-59. She starved the boy and would feed him only if he did chores. 2RP 1619, 2458-59. The mother made the boy memorize stories to tell people when they asked about his injuries. 2RP 1621.

C. ARGUMENT

1. THE COURT VIOLATED VENEGAS' RIGHT TO PRESENT A COMPLETE DEFENSE IN PROHIBITING J.V.'S TREATING PHYSICIAN FROM OPINING J.V.'S ACCOUNT OF THE INJURY COULD NOT HAVE HAPPENED AS HE DESCRIBED.

The assault at issue in count II involved J.V.'s allegation that Venegas repeatedly stomped his head into the kitchen floor, which caused his chin to bleed. At trial, Venegas denied the assault occurred and sought to call the treating physician as an expert witness to testify the injury could not have occurred as described by J.V. The court erred in excluding expert testimony on this point, thereby violating Venegas' right to present a complete defense.

a. The Trial Court Prohibited Crucial Expert Testimony That Would Have Contradicted J.V.'s Claim That Venegas Assaulted Him As Alleged In Count II.

As part of the State's case in chief, J.V. testified that Venegas stomped the back of his head into the kitchen floor while he lay on his stomach, which opened a cut on his chin that required 12 stitches to close. 2RP 1287-90. J.V. said she stomped him more than once. 2RP 1290. Venegas took him to Dr. Attig for treatment. 2RP 1292, 1432. J.V. told Dr. Attig he slipped in water while doing dishes and hit chin on counter. 2RP 1292. David Larkey, J.V.'s middle school teacher, saw the cut on J.V.'s chin and thought 10 to 12 stitches "was a lot for a chin injury. I don't know, though, I'm not a doctor." 2RP 689.

On the day Dr. Attig was to testify for the defense, the prosecutor informed the court that he had "just" interviewed Dr. Attig. 2RP 2020. The prosecutor objected to any expert opinion provided by Dr. Attig because he was only endorsed as a fact witness and any expert testimony would be beyond the scope of that endorsement. 2RP 2020, 2022. Defense counsel maintained the objection was preposterous because the State placed Dr. Attig on its own witness list and had interviewed him. 2RP 2021. Counsel maintained Dr. Attig was here to testify to his treatment of J.V. and to give his opinion as to whether the injuries were caused by or consistent with being stomped on the head. 2RP 2021, 2024-25. The prosecutor contended

such an opinion would only be appropriate if the State had been given notice that Dr. Attig was endorsed as an expert witness because the State would have found a medical expert to rebut Dr. Attig's opinion had it received such notice. 2RP 2022.

The trial court sustained the State's objection. 2RP 2022-24. The court claimed it would be unfair to allow Dr. Attig's expert testimony because the State did not now have an opportunity to call another doctor to rebut Dr. Attig's opinion. 2RP 2023. The court asserted the State would need another expert to prepare how to cross-examine Dr. Attig's expert testimony, and "I am not going to take that time now in the middle of trial." 2RP 2023.

Defense counsel made an offer of proof, in which Dr. Attig testified he treated J.V. on February 28, 2007 for a chin laceration. 2RP 2025-28. J.V. told Dr. Attig that he slipped on the kitchen floor and struck his chin. 2RP 2028. There was no bruising on J.V.'s head or neck. 2RP 2029. The injury was consistent with what J.V. said happened. 2RP 2029. Dr. Attig held an opinion to a reasonable degree of medical certainty that the injury was not caused by being stomped on the head. 2RP 2030-31.

b. The Trial Court Wrongly Excluded Dr. Attig's Expert Testimony Because Defense Counsel Violated No Discovery Rule And, Even If Counsel Did Violate The Rule, Such Extraordinary Sanction Was Unjustified.

Due process requires an accused be given "a meaningful opportunity to present a complete defense." State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant has the right to offer the testimony of her witnesses in order to establish a defense. State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003). "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Venegas had the constitutional right to present the expert testimony of Dr. Attig to refute J.V.'s account of the alleged crime. The trial court erred in excluding expert testimony on the issue on the ground that defense counsel did not endorse Dr. Attig as an expert witness.

CrR 4.7(b)(1) describes the defendant's discovery obligations as follows:

Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court. State v. Hutchinson, 135 Wn.2d 863, 882, 882, 959 P.2d 1061 (1998). But whether a proceeding satisfies constitutional due process is a question of law reviewed de novo. In re Welfare of J.M., 130 Wn. App. 912, 920, 125 P.3d 245 (2005). Court rules cannot diminish constitutional rights. City of Auburn v. Brooke, 119 Wn.2d 623, 632-33, 836 P.2d 212 (1992).

Interpretation of a court rule is a question of law reviewed de novo. Seto v. American Elevator, Inc., 159 Wn.2d 767, 772, 154 P.3d 189 (2007). Court rules are interpreted using principles of statutory construction. State v. Blilie, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). The focus is on ascertaining and carrying out the drafter's intent. City of Bellevue v. Hellenthal, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). If the rule is clear on its face, the reviewing court gives effect to the plain language and meaning of the rule. Id. In other words, when the language of a court rule is unambiguous, there is nothing for the court to interpret.

State v. Hutchinson, 111 Wn.2d 872, 877, 766 P.2d 447 (1989) (clear language of CrR 4.7(g) requires disclosure of mental examination reports but does not require preparation of such reports).

CrR 4.7(b)(1) does not contain any requirement that the defendant notify the prosecution as to which witnesses will be called as fact witnesses and which will be called as experts. It merely requires the defense to disclose a list of witnesses. Nothing in the court rule requires the endorsement of an expert witness, and therefore the trial court's asserted basis for preventing Dr. Attig from offering expert opinion is invalid.

Furthermore, there is no evidence in the record that Dr. Attig gave any written or oral statements to the defense that would be subject to discovery under this rule. Dr. Attig's expert testimony should not have been excluded because defense counsel did not violate any discovery obligation.

Furthermore, the purpose of CrR 4.7 is to prevent last-minute surprise, trial disruption and continuances. Hutchinson, 111 Wn.2d at 878. To establish noncompliance, the complaining party must in fact be surprised and make a *timely* claim of surprise. State v. Vavra, 33 Wn. App. 142, 143-44, 652 P.2d 959 (1982). The complaining party must additionally request a continuance of the trial for a reasonable time in

order that his counsel may prepare to cross-examine the witness and secure rebuttal testimony if it is available, and also establish prejudice if such opportunity be not afforded. Id. at 144.

Here, it is undisputed that the State knew Dr. Attig was a potential witness because the State placed him on its own witness list. The State knew Dr. Attig's profession and his status as J.V.'s treatment provider. That Dr. Attig would offer expert testimony if called cannot be considered surprising. Indeed, defense counsel in opening statement stressed Dr. Attig would testify that the cut on J.V.'s chin could not have been caused as J.V. alleged. 2RP 116, 126. The State was indisputably on notice as to the substance of Dr. Attig's testimony some three weeks before the State raised objection due to supposed lack of notice.

Additionally, the State failed to make a timely claim that it was surprised. The State chose not to interview Dr. Attig until just before he was to be called as a witness. The State offered no explanation as to why it waited so long to interview Dr. Attig, nor why it waited until the day he was to testify before claiming his expert testimony should be excluded. If any party was surprised here, it was the defense. In any event, the State did not even request time to secure rebuttal testimony.

Even assuming defense counsel violated a discovery rule by failing to timely endorse Dr. Attig as an expert witness, the sanction imposed by the trial court was unjust. CrR 4.7(h)(7)(i) provides:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

This rule permits exclusion of defense witness testimony as a sanction for discovery violations, but such exclusion is an extraordinary remedy and should be applied narrowly. Hutchinson, 135 Wn.2d at 881, 882. The factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. Id. at 882-83.

This case is a far cry from Hutchinson, where defense expert testimony was properly excluded because a less severe sanction would not be effective. Id. at 881, 883. The defense in that case was diminished capacity but the defendant adamantly refused to be evaluated by the State's

expert in violation of the trial court's proper discovery order. Id. at 880. A continuance to allow the State to seek examination would accomplish nothing because of the defendant's refusal to cooperate. Id. at 881. Furthermore, the State would have been prejudiced by an inability to counter the defense expert testimony with any affirmative evidence in the absence of an examination. Id. at 883. The discovery violation was willful because the defendant's "continual refusal" to undergo an examination was marked by repeated "defiance." Id.

Cases interpreting CrR 4.7(h)(7)(i) typically involve the failure to produce evidence or identify witnesses in a timely manner. Id. at 881. "Violations of that nature are appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence." Id. Such remedy was not available in Hutchinson because the defendant's own behavior foreclosed any opportunity to rebut the defendant's proposed evidence. Id.

In Venegas' case, the State had already interviewed Dr. Attig. The trial court wrongly failed to require the State to establish that it could not find an expert witness to rebut Dr. Attig's testimony. Instead, the court simply maintained it was too late, even though the State never said it did not in fact have time to find an expert and never made any effort to find one. The trial did not end until over two weeks later. Moreover, as set

forth above, the State manufactured surprise by failing to interview Dr. Attig until deep into trial. The State invited the problem by failing to interview Dr. Attig earlier. It shared responsibility for the supposed late endorsement. Finally, defense counsel did not willfully violate a discovery obligation. Nothing in CrR 4.7 required her to endorse Dr. Attig as an expert witness. The State endorsed Dr. Attig as its own witness and defense counsel adopted that endorsement as part of the defense witness list. Defense counsel may have been mistaken in her discovery obligations, but she did not act in bad faith. Venegas' case stands in stark contrast to the defendant's behavior in Hutchinson, which involved steadfast refusal to comply with a direct court order.

Only in narrow circumstances should courts employ the extraordinary sanction of excluding defense expert testimony for violating a discovery obligation. Hutchinson, 135 Wn.2d at 882. The trial court's rash decision to exclude Dr. Attig's expert testimony on a crucial aspect of Venegas' defense was unjustified. Criminal rules "shall not be construed to affect or derogate from the constitutional rights of any defendant." CrR 1.1; State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987) (court cannot sustain interpretation of court rule which contravenes the constitution).

Reversal is required because the trial court's extraordinary remedy violated Venegas' constitutional right to present a complete defense to Count

II. "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). The reviewing court "decides whether the actual guilty verdict was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical [trier of fact] faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999); accord Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

J.V. said Venegas stomped his head into the floor more than once. 2RP 1290. Venegas' son D.V. testified he was in another room when he heard a single thump or thud that he compared to the loudness of a really hard stomp. 2RP 1711-14, 1764. Venegas' daughter J.V. said no one else was in the kitchen when J.V. cut his chin, although she could not account for her mother's whereabouts. 2RP 2392. Venegas denied ever hitting her

son. 2RP 2954. Dr. Attig testified J.V.'s injury was consistent with slipping and falling onto the floor. 2RP 2035. Other than the chin laceration, Attig did not see any injuries on J.V.'s head or face. 2RP 2035, 2043.

The jury was faced with opposite versions of events and ambiguous circumstantial evidence of what happened. Dr. Attig's expert testimony would have cast grave doubt on J.V.'s allegation and the jury was entitled to hear it before it decided the truth of the matter. Reversal of Count II is required because exclusion of Dr. Attig's opinion was not harmless.

2. ALTERNATIVELY, DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO TIMELY ENDORSE THE PHYSICIAN AS AN EXPERT WITNESS, WHICH PREJUDICED VENEGAS' RIGHT TO PRESENT A COMPLETE DEFENSE.

In the event this Court finds the trial court properly excluded Dr. Attig's expert testimony, reversal is still required because defense counsel was ineffective in failing to comply with her discovery obligations. Every criminal defendant has the constitutional due process right to present a complete defense. Wittenbarger, 124 Wn.2d at 474. Here, Venegas' own attorney undermined that right in failing to follow a discovery rule.

Venegas was guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and

article I, section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Id. at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). In her opening statement, defense counsel told the jury that it would hear Dr. Attig testify that the cut on J.V.'s chin could not have been caused as J.V. alleged. 2RP 116, 126. Due to counsel's actions, however, the jury never heard any such testimony from Dr. Attig. Not only did the absence of such testimony undermine defense counsel's credibility with the jury, it deprived her client of key exculpatory evidence. Given defense counsel's stated intent to present this expert testimony, her late endorsement of the doctor as an expert witness cannot be considered legitimate strategy. Cf. Thomas, 109 Wn.2d at 231 (counsel deficient in failing to investigate

proposed expert witness's lack of qualifications, which led to exclusion of expert as witness).

Prejudice is demonstrated from a reasonable probability that, but for counsel's performance, the result would have been different. Id. at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. As set forth in section C. 1., supra, the inability to present Dr. Attig's expert testimony, which would have refuted J.V.'s account of the alleged assault, undermined confidence in the outcome. Reversal of Count II is required.

3. THE STATE PUT VENEGAS' BAD CHARACTER ON TRIAL -- AN AVALANCHE OF UNFAIRLY PREJUDICIAL EVIDENCE DETAILING HER DISGRACEFUL ACTS NECESSITATES A NEW TRIAL.

The State's theory of the case was that Venegas played the role of the wicked stepmother and J.V. was a modern day Cinderella or "Cinderfella." 2RP 3280. In opening statement, defense counsel implored the jury not to believe the State's argument that Venegas was a monster. 2RP 123, 127. But then the State, almost entirely without objection, presented a massive amount of evidence depicting Venegas as a horrible person. This evidence formed the bedrock of the State's request to the jury during its opening statement: "I will ask you, at the end of all of the evidence, to find her guilty, guilty as charged; to do the right thing, to do

the just thing, *guilty of being a mean, mean person* who hated this little boy and then showed it by abusing him in such a horrid manner." 2RP 114 (emphasis added). A new trial is required because there is a reasonable probability that the jury accepted the State's invitation to convict her of being a bad person.

- a. Evidence Must Not Be Admitted To Show Bad Character Or Propensity To Commit Crime, And Even Character Evidence Theoretically Admissible For A Permissible Purpose Should Be Excluded If It Is Unduly Prejudicial.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion. "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336. Prior misconduct, including acts that are merely unpopular or disgraceful, are inadmissible to show that the defendant is a "criminal type" and is likely to have committed a crime for which charged. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). In other words, ER 404(b) prohibits admission of evidence simply to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

ER 404(b) provides evidence of other crimes, wrongs, or acts may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In applying ER 404(b), a trial court must establish the relevance of the evidence and identify its permissible purpose, then balance on the record the probative value of the evidence against the prejudicial effect it may have on the fact-finder. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); Wade, 98 Wn. App. at 334. "Doubtful cases should be resolved in favor of the defendant." Wade, 98 Wn. App. at 334.

Under ER 404(b), the evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Further, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.³ This is part of the ER 404(b) analysis as well. Saltarelli, 98 Wn.2d at 361-62. Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the

³ ER 403 provides: "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."

jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Although propensity evidence is relevant, the risk that a jury uncertain of guilt will convict anyway because a bad person deserves punishment "creates a prejudicial effect that outweighs ordinary relevance." Old Chief v. United States, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

- b. The Court Wrongly Admitted Character Evidence Depicting Venegas As a Wicked Stepmother And Defense Counsel Was Ineffective In Failing To Prevent The Admission Of That Type Of Evidence.
- i. The Trial Court Erred In Overruling Objection To Bad Character Evidence.

In opening statement, the prosecutor listed a number of ways in which Venegas treated J.V. badly, including keeping him out of the school's gifted program even though his third grade teacher though he was intelligent. 2RP 111. Before the teacher took the stand, defense counsel moved in limine to exclude this evidence because such evidence was irrelevant and protested "you have to measure the probative value against its prejudicial effect." 2RP 915-17. The State maintained the evidence was "completely relevant" because it was part of State's theory that "[a]nything good and positive about [J.V.] she was not supportive of, including [J.V.] being in the gifted program." 2RP 915-16. Venegas' action showed "bias" against J.V. 2RP 916. The trial court denied the motion "because of what the State's theory is, that there's a motivation,

that there's a pattern for what they are accusing this person of." 2RP 920. The teacher duly told the jury that she had recommended J.V. for the gifted program but that Venegas did not want him to participate. 2RP 999-1000.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). "[D]iscretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Defense counsel objection on grounds of relevance should have been sustained. "Evidence is relevant and necessary if the purpose of

admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). The fact that Venegas kept J.V. out of the gifted program does not make it any more probable that she physically assaulted him as charged. The nexus between the crime and this act is missing and the attenuation simply too great to be considered relevant.

When determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. Foxhoven, 161 Wn.2d at 175.

The trial court admitted the evidence to show motive. Motive is an impulse, desire, or any other moving power that causes an individual to act. Powell, 126 Wn.2d at 259. Evidence of previous quarrels and ill-feeling may be admissible to show motive, but only if such evidence is of consequence to the action. Id. at 260. Prior misconduct evidence demonstrating motive is of consequence to the action when only circumstantial evidence of guilt exists. Id. But in this case, J.V.'s testimony presented direct evidence of the assaults at issue. In closing and

rebuttal argument, the prosecutor said no one will ever know why Venegas started beating J.V. but that question did not need to be answered in order to find Venegas guilty. 2RP 3285, 3356-57. Under these circumstances, motive was not of consequence to a material issue

Even assuming this evidence was admissible to show motive, the trial court failed to balance its probative value against its potential for unfair prejudice on the record. "Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

Even if the evidence was relevant and had a proper purpose, it was still unfairly prejudicial under ER 404(b). Defense counsel sufficiently invoked this ground for exclusion in pointing out "you have to measure the probative value against its prejudicial effect." 2RP 916-17; see State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (if the ground for objection is apparent from the context, the objection is sufficient to preserve the issue). Measuring probative value against prejudice is part of the test for admissibility under ER 404(b). Saltarelli, 98 Wn.2d at 361-62.

The court also erred in admitting evidence that Venegas did not want to pay for foster care after J.V. was removed from her home. 2RP 752-55, 758-60. Outside the presence of the jury, defense counsel

objected on grounds that this evidence was irrelevant and that prejudice outweighed any probative value. 2RP 755, 757. The prosecutor argued the evidence was relevant because "this woman hasn't expressed any concern over the child;" the State's theory was that she was motivated by money to keep him in household, and Venegas became furious when J.V. became a financial burden. 2RP 755-56.⁴ The court overruled counsel's objection, claiming evidence that she did not want to pay for foster care was more probative than prejudicial because it fit with the State's theory that "instead of getting money, now it is going to cost them money." 2RP 757.

The evidence should not have been admitted on grounds of relevance or ER 404(b) because Venegas' alleged financial motivation for keeping him in the household did not make it more probable that she assaulted him. The reason why she kept J.V. in the household was not "necessary to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362. Whatever slight probative value this evidence carried was outweighed by its prejudice, which displayed Venegas as a coldly calculating mother who did not even care enough for her child to provide a proper foster home. Even if this evidence was admissible under

⁴ The prosecutor further asserted this evidence somehow showed consciousness of guilt because she obstructed the State from conducting forensic child interviews. 2RP 756-57.

some exception to ER 404(b), it was still improperly admitted because the trial court failed to balance its probative value against its potential for unfair prejudice on the record. Tharp, 96 Wn.2d at 597. At most, the trial court articulated a reason for its admission, but did not discuss its prejudicial impact.

ii. Counsel Did Not Properly Object To Other Bad Character Evidence That Made Venegas Look Like A Monster.

Defense counsel did not properly object to any of the following ER 404(b) evidence, all of which was elicited as part of the State's case in chief unless otherwise specified:

(1) A birthday party was planned for J.V.⁵ and Venegas' three sons. 2RP 368-69. Venegas bought cakes for her three children, but not for J.V. 2RP 369. Venegas decided not to celebrate J.V.'s birthday because he was in trouble. 2RP 853. Venegas' brother in law decided to get a cake for J.V., which made Venegas mad. 2RP 835, 855-56, 1310. In addition, another of J.V.'s birthdays was not celebrated in any fashion, without friends or presents. 2RP 854-55. The prosecutor returned to this evidence in closing argument. 2RP 3280, 3282.

(2) Venegas took away J.V.'s gifts after his birthdays and on other occasions, saying he did not deserve them. 2RP 1310-14. In opening

⁵ This party occurred in 2006, when J.V. was 12 years old. 2RP 852.

statement, the prosecutor rhetorically asked "Was he so bad? Was that why his Christmas gifts were taken away immediately after they were given to him?" 2RP 111. The prosecutor returned to this evidence in closing argument. 2RP 3264, 3280.

(3) Venegas did not allow J.V. to attend his best friend's birthday party. 2RP 289, 332-33.⁶ J.V. testified this made him feel bad, as he had really been looking forward to the party all his friends went. 2RP 1330-31. In rhetorically asking "Was he so bad?" during opening statement, the prosecutor asked "Was that why he could not go to his best friend's birthday party?" 2RP 111-12.

(4) J.V. was not allowed to eat with the rest of his family. 2RP 183-84, 595, 1255-57. In opening statement, the prosecutor twice pointed to this evidence in laying out her case for why the evidence would show Venegas was guilty. 2RP 97, 111-12. The prosecutor returned to this evidence in closing argument. 2RP 3264.

(5) Venegas made J.V. completely rewrite a poem he had written for school about the death of his mother, which the teacher described as "beautiful" and "very moving." 2RP 1195-97, 1262-63. Defense counsel moved in limine to prevent the teacher from testifying about this incident,

⁶ This evidence was admitted again during the State's rebuttal. 2RP 3097, 3108-09.

but stated no ground for objection. 2RP 1162. The prosecutor argued for its admission, claiming "I think for the jury to fully appreciate, you know, the context, her description of the poem, as a language arts teacher -- I don't intend to spend a whole lot of detail on it, but she was touched by it, felt it was well written for a child his age, which is completely consistent with everybody's observation of [J.V.], that he is an articulate, bright, young boy, and inconsistent with everything the defendant said about him." 2RP 1162-63. The trial court denied the motion without articulation. 2RP 1162.

(6) J.V. was not allowed to play with toys and not allowed to play as much as Venegas' other children because he had to do chores. 2RP 188, 197-99, 374, 594, 849.

(7) Venegas restricted contact between J.V. and his best friend and eventually no friends were allowed to visit J.V. at his house. 2RP 286, 290, 289, 328-29, 331-32, 367-68, 1329-30. In rhetorically asking "Was he so bad?" during opening statement, the prosecutor asked "Was that why he never had his friends over, got to have his friends over when the other children did?" 2RP 111.

(8) J.V. testified that Venegas called him a "dumb ass, dumb fuck, fuck-up, asshole, shithead, faggot" and that she called him these things all the time. 2RP 1331-32. A.C. said Venegas berated J.V. by calling him

bad, useless, slow, and stupid. 2RP 182-83, 186. In opening statement, the prosecutor told the jury "You will hear that the beatings were not the only way that she punished him. In fact, the other ways you will hear hurt him even more, when she called him a faggot and an idiot and stupid. And she told him every day he was useless and worthless." 2RP 111. The prosecutor returned to this evidence in closing argument. 2RP 3246.

(9) Venegas used profanity around her children. 2RP 3048. The prosecutor elicited this evidence to rebut a denial from one of Venegas' children on cross-examination that Venegas did not curse at her children. 2RP 2462-63.

(10) Venegas said bad things about J.V. during parent-teacher conferences, including that he was a liar, a bad kid, and a thief, which embarrassed and upset J.V. 2RP 957-59, 992-93, 1043, 1174. In opening statement, the prosecutor told the jury "During parent/teacher conferences, when they told him what a good kid he was, what a good student, how he was good in class, good with the other children, he was a model student, he always knew how to behave, he was excellent, what a good kid he was, she became angry and said he was none of that, he was a bad, bad little boy. And she would say all kinds of awful things about him with [J.V.] sitting right there listening to all the things that she said about him and thought about him." 2RP 111.

(11) Venegas made J.V. do a disproportionate amount of chores in relation to her other children, and she treated him worse than the other children in giving him less privileges and toys. 2RP 173, 179-80, 184, 233-34, 594, 1264-65, 1333-34. In rhetorically asking "Was he so bad?" during opening statement, the prosecutor asked "Was that why he had to do chores after chores after chores and why he was in trouble all the time?" 2RP 111-12.

(12) Venegas deprived J.V. of food as punishment for not doing chores, such as when he forgot to feed the dog and did not feed him for a weekend. 2RP 194-96, 1327. In opening statement, the prosecutor said "you will hear that many, many meals he went without because he had to be punished for being a bad, bad little boy." 2RP 98.

J.V. testified most of time he did not have enough time to eat breakfast due to chores in morning. 2RP 1264, 1327. At one point, defense counsel moved in limine to keep a teacher from testifying that she saw J.V. eat three bowls of cereal before taking the WASL test. 2RP 1159. However, she stated no ground for the objection. The state argued it was relevant because "part of the State's theory and theme of this case, is the treatment by the defendant of [J.V.] as being the boy who did all the chores and didn't get any of the benefits of the other children, and was physically abused when he didn't perform well enough." 1159-60. The

court denied the motion to exclude and the teacher testified about this event. 2RP 1160, 1198.

(13) Venegas often locked J.V. in his room. 2RP 1296-98, 1319. The longest period was for a day and a half, during which time he did not receive food and was forced to urinate through a window. 2RP 1319-20. The prosecutor returned to this evidence in closing argument. 2RP 3264, 3281-82.

iii. Counsel Was Deficient In Failing To Object To The Bad Character Evidence.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Even if some or even all of the above ER 404(b) evidence was admitted for a purpose other than to prove propensity, it should still have been excluded because unfair prejudice outweighed its probative value. Saltarelli, 98 Wn.2d at 361-62. Evidence is unduly prejudicial when the evidence is likely to stimulate an emotional response rather than a rational decision. Powell, 126 Wn.2d at 264. The 404(b) evidence specified above fits squarely into this category. The evidence was unfairly

prejudicial because it was of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson, 123 Wn.2d at 223 (citation and internal quotation marks omitted); see also State v. Read, 100 Wn. App. 776, 782-83, 998 P.2d 897 (2000) (evidence is unfairly prejudicial "if it has the capacity to skew the truth-finding process.").

The ER 404(b) evidence here was especially likely to provoke an emotional response because the State wasted no opportunity in presenting J.V. not only as a thoroughly nice and likeable boy but also an angel. 2RP 284-85, 365. Bad enough that Venegas looked like a monster. Worse that she victimized a nice boy that the State clearly wished the jury to adore.

As part of Count I, the State needed to prove Venegas "previously engaged in a pattern or practice of assaulting J.V. which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks." CP 53 (Instruction 9). But there is a crucial difference between a pattern of assault and a pattern of bad behavior that did not amount to assault. The State's theory that Venegas' bad acts showed she hated J.V. and thus had motive to assault him became much too expansive, roving as it did over every aspect of Venegas' character and every bad act that was disgraceful and unlikeable. Venegas did not get J.V. a birthday cake and so she must have assaulted him. Venegas kept him out of the gifted program and so she must have assaulted him. Venegas must have

committed the charged crimes because she treated J.V. badly and she was, as the State put it, a "mean person." In essence, this was the State's theory of the case as it was presented to the jury.

Defense counsel was deficient for failing to object. There was no legitimate reason not to object given the extremely prejudicial nature of this character evidence. This evidence portrayed Venegas in an irredeemably bad light and likely provoked an emotional response from the jury that interfered with what should have been a rational deliberation process.

This was not a case where admission of the ER 404(b) evidence caught defense counsel by surprise and a split second decision to object in front of the jury needed to be made. The State telegraphed what it was going to do with this evidence in its opening statement, and the State did a splendid job of portraying Venegas as the wicked stepmother of fairytale lore in the absence of proper objection.

c. Reversal Is Required Because There Is a Reasonable Probability That The Combined Effect of Bad Character Evidence Affected The Verdict.

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that an accumulation of errors affected the verdict. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Most

of this evidence came in because defense counsel was ineffective in failing to prevent its admission. Some of the evidence came in through straightforward evidentiary error on the part of the trial court.

The standard of prejudice for an ineffective assistance of counsel claim is essentially the same for evidentiary error: an error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Neal, 144 Wn.2d at 611; Thomas, 109 Wn.2d at 226. "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." Neal, 144 Wn.2d at 611. However, "the concept of harmless error is not a license to inject naked prejudice into any case." State v. Avendano-Lopez, 79 Wn. App. 706, 722, 904 P.2d 324 (1995).

The cumulative effect of improper evidence in this case cannot be considered insignificant in relation to the evidence as a whole. Character assassination deprived Venegas of her right to a fair trial. The unfair prejudice in this case is that the jury may have believed Venegas was a bad person who had a propensity to do horrible things to J.V. and so must be guilty of assault. The combined effect of this character evidence tainted the verdict by inviting the jury to convict Venegas on the basis of emotion rather than reason. Reversal is required.

4. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION FOR ER 404(b) EVIDENCE.

Even if evidence of Venegas' bad acts was properly admitted, defense counsel was still ineffective in failing to request a limiting instruction that would have ensured the jury did not use this evidence for improper purposes.

Regardless of admissibility, in no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." Saltarelli, 98 Wn.2d at 362. For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. Id. A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). But counsel must request such instruction. State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975).

Defense counsel's failure to request a limiting instruction for the tidal wave of ER 404(b) evidence constitutes ineffective assistance of counsel. Counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from

considering Venegas' bad acts as evidence of her propensity to commit crime. There was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of this character evidence. Allowing the jury to convict Venegas on the basis of bad character did nothing to advance her defense.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" theory is inapplicable here. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. This evidence permeated the proceedings. Evidence that Venegas treated J.V. badly in so many different ways, some of which were quite vivid, was not the type of evidence the jury could be expected to forget or naturally minimize. Multiple witnesses testified about these facts. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. This evidence formed the State's theory of the case.

The dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of Venegas' prior bad acts as evidence of her propensity to commit the charged crimes. The jury is naturally inclined to treat evidence of other bad acts in this manner. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990); see also Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) ("Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others."). If that were not the case, there would never be any reason to give a limiting instruction for ER 404(b) evidence.

"[J]urors are presumed to follow instructions." State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). In light of this presumption, it was not a legitimate tactic to fail to insist on an instruction to limit the permissible use of the ER 404(b) evidence. There is a reasonable probability the outcome of the trial would have been different had the limiting instruction been given because, as set forth above, a mountain of unqualified character evidence allowed the jury to convict Venegas of being a bad person who had a propensity to assault. A new trial on all counts is required.

5. THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT IN MISSTATING THE NATURE OF REASONABLE DOUBT AND THE PRESUMPTION OF INNOCENCE, MISREPRESENTING THE ROLE OF THE JURY IN REACHING ITS VERDICT, AND IMPERMISSIBLY SHIFTING THE BURDEN OF PROOF ONTO THE DEFENDANT.

In rebuttal argument, the prosecutor told the jury the presumption of innocence was now gone, argued the jury needed to disbelieve the State's witnesses in order to believe Venegas "did nothing," and faulted the defense for failing to show J.V. was not credible. 2RP 3369-70. The trial court overruled defense counsel's repeated objections to these improper arguments. Reversal is required because there is a substantial likelihood the prosecutor's misconduct affected Venegas' right to a fair trial.

a. The Prosecutor Misstated The Law On Presumption Of Innocence And Burden Of Proof.

The prosecutor began her argument by stating:

Ko: Counsel says the defendant is presumed innocent and that the State bears the burden of proof and she's absolutely right. the defendant is presumed innocent and the State does bear the burden. We bear that burden gladly, but that presumption of innocence, ladies and gentlemen, that presumption erodes each and every time you hear evidence that the defendant is guilty.

Mandel: I object. That's a misstatement of the law.

Court: It's argument. I'll allow it.

Ko: Every single time that evidence is presented that the defendant is guilty as charged, then that presumption erodes little by little, bit by bit, and at the conclusion of all the evidence, including the defendant's witnesses and the defendant, herself, and that no presumption no longer

exists, then that's when the State has proven the case beyond a reasonable doubt.

2RP 3354-55.

The prosecutor later told the jury what the case boiled down to:

Ko: The bottom line is this. *To believe that she did nothing*, to believe her testimony in its entirety, this is what you have to believe. *You have to disbelieve Ms. Trezise, Ms. Redl, Ms. Weinrich,*⁷ when they all said how angry she got when they told her --

Mandel: Objection, misstates the law, not an accurate statement of the burden of proof.

Court: It's argument, overruled.

Ko: *You have to disbelieve Ms. Renner* when she testified that, no, the school had never called her home and said that [J.V.] had to be disciplined after school for four weeks.⁸

Mandel: Same objection, misstates the law, shifts the burden of proof, improper argument.

Court: It's argument.

Ko: *Disbelieve Ms. Gilmore when she testified*, "No. [J.V.] never said he was aspiring to be a gang member,"⁹ *disbelieve Kady Paxton, Alyson Clairmont, Marvin Clairmont* who said, "Hey, a cat. I picked him up."¹⁰

Mandel: Same objection, misstates the burden of proof, shifts the burden of proof, improper argument, misconduct.

⁷ These are schoolteachers who testified on behalf of the State. 2RP 952, 989-90, 1165.

⁸ Assistant principal Heather Renner testified on behalf of the State as a rebuttal witness. 2RP 2998. Venegas had testified J.V. was disciplined after school. 2RP 2946-48.

⁹ Venegas had testified that J.V. told her that he wanted to be in a gang. 2RP 2852. Middle school teacher Jennifer Gilmore testified on behalf of the State as a rebuttal witness. 2RP 3030.

¹⁰ There was a dispute whether the Venegas family had a cat at the time Venegas was alleged to have shoved cat feces into J.V.'s face. 2RP 185, 223-24; 2904-05. The prosecutor is referring to Marvin Clairmont's rebuttal testimony that the family had a cat during that time period. 2RP 3153.

Court: Overruled.

Ko: She said, "I never told CPS. I never told CPS that I was keeping the children in separate rooms." She had to say that because she just testified about how all the boys were kept together, allowed to play together, although, of course, every single day of their lives they slept in the living room, and when you're pondering whether to believe or disbelieve [J.V.], think of this, ladies and gentlemen, [J.V.], he had told his story to Rosa Broadnax, Shannon, police, defense investigators, and anyone else who asked, including the people in this courtroom and you have to ask yourselves this. *Did the defense attorney show to you that he is not credible, not believable?*

Mandel: Objection, shifts the burden.

Ko: *Untrustworthy?*

Mandel: Improper argument, misconduct.

Court: Overruled.

Ko. Ladies and gentlemen, I bear the burden. I have to prove that the defendant is guilty, but you know what? Once they put on their case, once they parade witnesses, then you have to give their evidence the exact same level of scrutiny and examination that you give the State's case, and one of the things that you have to consider is, was [J.V.] credible and believable when he testified, and was there anything to show that he was neither of those things? That's what you have to decide as a juror.

2RP 3369-70 (emphasis added).

b. The Prosecutor's Argument Was Improper And Prejudiced Venegas' Right to A Fair Trial.

The prosecutor, as an officer of the court, has a duty to see an accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). "Although prosecutors have 'wide latitude' to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defendant." State v. Miles, 139 Wn. App. 879, 889,

162 P.3d 1169 (2007).¹¹ A prosecutor commits misconduct when she argues that, in order to believe the defendant's version of events, the jury must find the State's witnesses are lying. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), overruled on other grounds, State v. Aten, 130 Wn.2d 640, 657-58, 927 P.2d 210 (1996); State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991); State v. Riley, 69 Wn. App. 349, 353 n.5, 848 P.2d 1288 (1993). It is also unfair to make it appear that an acquittal requires the jury to conclude that the State's witnesses are lying. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). Such arguments are intrinsically misleading because they misstate the nature of reasonable doubt and misrepresent the role of the jury in reaching its verdict. Fleming, 83 Wn. App at 213, 216; Wright, 76 Wn. App. at 825, 826.

¹¹ After telling the jury that they heard "mutually exclusive" versions of events, the prosecutor in Miles committed misconduct by arguing as follows: "What do I mean by that? To simplify it as much as possible, if one is true, the other cannot be, as I'm sure you all know. If the State's witnesses are correct, the defense witnesses could not be and vice versa . . . [I]n this case you have no choice because you have two conflicting versions of events. One is not being candid with you . . . You are being asked to use your experience and your common sense to decide which version of events that you have heard over in this courtroom over the course of this trial is more credible." Miles, 139 Wn. App. at 889.

The prosecutor told the jury that to believe Venegas "did nothing," it needed to disbelieve the testimony of State's witnesses. This argument is improper because it misstates the jury's role, which is to determine whether the State has met its burden of proving each element of its case beyond a reasonable doubt. Wright, 76 Wn. App. at 826. A jury need only find the State has not proven its case beyond a reasonable doubt in order to acquit. The jury may find reasonable doubt for a multitude of reasons that have nothing to do with whether a state's witness lied. Id. at 826; Fleming, 83 Wn. App. at 213. The argument made here presented the jury with a false choice between concluding the state's witnesses lied or convicting Venegas. Wright at 825.

The State's argument that the jury had to disbelieve the State's witnesses in order to believe Venegas was misleading because "the testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." Casteneda-Perez, 61 Wn. App. at 363. "A jury does not necessarily need to resolve which, if any, of the witnesses is telling the truth in order to conclude that one version is more credible or accurate than another." Wright, 76 Wn. App. at 825. Jurors did not need to disbelieve the State's witnesses or believe Venegas in order to conclude Venegas did nothing; all that they needed was to entertain a reasonable

doubt regarding any one element of the State's case. Miles, 139 Wn. App. at 890; Wright, 76 Wn. App. at 825-26; Fleming, 83 Wn. App. at 213.

The prosecutor committed further misconduct in criticizing Venegas for not showing J.V. was untrustworthy and not credible. A criminal defendant has no duty to present favorable evidence, and it is improper for the prosecution to shift the burden of proof and invite the jury to draw an adverse inference from a defendant's failure to produce evidence. Cheatam, 150 Wn.2d at 652; State v. Cleveland, 58 Wn. App. 634, 647-48, 794 P.2d 546 (1990). The burden of proof remains with the prosecutor. State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008). The prosecutor's acknowledgment that the State had the burden of proof, after the trial court repeatedly overruled defense counsel's proper objections, amounted to little more than a wink in the jury's direction.

The prosecutor compounded her misconduct by arguing the presumption of innocence eroded each time the jury heard a piece of inculpatory evidence. Every person accused of a crime is constitutionally endowed with an overriding presumption of innocence. State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

Argument that undermines the presumption of innocence is improper. Warren, 165 Wn.2d at 26. The prosecutor is therefore prohibited from arguing the presumption of innocence ceases to operate prior to deliberations. Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990). The presumption "remains with the accused throughout every stage of the trial, including, most importantly, the jury's deliberations, and . . . is extinguished only upon the jury's determination that guilt has been established beyond a reasonable doubt." Id. at 472 n.2. The prosecutor here told the jury that the presumption no longer existed before the jury even began deliberating. The prosecutor's statement skewed the proper deliberative process by leaving the jury with the impression that the presumption was irrelevant to its deliberations.

Where there is an unsuccessful objection to the prosecutor's misconduct, reversal is required where there is a substantial likelihood the misconduct affected the verdict. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). "The state's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999). The State's improper credibility argument was singled out over 10 years ago as a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial because the prohibition against such argument was already

firmly established. Fleming, 83 Wn. App. at 214. It is an unassailable principle that the burden of proof remains with the prosecution, and any attempt to shift that burden onto the defendant is flagrant and ill-intentioned. Miles, 139 Wn. App. at 889; Warren, 165 Wn.2d at 26-27.

To determine whether the misconduct warrants reversal, the court further considers its cumulative effect on the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996). Here, the prosecutor repeated her improper argument to Venegas' detriment. Furthermore, the risk of prejudice is acute where, as here, the defendant's case hinges on his credibility and the credibility of other witnesses. Rivers, 96 Wn. App. at 676; State v. Padilla, 69 Wn. App. 295, 301-02, 846 P.2d 564 (1993). In addition, the trial court overruled defense counsel's repeated objections to the prosecutor's improper argument, thus lending an emphatic aura of legitimacy to the State's improper argument. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Given the nature of the misconduct, coupled with the trial court's failure to sustain objection, there is a substantial likelihood the misconduct affected the jury's verdict. Cf. Warren, 165 Wn.2d at 26-28 (repeatedly misstating burden of proof during closing argument did not require reversal only because court gave curative instruction).

6. CUMULATIVE ERROR DENIED VENEGAS HER
CONSTITUTIONAL DUE PROCESS RIGHT
TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial under Article 1, section 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.¹² State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. Greiff, 141 Wn.2d at 929; Johnson, 90 Wn. App. at 74. Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

¹² The right to a fair trial also implicates article 1, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. Reed, 102 Wn.2d at 145.

As discussed below, an accumulation of errors affected the outcome of Venegas' trial. These errors include: (1) improper of exclusion of expert testimony related to Count II or ineffectiveness assistance of counsel in failing to endorse the witness as an expert; (2) improper admission of ER 404(b) evidence and ineffective assistance of counsel in failing to object to ER 404(b) evidence; (3) ineffective assistance in failing to request limiting instruction for ER 404(b) evidence; and (4) prosecutorial misconduct. Reversal on all counts is required.

D. CONCLUSION

For the reasons stated, this Court should reverse the convictions and remand for a new trial.

DATED this 2nd day of February 2009.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 37828-1-II
)	
LONI VENEGAS,)	
)	
Appellant.)	

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 FEB -2 PM 4: 26

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF FEBRUARY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
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TACOMA, WA 98402

- [X] LONI VENEGAS
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SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF FEBRUARY 2009.

x Patrick Mayovsky

09 FEB -5 AM 11: 52
STATE OF WASHINGTON
BY [Signature] DEPUTY
COURT OF APPEALS
DIVISION II