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STATE OF WASHINGTON
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NO. 40295-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES EARL WRIGHT,

Appellant.

APPELLANT'S BRIEF

James L. Reese, III
WSBA #7806
Attorney for Appellant

612 Sidney Avenue
Port Orchard, WA 98366
(360)876-1028

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A. Assignments of Error

Assignments of Error

1. The trial court erred when it granted the state's motion in limine (3.c.) excluding the testimony of SNJ's grandmother that she lied about everything, i.e., SNJ "lies about everything and anything minor issues or important issues."
2. The defendant was denied his Sixth and Fourteenth Amendment rights to confrontation of witnesses based on the trial court's evidentiary ruling excluding the testimony of SNJ's grandmother that SNJ lied about everything.
3. The trial court erred when it granted the state's motion in limine (3.c.) excluding the testimony of SNJ's mother that she lied about everything.
4. The defendant was denied his Sixth and Fourteenth Amendment rights to confrontation of witnesses based on the trial court's evidentiary ruling excluding the testimony of SNJ's mother that she lied about everything.
5. The trial court erred when it granted the state's motion in limine (3.c.) excluding SNJ's statement during her forensic interview and to the defense investigator that "She lied quite a bit."
6. The defendant was denied his Sixth and Fourteenth Amendment rights to confrontation of witnesses based on the trial court's evidentiary ruling

excluding SNJ's statement during her forensic interview and to the defense investigator that "She lied quite a bit."

7. The trial court erred when it allowed SNJ to testify to an uncharged alleged crime occurring in the summer of 2008.
8. The trial court erred when it denied the defendant's motion in limine that requested admission of evidence of sexual conduct between SNJ and her friend Chrissy as part of the defendant's theory of the case.
9. The trial court erred when it granted the state's motion in limine (4.) that prohibited testimony about SNJ's sexual conduct with Chrissy.
10. The defendant was denied his Sixth and Fourteenth Amendment rights to confrontation of witnesses based on the trial court's evidentiary rulings that prohibited testimony about SNJ's sexual conduct with Chrissy.
11. The trial court erred when it denied cross-examination of SNJ about her knowledge of Chrissy and foster care.
12. The defendant was denied his Sixth and Fourteenth Amendment rights to confrontation of witnesses based on the trial court's evidentiary ruling denying cross-examination of SNJ about her knowledge of Chrissy and foster care.
13. The trial court erred when it denied the defendant's proposed exhibits Nos. 10 and 11 and any cross-examination with regard to them.
14. The defendant was denied his Sixth and Fourteenth Amendment

rights to confrontation of witnesses based on the trial court's evidentiary ruling denying the defendant's proposed exhibits Nos. 10 and 11 and any cross-examination with regard to them.

15. Based on the cumulation of errors doctrine the appellate court should reverse the defendant's convictions.

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion when it granted the state's motions in limine excluding any testimony by SNJ's grandmother and mother that she lied about everything because they were not a neutral or generalized community? (Assignments of Error 1 and 3.)

2. Whether the trial court abused its discretion when it granted the state's motions in limine excluding any testimony of SNJ's statements during her forensic examination and to the defendant's investigator that "She lied quite a bit." (Assignment of Error 5.)

3. Whether the trial court erred when it allowed SNJ to testify to uncharged alleged crimes occurring in the summer of 2008. (Assignment of Error 7.)

4. Whether the trial court abused its discretion when it (1) prohibited testimony about SNJ's sexual conduct with Chrissy, (2) denied cross-examination of SNJ about her knowledge of Chrissy and foster care, (3) denied the defendant's proposed exhibits Nos. 10 and 11 and any cross-

examination with regard to them concerning a lie by SNJ posted on the internet as to her age and as to her thoughts following prosecution and defense interviews in preparation for trial? (Assignments of Error 8, 9, 11 and 13.)

5. Whether the defendant was denied his Sixth and Fourteenth Amendment rights to confrontation of witnesses based on the trial court's evidentiary rulings excluding testimony and evidence concerning SNJ? (Assignments of Error 2, 4, 6, 10, 12, 14.)

6. Whether the evidentiary errors committed by the trial court were harmless constitutional errors because the untainted evidence against Mr. Wright was so overwhelming that no rational conclusion other than guilt can be reached? (Assignments of Error 2, 4, 6, 10, 12, 14.)

7. Whether based on the cumulation of errors doctrine this court should reverse Mr. Wright's convictions because the combination of errors denied him of a fair trial in violation of the due process clause of the Fourteenth Amendment? (Assignments of Error 1, 3, 5, 6, 8, 9, 11, 13, 14, 15.)

B. Statement of the Case

Trial Procedure

Mr. Wright was initially charged with one count of Child Molestation in the Third Degree alleged to have occurred between January 1, 2008 and September 10, 2008 involving SNJ, DOB 07/22/1994 contrary

to 9A.44.089. CP1. This was amended in a second information. CP 34.

The second amended information alleged four counts. Count I was repeated and 3 other counts alleging Rape of a Child in The Third Degree were alleged to have occurred involving the same victim during the same period of time.¹

During trial count II was dismissed.. RP 225, 261. Mr. Wright was found guilty of Counts I, III and IV. CP 59-60. On December 4, 2009 he was sentenced to concurrent sentences of 41,46 and 46 months respectively. CP 78-9. A notice of appeal was filed on the same day. CP 91.

Testimony

Bernard Paul Brown testified that he was a Kitsap County Deputy Sheriff. II RP 89. He worked as a school resource officer for the South Kitsap School District. id. On September 10, 2008 he was called to Sedgwick Junior High School by a school counselor. After contacting SNJ he drove her to the Special Assault Unit for an interview. RP 91.

Later that day , Brown contacted Mr. Wright at his home in Port Orchard. RP 93. After being *Mirandized* Mr. Wright advised the deputy “...that he had not touched her inappropriately.” RP 96. He admitted that he had observed some “adult porn” with her on some web sites on the

¹ Counts II, III and IV added Rape of a Child in the Third Degree occurring between January 1, 2008 and September 10, 2008.

Internet and that he had answered SNJ's questions about sex. id. He had gone to Wikipedia² and to Gravee.com for examples of sex education. id.

During cross-examination Deputy Brown disclosed that when he contacted Mr. Wright he was advised of an incident involving one of his friends named Richard and SNJ. RP 104. Apparently, Richard had kissed SNJ earlier that year- in the spring of 2008- and Mr. Wright thought it was "an inappropriate kiss." RP 104. Mr. Wright became upset and terminated his relationship with Richard and told him not to come back to his house. id.

Brown also acknowledged that he was advised by Mr. Wright that in the spring of 2008 SNJ had been coming to him with questions of a sexual nature. RP 105. SNJ was thinking of becoming sexually active. id.

SNJ, age 15, testified that she lived with her grandmother Susan Skinner. She had known Mr. Wright for the past eight years, since she was about seven years old. RP 110. He moved into their house with SNJ, her mother and grandmother in the summer of 2007. RP 111-12. Mr. Wright was her mother Jennifer Jorges's boyfriend. RP 113.

SNJ described an incident involving Richard Kelsey who was a friend of Mr. Wright's when she was in the 7th grade. RP 114-15. On one

² Wikipedia was described as a web site "an encyclopedia that anybody can edit..." RP 105.

occasion they were alone and Richard kissed her on her lips RP 116-17. SNJ testified: “I just walked away.” id. The next day she advised Mr. Wright. RP 117. According to SNJ, Mr. Wright: “He got mad and called him.” RP 118.

Following this incident Mr. Wright engaged in sex education with SNJ. RP 120. She testified: “I started asking him questions because I was 13 and I was just wondering.” id. Mr. Wright showed SNJ sex education on a computer that was in his and SNJ’s mother’s bedroom. RP 122. SNJ could not remember any of the computer sites by name. RP 123.

SNJ described the first sexual contact with Mr. Wright as occurring on a couch at night while her grandmother and mother were asleep in their bedrooms.³ RP 124. According to SMJ: “He fingered me.” RP 125. She was referring to her vagina after she unbuttoned her jeans. RP 126. She could not remember whether Mr. Wright touched her on the inside or outside of her underwear. id. She testified; “I don’t remember.” in response to the prosecutor’s question. id.

Previously over objection, the trial court allowed testimony of an uncharged incident that occurred on the way back from Tacoma to Kitsap County during the summer of 2008. The trial court gave a limiting

³SNJ’s bedroom adjoins her mother and Mr. Wright’s bedroom. The family room is between the kitchen Ms. Skinner’s bedroom. RP.121.

instruction to the jury that they were to consider this testimony “...for the limited purpose of advising you of the totality of events between Mr. Wright and [SNJ] in the summer of 2008.” RP 129.

SNJ testified that she traveled to Tacoma with Mr. Wright at about 10:00 p.m. in his Explorer from Port Orchard to skin a bear. RP 130. According to SNJ: “He just – we were talking and he pulled to the side of the road and he fingered me again.” RP 131. She testified that he fingered her vagina by touching her under her underwear. RP 133.

SNJ continued her testimony by describing a later incident that happened at their house in Port Orchard. She testified: “Um, we were sitting on the couch, and I think we were watching TV, probably were, and he fingered me again, then a little later I gave him oral.” RP 138. This allegedly occurred at night while her mother was sleeping in her bedroom and while her grandmother was asleep in her room. id.

They were talking of things of a sexual nature while watching Schindler’s List. RP 139. She testified that the defendant touched her vagina under her underwear with his fingers. She could not remember if he touched her inside of her vagina or on the outside only. RP 141. She stated that on that occasion she put her mouth on Mr. Wright’s penis. RP 143.

The next morning she went into Mr. Wright’s bedroom when her grandmother was in her own room: “probably watching TV.” RP 145.

They talked about things of a sexual nature and Mr. Wright, who was lying on his bed, began masturbating. RP 148. According to SNJ she "...gave him oral, but it was only for like two or three seconds." ⁴ RP 147. She testified: "We were talking and I just sat down and then he started doing it, then I leaned over and I did it, and then I just went to the door and I was watching for my grandma." id. At that point the defendant ejaculated. RP 150.

Then SNJ testified that Mr. Wright showed her videos of adults having sex on the computer that was in her mother's bedroom. RP 152.

As part of her cross examination defense asked her:

" Q You testified this morning that his penis was hard, is that right?

A. Yes.

Q Did his penis have any distinguishing marks on it?

A. No.

Q Were there any moles or marks of any kind on his penis?

A. No.

Q Were there any birthmarks?

A. I don't remember." RP 211.

Later she was asked about an alleged incident that took place in Mr. Wright's bedroom when he was lying on the bed and allegedly masturbating.

"Q And did you see him masturbate?

⁴ When asked what this meant, SNJ testified: "I put my mouth on his penis." RP 149.

A Yes.

Q Was he wearing anything at that point?

A. I don't remember.

Q Okay. Did you see his penis?

A Yes.

Q Did you notice any marks on his penis?

A No.

Q Any marks near his penis?

A No.

Q At that point, as I understand it, for a short period of time, a couple of seconds you gave him oral.

A Yes.

Q And then you stopped.

A Yes.

Q And Mr. Wright continued to masturbate?

A Yes." RP 214-15.

Lisha Roberts testified as an impeachment witness. RP 230. She testified that on August 29, 2008 SNJ told her that there was disagreement in the household about SNJ's relationship with her friend Chrissy. RP 230-1. SNJ revealed that she wanted Chrissy to move into the house with her. And that her parents were upset and would not allow that to happen. id. SNJ told Ms. Roberts that she was upset about that. id.

Jennifer A. Jorge testified that she was Mr. Wright's girlfriend. RP 232. They had been together for the past 10 years. id. James moved into her house in the summer of 2007. RP 233. She was aware that Mr. Wright was attempting to answer SNJ's questions about sex by showing her articles from web sites about sexually transmitted diseases and about pregnancy. RP 235.

In August 2008 a disagreement originated in the household about SNJ's relationship with her friend Chrissy. RP 237. Ms. Jorge felt that Chrissy was not a good influence on SNJ. id. SNJ wanted Chrissy to move into their household. RP 238. Both she and Mr. Wright attempted to limit contact between SNJ and Chrissy. Ms. Jorge testified:

“She was no longer allowed to come to our house. The phone was restricted on Chrissy calling us. She was not allowed to see her outside of our home at that time.” RP 238.

SNJ responded with anger. id. She also responded with anger when she was not allowed to move into the home of her male friend Chris Hill. id.

Ms. Jorge testified that she took several pictures of Mr. Wright's genitalia at the request of his attorney. RP 241. These were admitted as exhibits 12 and 13. RP 242. She identified distinguishing marks on his penis. She testified: “He has a mole on his right side of this upper area. He also has a scar runs next to the mole, and in this one he's got his heat rash.” id. She testified that when she engaged in sexual conduct with Mr. Wright the mole on his penis was something that she easily noticed. RP 243. She testified that the mole was also present during the summer of 2008 and as long ago as the past 10 years. id.

Susan Skinner testified that she was the grandmother of SNJ RP 248. She had known Mr. Wright for the past “...seven years at least.” id. The court excluded testimony by this witness to the effect that SNJ “lies

about everything and anything minor issues or important issues.” CP 27.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT RULED IN LIMINE THAT THE DEFENSE WAS PROHIBITED FROM EXAMINATION ON THE SUBJECT OF SNJ’S LYING.

The prosecutor requested in its motion in limine 3.c. that the trial court exclude any testimony by SNJ’s mother or grandmother that SNJ “lies about everything and anything minor issues or important issues.” The prosecutor also petitioned to exclude testimony and a statement by SNJ that “She lied quite a bit”. CP 26-8.

The defense argued during these pre-trial matters:

“And I would expect to ask both the mother and the maternal grandmother, consistent with Evidence Rule 607⁵, whether [SNJ] has a reputation in the community for being a truthful person. The rule explicitly allows me to ask that question, and I will tell the court that I expect the answer from both witnesses will be that she does not have a reputation for being a truthful person.” RP 28

Reputation Evidence

The trial court denied this offer of proof based on the prosecutor’s argument that any evidence presented about SNJ’s reputation in the community had to be presented “within a neutral and generalized

⁵ This was corrected by defense counsel in the next paragraph to refer to ER 608. RP 28.

community”. The prosecutor argued: “..the mother and grandmother are not neutral or generalized members of [SNJ’s] community.” RP 31. The trial court agreed and ruled in part: “...they are not a generalized and neutral community.” RP 34.

Generally, rulings on the admissibility of evidence are reviewed for an abuse of discretion. Karl B. Teglund, 5 Washington Practice *Evidence* 99-100 (5th ed. 2007) (citing *State ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) (abuse of discretion is discretion that is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.)

ER 608 entitled “Evidence of Character and Conduct of Witness”states in part:

“(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.”

Teglund sets forth examples of neutral and generalized community. 5A Washington Practice *Evidence* 428 (5th ed. 2007): the community where the witness “lives” or ”works.” See *State v. Carol M.D.*, 89 Wn.App. 77, 948 P.2d 837 (Div. III 1997) (defendant should have been allowed to offer testimony regarding victim’s poor reputation for

truthfulness in the Boy Scouts) (*State v. Land*, 121 Wn.2d 494, 851 P.2d 678 (1993) (prosecutor allowed to introduce testimony about the defendant's reputation for truthfulness among the defendant's business associates with whom he worked.)

In *State v. Land, supra*, the defendant was convicted of second degree rape of a child and second degree child molestation. The state was permitted to present rebuttal testimony by two of the defendant's former business colleagues with respect to his reputation for veracity under ER 608). Reputation was shown within the wooden box ("wood shock") community.

The court stated when discussing the purposes behind ER 608: "This rule of evidence is designed to facilitate testimony from those who know a witness' reputation for truthfulness so that the trier of fact can properly evaluate witness credibility." *id.* at 499

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) determined that in prosecution for rape, the victim's reputation among two other family members was inadmissible under ER 608. *Gregory* is distinguishable because that decision was based on the fact that the testifying witness was basing his knowledge on information that was "several years prior to the time of trial." Here, the evidence of SNJ's reputation was based on current information and on information as the

case developed for trial.

SNJ'S Statement That She Lied A Lot

During the forensic examination SNJ was asked: "Is there anything else that you would like me to know about you before we end the interview?" RP 28. SNJ's response was "I lie a lot." id. This testimony from SNJ that "She lied quite a bit" was relevant and should have been allowed. ER 401, 404(a)(2). The trial court abused its discretion when it denied cross-examination on this statement.. RP 35.

The defense argued that although the court was not dealing with child hearsay, pursuant to *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984) and subsequent cases: "...all of the cases talk about in child sex cases about how character of the child witness for truthfulness is a relevant factor for the court to consider in assessing the admissibility of child hearsay. I argue by analogy...." RP 29.

The defense proposed to submit this testimony pursuant to ER 404(a)(2) which states:

"(a) Character Evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:..

"(2) *Character of Victim*. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same...."

The trial court abused its discretion when it denied cross-

examination of this statement which addressed the victim's own assessment of herself for truthfulness and veracity. The jury was entitled to know that SNJ regarded herself to be not a truthful person. According to *State v. Ryan, supra* at 175:

“Where cross examination would serve to expose untrustworthiness or inaccuracy, denial of confrontation ““would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it’” (Citation omitted.) *Davis v. Alaska*, 415 U.S.308, 318, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974) (citing *Smith v. Illinois*, 390 U.S. 129, 131, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968)).”

The constitutional right to face and confront witnesses guaranteed in the Sixth Amendment and in Const. Art. 1, sec. 22 was violated.⁶

II. THE TRIAL COURT ERRED WHEN IT ALLOWED SNJ TO TESTIFY TO UNCHARGED CRIMES.

The trial court erred when it allowed SNJ to testify to an uncharged, alleged crime occurring in the summer of 2008. This incident was described by the prosecutor as occurring when Mr. Wright and SNJ took a short trip to Tacoma where Mr. Wright skinned a bear. RP 72. The prosecutor argued that it should be admitted into evidence to show “lustful

⁶ “The Sixth Amendment’s confrontation clause provides, “[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....” Const. Art. 1, sec. 22 (amend 10) provides: “in criminal prosecutions the accused shall have the right ...to meet the witnesses against him face to face....” *State v. Ryan*, at 169.

disposition towards the victim.” RP 73. It was argued that it was the same victim and that it was similar sexual contact that happened before. *id.*⁷

The defendant cited and argued *State v. Baker*, 89 Wn.App. 726, 732, 950 P.2d 486 (1997).RP 74. *Baker*⁸ sets out a four- part test. The trial court must find by a preponderance of the evidence that the misconduct did in fact occur. Next, the court must identify the purpose for which the evidence is being introduced. Thirdly, the court must determine whether the evidence is relevant or not. And finally, the fact finder must conduct an ER 403 analysis of weighing probative value against prejudicial effect.⁹

The defense further argued that in doubtful cases, the evidence must be excluded. RP 74 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)(see also *State v. Dewey*, 93 Wn.App. 50, 966 P.2d 414 (1998), *review denied* 137 Wn.2d 1024 (1999)).

⁷ The prosecutor cited *State v. Guzman*, 119 Wn.App. 176, 79 P.3d 990 (2003) in support of its position. RP 73, 80. Division III held that evidence of defendant’s previous sexual contact with his wife’s sister in 1995 was admissible in a prosecution six years later for the third degree rape of the sister. This testimony was admitted to show lustful disposition.

⁸Baker was charged and convicted of first degree child molestation. The court admitted evidence of his alleged molestation of his daughter eleven to fifteen years earlier to show a common scheme or plan and to rebut his defense of accident. Division One affirmed.

⁹ This four part test is based on *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995).

The standard of review is based on an abuse of discretion standard.

State v. Pirtle, supra at 648. The trial court erred when it admitted this evidence.¹⁰ The defense argued in part:

“The problem is that the facts of this particular incident are unlike any of the other facts in this case, and it’s my position that there is no proper purpose for admitting this evidence. The evidence is of marginal relevance given the fact that it’s completely different than all the other incidents, and to the extent that it may show a small amount of lustful disposition its probative value is outweighed by its prejudicial effect.”
RP 77.

The charged incidents all took place within the family home. This uncharged incident took place in a truck somewhere between Tacoma and Port Orchard. The charged incidents took place on the family couch or in the main bedroom when other family members were present in the house. The “bear incident” is alleged to have occurred “in a fairly remote area....”
RP 71. Consequently, the details of where the incident occurred are not like the charged crimes.

The trial court admitted this prejudicial testimony and stated:

“As to the purpose under 404(b), the court would find there are two purposes for which this could be admitted. One is a common design, plan or design, and the other is lustful

¹⁰ The court stated: “The details are very specific, and then there is some corroboration I suppose in the fact of the bear tag in that time frame, and that they had gone to Tacoma for the purpose of skinning a bear or watching one being skinned.” RP 81. Hence, the reference to the “bear incident.”

disposition, and 404(b) addresses prior sexual acts, so this would only go to counts I and II of the second amended information.”¹¹ RP 81.

However, Mr. Wright had extensive contact with SNJ unlike the facts in *Guzman* and unlike the facts in *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991) where “the prior conduct reveals a sexual desire for that particular victim.” *State v. Guzman*, 119 Wn.App. at 182 (citing *State v. Ferguson*, 100 Wn.2d 131, 134, 667 P.2d 681 (1983) (quoting *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953))).

The defense further argued that the details of the uncharged incident were not admissible. “Basically the state is introducing it as propensity evidence, which is a purpose not permitted by the rule.” RP 77. According to Teglund, 5C Washington Practice *Evidence*: 5th ed. (2007): “Evidence of the defendant’s lustful disposition towards a particular person borders on evidence of general propensity, barred by Rule 404(b).” *id.* at 581.¹²

¹¹ Count I alleged Child Molestation in the first degree. CP 34. This was the first incident on the couch in the family home watching television. Count II alleged Rape in the Third Degree and was dismissed. RP 225,261.

¹² Teglund further noted: “Rule 404(b) expresses the traditional rule that evidence of prior crimes, wrongs, or acts is inadmissible to demonstrate a person’s character or general propensities. As the rule itself puts it, such evidence is inadmissible “to prove the character of a person in order to show action in conformity therewith.” 5 *Washington Practice* 519. (see *State v. Herzog*, 73 Wn. App. 34, 867 P.2d 648 (Div. 2 1994);

Probative Value versus Unfair Prejudice

The trial court concluded its analysis and found that probative value outweighed unfair prejudice to Mr. Wright. RP 83. The trial court abused its discretion and erred. It did not address any prejudicial effect or any unfair prejudice to Mr. Wright. The court merely repeated the previous reasons that it used to justify admission of this marginal evidence; such as similarity of the contacts and “a common design to have her in an isolated situation where he could have sexual contact with her.” RP 83. As shown above, the other incidents did not involve isolation. The charged crimes occurred in the family home with other members of the family within feet of the alleged incidents.¹³

In *State v. Smith, supra*, the court stated:

“ER 403 requires exclusion of evidence, *even if relevant*, if its probative value is substantially outweighed by the danger of unfair prejudice. *See State v. Goebel, supra*. As stated in *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984), “[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its

Broun, *McCormick on Evidence* sec. 190 (6th ed.)).

¹³ SNJ described the family home as small. RP 207. Exhibit 1 is a layout of the house. This exhibit shows the three bedrooms as well as the family room. The family room/living room contains the television set and the couch. Ex. 2. Other exhibits depict looking down the hallways to the respective bedrooms. RP 202-07.

highest.”¹⁴

Smith, 106 Wn.2d at 776 (citing *State v. Goebel*, 36 Wn.2d 367, 218 P.2d 300 (1950)). See also, *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983): “[i]n doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.”

The trial court abused its discretion when it found that the evidence of the “bear incident” was admissible to show “common design, plan or design.” RP 81. The common plan was described by the trial court as:

“...and this common plan or overarching kind of plan was that he would be able to have sexual contact with her, and I think there was a common plan here that is shown through the two prior incidents and this third incident, the third one, the uncharged one being he is able to pull over into a remote area and have sexual contact with her.” RP 82.

In *State v. Dewey*, *supra*, the court held:

“In conclusion, we hold that the common features required by *Lough* to establish a plan must be features other than those common to most rapes. Otherwise, all evidence of other rapes would be admissible to show plan, and ER 404(b), which prohibits propensity evidence, would be meaningless.” *id.* at 57-8.

¹⁴ *Smith*’s convictions of the rape of three women was reversed based upon the admission of evidence of three burglaries committed by the defendant to prove identity. The Supreme Court found this to be prejudicial and reversed the Court of Appeals’ unpublished opinion.

(citing *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995)).¹⁵

According to *Dewey's* reasoning the court- in the case at bench- must find that the other contacts or incidents involve something that was "unique or common only to these rapes." *id.* at 56.

Here, evidence of the "bear incident" was admitted because the court reasoned that Mr. Wright wanted to be alone with SNJ in an isolated location. Yet, as Judge Armstrong noted in *Dewey* this is a feature that is common to most rapes. *id.* at 57.

III THE TRIAL COURT ERRED WHEN IT GRANTED
THE STATE'S MOTION IN LIMINE WHICH
PROHIBITED ANY TESTIMONY ABOUT SNJ'S
SEXUAL CONDUCT WITH HER FRIEND CHRISSY
AND DENIED THE DEFENDANT'S MOTION.

Prior to trial the prosecutor filed its motions in limine. No. 4 which requested: "No reference to the consensual history, if any, of the victim, who is identified by the initials: SNJ. ER 405; RCW 9A.44.020." CP 28. Conversely, the defense moved in limine to "4. Permit introduction of evidence of prior sexual contact with Chrissy and exposure to pornography." CP 31.

¹⁵ In *Lough* the common feature was that the defendant, a paramedic, employed his "...expertise with drugs, use of drugs on women with whom he had a relationship, and sex after the women had been rendered unconscious or confused." *Dewey*, 93 Wn. App. at 56.

The trial court granted the prosecutor's motion in limine and denied the defendant's motion to admit evidence that SNJ was having a relationship with Chrissy because it was "...barred under the Rape Shield Statute."¹⁶ RP 46. The trial court abused its discretion. The standard of review is abuse of discretion. The granting or denying a motion in limine is a matter within the trial court's discretion. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976).

The defense argued in its motion:

"The rape shield law is designed to prevent defendants from attacking the credibility of the victim based solely on her prior sexual conduct. But the statute does not apply when the evidence is admissible for another purpose. State v. Sheets, 128 Wn.App. 149, 115 P.3d 1004 (2005) In Sheets, defense counsel introduced evidence that the victim had been drinking all evening as evidenced by the fact that she was "more flirtatious than usual." After initially indicating that this evidence was admissible, the trial court changed its mind, suppressed the evidence, and

¹⁶ RCW 9A.44.020. The alleged sexual contact between SNJ and Chrissy was that they kissed each other and masturbated together, although not touching each other. RP 39. Additionally, the defense requested: "MR. WEAVER: What about the fact that my client was making efforts to limit the contact between [SNJ] and Chrissy because he believed that their conduct was inappropriate given their ages? THE COURT: I would not allow that." RP 48.

declared a mistrial. The Court of Appeals reversed holding that the victim's level of intoxication was critical to the theories of both parties.

Evidence is probative if it tends to make a disputed fact more probable or less probable. ER 401. The evidence of S.J.'s sexual history is relevant for two reasons: to rebut the assertion that she is sexualized because of the actions of the defendant; and (2) as evidence of bias and motive to lie.

Evidence of unusual sexual knowledge is admissible as evidence of corroboration of molestation. State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990). It is expected the State will present evidence that S.J. has unusual sexual knowledge because of the actions of Mr. Wright. Mr. Wright is entitled to rebut this theory with evidence that her sexual knowledge comes from other sources, such as independently accessing pornography and becoming sexually active with Chrissy.

Pursuant to the Sixth Amendment, Mr. Wright is entitled to cross-examine S.J. about her motivation to lie about him. The right of cross-examination allows more than asking general questions concerning bias and motive; it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case. Davis v. Alaska, 415 U.S.

308,316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).¹⁷ The evidence that S.J. perceived her step-father was trying to break her up from her girlfriend is admissible as evidence of bias and motive to lie.” CP 32-33; RP 42-44.

The trial court erred because it was the defendant’s theory of the case as argued to the trial court: “[Wright] was also taking steps to minimize their contact with each other to the point where he prevented Chrissy from moving into the family home, and it’s the defense theory that her anger with my client at that point was what prompted the allegations.” RP 43. This testimony should have been admitted particularly since the prosecutor’s case turned on the credibility of the alleged victim.¹⁸

IV. THE TRIAL COURT ERRED WHEN IT DENIED CROSS EXAMINATION OF SNJ ABOUT HER KNOWLEDGE OF CHRISSY AND FOSTER CARE.

The trial court abused its discretion when it excluded testimony by SNJ on cross-examination that she was aware of her friend Chrissy

¹⁷ The United States Supreme Court reversed the defendant’s convictions and stated: “But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green’s [juvenile] testimony which provided “a crucial link in the proof...of petitioner’s act.” *Douglas v. Alabama*, 380 U.S. at 419, 85 S.Ct. at 1077.” *id.* 415 U.S. 318.

¹⁸ See generally, *Johnson v. Moore*, 427 F. Supp. 2d 1344 (M.D.Fla. 2007) (Florida’s Rape Shield Statute did not bar evidence that the alleged victim was a prostitute. The testimony was admitted to contradict the assertion that the victim had a minimal sexual history.)

alleging sexual misconduct by her uncle and subsequently being placed in foster care. This was part of the defendant's theory of the case. RP 165-173.

The defense asked during cross-examination:

“Q To the best of your knowledge, had Chrissy ever been in foster care?

MR. HULL: Objection, relevance.” RP 166.

The defense then argued in justification of this line of questioning outside the presence of the jury:

MR. WEAVER: Your Honor, the defense theory of this case is that [SNJ] made these disclosures during a period of time when she was having problems with Mr. Wright, and I intend to get into the nature of those problems, and it is my theory that she was trying to get herself placed into foster care placement, and I think it's important for me to explore what she knew about foster care and what she believed— Really what she knows is irrelevant. What she believed to be true is more relevant. And it is our position that she knew that alleging sexual abuse was the fast track into foster care.” RP 166-67.

An offer of proof indicated that SNJ had discussions of Chrissy's sexual abuse by Chrissy's uncle with her. And that Chrissy was not having contact with her uncle. However, SNJ did not know whether Child Protective Services or any other agency was involved or not. RP 170.

Based on this showing the trial court ruled:

“THE COURT: Based on this offer of proof, the court will sustain the state's objection that this is not relevant, and that under 402, it would be confusing to the jury because this doesn't fit together, that [SNJ] knows anything about

CPS and Chrissy.” RP 172.

ER 402 states:

“ All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.”

The defendant is entitled to argue his theory of the case.¹⁹ The trial court abused its discretion when it excluded the above stated testimony. This testimony would have shown the origins of SNJ’s motives to allege sexual misconduct by Mr. Wright i.e., so that she could be placed into foster care outside the family home. Motive is always subject to cross-examination. Also, according to Teglund the Rules of Evidence are subject to constitutional requirements. *5 Washington Practice* 4-5 (5th ed. 2007).

See the following examples: (*State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996) (Supreme Court reversed trial court’s ruling that excluded testimony by alibi witness of observing a child alive on the day

¹⁹ By comparison and as a general proposition each side is entitled to having the jury instructed on its theory of the case as long as there is evidence to support that theory. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)(*State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 105 (1997).

after the date the defendant was alleged to have kidnaped and murdered the child) (*Holmes v. United States*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (defendant's right to a fair trial was violated by the exclusion of evidence that, according to the defense, would have shown that a third party committed the charged crime.) (*State v. Roberts*, 80 Wn.App. 342, 908 P.2d 892 (Div. I 1996) (Court of Appeals reversed the trial court and held that the exclusion of testimony violated the defendant's constitutional rights to present a defense and to a fair trial. The defendant, who was charged with possession of marijuana with intent, tried to introduce evidence that there was no marijuana growing operation in his basement four months prior to renting the basement to a subtenant.)

The defendant was denied his right to cross-examination of SNJ's motivations to allege sexual abuse. It as stated in *Davis v. Alaska, supra*, at 415 U.S. 316: "Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested."

V. THE TRIAL COURT ERRED WHEN IT DENIED
DEFENDANT'S PROPOSED EXHIBITS NO. 10 AND 11
AND CROSS EXAMINATION ON THAT SUBJECT MATTER.

During cross-examination of SNJ the defense offered proposed exhibits Nos. 10 and 11. RP 184. These exhibits were the first pages of Myspace.com and Ubalabala which was the Myspace name for SNJ. id. SNJ represented herself on the internet as being age 19 years old, which

was not true. The exhibits also included what she stated her mood was an hour and a half following her interview with the defense on September 16, 2009. RP 185. The second message that SNJ put on the Myspace page were her comments “within an hour or two” of her interview with the prosecutor. id.

SNJ comments following the defense interview were: “Tired of all this fucking shit and just want all this to go away.” RP 186. Her comments following the prosecutor’s interview were: “I want it over. I am so fucking tired of this shit. Just let it be done. I want to get it over with. I hate him and her. Why did this happen?” id.

The defense asserted that this information was relevant and argued:

“...from my perspective, a person who had been lying for over a year is going to be tired of lying, they are going to be tired of being constantly asked the same questions about what is going on.

You know, I am not saying that’s the only interpretation. Mr. Hull is free to argue that there are contrary interpretations, and I am not saying that there aren’t, but it’s my position that [SNJ] set into motion some things in September of 2008 that have had consequences in her life and she is tired of having to deal with the consequences of what her lies have been, and that’s how I intend to argue it to the jury....”
RP 187.

The trial court erred when it denied these exhibits and/or any cross-examination concerning them. The exhibits were refused based on

ER 401. RP 188. The court stated: “They are not relevant to the issues which the jury has to decide.”²⁰ *id.* Rulings on the admissibility of evidence are reviewed for an abuse of discretion. *State ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

ER 401 states:

”Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

It was stated in *Teglund* on the subject of relevant evidence and materiality:

“Generally. With reference to materiality, Rule 401 defines relevant evidence as evidence that tends to prove or disprove “any fact that is of consequence to the determination of the action.” Facts that are “of consequence” include facts that offer direct evidence of an element of a claim or defense; also included are facts that imply an element of a claim or defense (circumstantial evidence), *as well as facts bearing on the credibility or probative value of other evidence (background information and evidence offered to impeach or rehabilitate a witness).*” (Italics mine.)

5 Washington Practice, pocket part at 14 (2009).

By comparison in *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999) the Supreme Court approved introduction into evidence of

²⁰ The defense offered to redact any information in the proposed exhibits that were prohibited by the orders in limine, i.e. SNJ’s sexual orientation or other matters protected by the Rape Shield Statute. RP 189.

defendant's letters written while in jail after a double homicide that expressed hostility towards the victims. The court ruled that these statements by the defendant were relevant to show motive and intent. Conversely, here, the defense had a similar reason to introduce the victim's statements following her interviews. The purpose was background information to impeach her with and thus material with regard to the victim's credibility.

Evidence of SNJ's statements after the interviews should have been admissible as evidence of bias and motive to lie. According to, *Davis v. Alaska, supra*, the defense should have been allowed to show that a government witness was biased because he was on juvenile probation. It was argued that his testimony might have been affected by promises or threats that could have been made by the arresting officer.

The Supreme Court of the United States reversed the convictions for burglary and grand larceny because of a denial of the defendant's constitutional right to confront witnesses. The High court stated: "We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959)." *id.* 415 U.S. 317-18; Sixth and Fourteenth Amendments.

As *Davis v. Alaska*, demonstrates, there is a distinction between an attack on general character for truthfulness and, as the Court found: “A more particular attack on the witnesses’ credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” 415 U.S. 317, 94 S.Ct. 1110.

VI. THE EVIDENTIARY ERRORS OCCURRING DURING TRIAL WERE NOT HARMLESS.

The prosecutor has the burden of proving guilt beyond a reasonable doubt. The defendant has the constitutional right to a fair and unbiased trial. The harmless error test has been variously stated. Generally, prejudicial error is error that affects the final results of the trial. Teglund, 5 Washington Practice *Evidence* 109.

According to *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982): permitting the Ruth Pitts’ homicide evidence to be introduced pursuant to ER 404(b) in the defendant’s trial for killing David King ten months later was error. Whatever relevance there was was, “...far outweighed by the potentially prejudicial effect of the evidence.”

However, the error was ruled harmless however because the remaining untainted evidence, which included Robtoy’s confession to the King murder, was overwhelming. The rule that was applied stated:

“...error is not prejudicial unless, within rationale probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *id.* at 44. See also, *State v. Cunningham*, 93 Wn.2d 823,831, 613 P.2d 1139 (1980).

In *State v. Traweck*, 43 Wn.App. 99, 715 P.2d 1148 (Div. II 1986) a friend of a co-defendant testified that he and the defendant planned to raid a marijuana factory on the day of the attempted robbery. This evidence was admitted because it happened on the same day as the robbery and placed the defendant near Belfair, Washington on the day of the robbery. The court stated:

“Error in admitting evidence under ER 404(b) is not of constitutional magnitude; therefore, reversal is required only if, within reasonable probabilities, the trial’s outcome would have been different had the error not occurred.

Traweck at 106.²¹ (There the error was harmless in light of the evidence against the defendant.)

Assessment of the Evidence

The evidence in this case was not overwhelming against Mr.

²¹ The court further stated at 106: “Evidence is admissible under ER 404(b) if (1) it is logically relevant to a material issue before the jury, and (2) its potential for prejudice does not substantially outweigh its probative value. *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982). The trial court must weigh pre-judice against probative value on the record. *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984).”

Wright. One of the original four counts had to be dismissed for lack of evidence. RP 225. The testimony of Officer Brown was that when Mr. Wright was interrogated in his home he advised the deputy "...that he had not touched her inappropriately." RP 96. There was no confession except that Mr. Wright admitted to observing some "adult porn" on the internet to attempt to answer SNJ's general questions about sex.

Jennifer Jorge, Wright's significant other and the mother of SNJ, testified that when she and Mr. Wright engaged in sexual activity over the past ten years there were distinguishing marks on his penis that she noticed. RP 243. Mr. Wight had a mole on the right side and a scar was visible that ran along side of the mole on his penis. Exhibits 12 and 13 were admitted into evidence. These were distinguishing marks. RP 242.

Ms. Jorge was not shown to be incredible. This evidence regarding the appearance of Mr. Wright's penis was not disputed. On the other hand, SNJ testified that there were no distinguishing marks on Mr. Wrights penis, nor were there any moles or marks of any kind on his penis. RP 211, 214-215.

Furthermore, SNJ's memory of any sexual contacts or the circumstances surrounding the charged incidents was very poor. She testified on direct examination "I don't remember" at least 28 times and "I don't know," at least 12 times.

Part of the defendant's closing argument concerned SNJ's lack of memory. Mr. Weaver argued for the defense: "[SNJ]'s real unclear about when these events that she's talking about occurred, and it was impossible to really nail her down." RP 280. "...and she says Mr. Wright touched her vagina. She doesn't know if it was on the inside or outside of her underwear, but she remembers being touched." RP 280-81. "She claims at some unspecified time there were a couple of other incidents, but you get the impression from her testimony that, she claims that counts III and IV occurred one day apart...but we really don't know where in that time line it is." RP 281.

Constitutional Review

Constitutional error is presumed prejudicial. *State v. Stephens*, 93 Wn.2d 186, 607 P.2d 304 (1980). The test for evidentiary rulings involving constitutional error is that the error may not be necessarily prejudicial but it is presumed to be. Teglund, 5 Washington Practice *Evidence* 110. This presumption can be overcome only if the prosecutor proves that the constitutional error did not prejudice the accused and that he or she would have been convicted anyway, even if the error had not occurred. The burden is on the state to overcome the presumption.

In *State v. Stephens, supra*, the defendant asserted that his constitutional right to a jury trial was infringed. Const. Art. 1, sec. 22.

The Supreme Court determined that the trial court's instruction allowing the jury to convict the defendant of assault in the second degree while armed with a firearm was in error. It was error because it did not require a unanimous verdict as to one of the two alleged victims. This error was of constitutional magnitude. *id.* at 190.

The Supreme Court reversed the Court of Appeals because that court found the error to be harmless. 72 Wn.App. 548. The Supreme Court first noted: "...violation of a defendant's constitutional rights is presumed to be prejudicial. *State v. Burri*, 87 Wn.2d 175,181, 550 P.2d 507 (1976)." *id.* at 190-91. The High Court then stated:

"Moreover, an error of constitutional proportions will not be held harmless unless the appellate court is "able to declare a belief that it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18,24, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967), *accord*, *State v. Johnson*, 71 Wn.2d 239,244-45, 427 P.2d 705 (1967)"

Stephens, 93 Wn.2d at 191.

As shown, it must affirmatively appear from the record that the error is harmless beyond a reasonable doubt. *State v. Roberts*, 31 Wn.App. 375, 642 P.2d 762 (Div. II 1982). Stated conversely: "...the error is harmless if the untainted evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached." *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

In *State v. Watt*, 160 Wn.2d 626, 166 P.3d 640 (2007) Justice Sanders stated in his concurring opinion: “But if James Watt’s improperly admitted statements had controverted Kendra’s defense or involved relevant evidence properly before the jury, the error could not have been harmless.” *id.* at 642.

It is well established under the federal law that a violation of the Confrontation Clause is subject to harmless error analysis. *Delaware v. VanArsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (“...the constitutionally improper denial of a defendant’s opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless error analysis.”)” *id.* at 684.²² (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (Delaware trial court precluded all possibility of cross-examination about motive to favor prosecution in witnesses’ testimony by prohibiting examination about dismissal of the witnesses’ pending public drunkenness charge.)

VII. BASED ON THE CUMULATION OF ERRORS DOCTRINE
MR. WRIGHT’S CONVICTION SHOULD BE REVERSED.

²² Compared to automatic reversal that is required when a constitutional error is characterized as a “structural defect.” The *Chapman* principle stated that a reviewing court must be able to “...confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Delaware v. Van Arsdall*, 475 U.S. at 681.

The cumulative error doctrine applies to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal, but when they are combined they may deny an accused a fair trial. *State v. Grieff*, 141 Wn.2d 910,929, 10 P.3d 390 (2000). See *State v. Whalon*, 1 Wn.App. 785,804, 464 P.2d 730 (1970) “(reversing conviction because (1) court’s severe rebuke of the defendant’s attorney in the presence of the jury, (2) court’s refusal of the testimony of the defendant’s wife, and (3) jury listening to tape recording of line- up in the absence of court and counsel).” *Grieff*, 141 Wn.2d at 979.

See also, *State v. Badda*, 63 Wn.2d 176,183, 385 P.2d 859 (1963) conviction for two counts robbery; court held that the combined effect of an accumulation of errors, no one of which standing alone “might be of sufficient gravity to constitute grounds for reversal, may well require a new trial.” Failure to give precautionary instruction, failure to give instruction to disregard prejudicial remarks by prosecutor, inadequate accomplice instruction and failure to instruct on requirement of a unanimous verdict required reversal.

In *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) the accumulated evidentiary errors committed by the trial court necessitated a new trial. The prior acts of the defendant should not have been admitted pursuant to ER 404(b) where they were offered to prove modus operandi

and identity. (citing *State v. Irving*, 24 Wn.App. 370,374, 601 P.2d 954 (1979), *review denied*, 93 Wn.2d 1007 (1980)).

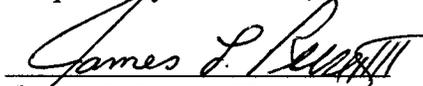
D. Conclusion

Based on the trial court's multiple evidentiary rulings which insulated SNJ from significant impeachment evidence, the prosecutor was able to fashion a closing argument portraying SNJ as a credible victim. RP 262-64.²³ Whereas SNJ's mother and grandmother considered her to be an habitual and skillful liar. The jury was not fully apprised of SNJ's propensity to lie.

This court should reverse Mr. Wright's convictions and remand the case for a new trial. The errors in this case were not constitutionally harmless. They were cumulative and require a reversal and remand.

Dated this 31st day of May 2010.

Respectfully Submitted,



James L. Reese, III

WSBA #7806

Court Appointed Attorney
for Appellant

²³ Mr. Hull asserted at the very inception of his closing argument: "There are two people involved in this case, however, that can point to [SNJ]'s credibility without any hesitation at all, and they can point to her credibility and give you what you need to go back and decide this case, go back to make the determination that [SNJ]'s testimony was credible. Who are those two people? [SNJ]'s mother and the defendant." RP 262.

TITLE V. PRIVILEGES

RULE 501. GENERAL RULE

The following citations are to certain statutes and case law that make reference to privileges or privileged communications. This list is not intended to create any privilege, nor to abrogate any privilege by implication or omission.

- (a) **Attorney-Client.** (Reserved. See RCW 5.60.060(2).)
- (b) **Clergyman or Priest.** (Reserved. See RCW 5.60.060(3), 26.44.060, 70.124.060.)
- (c) **Dispute Resolution Center.** (Reserved. See RCW 7.75.050.)
- (d) **Counselor.** (Reserved. See RCW 18.19.180.)
- (e) **Higher Education Procedures.** (Reserved. See RCW 28B.19.120(4).)
- (f) **Husband-Wife.** (Reserved. See RCW 5.60.060(1), 26.20.071, 26.21.355(8).)
- (g) **Interpreter in Legal Proceeding.** (Reserved. See RCW 2.42.160; GR 11.1(e).)
- (h) **Journalist.** (Reserved. See *Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982); *State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984).)
- (i) **Optometrist-Patient.** (Reserved. See RCW 18.53.200, 26.44.060.)
- (j) **Physician-Patient.** (Reserved. See RCW 5.60.060(4), 26.26.120, 26.44.060, 51.04.050, 69.41.020, 69.50.403, 70.124.060, 71.05.250.)
- (k) **Psychologist-Client.** (Reserved. See RCW 18.83.110, 26.44.060, 70.124.060.)
- (l) **Public Assistance Recipient.** (Reserved. See RCW 74.04.060.)
- (m) **Public Officer.** (Reserved. See RCW 5.60.060(5).)
- (n) **Registered Nurse.** (Reserved. See RCW 5.62.010, 5.62.020, 5.62.030.)

[Adopted effective September 1, 1988; amended effective September 1, 1992; January 4, 2005.]

TITLE VI. WITNESSES

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as otherwise provided by statute or by court rule.

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

[Amended effective September 1, 1992.]

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

[Amended effective September 1, 1992.]

RULE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

[Amended effective September 1, 1992.]

RULE 605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

RULE 606. COMPETENCY OF JUROR AS WITNESS

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

[Amended effective September 1, 1992.]

RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

[Amended effective September 1, 1992.]

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(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.

(b) **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking

of 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.

[Amended effective September 1, 1992.]

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) **General Rule.** 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.

(b) **Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile Adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that

admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **Pendency of Appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

[Amended effective September 1, 1988.]

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

[Amended effective September 1, 1992.]

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross Examination.** Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

[Amended effective September 1, 1992.]

RULE 612. WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh memory for the purpose of testifying, either: while testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires.

[Amended effective September 1, 1992.]

TITLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

**RULE 301. PRESUMPTIONS IN GENERAL
IN CIVIL ACTIONS AND PROCEEDINGS
[RESERVED]**

**RULE 302. APPLICABILITY OF STATE LAW
IN CIVIL ACTIONS AND PROCEEDINGS
[RESERVED]**

TITLE IV. RELEVANCY AND ITS LIMITS

**RULE 401. DEFINITION OF "RELEVANT
EVIDENCE"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**RULE 402. RELEVANT EVIDENCE GENER-
ALLY ADMISSIBLE; IRRELEVANT EVI-
DENCE INADMISSIBLE**

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

**RULE 403. EXCLUSION OF RELEVANT EVI-
DENCE ON GROUNDS OF PREJUDICE,
CONFUSION, OR WASTE OF TIME**

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.

**RULE 404. CHARACTER EVIDENCE NOT
ADMISSIBLE TO PROVE CONDUCT;
EXCEPTIONS; OTHER CRIMES**

(a) *Character Evidence Generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *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.

[Amended effective September 1, 1992.]

**RULE 405. METHODS OF PROVING
CHARACTER**

(a) *Reputation.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific Instances of Conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

[Amended effective September 1, 1992.]

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

**RULE 407. SUBSEQUENT REMEDIAL
MEASURES**

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership,

AMENDMENT VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT (XIV)

ss.1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF WASHINGTON

ARTICLE 1, ss. 22 Rights of the Accused

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases:

Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

RCW 9A.44.020

Testimony — Evidence — Written motion — Admissibility.

(1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

[1975 1st ex.s. c 14 § 2. Formerly RCW 9.79.150.]

FILED
COURT OF APPEALS
DIVISION TWO

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STATE OF WASHINGTON

BY _____
DEPUTY

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

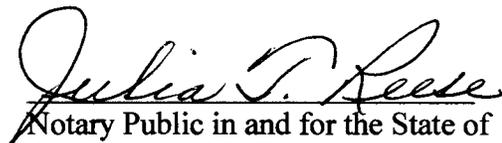
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 2nd day of June, 2010, he deposited in the mails of the United States of America, postage prepaid, the original and one(1) copy of Appellant's Brief in State of Washington v. James Earl Wright, No. 40295-5-II for filing to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant at his last known address; James Earl Wright, DOC #335581, Monroe Correctional Complex/Twin Rivers Unit, D-209-1, P.O. Box 888, Monroe WA 98272-0888.



Signed and Attested to before me this 2nd day of June, 2010 by James L. Reese, III.



Notary Public in and for the State of
Washington residing at Port Orchard.
My Appointment Expires: 4/04/13