

COURT OF APPEALS
DISTRICT II
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STATE OF WASHINGTON
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NO. 40600-4-II

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

STATE OF WASHINGTON,

Respondent,

vs.

PATRICK JOSEPH CLEARY,

Appellant.

BRIEF OF APPELLANT - Corrected Version

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's refusal to prevent the state from eliciting evidence concerning the defendant's alleged drug use denied him a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, because it was more prejudicial than probative.

2. The trial court's decision to allow a "victim's advocate" to stand next to the complaining witness during her testimony in front of the jury constituted a comment on the evidence by the court in violation of Washington Constitution, Article 4, § 16, and denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment .

Issues Pertaining to Assignment of Error

1. Does a trial court's refusal to prevent the state from eliciting evidence concerning a defendant's alleged drug use deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when that evidence was more prejudicial than probative, and when the jury would have returned a verdict of acquittal had the evidence been excluded?

2. Does a trial court's decision to allow a "victim's advocate" to stand next to an 11-year-old complaining witness during her testimony before the jury constitute a comment on the evidence by the court in violation of Washington Constitution, Article 4, § 16, when the jury interprets the presence of the advocate as the court's implied statement that the witness was truthful, and does that action also deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

Factual History

Sometime during the beginning of 2004, Melissa Lee separated from her husband Shannon Lee, who filed for divorce. RP 144-151, 241-244.¹ Prior to their separation, the two of them were residing in the City of Vancouver with Melissa's seven-year-old son B.L. and the two children they had together, J.L.L.(DOB: 5/11/1998) and J.L. *Id.* At the time, J.L.L. was six-years-old and J.L. was two-years-old. *Id.* When Melissa moved out, she left all three children with Shannon, and when they divorced in April of 2004, she gave up custody of all three children to Shannon. RP 148-151. After moving out of the family home, Melissa got her own small apartment in Clark County, but spent the majority of her time living with the defendant. *Id.* During this period, Melissa had visitation with her children on every other weekend, and would usually spend her time with them at her apartment, although the children occasionally visited her at the Defendant's home. RP 152-153.

According to Melissa, during the time she lived with the defendant, she was regularly using methamphetamine, as was the defendant and their friends, including a woman by the name of Peggy Green. RP 59-61, 153,

¹The record in this case includes six continuously numbered volumes of verbatim reports, referred to herein as "RP [page #]."

157-159. Many times while using methamphetamine, Melissa and the defendant would participate in sexual acts with third parties, including Peggy Green. *Id.* Melissa Lee later testified that she would not have participated in such aberrant sexual behavior but for her methamphetamine use. RP 157-159.

According to Melissa, she did remember one time when her children were visiting at the defendant's home and she asked him to take J.L.L. with him to go purchase some diapers at Fred Meyers while she made dinner. RP 152-153. The defendant and J.L.L. then left, and returned a while later with the diapers. *Id.* Melissa noted nothing amiss when they returned. *Id.* Later that evening or the next day, J.L.L. told her mother that the defendant had molested her when they went to get the diapers, and she repeated this statement to her mother three days later. RP 427-428. J.L.L. reported that her mother had told her that she "would take care of it." *Id.* Melissa Lee later stated that she had no memory of her daughter J.L.L. saying any such thing to her. RP 181. During this time period, the defendant owned a white Ford F-150 truck. RP 154-156, 177-178. He also owned a canopy which he would occasionally put over the truck's bed. *Id.* There were no chairs in the bed of the truck, and the canopy was low enough that you couldn't put a lawn chair in the bed of the truck and sit in it with the canopy attached to the bed. *Id.*

By October of 2004, Melissa broke off her relationship with the

defendant and took up residence with her mother in Olympia for about a year. RP 144-147. She then moved to San Francisco for two or three years, and then to Phoenix, Arizona, where she has resided for the past two years. *Id.* During this time, she would occasionally have visitation with her children. RP 157-159. One such visit occurred in the summer or winter of 2008, when her ex-husband Shannon arranged for J.L.L. to fly to Phoenix for a month. *Id.* According to Melissa, during this visit, J.L.L. made a claim to her that the defendant had molested her years before when she had gone to Fred Meyers with him. *Id.* This happened after her ex-husband called her and stated that J.L.L. had told his current wife's daughter that the defendant had touched her inappropriately. RP 186-188.

After J.L.L. returned to Vancouver from her visit with her mother in Arizona, the Camas Police Department began an investigation into J.L.L.'s allegations against the defendant. RP 287-296. During this investigation, J.L.L. spoke to a number of people about her claims, including Camas Police Department Special Investigator Carol Buck, Pediatric Nurse Practitioner Marsha Stover, J.L.L.'s paternal grandmother Teri Lee, and eventually Defendant's Attorney Aaron Ritchie. RP 99, 265-271, 296, 412-428. She also wrote two letters to Detective Buck about her claims. RP 320-326; Exhibit 6 & 8. J.L.L. was 10-years-old by the date of her first interview, which was with Detective Buck. RP 296-301.

According to Detective Buck, J.L.L. made the following claims during two interviews the Detective had with her: (1) on one occasion when she was in the truck with the defendant, he had her crawl through the rear window of the cab in order to get into the back of the truck under the canopy, (2) this happened when they were parked by a red building with white columns, (3) the defendant then walked around and got into the bed of the truck under the canopy with her, (4) he then touched her inappropriately, and (5) this happened one time only, and there were no other incidents of any inappropriate touching. RP 455-465. At no time during the two interviews did J.L.L. claim any type of inappropriate contact other than “touching,” she did not claim any form of oral-genital contact, and she did not claim that anything happened at Fred Meyers. *Id.*

J.L.L.’s claims to Nurse Practitioner Marsha Stover were as follows: (1) one time when she was with the defendant, he had her walk around and get in the back of the truck under the canopy, (2) once in the bed of the truck under the canopy, he took her pants off and placed them on a chair, (3) he then touched his “private area” on the outside of her “private area” but did not put it inside her “private area,” (4) this was the only type of inappropriate touching that occurred, (5) when he did this she screamed and told him five times to stop, (6) he then stopped and they went home, and (7) this happened on one occasion and one occasion only. RP 103-111, 112-113, 127-131.

J.L.L.'s claims to her paternal grandmother Teri Lee were as follows: (1) on multiple, separate occasions, the defendant touched her inappropriately, (2) this sexual contact occurred in such places as home when her mother was gone to the store, and the parking lots of both Fred Meyers and Safeway when she was with the defendant in his truck, (3) during these instances of abuse, the defendant would lick her private area, and (4) the instances of abuse in the parking lots of Fred Meyers and Safeway happened on separate occasions. RP 267-279.

J.L.L.'s claims to the defendant's attorney during his interview with her were as follows: (1) the defendant touched her inappropriately when they were in the back of the defendant's truck, which was grey or silver, (2) this happened one time when they went to the store together, (3) this lone incident of touching happened after they came out of the store and not before they went into the store, (4) the defendant did not take off any of his clothing during the inappropriate touching, and (5) this happened on one occasion and one occasion only and at one place and one place only. RP 412-428.

In the two letters J.L.L. wrote to Detective Buck, she made the following claims: (1) "his truck was silver," (2) "he took me to this big building it looked like a hospital," (3) "it was red . . . it was by Safeway," (4) "he made me clime [sp] in the back of the canapie [sp] and he got out to get in the back," (5) he "stuck his private in mine," (6) "he never touched me

with his mouth,” and (7) “he never did anything else.” Exhibits 6 & 8.

During her testimony at trial on direct examination, J.L.L. made the following claims: (1) on one occasion she went to Fred Meyers with the defendant to get diapers for her brother, (2) the defendant was driving his truck, which was grey or silver, (3) once they got to Fred Meyers, while in the passenger cab of the truck, the defendant pulled her pants down or her skirt down, (4) he then put his private “in mine,” (5) people were walking by but didn’t see what was happening, (6) when he stopped, the two of them went into the store, bought the diapers, returned to the truck, drove to a red building, and stopped, (7) while parked by the red building, he again pulled her pants or her skirt down and put his private inside her until she cried, (8) they never went into the back of the truck under the canopy, and (9) after the second incident, he said he would hurt her mother if she told anyone what happened. RP 377-395.

Finally, on cross-examination at trial, J.L.L. made the following claims: (1) all of the sexual contact occurred in the front of the truck, (2) she has never been in the back of the truck under the canopy and no sexual contact ever happened in the back of the truck, (3) there is a window between the cab of the truck and the canopy but she has never crawled through that window, (4) there have never been any seats or chairs in the back of the truck under the canopy, (5) the defendant put his mouth on her private while they

were at Fred Meyers, (6) she did not tell her grandmother that it had happened on three separate occasions, and (7) she does know the difference between inside and outside, but she didn't remember telling Nurse Stover that he had not put his private in her. RP 407-441.

Procedural History

By information filed June 26, 2009, and amended February 18, 2010, the Clark County Prosecutor charged the defendant Patrick Joseph Cleary, with one count of first degree rape of a child and one count of intimidating a witness. CP 1-2, 40-41. Prior to trial, the defense filed a motion in limine seeing to preclude any evidence of the defendant's alleged drug use as irrelevant and unfairly prejudicial. RP 38-43. The court initially deferred ruling on the motion. *Id.* The trial then proceeded through *voir dire* and opening, after which the state called 10 different witnesses, including complainant J.L.L. CP 57, 83, 92, 96, 144, 224, 240, 255, 284, 269. The defense then called three witnesses. CP 455, 466, 485. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History.

The state's first witness was Peggy Green. RP 57-81. During her testimony, she told the jury that on a number of occasions, she, Melissa Lee, and the defendant had sex together and smoked methamphetamine. RP 59-61. The defense then renewed its pretrial objection to any evidence

concerning the defendant's alleged drug use as irrelevant and unfairly prejudicial. *Id.* The court overruled the objection and let the testimony concerning the defendant's alleged drug use stand. *Id.* Peggy Green then went on to state that she had recently remembered that on one specific occasion when she, the defendant, and Melissa Lee were having sex together and smoking methamphetamine, the defendant told her when Melissa had left the room for a moment, that he had Melissa's daughter J.L.L. sitting on his lap while he was in his pickup parked at Fred Meyers and people were walking by. RP 59-61. According to Ms Green, she did not tell Melissa about what the defendant said until recently. RP 63-65.

In addition, during Melissa Lee's testimony, the state asked her if she had any further contact with the defendant after she ended her relationship with him. RP 153. The state's question, and Melissa Lee's response were as follows:

Q. All right. Did that end the relationship between the two of you and you were done with him and you had nothing further to do with him?

A. No, I continued to be his drug dealer.

RP 153.

Upon hearing this question, the court sustained a defense objection and stated: "The jury will disregard that." RP 153.

Although the second reference to the defendant's methamphetamine

use was technically not evidence admitted for use by the jury, the jury were present to hear the question and answer, and Peggy Green's testimony about the defendant's methamphetamine use during the time he allegedly sexually assaulted J.L.L. was admitted into evidence for the jury consideration. RP 59-61. During rebuttal, the state specifically argued to the jury that the defendant's methamphetamine use and association with Melissa Lee was evidence to indicate that he had sexually abused J.L.L. RP 562-563. The state's argument on this point went as follows:

There was a year of self-indulgence that Melissa went through that started when she met this man (indicating defendant) right here. He was the person she was with during this year of indulgence, where what she did was take meth, she would do whatever she felt like doing, she would pay no attention to her child, she would take meth, and she would have sex with whoever she wanted to have sex with and pay no attention to her daughter, just do whatever she felt like.

This gentleman is front and center in that summer. You can judge people by the company they keep. He's also having sex with Peggy Green at the same time he's having sex with her and smoking methamphetamine.

They were all extremely self-indulgent. They were all into risk-taking, smoking meth is risk-taking. Having sex with a young child in a parking lot at a store is risk-taking.

RP 562-563.

The state's last witness was J.L.L, who was 11-years-old during her testimony. RP 369. During her direct examination, she provided the jury with some background information about her and her family, and she

identified the defendant in court as the person who touched her inappropriately. RP 369-376. The state then had her explain the facts concerning the incident in which her mother had her go to the store with the defendant to get diapers for her brother. RP 377-382. During this testimony, she started crying, and the court called a recess at the state's request. RP 382. The jury then exited the courtroom to the sight of J.L.L. on the stand in tears. *Id.* This occurred sixteen minutes into her testimony at 9:31 am on the third day of trial. CP 133-134.

At 10:09 am, almost 40 minutes later, the court reconvened without the jury, and the prosecutor stated that J.L.L. refused to return to the courtroom if the defendant was present. RP 385-387. Following an unrecorded chamber's conference, the court ruled, over the defendant's objection, that J.L.L. would be allowed to continue her testimony with a victim-witness advocate sitting in a second chair on the witness stand with her. RP 384-385; CP 134. Finally, at 10:44 am, exactly an hour and thirteen minutes after the court recessed because J.L.L. was crying, the jury returned, and the state resumed its testimony with a victim-witness advocate sitting next to J.L.L. on the witness stand. RP 387; CP 134. At the end of the trial, the court gave the following instruction concerning the presence of the victim-witness advocate:

You should not give any special weight to the testimony of J.L.L.

because she had an advocate with her while testifying.

CP 108.

Following instruction and argument by counsel, the jury retired for deliberation. CP 135. After about three and one-half hours of deliberation, the jury sent out a note requesting further clarification on the meaning of the phrase “reasonable doubt.” CP 128. The jury’s question stated as follows:

What percentage of personal conviction does each individual need to render a guilty verdict beyond a reasonable doubt? i.e. 70%

CP 123.

The court responded with the following: “Please reread the reasonable doubt jury instruction.” CP 123. The jury then continued deliberating, and eventually returned verdicts of “guilty” on both counts. RP 136-137. The court later sentenced the defendant to 20 months on Court II, concurrent with a sentence of life in prison on Count I with a minimum mandatory time to serve of 120 months before he could first be considered for release. CP 156-170. The minimum mandatory time was within the suggested standard range of 102 to 136 months for this charge with the defendant’s offender score, which was zero. *Id.* The defendant thereafter filed timely notice of appeal. CP 175-176.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO PREVENT THE STATE FROM ELICITING EVIDENCE CONCERNING THE DEFENDANT'S ALLEGED DRUG USE DENIED HIM A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT BECAUSE IT WAS MORE PREJUDICIAL THAN PROBATIVE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

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.

ER 403.

In weighing the admissibility of evidence under ER 403, a court should consider the following: (1) the importance of the fact that the evidence is intended to prove, (2) the strength and length of the chain of inferences necessary to establish the fact, (3) whether or not the fact is

disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that

the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

Turning to the case at bar, the trial court allowed the state to elicit evidence that the defendant was using methamphetamine during the time period in which the complaining witness claimed the defendant raped her. The state also elicited evidence from a witness that she repeatedly

participated in a “threesome” with the defendant and the mother of the complaining witness during the relevant time period, and that she would never have participated in such aberrant sexual practices absent her own methamphetamine use. There was precious little relevance to this evidence of the defendant’s alleged drug use. Conversely, it created a large amount of unfair prejudice. First it invited the jury to convict the defendant based upon the inference that he committed the alleged rape of a child, itself another form of aberrant sexual behavior, because he was also using methamphetamine. Second, it also invited the jury to convict the defendant based upon his bad character as a drug user. Thus, it invited the jury to convict based upon the defendant’s “propensity” to commit crimes.

It is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is

presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

The decision in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), illustrates this principle. In *Pogue*, the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in

the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In the case at bar, the admission of the evidence of the defendant's drug use invited the jury to convict the defendant because of his propensity to commit crimes, particularly given the evidence that the defendant participated in aberrant sexual behavior while using methamphetamine. In fact, in rebuttal argument, the prosecutor specifically argued this point to the jury. The prosecutor stated:

There was a year of self-indulgence that Melissa went through that started when she met this man (indicating defendant) right here. He was the person she was with during this year of indulgence, where what she did was take meth, she would do whatever she felt like doing, she would pay no attention to her child, she would take meth, and she would have sex with whoever she wanted to have sex with and pay not attention to her daughter, just do whatever she felt like.

This gentleman is front and center in that summer. You can judge people by the company they keep. He's also having sex with Peggy Green at the same time he's having sex with her and smoking methamphetamine.

They were all extremely self-indulgent. They were all into risk-taking, smoking meth is risk-taking. Having sex with a young child in a parking lot at a store is risk-taking.

RP 562-563.

The state's argument that "smoking meth is risk-taking" and "having sex with a young child in a parking lot at a store is risk-taking" is a direct appeal to the jury to convict the defendant because he used methamphetamine while participating in aberrant sexual behavior with consenting adults, so he must also have participated in aberrant sexual behavior with a child. In the

same manner that the admission of the “propensity” evidence in *Pogue* was error, so the admission of this “propensity” evidence in the case at bar was error.

In addition, as the review of J.L.L.’s statements to Dr. Stover, Detective Buck, Teri Lee, the defense attorney, and the jury reveal, her claims were grossly contradictory in almost every particular of her claims. This was not a case in which a young child was unsure about details, but consistent in the claim of abuse. Rather, this is a case in which an 11-year-old witness repeatedly contradicted herself on every particular of her claim. To some people, she emphatically stated that there was one instance of abuse and one only and that it occurred at one location and one location only. To others, she said that abuse occurred on multiple occasions, including at her home. Finally, at trial, state stated that the abuse happened on one day but at two different locations. To some witnesses she stated that the abuse happened in the bed of the truck under the canopy. To other witnesses, she stated that she has never been in the back of the truck and that the abuse only happened in the front of the truck with people walking nearby. To some witnesses and the jury she claimed oral-genital contact. To other witnesses, and in two letters, she absolutely denied any oral-genital contact.

The list of contradictions in J.L.L.’s claims goes on and on and cannot be explained by a child’s expanding story of abuse as she becomes less

fearful in telling what happened to her. Rather, it changes randomly according to who she is telling on any particular day. The point here is that given the long time between the alleged abuse and the claims, given the gross contradictions in the claims, and given the lack of any physical evidence to support this claims, the only conclusion that can be drawn is that the state's case for conviction was extraordinarily weak. In such circumstances, the admission of unfairly prejudicial evidence and the state's argument that it proved the defendant's propensity to commit the crime charged caused prejudice. As a result, the admission of this improper evidence of drug use, and the state's propensity arguments from it, denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, the defendant is entitled to a new trial.

II. THE TRIAL COURT'S DECISION TO ALLOW A "VICTIM'S ADVOCATE" TO STAND NEXT TO THE COMPLAINING WITNESS DURING HER TESTIMONY IN FRONT OF THE JURY CONSTITUTED A COMMENT ON THE EVIDENCE BY THE COURT IN VIOLATION OF WASHINGTON CONSTITUTION, ARTICLE 4, § 16, AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

Under Washington Constitution, Article 4, § 16, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement made by the court in front of the jury constitutes an impermissible "comment on the evidence" if a reasonable juror hearing the statement in the context of the case would infer the court's attitude toward the merits of the case, or would infer the court's evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crotts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. at 250-51.

The courts of this state "rigorously" apply the prohibition found in

Article 4, § 16, and presume prejudice from any violation of this provision.

State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, "[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment". *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

State v. Lane, at 838-839.

In the case at bar, the trial court commented on the evidence (the substance and veracity of J.L.L.'s testimony), when it allowed a victim-witness advocate to sit next to J.L.L. on the witness stand during the majority of her testimony. As was pointed out in the Statement of the Case in this brief, during J.L.L.'s direct examination, she initially provided the jury with some background information about her and her family, and she identified the defendant in court as the person who touched her inappropriately. She then related her claims concerning the alleged incident in which her mother had her go to the store with the defendant to get diapers for her brother. At this point, the record reveals that she started crying, so the court called a recess

at the state's request. This occurred sixteen minutes into her testimony at 9:31 am on the third day of trial.

At 10:09 am, almost 40 minutes later, the court reconvened without the jury, and the prosecutor stated that J.L.L. refused to return to the courtroom if the defendant was present. Following an unrecorded chamber's conference, the court ruled, over the defendant's objection, that J.L.L. would be allowed to continue her testimony with a victim-witness advocate sitting in a second chair on the witness stand with her. Finally, at 10:44 am, exactly one hour and thirteen minutes after the court recessed because J.L.L. was crying, the jury returned, and the state resumed its testimony with a victim-witness advocate sitting next to her on the witness stand. Even the court admitted that this procedure would improperly influence the jury. The court stated:

THE COURT: – involved. Because I do agree with you, counsel, that it could be potentially interpreted, the presence of other people in the courtroom, other things could be interpreted in many different ways by a jury. And I wanted to clearly tell them what to do and what not to do.

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One of the “many different way” that the jury could interpret the court's decision to allow a victim-witness advocate to sit next to an 11-year-old child during her testimony is that the court obviously believed that the defendant had committed the alleged crimes, that he commission of those

crimes had obviously traumatize the child, and that in order to overcome this trauma, the court was making special accommodations to help the witness present what the court knew was truthful testimony. No jury instruction could overcome that taint on the proceedings that this procedure created.

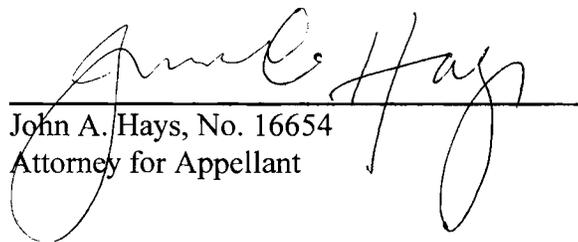
In analyzing the defendant's claim on this point, the question this court should ask itself is the following: Would a reasonable juror seeing the court's actions or statements in the context of the case infer the court's attitude toward the merits of the case, or infer the court's evaluation relative to the disputed issue? *See State v. Hansen, supra.* The answer to this question in the case at bar is that a reasonable juror would interpret the court's actions as a statement by the court on the veracity of J.L.L.'s testimony. As such, the court's actions constituted a comment on the evidence and are presumed prejudicial. Given the weakness of the state's case, and the gross contradictions in J.L.L.'s claims, the state cannot overcome the presumption that the court's comments were prejudicial. As a result, the defendant is entitled to a new trial.

CONCLUSION

The trial court's decision to admit irrelevant and prejudicial propensity evidence, and the trial court's decision to follow a procedure in J.L.L.'s testimony that constituted a comment on the evidence denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and also violated Washington Constitution, Article 4, § 16. As a result, the defendant is entitled to a new trial.

DATED this 23RD day of February, 2011 (Date of Corrections)

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, 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 law.