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NO. 50373-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMY LIEBICH,

Appellant.

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

The Honorable Bernard Veljiacic, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying appellant Jeremy Liebich's motion for arrest of judgment or a new trial based on:

- a. Sufficiency of the evidence,
- b. Admission of the recorded interviews by Dr. Kim Copeland of the complaining witnesses J.L. and K.S., and
- c. Denial of motion to allow evidence of character evidence and bias of J.L.'s mother, Cindy Strong, and reputation for truthfulness of J.L.

2. There was insufficient evidence presented to support the convictions for first degree rape of a child as alleged in Counts 1 through 4.

3. There was insufficient evidence presented to support the convictions for first degree molestation of a child and attempted first degree molestation as alleged in Counts 5 and 6.

4. In violation of the due process provisions of article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the evidence does not support first degree rape of a child where the evidence was insufficient to clearly delineate the offenses alleged in Counts 1 through 4 by either specific or general testimony.

5. The evidence does not support first degree child molestation and attempted child molestation where the evidence was insufficient to clearly delineate the offenses alleged in Counts 5 and 6 through either specific or general testimony.

6. The trial court erred when it admitted third party hearsay under the ER 803(a)(4) "Statement for Purposes of Medical Diagnosis or Treatment" exception because the statements admitted were not reliable, and in the case of K.S., was not given for the purpose of diagnosis or treatment.

7. The trial court deprived Mr. Liebich of his Sixth Amendment right to present a defense when it barred the admission of relevant evidence.

8. Cumulative error deprived Mr. Liebich of a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in failing to grant Mr. Liebich's CrR 7.4 motion for arrest of judgment and CrR 7.5 motion for new trial? Assignment of Error 1.

2. Due process requires the State to prove each essential element of each of the crimes charged beyond a reasonable doubt. Where the State charges multiple acts of child rape or molestation, there must be specific evidence of each act to survive scrutiny. Here, the complaining witnesses J.L. and K.S. testified that more than one act of sexual misconduct occurred, but their testimony was generic and vague. The State provided no specific evidence of the alleged acts, relying solely on non-specific generic testimony regarding each of the six counts. Did the State fail in its burden of proving each of the alleged acts, thus requiring reversal of Counts 1 through 6 with instructions to dismiss? Assignments of Error 1(a), 2, 3, 4, and 5.

3. Hearsay statement is not admissible under ER 803(a)(4)

unless the declarant's purpose in making the statement is to receive medical treatment or diagnosis. If the declarant is a child too young to understand the purpose of making the statement, the record must contain other evidence corroborating the statement. Here, the children, who were both eleven at the time of their sexual assault examination by Dr. Copeland in May, 2016, were too young to understand the purpose of talking to Dr. Copeland. Did the trial court abuse its discretion in admitting the hearsay statements of J.L. and K.S.? Assignments of Error 1(b) and 6.

4. The Sixth Amendment to the United States Constitution guarantees an accused person the right to present a defense and meet the charges against him. Here, the trial court precluded Mr. Liebich from introducing evidence relevant to the bias and credibility of the alleged victims and the reputation for truthfulness in the community. Did the trial court violate the appellant's constitutional rights to present a defense when it excluded relevant evidence that supported the defense theory that J.L. would make up stories and that Cindy Strong - J.L.'s mother - wanted to obtain custody of J.L., that Ms. Strong had a house that was dirty, that she abandoned J.L. and left with a sex offender, and that she was a "bad mom"? Assignments of Error 1(c) and 7.

5. Even where no single error standing alone may merit reversal, an appellate court may nonetheless find a defendant was denied a fair trial where cumulative errors created a reasonable probability that the jury's verdict

would have been different had the errors not occurred. In light of the above errors, does the cumulative error doctrine require reversal of Mr. Liebich's convictions? Assignment of Error 8.

**C. STATEMENT OF THE CASE**

**1. Procedural facts:**

Jeremy Liebich was charged in Clark County Superior Court by information filed May 16, 2016 with four counts of first degree rape of a child alleging that Mr. Liebich engaged in sexual intercourse with his daughter J.L. between December 6, 2009 and May 1, 2016. RCW 9A.44.073. The State also charged him with first degree child molestation and attempted first degree child molestation, alleging that he had sexual contact or attempted to have sexual contact with K.S. between March 30, 2010 and March 30, 2015. RCW 9A.44.083. The State alleged as an aggravating factor that Counts 1 through 4 occurred as part of an ongoing pattern of sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(g). Clerk's Papers (CP) 3-4.

***a. Objection to medical hearsay testimony***

Prior to trial, the trial court presided over a hearing on March 8, 2017 to admit medical hearsay testimony by Dr. Kim Copeland, a child abuse pediatrician for the Legacy Health System. Report of Proceedings<sup>1</sup>

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<sup>1</sup>The record of proceedings consists of five volumes, which are designated as follows: Report of Proceedings (RP) - May 20, 2016 (arraignment), June 29, 2016 (hearing), October 12, 2016 (motion for continuance), October 31,

(RP) at 26-171. Dr. Copeland performed a sexual assault examination of J.L. on May 18, 2016. RP at 36. Dr. Copeland made an audio recording of an interview with J.L. as part of the examination. RP at 38. Dr. Copeland also performed a sexual assault examination of K.S. on May 16, 2016, which was also recorded. RP at 38-39. Dr. Copeland stated that she found a transection of J.L.'s hymen, which is indicative of penetrative trauma. RP at 51.

The recording of Dr. Copeland's interview with K.S. was played to the court. RP at 60-76. In the recording, K.S. stated that her mother's ex-husband had put his hands down her pants, under her underwear, and that this had started when she was five or six years old. RP at 68-69.

The court also heard the recording of Dr. Copeland's interview of J.L. RP at 78-131. J.L. stated that her father Jeremy Liebich penetrated her "private area" with his fingers, and that this happened a "bunch of times." RP at 116. She stated that he penetrated her vagina and anus with his penis and that this continued until about two weeks before she was removed from the house by Child Protective Services and law enforcement. RP at 120-121, 124. She stated that she also had to rub her father's penis using her hands. RP at 126-27.

The State argued that the audio recordings were admissible under ER

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2016 (motion for release), February 7, 2017 (pretrial conference hearing and continuance), March 8, 2017 (motion hearing); 1RP - March 13, 2017 (jury trial); 2RP - March 14, 2017, (jury trial); 3RP - March 15, 2017, (jury trial); and May 10, 2017 (sentencing).

803(a)(4) for purposes of medical diagnosis. RP at 132-33. After hearing argument, the trial court admitted the recorded interviews, finding that they were made for the purpose of medical diagnosis. RP at 141-45. The court found that regarding J.L., the interview was consistent with determining whether medical treatment was needed. RP at 142. The court also found that K.S.'s statements were made for the purpose of medical diagnosis or treatment. RP at 144. The court found that both Exhibit 1 and 2 were admissible. RP at 144.

The court granted the State's motion to redact J.L.'s interview to remove a reference to an arrest for fourth degree assault (domestic violence) of April Mason, a witness for the State. RP at 149-53.

The defense renewed its objection to entry of the recorded interviews prior to the prosecution playing both interviews to the jury. 1RP at 181, 2RP at 559, 580. Regarding the reference by J.L. to the arrest of April Mason for assault, the trial court reiterated its previous ruling that references by J.L. to the arrest for domestic violence were to be excluded. 1RP at 184.

Counsel also moved to redact the initial 26 minutes of J.L.'s interview that contained background information on the basis that it was not relevant to Dr. Copeland's interview of the girls. 1RP at 180-81. The court ruled that under ER 403 the probative value is not outweighed by unfair prejudice and again ruled that the recordings were admissible. 1RP at 190.

***b. Conviction and sentencing:***

The matter came on for jury trial on March 13, 14, and 15, 2017, the Honorable Bernard Veljiacic presiding. 1RP at 173-385, 2RP at 386-656, and 3RP at 657-853.

The jury found Mr. Liebich guilty of first degree rape as charged in Counts 1 through 4, first degree child molestation as charged in Count 5, and attempted first degree child molestation as charged in Count 6. 3RP at 842-43; CP 110, 112, 114, 116, 118, 119. The jury found by special verdict that the offenses in Counts 1 through 4 were part of an ongoing pattern of sexual abuse over a prolonged period of time. 3RP at 842-43; CP 111, 113, 115, 117.

Prior to sentencing, Mr. Liebich filed a motion for arrest of judgment/motion for a new trial. CP 140. Mr. Liebich's motion was based upon CrR 7.4(a)(3) and CrR 7.5(a)(6), (7), and (8). CP 140. Mr. Liebich argued that substantial justice had not been done, and that the State presented insufficient evidence as to the elements of the charges in Counts 1 through Count 4 for first degree rape of a child, and Count 5 and Count 6 for first degree child molestation and attempted child molestation, (2) failure to establish that each of the offenses occurred in Clark County, Washington, and also moved for new trial on the basis that (1) the trial court erred by admitting the recorded interviews by Dr. Copeland of J.L. and K.S., and (2) failure of the trial court to allow evidence of J.L.'s mother's act of allegedly

abandoning her and “running off with a sex offender,” resulting in placement of J.L. with her father, Ms. Strong’s desire to regain custody of J.L., and possible motivation of J.L. to fabricate allegations. CP 140-42. After hearing argument, the court denied the motion. RP at 860-63.

Mr. Liebich had an offender score of “15” and a standard range of 240 to 318 months for Counts 1 through 4, 149 to 198 months in Count 5, and 111.75 to 148.5 months in Count 6. RP at 874; CP 151. The State argued that under the “free crimes aggravator” in RCW 9.94A.525(2)(c), and the aggravating factor found by the jury in Counts 1 through 4, the court should impose an exceptional sentence of 318 months for counts 1 through 4, and 198 months for Count 5, to be served consecutively, for a total at 516 months to a maximum of life. RP at 875. Defense counsel objected to an exceptional sentence and in particular to consideration of the “free crimes” aggravator requested by the prosecution. Counsel argued for a sentence within the standard range of 240 to 318 months. RP at 878. The court accepted the State’s recommendation and sentenced Mr. Liebich to an exceptional sentence of 318 months for Counts 1 through 4, to be served concurrently, 198 months for Count 5, and 148.5 months for Count 6, and ordered that Counts 1 through 4 be consecutive to Counts 5 and 6, for a total of 516 months. RP at 882; CP 151.

Timely notice of appeal was filed on May 15, 2017. CP 168. This appeal follows.

**2. Trial testimony:**

J.L. was born December 6, 2004. 2RP at 440. Her mother is Cindy Strong and her step-mother is April Mason. 2RP at 473. April Mason is the mother of five children, including K.S. 2RP at 503. Ms. Mason was high school sweethearts with Mr. Liebich, but married Brenson Smith, who is the father of K.S. 2RP at 503, 505. Ms. Mason later reconnected with Mr. Liebich in 2008 or 2009 and they married in 2009. 2RP at 505. She and Mr. Liebich have a son together. 2RP at 504. They lived at several addresses in Clark County, Washington. 2RP at 507. Ms. Mason stated that J.L. always shared a room with K.S. when they lived together. 2RP at 509. Ms. Mason testified that J.L. had conversations on April 21 or 22, 2016 with J.L. and that she was crying hysterically. 2RP at 512. Ms. Mason texted her father, Mr. Liebich, and asked if J.L. could stay for the weekend, and he agreed. 2RP at 513. Following a disclosure by J.L., Ms. Mason did not contact police or Child Protective Services. 2RP at 514. J.L. went back to her father's house after the weekend. 2RP at 514.

J.L. testified that she was raped by her father, and that the abuse started when she was four or five years old and that it might have occurred in California. 2RP at 445. She stated that she was in her bedroom and about to fall asleep and her father came into the bedroom and pulled down her underwear and penetrated her vagina with his fingers. 2RP at 446, 447. She stated that she and her father later moved to Vancouver, Washington, when

she was six or seven years old, and she started to live with Ms. Mason and her children. 2RP at 448. She shared a room with a stepsister K.S. and had a bunkbed. 2RP at 448. J.L. testified that they moved to another house and she again shared a room with K.S. 2RP at 449.

J.L. testified that her father would come into the room about twice a week at night, get under the covers and pull down her pants and penetrate her vagina with his penis. 2RP at 451. J.L. stated that this occurred possibly three times a week. 2RP at 452. She stated that this happened in the house, usually in her bedroom, but that at times he would take a shower and call her into the bathroom by poking his head into the bedroom and using a hand signal for her to follow him or cock his head to signal that she was to follow him. 2RP at 452-53. She stated that after she followed him into the master bathroom, he would usually turn on the shower and get on her hands and knees and he would then put his penis in her vagina. 2RP at 454. She stated that this occurred many times and that it took place in the house that he shared with her stepmother, April Mason. 2RP at 455. She said that after this happened he would usually take a shower and she would get dressed and leave. 2RP at 456. J.L. said that this also happened in other rooms in the house including her stepmother's room and the master bedroom. 2RP at 457.

J.L. said that later she lived with her father in an apartment and did not live with Ms. Mason and her stepsiblings. 2RP at 461. She said that after moving out the house, the abuse happened more often, and that it mostly

occurred in her bedroom. 2RP at 461. J.L. stated that the number of times she was abused was about two hundred, and that it occurred 70 to 80 times when she lived with Jamie Anselm. 2RP at 487.

J.L.'s stepsister, K.S., was born March 30, 2005. 1RP at 348. Her mother, April Mason, married Mr. Liebich. 1RP at 350. K.S. said that Mr. Liebich molested her, and that the molestation started when she was five. 1RP at 351. K.S. testified that she could "fully remember" three times that he molested her. 1RP at 351. K.S. stated that Mr. Liebich pulled her on top of him and he put his hands down her pants and touched her "lady area", under her underwear, for five to seven minutes, and then he got up and left. 1RP at 353-55. She stated that this took place in a bunkbed and that her step sister J.L. was on the lower bunk at the time. 1RP at 356. K.S. testified that Mr. Liebich did the same thing another time and that she struggled more than previously. 1RP at 356. She stated that this incident took place in the same bunkbed as the other incident she described. 1RP at 356. She testified that he touched her skin to skin in the "same place, down there" as he did during the first incident, and that she was wearing pajama bottoms and a shirt at the time. 1RP at 357. She stated that he touched where she urinates, and that his hand "was moving" when he touched her. 1RP at 362-63. K.S. testified that she did not know the address of the house where she and J.L. had a bunkbed and did not know the address of the other house. 1RP at 364-65

K.S. testified that at a different house she was watching television in

the room she shared with J.L. 1RP at 358. She stated that she was sitting on J.L.'s bed and that Mr. Liebich came into the room and touched her "[d]own there[,] underneath her underwear for five to seven minutes and then when he was finished told her "Don't tell your mom." 1RP at 358-59. She testified that there was another incident in the same bedroom where she struggled and kept pulling up her pants and "just not letting him touch me," and stated that Mr Liebich "got up and left." 1RP at 359-60. She said that she was "about seven" years old at the time of the last incident. 1RP at 360.

K.S. stated that she did not tell anyone, but wrote a note to her mother that Mr. Liebich put his hands down her pants. 1RP at 361. Her mother April Mason had asked K.S. and J.L. earlier that if anyone had touched them, would they tell her about it, and K.S. could not tell her so she wrote it on a piece of paper. 1RP at 361.

J.L. stated that she and her father moved into an apartment with Jamie Anselm in Vancouver. 2RP at 462-63. J.L. stated that the abuse normally occurred in the bathroom. 2RP at 463-64. She stated that the bathroom had two doors, one entering the hallway the other continuing to the bedroom shared by her stepbrothers. 2RP at 464. Another door led to the bedroom she shared with her stepsisters. 2RP at 464. J.L. stated that her father would poke his head into the girls' bedroom and give a head signal or use his finger motioning her to come to the bathroom. 2RP at 464. She stated that last time this occurred was a few days before she was removed from Ms. Anselm's

apartment and placed in foster care. 2RP at 466. She stated that during the last incident of abuse she went into the bathroom and got on her hands and knees and he put his penis in her vagina. 2RP at 467. She said that his penis went in her anus about 20 to 25 times. 2RP at 469. She stated that the first time it was “horrible, horrible pain” and that it happened when they lived with April Mason. 2RP at 469.

J.L. said she did not get along with Ms. Mason’s children when she lived there, and said that she “saw them as my evil steps and stepmother.” 2RP at 480. Ms. Anselm, who has six children, lived in the apartment, which was very crowded. 2RP at 479.

Ms. Anselm had known April Mason since high school and kept in contact with her. 3RP at 702. Ms. Anselm met Mr. Liebich in 2009. 2RP at 547; 3RP at 705-07. Mr. Liebich and J.L. moved into her apartment in June, 2015.

Ms. Mason stated that J.L. and her mother Cindy Strong moved from California to Washington in February 2011. 2RP at 533. Her father obtained custody of J.L. and she lived with Ms. Mason and Mr. Liebich. 2RP at 533. Ms. Mason and Mr. Liebich separated in December, 2014. 2RP at 537. Cindy Strong, who initially had custody of J.L., later contacted Mr. Liebich and resumed visitation with J.L. 2RP at 537. Ms. Anselm stated that J.L. went to Ms. Strong’s house during part of Thanksgiving and Christmas breaks in 2015, and then again during spring break in 2016. 3RP at 719-20. Ms.

Anselm said that she was at home at all times with the children and that she would have known if someone went into the bathroom because the walls are thin and “you can hear everything.” 3RP at 724.

J.L. said that Ms. Anselm’s apartment had two bedrooms and that she had five children and that it was very crowded. 2RP at 463. When she was living with Ms. Anselm, J.L. stated that she told Ms. Mason about the abuse and that Ms. Mason asked her father if she could stay at her house that night. 2RP at 471-72. She stated that Ms. Mason had her write down what happened. 2RP at 472. After removal, J.L. was placed in the care of her mother. 2RP at 473. She stated that she had previously discussed wanting to live with her mother, and that she and her mother were trying to convince her father to let her go live with her. 2RP at 475.

While driving K.S. and her oldest daughter, Ms. Mason testified that she told them that she hoped they would tell her if they had been abused. 2RP at 515. She stated that K.S. started to cry and made a disclosure by writing it on a piece of paper. 2RP at 516-17. Ms. Mason did not tell police about the alleged disclosure. 2RP at 517. She was contacted by police several day later, on April 26. 2RP at 518. J.L. was taken into protective custody by CPS in April 2016, and Vancouver police detective Deana Watkins began an investigation in May, 2016, following a referral from Child Protective Services. 1RP at 380.

Dr. Linnea Wittick Roy, a pediatric emergency physician, treated J.L.

at Legacy Salmon Creek Medical Center in Vancouver on April 28, 2016. 2RP at 393. J.L.'s foster mother brought her to the emergency room for a sexual assault evaluation at the direction of CPS. 2RP at 394. The evaluation took place on April 28, 2016, and was performed by Dr. Wittick Roy. She reported that the finding for J.L. was that her hymen was normal. 2RP at 397, 398, 651.

Laura Kelly, a forensic scientist at the Washington State Patrol Crime Lab in Vancouver, tested samples obtained from J.L. from the sexual assault evaluation. 2RP at 412. She testified that no semen was detected from the vaginal and anal swabs or underwear collected from J.L. 2RP at 413. Human saliva was detected on the underwear. 2RP at 413. No male DNA was detected in any of the swab samples except the underwear, which contained a low amount of male DNA, but was of such a low amount that it could not be tested further. 2RP at 413

Dr. Copeland performed a sexual assault examination of K.S. on May 16, 2016 following a referral from the Children's Justice Center regarding possible sexual abuse. 2RP at 558. The audio recording of the evaluation was played to the jury. 2RP at 560-575. Dr. Copeland testified that the examination of K.S. was normal. 2RP at 577. Dr. Copeland performed an examination of J.L. on May 18, 2016. 2RP at 579. The audio recording of the evaluation was also played, again over defense's objection. 2RP at 580-633. Dr. Copeland testified that J.L. had ongoing history of abnormal

periods, abdominal pain, cutting behavior, described pain during the alleged abuse, and depression with suicidal ideation. 2RP at 633, 634. She stated that J.L.'s physical examination showed a transaction or tear through the hymen. 2RP at 645. She stated that the exam results are consistent with the history given by J.L. in her interview, which is consistent with penetrative trauma. 2RP at 648. Dr. Copeland stated that penetration trauma could be caused by anything that was passed beyond the hymen and through the hymen opening. 2RP at 653.

**D. ARGUMENT**

**1. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR ARREST OF JUDGMENT/NEW TRIAL**

After the jury's verdict, Mr. Liebich filed a motion for arrest of judgment and a motion for a new trial. CP 140-42. The trial court erred in denying the motion for arrest of judgment under CrR 7.4(a)(3), which alleged (1) insufficiency of the evidence as to the elements of the charges in Counts 1 through Count 4 for first degree rape of a child, and Count 5 and Count 6 for first degree child molestation and attempted child molestation, and (2) failure to establish each of the offenses occurred in Clark County, Washington.

Pursuant to CrR 7.5(6), the appellant moved for new trial (1) due to admission of recorded interviews by Dr. Copeland of J.L. and K.S., and (2) failure of the trial court to allow evidence of J.L.'s mother's attempt to gain custody of her and possible motivation of J.L. to fabricate allegations. CP 140.

Under Criminal Rule 7.4(a), an arrest of judgment may be granted for (1) lack of jurisdiction of the person or offense; (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime. “The evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the state, could find the essential elements of the charged crime beyond a reasonable doubt.” *State v. Longshore*, 141 Wash.2d 414, 420-21, 5 P.3d 1256 (2000). “Review of a trial court decision denying ... a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court.” *Longshore*, 141 Wash.2d at 420; *State v. Huynh*, 107 Wash.App. 68, 76-77, 26 P.3d 290, 295 (2001); *State v. Ceglowski*, 103 Wn. App. 346, 349, 12 P.3d 160 (2000); As stated in the *Longshore* and *Ceglowski* cases, “[t]he evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the state, could find the essential elements of the charged crime beyond a reasonable doubt.” *Longshore, supra* at 420-421; *Ceglowski, supra* at 349.

A CrR 7.5 motion for a new trial may be granted for “[i]rregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial”, or for “[e]rror of law occurring at the trial and objected to at the time by the defendant”, or when “substantial justice has not been done.” CrR

7.5(a)(5), (6) and (8). A trial court's decision regarding a motion for new trial is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 642, 790 P.2d 610 (1990). A court abuses its discretion where the decision was manifestly unreasonable, or based on untenable grounds or reasons. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

*a. The evidence is not sufficiently specific to sustain the convictions for rape of a child, child molestation, or attempted child molestation, requiring their reversal and dismissal.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In cases alleging multiple counts of sexual abuse within the same charging period, the

evidence must clearly establish specific and distinct incidents. *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996). To sustain resulting multiple convictions, the evidence must be “sufficiently specific.” *Id.*

In this case, to convict Mr. Liebich of first degree child rape, the jury was required to determine that Mr. Liebich, in acts separate and distinct from the other counts, had sexual intercourse with J.L., that J.L. was less than twelve years old at the time of the sexual intercourse, she was not married to Mr. Liebich, and she was at least twenty-four months younger than Mr. Liebich. RCW 9A.44.073. Similar, but of course not identical, elements are required to prove first degree child molestation. RCW 9A.44.083.

In sexual abuse cases, the difficulty in proving the offense arises where the State brings multiple identical charges based on a child’s allegations that the same act of sexual abuse occurred more than once. Where such multiple counts are alleged to have occurred during the same charging period, the State is not required to elect particular acts associated with each count so long as the evidence clearly delineates specific and distinct incidents of sexual abuse during the charging period. *State v. Edwards*, 171 Wn. App. 379, 401, 294 P.3d 708 (2012). A three-prong test was set forth in *Hayes, supra*, and is used to determine whether generic testimony about a course of sexual abuse sufficiently describes specific and distinct incidents

of abuse in order to affirm a conviction on multiple counts. *Edwards*, 171

Wn. App. at 402. Under the test:

the alleged victim must (1) describe the act or acts with sufficient specificity to allow the jury to determine what offense, if any, has been committed; (2) *describe the number of acts committed with sufficient certainty to support each count the prosecution alleged*; and (3) *be able to describe the general time period in which the acts occurred*.

*Edwards*, 171 Wn. App. at 401-402 (evidence must “clearly delineate[] specific and distinct incidents of sexual abuse during the charging periods.”) (emphasis added) (citing *Hayes*, 81 Wn. App. at 431).

Although Mr. Liebich was charged with four counts of first degree child rape, one count of child molestation, and one count of attempted molestation, the State presented only unspecific generalized testimony by J.L. about the alleged offenses. K.S. provided similarly vague, non-specific testimony regarding child molestation and attempted child molestation alleged in Counts 5 and 6.

Here, the generic testimony of K.S. and J.L. fail the second and third prongs of the *Hayes* test, which require evidence of the number of acts committed with sufficient certainty and require a description of the general time period in which the acts occurred to match the charging period. *Hayes*, 81 Wn. App. at 431; *Edwards*, 171 Wn. App. at 401.

The testimony provided by both witnesses were very non-specific

regarding the alleged times, and was unable to describe the number of acts. J.L. said that the abuse occurred 200 times, with 70 to 80 times occurring at one location, but told the defense investigator that the abuse happened over 1,500 times. 2RP at 488. J.L. and K.S. were unable to describe the time period during which the abuse allegedly occurred and were unable to say where many of the alleged acts took place. The testimony of both K.S. and J.L. was not “specific enough to sustain separately each of the counts charged.”

The convictions for child rape and molestation should be reversed because the evidence did not prove distinct and separate criminal acts. *Edwards*, 171 Wn. App. at 401-03, (trial court properly vacated child molestation conviction where generic testimony alleging 10 to 15 acts was insufficiently specific); *State v. Jensen*, 125 Wn. App. 319, 328, 104 P.3d 717 (2005). In *State v. Jensen*, this Court found there was insufficient evidence on one of the counts of child molestation. *Jensen*, 125 Wn. App. at 326-328. Jensen had been charged with committing one count of indecent exposure and three counts of child molestation “on or about August 1, 2001 through February 19, 2002.” *Id.* at 326. The victim testified to an instance of indecent exposure involving a mirror and two incidents where Jensen touched her between the legs and on her breast during the summer of 2001. *Id.* at 323,

326-27. The victim testified Jensen touched her private area “a few times.” *Id.* at 327. She also testified Jensen entered her room at night on two other occasions, though it was not clear what, if any, sexual contact took place during those incidents. *Id.* at 328. Applying the three-prong analysis discussed above, the *Jensen* Court found the victim’s testimony did not describe a third act of molestation with sufficient specificity. *Id.* This Court affirmed one count of indecent exposure and two counts of child molestation, but reversed the third count due to the inadequate “generic testimony.” *Id.* at 327-28.

Here, because there was insufficient evidence to support the convictions for each count, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

**2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING J.L.’S AND K.S.’S HEARSAY STATEMENTS TO DR. COLEMAN BECAUSE THE REQUIREMENTS OF ER 803(A)(4) ARE NOT SATISFIED**

*a. Hearsay is not admissible under ER 803(a)(4) unless it is reasonably pertinent to medical diagnosis or treatment.*

The state moved for admission of the recorded interviews by Dr. Coleman of J.L. and K.S. Defense counsel objected, arguing that the statements were not admissible under ER 803(a)(4). The court granted the State's motion and ruled that the interviews were admissible. RP at 141-45.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross examine witnesses. The confrontation clause provides that the state can present testimonial statements of an absent witness only if the witness is unavailable and the defendant has had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

An out-of-court statement offered to prove the truth of the matter asserted is hearsay. ER 801(c). "Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(d). Hearsay is not admissible at trial unless it falls under a specific exception to the hearsay rule. ER 802.

One such exception allows the admission of hearsay if the declarant made the statement for the purpose of a medical diagnosis or treatment. Under ER 803(a)(4), the following statements are not excluded by the hearsay rule:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The medical treatment exception applies to statements only if they were "reasonably pertinent to diagnosis or treatment." ER 803(a)(4); *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046 cert. denied, 534 U.S. 964 (2001); *State v. Williams*, 137 Wn. App. 736, 154 P.3d 322 (2007); *State v. Butler*, 53 Wn. App. 214, 766 P. 2d 505 (1989). "To be admissible, the declarant's apparent motive must be consistent with receiving treatment, and the statements must be information on which the medical provider reasonably relies to make a diagnosis." *State v. Fisher*, 130 Wn.App. 1, 14, 108 P.3d 1262 (2005). The rationale for admitting statements under ER 803(a)(4) is the presumption a medical patient has a strong motive to be truthful and accurate. "This provides a significant guarantee of trustworthiness." *State v. Perez*, 137 Wn. App. 97, 106, 151 P.3d 249 (2007).

The medical exception applies only to hearsay statements that are "reasonably pertinent to diagnosis or treatment." ER 803(a)(4); *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 19-20, 84 P.3d 859 (2004). Generally, to establish reasonable pertinence (1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must

have reasonably relied upon the statement for purposes of diagnosis or treatment. *Grasso*, 151 Wn.2d at 2; *Butler*, 53 Wn. App. At 220.

The rationale for the rule is that the court presumes a medical patient has a strong motive to be truthful and accurate. “This provides the necessary, significant guarantee of trustworthiness.” *Perez*, 137 at, 106.

Washington courts recognize that young children may not understand that their statements to a physician are necessary for medical diagnosis or treatment, undermining the justification for the hearsay exception. Courts may admit a young child’s statements under ER 803(a)(4) “only if corroborating evidence supports the child’s statements.” *State v. Florczak*, 76 Wn. App. 55, 65, 882 P.2d 199 (1994); *Grasso*, 151 Wn.2d at 20. The trial court “should identify on the record the specific evidence—drawn from the totality of the circumstances—on which it relies to determine whether or not the statements were reliable, and therefore admissible.” *Florczak*, 76 Wn. App. at 66.

The necessary corroborating evidence must affirmatively appear in the record and must be “part of the totality of the circumstances in which the child makes the statements.” *Id.*

Here, the hearsay statements to Dr. Coleman was admitted at trial under the hearsay exception for statements made for the purposes of medical diagnosis and treatment. K.S. and J.L. were both 11 years old when they made the

statements to Dr. Coleman. Both were almost certainly too young to understand the purpose for making the statements. The trial court made no finding about what either child understood. RP at 141-45. The trial court nonetheless admitted the statements under ER 803(a)(4) without the necessary evidence demonstrating their trustworthiness. The court did not identify any circumstances that demonstrated the statements were reliable and made no finding that the statements were corroborated. *Id.*

No evidence supported the statement in the case of K.S., who had no physical injuries. Dr. Coleman noted that J.L. had signs of penetration, but there was no testimony that it was caused by abuse, only that it was by a “penetrative” object. Moreover, the record does not support the trial court’s conclusion that K.S.’s statements, who showed no sign of injury, was for the purpose of medical diagnosis.

Because the record contains no evidence that either child’s statement was reliable, they were not inherently trustworthy and should not have been admitted under ER 803(a)(4). *Florezak*, 76 Wn. App. at 65; *Grasso*, 151 Wn.2d at 20.

**3. THE TRIAL COURT DENIED MR. LIEBICH HIS RIGHT TO PRESENT A DEFENSE BY EXCLUDING RELEVANT EVIDENCE**

Mr. Liebich made several offers of proof, detailing prior acts of questionable parenting by Cindy Strong, and her desire to regain custody of J.L., relevant to her bias and motive to compel J.L. to lie against Mr. Liebich

concerning the instant charges. RP at 163, 2RP at 484; 3RP at 696-97; CP 140. The prior bad acts of Ms. Strong were relevant to her credibility, but moreover, to show J.L.'s potential bias to lie about the alleged abuse in order to compel a change in placement.

The proffered testimony was highly relevant to J.L.'s motivation for making the allegations in this case. The court consistently ruled that none of Ms. Strong's prior acts and desire for custody were relevant to her general disposition for untruthfulness, and the probative value as to motive would be substantially outweighed by its potential for prejudice. The court stated that this "not a family law case," and denied the defense's requests to introduce evidence pertaining to Ms. Strong's parenting, and her desire custody of J.L. RP 165.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006); U.S. Const. Amends. VI, XIV. Article I, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Jones*, 168 Wn.2d 713,

720, 230 P.3d 576 (2010).

Although this right is of constitutional magnitude, it is subject to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the state's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. See *Washington v. Texas*, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); *State v. Gallegos*, 65 Wn. App. 230, 236-37, 828 P.2d 37, rev. denied, 119 Wn.2d 1024 (1992).

Under ER 608(b),

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of a 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.

Evidence of Ms. Strong's prior acts of questionable parenting, as well as her desire to have custody of J.L., was probative of her untruthfulness, her bias, and her motive to lie and also provided a basis for J.L. to lie in order to move back with her mother.

Here, the evidence defense counsel sought to elicit was undeniably relevant. The whole case came down to a credibility contest between Mr.

Liebich and J.L., and K.S. There was no physical evidence, and there were no witnesses to the alleged abuse other than J.L. and K.S. Consequently, any evidence that would shed light on the credibility was critical to a material issue in the case.

Because the excluded evidence was relevant, Mr. Liebich had a right to present it unless it was "so prejudicial as to disrupt the fairness of the factfinding process." *Hudlow, supra*. However, was the exclusion of this credibility evidence that disrupted the fairness of the fact-finding process. Looking at the trial as a whole, the State's case was focused on J.L.'s (and K.S.'s) credibility. Nevertheless, the defense was prevented from examining credibility, and the credibility of her mother, and any potential reason to lie, in any meaningful way.

A violation of the defendant's rights under the confrontation clause is constitutional error. *State v. McDaniel*, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996) (citing *State v. Dickenson*, 48 Wn. App. 457, 470, 740 P.2d 312 (1987)). Constitutional error is presumed prejudicial, and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *McDaniel*, 83 Wn. App. at 187 (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986)). Because the court's exclusion of relevant evidence denied Mr. Liebich of his Sixth Amendment right to present a defense, the error requires reversal of Mr. Liebich's convictions unless the State can prove beyond a reasonable doubt

that it “did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Neder v. U.S.*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Jones*, 168 Wn.2d at 724. The State cannot meet this burden in this case.

**4. CUMULATIVE ERROR DEPRIVED MR. LIEBICH OF A FAIR TRIAL**

Pursuant to the cumulative error doctrine, even where no single error standing alone merits reversal, a reviewing court may nonetheless find the combined errors denied a defendant a fair trial. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine requires reversal where the cumulative effect of otherwise nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 150 (1992).

Here, Mr. Liebich contends that each error set forth above, viewed alone, engendered sufficient prejudice to merit reversal. Alternatively, however, he argues the errors, taken together, created a cumulative and enduring prejudice that was likely to materially affect the jury's verdict and the integrity of the verdict cannot be assured. This Court must reverse his conviction and order a new trial.

**E. CONCLUSION**

Based on the foregoing, Mr. Liebich requests that the convictions for rape of a child, molestation and attempted molestation be reversed and dismissed with prejudice for insufficient evidence. In the alternative, the

convictions for child rape and child molestation must be reversed due to the erroneous admission of the hearsay statements during the sexual assault interview.

DATED: March 14, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

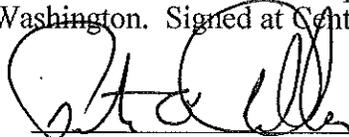
The undersigned certifies that on March 14, 2018, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, and Rachael Rogers and copies were mailed by U.S. mail, postage prepaid, to the following appellant at:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 14, 2018.



PETER B. TILLER

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