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No. 50733-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

PAUL MCDONALD, Appellant.

Appeal from the Superior Court of Clallam County
The Honorable Brian Coughenour
The Honorable Erik Rohrer
No. 17-1-00210-0

BRIEF OF APPELLANT PAUL MCDONALD

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF THE CASE.....3

IV. ARGUMENT.....9

1. The Trial Court Erred In Admitting Irrelevant, Prejudicial Evidence That Infringed On McDonald's Right To A Fair Trial When It Admitted Propensity Evidence Without Undertaking The Required ER 404(b) and ER 403 Analysis.....9

2. The Trial Court Abused Its Discretion By Admitting A Copy Of Mr. McDonald's Misdemeanor Theft In The Third Degree Conviction After He Acknowledged This Conviction In His Testimony.....18

3. Mr. McDonald Was Deprived Of A Fair Trial When The State's Key Witness Provided a Non-Responsive Answer to A Question That Informed The Jury The Defendant Had Been Incarcerated Between May 22, 2015 and June 6, 2017 Jail.....20

   a.) The Non-Responsive Testimony Was a Serious Irregularity.....25

   b.) The Testimony Was Not Cumulative Of Other Properly Admitted Evidence.....27

   c.) The Curative Instruction Did Not Un-ring The Bell.....28

4. Mr. McDonald's conviction, based on insufficient evidence presented at trial was error.....33

   a.) The evidence presented at trial was insufficient to support Mr. McDonald's conviction.....33

b.) Mr. McDonald's prosecution was contrary to the legislative intent of RCW 9A.44.130(6)(b).....37

5. The State's misstatement of the definition of knowingly with regards to RCW 9A.44.130(b)(6) during closing arguments was error that mislead the jury and misstated the law.....38

a.) The prosecuting attorney's statements were improper.....39

b.) Mr. McDonald was prejudiced by the improper statements of the prosecuting attorney.....42

6. Cumulative error deprived Mr. McDonald of a fair trial.....44

V. CONCLUSION.....46

TABLE OF AUTHORITIES

Washington State Cases

Carroll v. Junker, 79 Wn.2d 12,26,482 P.2d 775 1971).....10

In re Pers. Restraint of Lord, 123 Wn.2d 27 296, 332, 868 P.2d 835, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994).....45

In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).....33

Maehran v. Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979).....9

State v. Albutt, 99 Wn.253, 259, 169 P.584 (1917).....29

State v. Allen, 182 Wash.2d 364, 341 P.3d 268 (2015).....39, 40

State v. Anderson, 31 Wn.App. 352, 354, 641 P.2d 728 (1982).....20

State v. Anderson, 153 Wn.App. 417, 432, 220 P.3d 1273 (2009).....42

State v. Bell, 10 Wn.App. 957, 961, 521 P.2d 70 (1974).....9

State v. Bennett, 36 Wn.App. 176, 180, 672 P.2d 772 (1983).....12

State v. Bennett, 161 Wn.2d 303,315, 165 P.3d 12421 (2007).....42

State v. Cameron, 100 Wn.2d 520, 674 P.2d 650 (1983).....15

State v. Carlin, 40 Wn.App. 698, 700 P.2d 323 (1985).....30

State v. Coe, 101 Wn.2d 772, 780–81, 684 P.2d 668 (1984).....12, 14, 18, 20, 44

State v. Coles, 28 Wn.App. 563, 573, 625 P.2d 713 (1981).....19

State v. Davenport, 100 Wash.2d at 763, 675 P.2d 1213 (1984).....44

State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001).....30

State v. DeVincentes, 150 Wn.2d 11,17,74 P.3d 119 (2003).....10

State v. Devlin, 145 Wash. 44, 52, 258 P.826 (1927).....21

State v. Dinges, 48 Wn.2d 152, 154, 292 P.2d 361 (1956).....31

State v. Drake, 149 Wn.App.88 (2009).....35, 36

State v. Draper, 10 Wn.App. 802, 521 P.2d 53 (1974).....10

State v. Emery, 174 Wash.2d 741, 760, 278 P.3d 653 (2012).....42

State v. Escalona, 49 Wn. App. 251, 254,
742 P.2d 190 (1987).....23, 24, 25, 26, 30

State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007).....10, 20

State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979).....24

State v. Goebel, 40 Wn.2d 18, 240 P.2d 251 (1952).....12

State v. Green, 71 Wn.2d 372, 373, 428 P.2d 540 (1967).....21

State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).....45

State v. Heiskell, 129 Wn.2d 113, 117, 916 P.2d 366 (1996).....37

State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003).....45

State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984).....12, 13

State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).....24

State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).....44

State v. Johnson, 158 Wn.App. 677, 685; 243 P.3d 936 (2010).....39, 41

State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).....11

State v. King, 131 Wn.App. 1015 published with modifications at 131

Wn.App. 789, 130 P.3d 376 (2006).....23

State v. Laureano, 101 Wn.2d 745, 682 P.2d 889, 901 (1984).....9

State v. McBride, 192 Wn. App. 859, 867,
370 P.3d 982, 985–86 (2016).....19, 20

State v. McCullum, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).....34

State v. Meader, 54 Vt. 126, 132 (1881).....33

State v. Meyers, 49 Wn. App. 243, 742 P.2d 180 (1987).....17

State v. Miles, 73 Wn.2d 67,
436 P.2d 198 (1968).....10, 21, 30, 31, 32, 33

State v. Montague, 31 Wn. App. 688, 644 P.2d 915 (1982).....14

State v. Morsette, 7 Wn. App. 783, 789, 502 P.2d 1234 (1972).....29

State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).....10, 20

State v. Oughton, 26 Wn. App. 74, 85, 612 P.2d 812 (1980).....44

State v. Pray, 96 Wn. App. 25, 28, 980 P.2d 240 (1999).....37

State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172,
837 P.2d 599 (1992).....24

State v. Ray, 116 Wn.2d 531, 545,806 P.2d 1220 (1991).....18

State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994).....44

State v. Saltarelli, 98 Wn.2d
358, 655 P.2d 697 (1982).....10, 11, 12, 12, 14, 16, 26

State v. Shipp, 93 Wash.2d at 514, 610 P.2d 1322 (1980).....40

State v. Stratton, 130 Wn. App. 760, 765, 124 P.3d 660 (2005).....37

State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).....29, 32, 33

State v. Teal, 152 Wash.2d 333, 342, 96 P.3d 974 (2004) (Sanders, J., dissenting).....41

State v. Thang, 145 Wn.2d 630,642,41 P.3d 1159 (2002).....10

State v. Thorgerson, 172 Wash.2d 438, 443, 258 P.3d 43 (2011).....39

State v. Venegas, 155 Wn. App. 507, 525 228 P.3d 813 (2010).....20

State v. Warren, 165 Wash.2d 17, 28, 195 P.3d 940 (2008).....39, 44

State v. Weber, 99 Wn.2d 158, 165–66, 659 P.2d 1102 (1983).....23, 24

State v. Welchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990).....45

Federal Cases

Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994).....15

Hurd v. People, 25 Mich.405.....21

Lockwood v. AC&S, Inc., 109 Wn.2d 235, 744 P.2d 605 1987).....15

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978).....16

United States v. Espinoza, 827 F.2d 604, 613, (9th Cir. 1987).....30

United States v. McRae, 593 F.2d 700 (5th Cir.).....15

United States v. Reed, 647 F.2d 678 (6th Cir. 1981).....14

United States v. Roark, 753 F.2d 991.....15

Statutes and Court Rules

ER 401 14

ER 402 14

ER 403 .....9, 12, 15, 16

ER 404(b) 1, 2, 9, 11, 12, 14, 15, 17, 23, 31, 43, 47

ER 609 .....2, 18, 19, 20, 27, 43, 47

ER 609(a) 18

RCW 9A.09.010(1)(b)(ii) 1, 2, 3, 33, 34, 35, 37, 38, 39, 42

RCW 9A.44.130(6)(b) 39

Other

5DWashington Practice, Handbook on Washington Evidence, 2016-2017 Ed., §404:6. Pg. 171.....17

Chris Mai and Ram Subramanian. Price of Prisons 2015: Examining State Spending Trends, 2010-2015. New York: Vera Institute of Justice, 2017.....38

I. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting irrelevant, prejudicial evidence that infringed on Mr. McDonald's right to a fair trial when it admitted propensity evidence without undertaking the required ER 404(b) analysis.
2. The trial court abused its discretion by admitting a copy of Mr. McDonald's misdemeanor theft in the third degree judgment and sentence after he voluntarily acknowledged the conviction during his testimony.
3. Mr. McDonald was deprived of a fair trial when the State's key witness provided a non-responsive answer to a question that informed the jury that Mr. McDonald had been incarcerated between May 22, 2015 and June 6, 2017.
4. Mr. McDonald's conviction based on insufficient evidence presented at trial was error.
5. The State's misstatement of the definition of "knowingly" with regards to RCW 9A.44.130(b)(6) during closing argument was error that mislead the jury and misstated the law.
6. Cumulative error denied Mr. McDonald a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion when it admitted propensity evidence he had previously missed his registration date in September 2016 without conducting the required ER 404(b) analysis on the record?
2. Whether the trial court abused its discretion when admitted a copy of Mr. McDonald's misdemeanor theft in the third degree judgment and sentence after Mr. McDonald voluntarily acknowledged the ER 609 conviction during his testimony?
3. Did the court abuse its discretion when it failed to grant a mistrial after the State's key witness, an experienced law enforcement officer and head of the registration unit, told the jury Mr. McDonald had been incarcerated between May 2015 and May 2017?
4. Was the evidence presented at trial insufficient to establish beyond a reasonable doubt that Mr. McDonald failed to comply with RCW 9A.44.130(6)(b), considering there was no testimony that Mr. McDonald knowingly arrived at the Clallam County Courthouse after "normal business hours".
5. Does the State commit flagrant and ill-intentioned

misconduct when it argues that the "knowingly" element of the crime charged has been satisfied by evidence that the defendant "knew that he had to register as a sex offender" as opposed to "knowingly failed to comply with a requirement of sex offender registration" as properly stated by RCW 9A.44.130(6)(b).

6. Did cumulative error deny Mr. McDonald a fair trial?

III. STATEMENT OF THE CASE

Paul Aaron McDonald was charged by information with one count of Failure to Register as a Sex Offender, under RCW 9A.44.130(6)(b), in Clallam County Superior Court under cause number 17-1-00210-0 on June 7th, 2017. CP 118. He was arraigned on June 16, 2017 and entered a plea of not guilty. RP 12. His case proceeded to jury trial before the Honorable Judge Brian Coughenour on August 2nd, 2017. RP 44. On August 3rd, 2017, the jury returned a verdict of "guilty". CP 55

On August 9th, 2017, Mr. McDonald was sentenced to 25 months in prison and filed his notice of appeal. CP 23 and 20.

1. Facts

On June 6th, 2017, sometime between 4:30 and 4:45 PM, Paul Aaron McDonald was met at the Clallam County Courthouse door by Sheriff's deputy Andrew Wagner. RP 248. Deputy Wagner escorted Mr.

McDonald into the lobby of the Sheriff's Office and shortly thereafter took him into custody for allegedly failing to register as a sex offender. RP 249. Ten days later, Mr. McDonald was arraigned in Clallam County Superior Court and entered a plea of not guilty to one count of Failing to Register as a Sex Offender. RP 12. On August 2nd, 2017, Mr. McDonald's jury trial commenced before the Honorable Brian Coughenour. RP 41.

The State called Clallam County Sheriff's Deputy Kaylene Zellar RP 169. Deputy Zellar testified that as one of her duties she supervises the sex offender registration program for the Clallam County Sheriff's Office. RP 170. She also testified that she is an instructor on sex offender registration to other officers around the State. RP 170. On direct examination the State inquired as to the specific procedures for the registration of sex offenders in Clallam County. Deputy Zellar testified that individuals under her supervision who lack a fixed address are required to sign a form that outlines what is required of them with regards to registration requirements. RP 171. "Transients" are required to register every Tuesday during normal business hours, which according to the deputy occurs in the lobby of the Sheriff's Office in the Clallam County Courthouse between 8:30AM and 4:30PM. RP 171-172.

The State also elicited testimony from Deputy Zellar that Mr.

MacDonald had previously failed to comply with the Clallam County Sheriff's Office policies regarding sex offender registration on September 13th, 2016. Mr. McDonald's counsel objected. RP 190-192 Following argument the Court overruled the objection and allowed Deputy Zellar to testify that according to State's Exhibit 5, a "Clallam County Sheriff's Office Homeless Sexual Offender Weekly Check-In Register", Mr. McDonald had failed to register as homeless with the Sheriff's Office on September 13th, 2016. RP 193) Deputy Zellar also testified that on the following day, Mr. McDonald signed a "Clallam County Sheriff's Office Notice to Sex Offenders Registering Homeless" document (State's Exhibit 6), which included handwriting in the margins that read, "any further non-compliances will result in arrest, no exceptions." RP 193-195.

The defense called Mr. McDonald as its first witness. RP 230. Mr. McDonald testified that on June 6, 2017, he arrived at the courthouse sometime after 4:20PM and that as he reached for the door handle of the courthouse door it was opened by Sheriff's deputies. RP 238.

Defense counsel asked Mr. McDonald whether he remembered approximately what time it was when he arrived at the courthouse and he responded: "Um, I didn't know exactly what time it was. But I—last time I checked my phone, it was 4:20, and that was when I was still walking." RP 238-239.

When the doors to the courthouse opened Mr. McDonald told the deputy that he was there to register and the deputy brought him in the Sheriff's lobby. RP 239. It was then that he was told that he was under arrest. RP 239. Mr. McDonald was also asked by defense counsel whether he previously been convicted of theft in the third degree. Mr. McDonald answered in the affirmative. RP 241.

On Cross examination the State also asked Mr. McDonald whether he had been convicted of a "theft offense in Clallam County last year?". RP 242. Again, Mr. McDonald answered in the affirmative. RP 242. The State then moved to admit State's Exhibit 10; Mr. McDonald's 2016 Judgement and Sentence for theft in the third degree in Clallam County District Court. (Cause Number CCR 21812) RP 242. Mr. McDonald's counsel questioned the relevance of State's Exhibit 10, given Mr. McDonald's prior testimony. State's Exhibit 10 was admitted by the Court. RP 242.

Deputy Wagner was also called as a witness for the defense and testified that while working at the courthouse on June 6th, 2017, he met Mr. McDonald outside the courthouse doors. RP 248. When asked what time he encountered Mr. McDonald Deputy Wagner stated, "a quarter to 5:00ish". RP 248. According to his testimony deputy Wagner then escorted Mr. McDonald into the Sheriff's lobby and subsequently took

him into custody. RP 248-249.

Other than deputy Wagner's vague estimate of "a quarter to 5:00ish", and Mr. McDonald's testimony that it was some time after 4:20PM, there was no testimony as to what time it was when Mr. McDonald arrived at the courthouse. RP 239, 248.

During closing arguments, the State placed emphasis on Mr. McDonald's previous failure to appear at the Sheriff's office in timely fashion:

> "So, the Defendant missed his check in back in 2016, which we heard about. He was again warned on a very similar document that he was given on May 22nd, that — not only was he told again about the duties for checking in every Tuesday between 8:30 and 4:30, but was told that's it, no more warnings. So it was to import upon him the critical nature of him showing up every Tuesday from 8:30 to 4:30." RP 281-282

The State then addressed Jury Instruction 11, the "to convict" instruction:

> "All right, instruction number 11, knowingly. So, this is one of the more confusing jury instructions that is probably in your packet. (Inaudible), so I'll try to condense this in a way that maybe makes some more sense. One of the requirements is that Mr. McDonald acted knowingly. That's on the elements, that he knowingly failed to comply. So, what does knowingly mean? For the purposes of this case, knowingly is that Mr. McDonald knew that he had to show up June 6th. He knew that he had to show up between 8:30 and 4:30. And he knew that if he didn't

> there would be consequences for it. That's knowingly for the purposes of this case." RP 283-284

Defense objected that State was stating what the law was and the court advised the jury that they, "must disregard any remarks, statement or argument that is not supported by the law in my instructions." RP 284.

The State continued:

> "So, for knowingly, that is supported by the fact that, well, he did show up, albeit late, so he did know that he had to be there. And based on prior warnings that he was given back in September, he knew what the consequences were going to be." RP 284
>
> "He's been registering here for quite a while now, he registers as an individual who lacks a fixed address. Tuesday's the day specified by the Sheriff's Office, he has to come in on Tuesday. When on Tuesday? Normal business hours is operating on the elements, do not let that trip you up, because we refer back to instruction number 16 — or, excuse me, not 16, 6, which says on paragraph 2, during normal business hours. Okay, so that defines when on June 6th he was supposed to show up." RP 285.
>
> "All right, then on June 6th, the Defendant knowingly failed to comply with the requirement of sex offender registration. He didn't show up. The office was closed when he showed up. The door to the Sheriff's Office was locked. Deputy Wagner said that the lights were out. He had a whole day to get there. He didn't get there, he missed it. He failed to meet the compliant — or the requirements of the sex offender registration on that day." RP 285.

On August 3rd, 2017, the jury found Mr. McDonald guilty of

Failure to Register as a Sex Offender. RP 315, CP 55.

IV. ARGUMENT

Issue No 1 - The Trial Court Erred In Admitting Irrelevant, Prejudicial Evidence That Infringed On McDonald's Right To A Fair Trial When It Admitted Propensity Evidence Without Undertaking The Required ER 404(b) and ER 403 Analysis.

A criminal defendant is entitled to be tried for the crime charged. Evidence of prior criminal misconduct, wrongs or bad acts is not admissible to prove character as a basis for suggesting that conduct on the particular occasion of the crime charged was in conformity with conduct on other occasions[1] because of its great prejudice and minimal probative value. ER 404(b); State v. Bell, 10 Wn. App. 957, 961, 521 P.2d 70 (1974); State v. Laureano, 101 Wn.2d 745, 682 P.2d 889, 901 (1984); Maehran v. Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979). Pursuant to ER 404(b) it is improper to use evidence of other criminal activity to show that the defendant has such a character that he is likely to have committed the crime charged. The logic of this is clear. The fact that a defendant has committed a crime or other bad acts does not mean that his character is so wedded to crime that he is likely to have committed the crime presently charged.

[1]The Rule also states: "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." However, none of these purposes are in issue in this case because Mr. McDonald never testified he did not know he was not supposed to register.

Appellate courts review the trial court's decision to admit ER 404(b) evidence for an abuse of discretion. State v. DeVincentes, 150 Wn.2d 11,17,74 P.3d 119 (2003); State v. Thang, 145 Wn.2d 630,642,41 P.3d 1159 (2002). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." Thang, 145 Wn.2d at 642 (citing State ex rel Carroll v. Junker, 79 Wn.2d 12,26,482 P.2d 775 (1971)). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Although the words "crimes, wrongs, or acts" are imprecise, a number of decisions indicate that evidence of this sort should be admitted with extreme caution to avoid prejudice against the defendant. See e.g. State v. Draper, 10 Wn. App. 802, 521 P.2d 53 (1974); State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968). The statutory prohibition encompasses not only prior bad acts and bad behavior but any evidence offered to show the character of a person to prove the person acted in conformity with that character at the time of the crime. State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007). The rule excludes prior criminal acts, regardless of whether they resulted in convictions, State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982) (attempted rape).

ER 404(b) evidence may be admissible for another purpose, however, in this case the trial court said it did not consider the offered evidence as ER 404(b) even though it was being offered to show he had been late once before and warned to be on time. The court said, "I don't need argument because I don't see this as –saying this is a (sic) act on conformity therewith. ...) RP 187. The State, clearly concerned the trial court was not making a sufficient record argued without analysis that the probativeness of the evidence outweighed any prejudice and that he was offering it to show knowledge. After the court stated it did not consider the evidence that Mr. McDonald had been late once before and warned to be conformity or propensity evidence (RP 187), the court admitted the evidence and testimony. Only after the state tried to shore up the record was the challenged evidence was belatedly justified as showing "knowledge". RP 188-89. In response to the State's conclusory statements that the evidence was not unduly prejudicial and that it was admissible to show knowledge, the court said," Okay, and that's basically what I'm finding." RP 189.

The admission of ER 404(b) evidence is a four-step process. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002)[2]. The trial court first

[2]In Saltarelli, this court defined the analysis a trial court must employ before admitting evidence of other crimes. First, the court must identify the *purpose* for which the evidence is to be admitted. Second, the court must determine the *relevancy* of the

must make preliminary findings of fact that the uncharged acts more probably than not took place. *Id.* Next, the court must articulate some reason why the evidence is admissible. Id. Then it must find that the acts are relevant to some factual issue the jury will have to resolve. Id. Finally, the court must weigh the probative value of the evidence. Id. The trial court must also give the jury a limiting instruction regarding the proffered ER 404(b) testimony.[3] ER 403 requires exclusion of evidence, *even if relevant,* if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Goebel, 40 Wn.2d 18, 240 P.2d 251 (1952). 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 highest" and as stated in 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."

In State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984), the court held that a trial court errs if the judge does not undergo the aforesaid

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evidence. In determining relevancy, (1) the purpose for which the evidence is offered "must be of consequence to the outcome of the action", *and* (2) "the evidence must tend to make the existence of the identified fact more ... probable." Third, after the court has determined relevancy, it must then "balance the probative value against the prejudicial effect ..." Saltarelli, at 362-363.

[3] Here, neither party requested a limiting instruction.

analysis *on the record.* Failure to do so precludes the trial court's "thoughtful consideration of the issue", and frustrates effective appellate review. Jackson, at 694, 689 P.2d 76. The trial court in this case did not provide thoughtful and careful consideration of why the prior uncharged conduct was admissible to show knowledge. The court did not explain how knowledge of the past event was of consequence to the current case or analyze the danger of unfair prejudice on the record before overruling the defense objection, at best the court belatedly agreed with the State that it was admissible to show Mr. McDonald knew he was supposed to register on Tuesdays at the Clallam County Sheriff's window located in the courthouse, something Mr. McDonald never contested. RP 189. As the Saltarelli court warned, "cases lacking analysis do little more than pay lip service to the great potential for prejudice". 98 Wn. 2d at 364. As jurors discussed during voir dire, convicted sex offenders trigger strong reactions and community prejudices. RP 89 (government should be in the business of monitoring convicted sex offenders even if the crime was from long ago), RP 91 (State should monitor) RP 93 (monitor for public safety) RP 94 (parties have stipulated defendant is a sex offender and that is all you are going to know), RP 96 (strictly enforce registration laws).

A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is

particularly important in sex cases, where the prejudice potential of prior acts is at its highest. State v. Saltarelli, 98 Wn.2d at 363, State v. Coe, 101 Wn.2d 772, 780–81, 684 P.2d 668 (1984), The rule likewise excludes acts that are merely unpopular or disgraceful. United States v. Reed, 647 F.2d 678 (6th Cir. 1981). Arrests and mere accusations of crimes are generally inadmissible, not so much on the basis of ER 404(b), but simply because they are irrelevant and highly prejudicial. State v. Montague, 31 Wn. App. 688, 644 P.2d 915 (1982). Such is the situation here. The State was allowed to offer testimony and exhibits to show that on one previous occasion in September 2016 Mr. McDonald was late and had been warned that he would be arrested if he were late again. RP 190-95, CP Ex. 5 & 6.

ER 401 defines "relevant evidence" as 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." Under the evidence rules, irrelevant evidence denotes evidence that does not logically tend to prove or disprove any material fact or proposition. Evidence that at best produces only speculative inference is irrelevant evidence. Irrelevant evidence is not admissible. ER 402. Even if the items were relevant to some issue, the danger of unfair prejudice substantially outweighs the probative value of

this evidence. ER 403 provides that even relevant evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" has been defined as evidence that is more likely to arouse an emotional response than a rational decision among the jurors. Lockwood v. AC&S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987); State v. Cameron, 100 Wn.2d 520, 674 P.2d 650 (1983). Other courts have characterized as prejudice that caused by evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994), United States v. Roark, 753 F.2d 991 (quoting United States v. McRae, 593 F.2d 700 (5th Cir.), cert. denied, 444 U.S. 862, 62 L.Ed.2d 83, 100 S. Ct. 128 (1979)).

Here, the testimony that on September 13, 2016, Mr. McDonald was late for his Tuesday registration has no relevance because being late one time months before the charged offense has no bearing on any facts in issue in this case and appears to add little, but in any case, the trial court failed to make the required ER 404(b) analysis including a careful consideration of the relevance and a realistic balancing of the probative value against its potential for prejudice. This type of evidence only serves only to "arouse an emotional response" from the jury or suggests to the jury he has criminal propensities of which these acts are in conformity. The

argument that it is admissible to show "knowledge" because the State must prove a "knowing" failure to register does not pass muster because Mr. McDonald never testified or claimed he did not know he needed to register each and every Tuesday. RP 231. In fact, just the opposite occurred, Mr. McDonald testified he knew had to register on June 6, 2017, and he actually came to the courthouse to register. RP 238, 240 (asked if he could register). He not only came to the court house to register, he was arrested in the lobby. RP 239. That the State understood the prejudicial impact of this propensity evidence cannot be minimized, the State emphasized the prior, uncharged incident multiple times in its closing argument. RP 281-82, 284.

Whether evidence is admissible under this section is determined by reference to the considerations set forth in ER 403. State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982). The court must determine whether the danger of undue prejudice outweighs the probative value of the evidence. Id. In assessing prejudicial effect, the court should consider the necessity for the evidence, the availability of other less inflammatory evidence to make the same point, and the probable effectiveness of a limiting instruction under ER 105. Id. The more closely the misconduct resembles the crime charged, the greater the possibility of prejudice to the defendant. United States v. Beechum, 582 F.2d 898 (5th Cir. 1978). In a criminal

case such as this, any doubt should normally be resolved in favor of excluding the evidence. State v. Meyers, 49 Wn. App. 243, 742 P.2d 180 (1987). The State produced multiple witnesses who testified regarding the June 6, 2017 charge. Thus, the State's witnesses, were available to testify about the offense for which he was being tried. The single other uncharged act of not presenting himself at the Clallam County Sheriff's Office on a Tuesday occurred months previously, had little to no probative value and the danger for unfair prejudice and confusion of the issues was at its highest because of the similarity of the allegations. Therefore, the Court abused its discretion when it permitted the State to introduce evidence that he had once before missed his registration.

In sum, ER 404(b) governs the admissibility of evidence of other crimes or misconduct for purposes other than proof of general character. The primary purpose of the rule is to restrict the admissibility of related, but uncharged criminal activity in a criminal case. 5DWashington Practice, Handbook on Washington Evidence, 2016-2017 Ed., §404:6. Pg. 171. The rule explicitly excludes this very type of propensity evidence and its admission was an abuse of discretion. Under ER 404(b), evidence of Mr. McDonald's alleged other bad act was not admissible to show the charged offense in this case because the probativeness of the acts is of no, or at best marginal, relevance to the this case. The potential for unfair

prejudice stemming from the State's introduction of the prior instance of being late for his registration greatly outweighs the relevance, if any, of Mr. McDonald's charged instance of failing to show.

Moreover, the Court abused its discretion by failing to engage in the required analysis on the record concerning the admission of the testimony by Deputy Zellar that he was late one time before and had been warned.

Issue No 2 - The Trial Court Abused Its Discretion By Admitting A Copy Of Mr. McDonald's Misdemeanor Theft In The Third Degree Conviction After He Acknowledged This Conviction In His Testimony.

ER 609(a)[4] provides the credibility of a witness may be attacked by evidence that the witness has been previously convicted of a crime. State v. Coe, 101 Wn.2d 772, 775, 684 P.2d 668 (1984). ER 609(a)(2) permits admission of evidence of a conviction to attack credibility if the crime "involved dishonesty or false statement, regardless of the punishment". Theft is a crime of dishonesty. State v. Ray, 116 Wn.2d 531, 545,806 P.2d 1220 (1991). Theft in the third degree is codified at 9A.56.050 and classified as a gross misdemeanor.

[4] ER 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 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.

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted ***if elicited from him or established by public record during cross examination*** ...". This is because "[c]ross examination exceeding these bounds is irrelevant and likely to be unduly prejudicial, hence inadmissible." Id. As the court explained in State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), "[t]he details of the acts leading to the prior convictions are not admissible" under ER 609 because "the only purpose of such information in a subsequent trial on an unrelated offense is to bring irrelevant evidence before the jury to insinuate that conviction of the prior offense somehow is proof of defendant's guilt in the present action." State v. McBride, 192 Wn. App. 859, 867, 370 P.3d 982, 985–86 (2016) (emphasis added).

Mr. McDonald admitted his conviction for theft in the third degree on both direct and cross examination. RP 241, 242. The State, even though Mr. McDonald admitted his conviction, offered the theft in the third degree district court judgment and sentence. RP 241, 241. Defense objected. RP 241, 242. Without analysis the court admitted the judgment and sentence. RP 242. The judgment and sentence revealed that he went to jail for the offense along with other extraneous and inadmissible information. RP 247.

Accordingly, certified copies of McDonald's prior conviction for third degree theft should not have been admitted because they exceeded the scope of the rule once Mr. McDonald volunteered his conviction. State v. Coe, 101 Wn. 2d 772, 775, 684 P.2d 668, 670–71 (1984). A trial court's discretionary decisions regarding the admissibility of prior convictions under ER 609 will only be reversed "where the record reflects a clear abuse of discretion." State v. Anderson, 31 Wn. App. 352, 354, 641 P.2d 728 (1982). Failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion. State v. Venegas, 155 Wn. App. 507, 525 228 P.3d 813 (2010) citing State v. Foxhoven, 161 Wn.2d at 174. In exercising its discretion whether to admit evidence, a trial court abuses its discretion if its decision is contrary to law. State v. Neal, 144 Wash.2d 600, 609, 30 P.3d 1255 (2001); State v. McBride, 192 Wn. App. at 873. The trial court abused its discretion in overruling the defense objection and admitting the judgment and sentence into evidence because once Mr. McDonald admitted his conviction the impeachment was complete and the admission of the certified judgment and sentence exceeded the scope of the rule.

Issue No 3 - Mr. McDonald Was Deprived Of A Fair Trial When The State's Key Witness Provided a Non-Responsive Answer to A Question That Informed The Jury The Defendant Had Been Incarcerated Between May 22, 2015 and June 6, 2017 Jail.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968); *cf* State v. Green, 71 Wn.2d 372, 373, 428 P.2d 540 (1967). In this case, Deputy Zellar's testimony that Mr. McDonald spent time in jail was not only irrelevant and thus inadmissible, but was so highly prejudicial that no curative instruction could have overcome the impression left upon the jury.

In another case involving crimes considered reprehensible by society, the court noted:

> In the maintenance of government to the extent it is committed to the courts and lawyers in the administration of the criminal law it is just as essential that one accused of crime shall have a fair trial as it is that he be tried at all, whether he be guilty or not, has his picture in the rogue's gallery or not. . . [I]t must be remembered, as stated in Hurd v. People, 25 Mich.405, that:
>
> 'Unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.'

State v. Devlin, 145 Wash. 44, 52, 258 P.826 (1927). The Devlin court ruled that the defendant had not received a fair trial where testimony elicited was "wholly disconnected from and foreign to the issues to be

decided," and where the jury was led into the belief that they were dealing with a "notorious" criminal. Id.

Here, Deputy Zellar was asked if there instances where Mr. McDonald did not comply with the Clallam County department registration requirements in the time period between May 22, 2015 and June 6, 2017. RP 201. Deputy Zellar's non-responsive testimony was that Mr. McDonald had "gone to jail" in that time period. RP 202. The testimony was objected to as non-responsive and defense counsel requested a mistrial. RP 202, 204, 208-09 (cannot un-ring the bell). Defense counsel argued that no reasonable response would have included the information that Mr. McDonald had gone to jail. RP 206. The judge found that being in jail was not a non-compliance event. RP 206. Even Deputy Zellar acknowledged that when a person is in jail they are not required to report and register. RP 206-07. The trial court struck the testimony and told the jury to disregard it. RP 212. The court did not grant the mistrial finding that "But at this point I don't think it's enough for a mistrial...". RP 210.

Here Deputy Zellar's non-responsive answer was also "wholly disconnected from and foreign to the issues to be decided." Moreover, Deputy Zellar had previously described herself as being knowledgeable regarding registration requirements, and indicated she actually taught

other officers around the state. RP 170. With this background and her admission to the court that she knew being in jail was a not non-compliance event, she nonetheless answered a question from the defense counsel about whether Mr. McDonald had other instances of not meeting the county's reporting and registration requirements by saying he had been in jail. RP 206. There was no argument by the State that this testimony was admissible under ER 404(b) and no analysis regarding its admissibility under that court rule was conducted.

McDonald argues that the trial court erred by denying his motion for a mistrial and a new trial based on Deputy Zellar's improper statement. To determine whether a trial irregularity warrants a new trial, a court considers three factors: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow." State v. King, 131 Wn. App. 1015, published with modifications at 131 Wn. App. 789, 130 P.3d 376 (2006), as amended (Mar. 7, 2006), publication ordered (Mar. 7, 2006), State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165–66, 659 P.2d 1102 (1983)).

Ultimately, the court must decide whether the remark, when viewed against the backdrop of all the evidence, so prejudiced the jury that there is a substantial likelihood the defendant did not receive a fair trial. Weber, 99 Wn.2d at 164–65.

The trial court has wide discretion to cure trial irregularities, and an appellate court reviews the trial court's decision whether or not to grant a mistrial for an abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992) (citing State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)), Weber, 99 Wn.2d at 166; Escalona, 49 Wn. App. at 254–55. The trial court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (citing State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).

In State v. Escalona, the State charged Escalona with assault while armed with a knife. The trial court granted Escalona's motion in limine to exclude any reference to his prior conviction for the exact same crime. At trial, the alleged victim, Vela, testified that he was nervous because Escalona " 'already has a record and had stabbed someone.' " Escalona, 49 Wn.App. at 253. Escalona objected and the court ordered

the statement stricken, but it denied Escalona's motion for a mistrial. The court instructed the jury to disregard the remark.

The reviewing court reversed after setting forth and applying the three-step test for determining whether a trial irregularity may have influenced the jury. Id. at 254–55. The Court held that the alleged victim's remark was extremely serious, and the statement was not cumulative of other evidence as it was the only reference to the prior crime. Id. at 254–55 (internal quotation marks and citations omitted).

The court further held that:

> There is no question that the evidence of Escalona's prior conviction for having stabbed someone was inherently prejudicial. The information imparted by the statement was also of a nature likely to impress itself upon the minds of the jurors since Escalona's prior conduct, although not legally relevant, appears to be logically relevant. As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.

Id. at 255–56 (internal quotation marks and citations omitted).

a) The Non-Responsive Testimony Was A Serious Irregularity

Zellar's statement was a serious irregularity. *See* State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is very prejudicial as it may lead the jury to believe the defendant has a propensity to commit crime); Escalona, 49 Wn.App. at 256 (jury

would use testimony that assault defendant had a criminal record and had stabbed someone to improperly conclude that defendant had acted on this occasion in conformity with past assaultive behavior).

It was non-responsive and designed to impart irrelevant evidence establishing criminality and undermining the presumption of innocence. Zellar had already testified that Mr. McDonald was sex offender had been registering for many years, since the 1990s. RP 174. Referring to McDonald's other periods of incarceration indicates to the jury that Mr. McDonald continues to engage in criminal behavior that results in going to jail and would likely have led the jury to infer that McDonald had the propensity to commit the charged crimes. Id, The prejudice potential of prior acts is at its highest in cases in which the defendant has a history of sexual misconduct, State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) and here this is exacerbated because Deputy Zellar is the head of the Clallam County Sheriff Depart Sex Offender Registration Unit and an instructor for other law enforcement officers around the State, RP 170, someone whom the jury might reasonably presume would know whether Mr. McDonald had multiple convictions or arrests.

Hearing that a convicted sex offender has committed offenses; even without identifying identify a specific crime does not make a

significant difference in the seriousness of the error. In light of these facts, Mr. McDonald has established the first prong of the Escalona test.

b) The Testimony Was Not Cumulative Of Other Properly Admitted Evidence

The testimony that Mr. McDonald had "gone to jail" between May 22, 2015 and June 6, 2017 (RP 202) is not cumulative of other properly admitted evidence because the only other evidence he was in jail was a misdemeanor judgment and sentence that was admitted in error under ER 609. (See argument Issue No. 2 of this appeal.) Moreover, even if it was properly admitted, the jury was left to speculate if this was the only time he was in jail or of he was in jail for other crimes. Mr. McDonald's defense was that he knew he needed to register on Tuesday, June 6, 2017, and he used every method at his disposal to get to the court house to register at the Sheriff's office on time after his planned ride fell through. RP 233, (ride fell through), RP 235-37 bus difficulties because of his dog), RP 238 (speed walking), RP 239 (tells deputy at the door he was there to register.) After the court struck the testimony and denied the motion for the mistrial the court admitted Exhibit 10, Sup.CP 124, RP 242,which informed the jury he had been convicted of a misdemeanor theft charge and was incarcerated. The trial court then used this a further justification

for denying the mistrial presumably on the basis that Deputy Zellar's improper statement was cumulative of other evidence. RP 247.

c) The Curative Instruction Did Not Un-ring The Bell

Here the Court's admonition to the jury to disregard Deputy Zellar's answer (RP 212) was insufficient to protect Mr. McDonald's right to a fair. In this case no reasonable fact finder could find that a curative instruction would have "un-rung" the bell. Here the State labored long and hard to systematically undercut the Mr. McDonald's defense and credibility. That this was an enduring theme and strategy in their case presentation is apparent from voir dire regarding punishment, to the repeated questioning of Deputy Zellar as to forms and obligations of convicted "sex offenders". RP 170-174 (procedure for registration, RP 174 (his sex crime), RP 175 175-179 (forms),P 77(exhibit list) CP Trial Exhibits 1,3,4,5,6,7 and 8. Moreover, the State's case was weak, at worst Mr. McDonald was present at the Clallam County Courthouse to register fifteen minutes after, what they defined as normal business hours. RP 248. He was arrested in the courthouse lobby on the day he was required to appear for his weekly registration. RP 248.

Officer Zellar's testimony is the type of evidence which is "inherently prejudicial and of such a nature as to likely impress itself

upon the minds of the jurors". State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

> "While ordinarily an error in the admission of evidence is remedied by an instruction directing the jury to disregard it, the rule is by no means of universal application. Each case must rest upon its own facts, and in some instances the error may be so serious that an instruction, no matter how framed, will not avoid the mischief."

State v. Morsette, 7 Wn. App. 783, 789, 502 P.2d 1234 (1972), *quoting* State v. Albutt, 99 Wash. 253, 259, 169 P.584 (1917).

The Court's ruling acknowledges that telling the jury the defendant had periods of time in jail was the type of inherently prejudicial information which "could not be expected to be erased by an instruction to disregard it." Morsette, 7 Wn. App. at 789.[5]

It is far more likely that the testimony of Deputy Zellar was imbued in the minds of the jury with a perverse credibility, since she is a law enforcement officer supposedly recounting "facts" about Mr. McDonald's criminality, she is in a position to know how many times and how often he has been in jail. Such information would appear "logically

[5] As stated by the Morsette Court, "To think that the jury could have forgotten is a strain on credulity and highly dubious. ...We conclude . . . that the testimony of the officer and expert in this case 'was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it.' Further, any doubt as to whether the error was cured must be resolved in favor of the accused."

relevant"[6] to a jury, even though not "legally relevant." *See* State v. Escalona, 49 Wn. App. 251, 256, 742 P.2d 190 (1987); State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985) (statement by a government official or law enforcement officer is more likely to influence the fact finder), United States v. Espinoza, 827 F.2d 604, 613, (9th Cir. 1987) (police officer's testimony carries an "aura of reliability"."), State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (police officer's testimony carries an aura of reliability").

In State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968), a Spokane police officer was asked to relate the message that was contained in a Teletype which had been received from the Yakima County sheriff's office, on the basis of which the arrest of the defendant had been made. Id. at 68, 436 P.2d 198. Over defense counsel's objection that the answer would be hearsay, the court allowed the officer to answer, stating that the testimony was not offered to prove the truth of the matter contained therein. Id. The officer then testified that the Teletype described two wanted subjects out of Yakima County and a wanted car, and stated that they were headed for Spokane to duplicate the robbery committed in

[6] "Logical relevance" of a statement tends to "impress itself upon the minds of the jurors," and is a factor that tends to show that an instruction cannot cure the prejudicial effect of a statement. *See* Escalona, 49 Wn. App. at 256, 742 P.2d 190.

Grandview. Id. The defense moved for a mistrial, and the trial court denied the motion, instructing the jury:

> You are instructed to disregard that last portion of the testimony of this officer, other than that relating to two subjects in an automobile. That's the only part you may consider. The rest of it has no bearing in this trial and no bearing upon any outcome of this trial, and it really has no bearing on this man's testimony. All we are concerned with is that he had information concerning two people in a car, and from there you may proceed.

Id. at 69, 436 P.2d 198. The defense contended, inter alia, that no instruction could erase its effect from the minds of the jury. The Miles court noted that a defendant must be tried for the offense charged in the indictment or information, and that to introduce evidence of an unrelated crime is "grossly and erroneously prejudicial" unless such evidence is admissible under ER 404(b). Id., *quoting* State v. Dinges, 48 Wn.2d 152, 154, 292 P.2d 361 (1956).

The Miles court stated:

> [A]lthough it was incompetent to prove the matter which it asserted, it cannot be supposed that the jury was unimpressed by it. This testimony was calculated to and undoubtedly did implant in the minds of the jury the idea that the defendants had committed other robberies of this type and were therefore most likely to have committed the one charged. It is true that there was no reference to past acts; but the inference is strong that the Yakima County sheriff had sufficient knowledge of the defendants' activities to form a judgment about their

> future plans. We do not think the prejudicial effect of this testimony could be removed by an instruction.

Miles, 73 Wn.2d at 70, 436 P.2d 198.

As in the Miles case, the prejudicial effect of Deputy Zellar's volunteered testimony could not be removed by an instruction. Similarly, in State v. Suleski, 67 Wn.2d 45, 48-49, 406 P.2d 613 (1965), the reviewing court determined that "adroitly drawn picture of the defendant's criminal proclivities, sketched upon the backdrop of the medical witness's fear of violence and suspicion of drug addiction, literally dissolved any legalistic curtain based upon the theory that the court's instructions could remove all undue impressions from the jurors' minds. The defendant was irretrievably prejudiced" and hence the bells could not be unrung by a curative instruction. Suleski, 67 Wn.2d at 51, 406 P.2d 613. Here, the "bells" of Mr. McDonald's criminal activities were "so conclusively rung as to effectively preclude 'their unringing.'" — even though irrelevant to the charges before them — is simply too inflammatory to credibly presume that the jury could disregard the testimony, even when instructed to do so. Here, as in Suleski, the State has created an "adroitly drawn picture of the defendant's criminal proclivities."

"The question in all cases, is not whether the court, if trying the case, would disregard the obnoxious evidence but whether the court is

assured that the jury has done so." Suleski, 67 Wn.2d at 51, quoting State v. Meader, 54 Vt. 126, 132 (1881). Because the type of information given by Deputy Zellar is "inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors" (Miles, 73 Wn.2d at 71) it cannot be assumed that the jury could disregard his testimony.

Because the trial abused its discretion in failing to declare a mistrial. The court's reasoning that defendant was not prejudiced is manifestly unreasonable or based on untenable grounds.

Issue No 4 - Was The Evidence Presented At Trial Insufficient To Establish Beyond A Reasonable Doubt That Mr. McDonald Failed To Comply With RCW 9A.44.130(6)(b), Considering There Was No Testimony That Mr. McDonald Knowingly Arrived At The Clallam County Courthouse After "normal business hours".

(a) The evidence presented at trial was insufficient to support Mr. McDonald's conviction.

"The standard for determining whether a conviction rests on insufficient evidence is 'whether, 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.'" In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). "The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the

crime charged." State v. McCullum, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. amend. XIV.

The State bore the burden of proving that Mr. McDonald knowingly failed to comply with the registration requirements of RCW 9A.44.130, which states in relevant part that:

> "A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours."

Therefore, the State's burden was to prove beyond a reasonable doubt that Mr. McDonald knowingly failed to report as a transient at the Sheriff's Office at the Clallam County Courthouse on June 6th, 2017 after normal business hours.

What constituted normal business hours was of primary importance to the State's case, yet the State's witnesses' were not in accord in their understanding of what the courthouse's normal business hours were. Deputy Zellar testified that the courthouse opened at 8:30 AM (CP 171), while Deputy Oakes testified that the courthouse opened as early as 8:00 AM. (CP 217) Deputy Wagner, who escorted Mr. McDonald into the courthouse at approximately 4:45 PM was not asked to opine on what the normal business hours of the courthouse were. None of the State's witnesses were asked what time it actually was when Mr. McDonald was escorted into the Sheriff's Office by Deputy Wagner.

More importantly, there was not a scintilla of evidence presented at trial that Mr. McDonald himself knew what time it was, and therefore no evidence that he knowingly failed to comply with the requirements of RCW 9A.44.130.

In State v. Drake, the issue of a defendant's knowledge with regard to failing to comply with registration requirements pursuant to RCW 9A.44.130 was addressed. In Drake, the court overturned the conviction based on insufficiency of the evidence. State v. Drake, 149 Wn.App.88 (2009). The facts in the Drake case as recounted by the court include:

> "Mr. Drake moved into the New Washington Apartments in Spokane on April 6, 2007. His rent was paid up until midnight on May 6. He registered the New Washington Apartments address with the Spokane County Sheriff's Office on May 4. Mr. Drake did not pay his rent by May 7. Apartment management personnel removed Mr. Drake's belongings and placed them into storage. Mr. Drake's property was later picked up by someone other than Mr. Drake after May 30. On May 16, while making a routine check of the sex offender registry, police learned of Mr. Drake's ouster by the New Washington Apartments. An arrest warrant was requested. On May 22, the State filed an information charging Mr. Drake with failure to register as a sex offender. Mr. Drake waived his right to a jury trial and was convicted after the bench trial." Drake at 91
>
> "While the lawfulness of his eviction is not at issue, the absence of evidence that Mr. Drake was notified of his ouster calls into doubt the legitimacy of the court's finding that Mr. Drake "had no legal right to reside at the address.". It therefore impacts the mens rea element. In fact, there is no other evidence to support an inference of a knowing failure to register." Drake at 94

In its analysis the court focused on the knowledge element of the offense, finding that evidence that Mr. Drake had, in fact, been evicted from his registered address was insufficient;

> "...the fact that Mr. Drake probably knew he did not pay his rent does not necessarily equate to the knowledge of an automatic lockout. Thus, the State did not show that Mr. Drake knew he was ousted." Drake at 95

In the present case, viewing the evidence in light most favorable to the plaintiff, normal business hours at the Clallam County Courthouse on June 6th, 2017 were between 8:30AM and 4:30PM. Mr. McDonald arrived sometime after 4:20 and "a quarter to 5:00ish". While the State presented evidence that Mr. McDonald knew that he had to register during normal business hours on June 6th, 2017, there was no evidence presented as to what time he actually arrived. More importantly there was no evidence that Mr. McDonald knew what time he arrived. Pursuant to the court's ruling in Drake, an argument that Mr. McDonald "probably knew" that he had arrived after "normal business hours" is insufficient to support his conviction.

When the State seeks to prosecute cases with fact patterns such as those in this case, they should be held to the standard of their exactness, and be required to demonstrate beyond a reasonable doubt that a defendant knew, beyond a reasonable doubt, the hour to the minute.

Because insufficient evidence supported the court's verdict, the proper remedy is to reverse and remand for dismissal with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

(b) Mr. McDonald's prosecution was contrary to the legislative intent of RCW 9A.44.130(6)(b)

When the legislature enacted the sex offender registration statute, it made the following findings:

> "The legislature finds that sex offenders often pose a high risk of re-offense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction..."
>
> "...Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in section 402 of this act."

LAWS of 1990, ch. 3, § 401.

Our courts have concluded that the "purpose behind sex offender registration is to assist law enforcement agencies' protection efforts." State v. Heiskell, 129 Wn.2d 113, 117, 916 P.2d 366 (1996); *see also* State v. Stratton, 130 Wn. App. 760, 765, 124 P.3d 660 (2005); State v. Pray, 96 Wn. App. 25, 28, 980 P.2d 240 (1999). It does so by keeping law enforcement informed of the whereabouts of sex offenders who may reoffend. *See* Pray, 96 Wn. App. at 28-29.

Given the testimony presented at trial by Deputy Wagner, Mr. McDonald was present in the lobby of the Sheriff's office no later than 4:45 PM on June 6th, 2017. There was no evidence presented that his tardiness was "abnormal" in the sense of "normal business hours", or in any way subverted the stated legislative purpose of assisting law enforcement protection efforts. In fact, law enforcement was well informed as to Mr. McDonald's whereabouts.

According to a May 2017 report by the Vera Institute of Justice entitled "The Price of Prisons: Examining State Spending Trends, 2010-2015", Washington State spent an average of $37,841 per inmate in 2015. (Chris Mai and Ram Subramanian. Price of Prisons 2015: Examining State Spending Trends, 2010-2015. New York: Vera Institute of Justice, 2017.) Given Mr. McDonald's sentence of 25 months, his estimated cost of incarceration would be nearly $80,000. This despite the fact that he presented himself for registration and was in the Sheriff's office on the day he was required to register within fifteen minutes of the most generous estimate of normal business hours.

Issue No 5 - The State Committed Flagrant And Ill-intentioned Misconduct When It Argued That The Knowingly Element Of The Crime Charged Had Been Satisfied By Evidence That The Defendant Knew That He Had To Register As A Sex Offender As Opposed To Knowingly Failed To Comply With A Requirement Of Sex Offender Registration" As Properly Stated By RCW 9A.44.130(6)(b).

The prosecuting attorney committed prejudicial misconduct by misstating the standard upon which the jury could find Mr. McDonald

guilty. To establish that the prosecuting attorney here committed misconduct during closing argument, Mr. McDonald must prove that the prosecuting attorney's remarks were both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011)

(a) The prosecuting attorney's statements were improper.

A prosecuting attorney commits misconduct by misstating the law. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). It is improper for a prosecutor to misstate the burden of proof. State v. Johnson, 158 Wn. App. 677, 685; 243 P.3d 936 (2010). In Johnson, the State misstated the burden of proof in its closing argument, arguing that in order to find the defendant not guilty, the jurors had to have a reason to doubt and implied that the jurors must convict unless they had a reason not to. Id.

Here, the prosecuting attorney misstated the standard upon which the jury could find Mr. McDonald had actual knowledge. The State was required to prove that Mr. McDonald knew that he had failed to comply with a registration requirement of RCW 9A.44.130(b)(6). While the State must prove actual knowledge, it may do so through circumstantial evidence. Thus, Washington's culpability statute provides that a person has actual knowledge when "he or she has information which would lead a reasonable person in the same situation to believe" that he was promoting or facilitating the crime eventually charged. RCW 9A.08.010(1)(b)(ii).

As the court in State v. Allen noted, "Although subtle, the distinction between finding actual knowledge through circumstantial

evidence and finding knowledge because the defendant "should have known" is critical. We have recognized that a juror could understandably misinterpret Washington's culpability statute to allow a finding of knowledge "if an ordinary person in the defendant's situation would have known" the fact in question, or in other words, if the defendant "should have known." State v. Shipp, 93 Wn.2d at 514, 610 P.2d 1322 (1980). However, such an interpretation subjects a defendant to accomplice liability under a theory of constructive knowledge and is unconstitutional. Id. at 515–16, 610 P.2d 1322. To pass constitutional muster, the jury must find actual knowledge but may make such a finding with circumstantial evidence. Id. at 516, 610 P.2d 1322." State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015)

Here, the prosecuting attorney repeatedly misstated the law to the jury, arguing that it could convict McDonald if it found that he knew that had to register on the date and time indicated on his registration forms,

" For the purposes of this case, knowingly is that Mr. McDonald knew that he had to show up on June 6th. He knew that if he didn't there would be consequences for it. That's knowingly for the purposes of this case." RP 283-284.

> "All right, instruction 11, knowingly. So, this is one of the more confusing jury instruction that is probably in your packet. (Inauduble), so I'll try to condense this in a way that maybe makes some more sense. One of the requirements is that Mr. McDonald acted knowingly. That's on the elements, that he

> knowingly failed to comply. So, what does knowingly mean? For the purposes of this case, knowingly is that Mr. McDonald knew that he had to show up on June 6th. He knew that if he didn't there would be consequences for it. That's knowingly for the purposes of this case." RP 283-284

Mr. McDonald's counsel objected to the State's argument in closing and the court advised the jury they, "must disregard any remarks, statement or argument that is not supported by the law in my instructions." RP 284.

Though Mr. McDonald's counsel objected during the prosecuting attorney's closing argument and the judge advised the jury to disregard that which did not comport with the law and the court's instructions, such is not a reliable panacea. As Justice Sanders noted in his dissent in State v. Teal, "Juries are presumed to follow the instructions given by the court, but that presumption is overcome when they are forced to 'assume' the law is different from that provided." State v. Teal, 152 Wn.2d 333, 342, 96 P.3d 974 (2004) (Sanders, J., dissenting) In this instance, the State's argument was "flagrant, ill-intentioned and incurable by a trial court's instruction in response to a defense objection." State v. Johnson, 158 Wn. App at 685 (2010. "[A] misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." Id. at 685-86,

citing State v. Bennett, 161 Wn.2d 303,315, 165 P.3d 12421 (2007); State v. Anderson, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009)).

The State's argument during its close was a gross simplification of its burden and effectively mischaracterized the offense of Failing to Register as a Sex Offender as a strict liability offense. While the State argued that it only needed to show that Mr. McDonald knew he had to register on the day in question, RCW 9A.44.130(6)(b) explicitly states that a violation of the statue occurs when a defendant knowingly fails to comply with a registration requirement. The "knew he had to show up on June 6" standard presented by the State during closing argument was a misstatement of the law and therefore improper.

(b) Mr. McDonald was prejudiced by the improper statements of the prosecuting attorney.

Should a court determine that a prosecuting attorney's statements were improper, it must then determine whether the defendant was prejudiced under one of two standards of review. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." Id. However, if the defendant failed to object, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." Id. at 760–61, 278 P.3d 653.

Because Mr. McDonald objected at trial, the court should proceed under the first standard and ask whether there was a substantial likelihood that the misconduct affected the jury verdict.

Because the charge against Mr. McDonald was based on his knowledge, what Mr. McDonald knew and did not know was of critical significance. The State could have inquired of any if the witnesses if they knew what time it was when Mr. McDonald appeared. The State could have sought on estimate from Mr. McDonald himself on cross examination as to where he was when he looked at his phone and saw it was 4:20PM, and thereby opine whether a person on foot could have traveled fast enough to get to the courthouse before 4:30. However, the State produced no direct evidence that Mr. McDonald had actual knowledge that he had in fact violated a condition of his registration requirement. Thus, the trial turned on whether the State produced sufficient circumstantial evidence to allow the jury to infer that Mr. McDonald had actual knowledge.

The State could have sought to develop such testimony in the presentation of its case, but intentionally and improperly foisted improper ER 404(b) and ER 609 evidence on the jury, instead of legitimate circumstantial evidence. (See argument issue No. 1, 2 and 3 of this appeal.) A misstatement that the jury could find Mr. McDonald guilty by a showing that he knew he had to register was particularly likely to affect the jury's verdict as knowledge was the mens rea of the crime charged.

Misconduct by the State is particularly egregious. "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d at 763, 675 P.2d 1213 (1984). This is because "[t]he jury knows that the prosecutor is an officer of the State." State v. Warren, 165 Wn.2d at 27, 195 P.3d 940 (2008).

In this case, the prosecuting attorney's statements were improper. And because there is a substantial likelihood that the improper statements affected the jury's verdict, the prosecuting attorney committed prejudicial misconduct and Mr. McDonald's conviction should be overturned and the case remanded for retrial.

Issue No 6 - Cumulative Error Deprived Mr. McDonald Of A Fair Trial.

Even if none of the errors alleged by the defendant on appeal alone mandate reversal, where it appears reasonably probable that he cumulative effect of those errors materially affected the outcome of the trial, a reversal of the convictions is required. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998), *citing* State v.Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); see also State v. Coe, 101 Wn.2d 772, 789, 694 P.2d 668 (1984); State v. Oughton, 26 Wn. App. 74, 85, 612 P.2d 812 (1980).

Mr. McDonald argues that cumulative error deprived his right to a fair trial. The cumulative error doctrine applies when several errors

occurred at the trial court level, but none alone warrants reversal. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004). Instead, the combined errors effectively denied the defendant a fair trial. Hodges, 118 Wn. App. at 673-74. The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. In re Pers. Restraint of Lord, 123 Wn.2d 27 296, 332, 868 P.2d 835, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994).

A cumulative error analysis depends on the nature of the error. Constitutional error requires reversal unless we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Welchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). Constitutional error is harmless when overwhelming evidence supports the conviction. Id. Non-constitutional error requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Because this case involves both constitutional and non-constitutional errors, the reviewing court applies apply the more stringent constitutional error standard in evaluating the cumulative effect of any errors.

Although some of the evidentiary errors, standing alone, might not warrant reversal, their cumulative effect requires a new trial. The admission of evidence of other bad acts or misconduct, the stricken testimony that he spent periods of time in jail, the improper admission of judgment and sentence documents and the misstatement of law in closing argument improperly allowed the jury to infer that he was a bad character and thus more likely to have committed the crime. In this case the untainted evidence is inextricably entangled with the State's use of improperly admitted evidence.

The State relied so extensively on the improperly admitted evidence that this court is unable to determine whether the jury verdict would have been the same absent the errors. It is reasonably possible that the improperly admitted evidence took away reasonable doubts that the jury may have had about McDonald's guilt. Absent the erroneously admitted evidence, the evidence was not overwhelming that Mr. McDonald knowingly failed to register as a sex offender. Rather, the jury reasonably could have reached a different outcome in this case. Thus, this court must reverse and remand for a new trial.

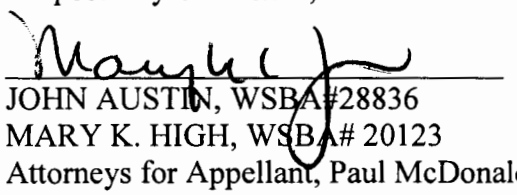
V. CONCLUSION

In conclusion, Mr. McDonald was denied a fair trial due to prosecutorial misconduct, introduction of improper evidence contrary to

ER 404(b), ER 609 and cumulative error. Therefore, this matter should be reversed and remanded for a new trial. In addition, there was insufficient evidence to convict Mr. McDonald of Failure to Register as a Sex Offender and the proper remedy is to reverse and remand for dismissal with prejudice.

Dated this 30 day of January, 2018.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. PAUL MCDONALD, Appellant.	)))))))))	NO. 50733-1-II CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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Jesse Espinoza
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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

Paul McDonald, DOC# 874971
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PO Box 769
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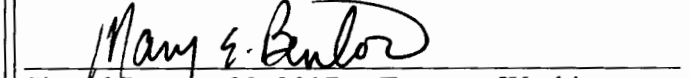
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.



Signed January 30, 2017 at Tacoma, Washington.

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