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Division II  
State of Washington  
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No. 52505-4-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

JERRY C. THOMPSON,  
Appellant.

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

Cause No. 17-1-00171-8

The Honorable Phillip K. Sorensen

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OPENING BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. Defense counsel's failure to contest the State's motion to join two sex offenses involving different victims deprived Mr. Thompson of his Sixth Amendment right to effective assistance of counsel.
2. Defense counsel's failure to object to prejudicial irrelevant testimony regarding Ms. Peggy Thompson's reason for divorce and the Thompson's sexless marriage deprived Mr. Thompson of his Sixth Amendment right to effective assistance of counsel.
3. Defense counsel's failure to object to numerous instances of prejudicial hearsay testimony deprived Mr. Thompson of his Sixth Amendment right to effective assistance of counsel under the cumulative error doctrine.
4. Defense counsel's failure to object to numerous instances of admission of prejudicial inadmissible and irrelevant evidence, and improper questioning deprived Mr. Thompson of his Sixth Amendment right to effective assistance of counsel under the cumulative error doctrine.
5. Defense counsel's failure to object to the State's motion to join two child sex cases involving different victims, failure to object to

prejudicial and irrelevant testimony regarding Mr. Thompson's wife's motive for a divorce and their sexless marriage, failure to object to numerous admissions of prejudicial hearsay evidence, failure to object to admission of numerous instances of inadmissible and irrelevant but prejudicial testimony, and failure to object to improper questioning deprived Mr. Thompson of his Sixth Amendment right to effective assistance of counsel under the cumulative error doctrine.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a defendant is charged with two sex crimes involving two different victims in two separate cases, is does he suffer from prejudicial ineffective assistance of counsel when counsel does not object to joinder of the cases when a reading of the record makes clear an objection to joinder would have kept the cases severed?
2. When defense counsel fails to object to prejudicial irrelevant testimony regarding the defendant's wife's reason for divorce, when that evidence would lead a jury to conclude the wife believed accusations of sex abuse, and the jury is told that the defendant is in a sexless marriage, allowing the jury to speculate that the

marriage is sexless because the defendant is molesting the child in the house, does the defendant suffer from prejudicial ineffective assistance of counsel?

3. When defense counsel fails to object to numerous instances of prejudicial hearsay testimony, is the defendant deprived of his Sixth Amendment right to effective assistance of counsel under the cumulative error doctrine?
4. When defense counsel fails to object to numerous instances of admission of prejudicial inadmissible and irrelevant evidence, and improper questioning, is the defendant deprived of his Sixth Amendment right to effective assistance of counsel under the cumulative error doctrine?
5. When defense counsel fails to object to the State's motion to join two child sex cases involving different victims, fails to object to prejudicial and irrelevant testimony regarding the defendant's wife's motive for a divorce and their sexless marriage, fails to object to numerous admissions of prejudicial hearsay evidence, fails to object to admission of numerous instances of inadmissible and irrelevant but prejudicial testimony, and fails to object to improper questioning, is the defendant deprived of his Sixth

Amendment right to effective assistance of counsel under the cumulative error doctrine?

### III. STATEMENT OF THE CASE

#### A. Procedural History

On January 17, 2017, Mr. Thompson was arraigned under Pierce County Superior Court cause 17-1-00171-8. CP 3-5. That information charged him with two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree pertaining to alleged victim A.T. CP 15.

On February 7, 2017, Mr. Thompson was arraigned on another case, Pierce County Superior Court cause 17-1-00577-2. CP 15. That information charged him with two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree pertaining to alleged victim D.W.

On July 21, 2017, the State amended the 17-1-00171-8 information to add one count of Unlawful Possession of a Firearm in the Second Degree. CP 6-8.

On March 6, 2018 the State moved to join the all the charges alleged in the two informations, and on March 20, 2018 the trial court

granted the motion when the defense did not object. CP 39. On March 29, 2018 the State filed a Third Amended Information under cause 17-1-00171-8 (CP 40-45) charging Mr. Thompson with:

Count 1 - Rape of a Child in the First Degree, alleging he raped A.T. on or between May 3, 2011 and September 11, 2013;

Count 2 – Child Molestation in the First Degree, alleging he molested A.T. on or between May 3, 2011 and September 11, 2013;

Count 3 – Rape of a Child in the First Degree, alleging he raped A.T., on or between May 3, 2015 and November 4, 2016;

Count 4 – Child Molestation in the First Degree, alleging he molested A.T., on or between May 3, 2015 and November 4, 2016;

Count 5 – Rape in the First Degree, alleging he raped D.W. on or between November 14, 2014 and November 16, 2014;

Count 6 – Rape of a Child in the First Degree alleging he raped D.W. on or between November 14, 2014 and November 16, 2014;

Count 7 – Rape in the Second Degree, alleging he raped D.W. on or between November 14, 2014 and November 16, 2014;

Count 8 – Rape of a Child in the First Degree, alleging he raped D.W. on or between November 14, 2014 and November 16, 2014;

Count 9 – Child Molestation in the First Degree, alleging he molested D.W. on or between December 1, 2014 and December 31, 2014;

Count 10 – Rape in the Second Degree, alleging he raped D.W. on or between June 1, 2016 and September 1, 2016;

Count 11 – Rape of a Child in the Second Degree, alleging he raped D.W. on or between June 1, 2016 and September 1, 2016;

Count 12 – Unlawful Possession of a Firearm in the Second Degree, alleging he possessed a firearm on or about the 13th day of January, 2017.

On April 18, 2018 the defendant pleaded guilty to Count 12, Unlawful Possession of a Firearm in the Second Degree. CP 65-75. On April 23<sup>rd</sup> and 24<sup>th</sup> the trial court conducted a child hearsay hearing pursuant to RCW 9A.44.120. At this hearing the court heard from nine witnesses: nine year old A.T. (RP 24-44), A.T.'s mother Shauna Thompson (RP 45-83), school counselor Cassandra Swasey (RP 84-112), Keri Arnold who is employed as a child interviewer in the Pierce County Prosecuting Attorney's Office (RP 113-47), fourteen year old D.W. (RP 148-59), Sigournia Hamilton, a friend of Shauna Thompson (RP 160-84), Katrina Andrade, a Child Protective Services employee (RP 185-96), Jennifer Schooler, a child forensic interviewer employed by Multicare at the Child Advocacy Center of Pierce County, (RP 197-216), and another friend of Shauna Thompson, Rachel Hamilton (RP 217-38).

After argument by the parties the court found the State had met its burden the statements were admissible. RP 253. The court's written findings of fact and conclusions of law were not filed until July 16<sup>th</sup>, after the trial had concluded. CP 304-06.

In ruling on pretrial motions in limine the court granted the State's motion to exclude evidence regarding D.W. acting out sexually or writing sexually, and to exclude evidence regarding A.T. acting out sexually or acting more sexual than her peers. RP 261. The court reserved ruling on

whether the defense could use character evidence of A.M.T. and D.W. RP 263. The court excluded “other suspect evidence.” RP 263. The court reserved ruling on whether letters written to Mr. Thompson while he was in-custody, by his wife Peggy Thompson, would be admissible. RP 271.

The court granted the defense motion to prohibit witnesses from commenting on the credibility of the State's witnesses or defendant's guilt. RP 272. The court denied the defense motion to prohibit the jury from repeatedly replaying the videos of the forensic interviews during its deliberations. RP 274.

## B. Trial

By the time the case came to trial Mr. Thompson was a 66 year old retired man who spent most of his adult life self-employed in the automotive repair and auto sales business. RP 5/10/18, pp. 15, 17. He had been married to Peggy Thompson for more than 35 years before they had recently divorced. RP 5/10/18, pp. 15-16. Ms. Thompson was the bookkeeper, while Mr. Thompson did the work at the shop. *Id.*, at 18. The couple had five children together, and Mr. Thompson had two children from a prior marriage, while Ms. Thompson had one child from a prior marriage. *Id.*, at 15-16; RP 790. At the time of the trial, Mr. Thompson had six grandchildren. *Id.*, at 19.

A.T. is the daughter of Mr. Thompson daughter Shauna Thompson. Id. Mr. and Ms. Thompson raised A.T. for the first four years of A.T.'s life. Id., at 21-22. Shauna only spent a few nights at the home and Mr. Thompson did not get along well with her. Id., at 25. After Mr. Thompson closed his storefront, he ran a mobile mechanic business and would take A.T. with him when he went to work on cars; she was his "sidekick." Id., at 24. During A.T.'s first four years, Mr. Thompson and Peggy took care of everything A.T. needed. Id., at 25. During this time period, Mr. Thompson would give Peggy money to give to Shauna. When Mr. Thompson decided to terminate this support, Shauna decided she would no longer let Mr. Thompson and Peggy see A.T. Id. at 26.

A.T. was born on May 31, 2008 to Shauna Thompson. RP 787. Shauna grew-up on Crystal Lane Loop in Puyallup. RP 788. It was the family residence until sold just before trial. RP 788-89. Shauna testified A.T. was four years old when A.T. first mentioned any kind of abuse. RP 802-03. Shauna testified that A.T. said "that he touches her foo-foo and that he made her take a bath, and then that he continued to touch her. . . . that he told her not to tell anybody or else she would be in trouble." RP 814. Per Shauna, A.T. uses the word "foo-foo" when referring to her vagina. Id.

After A.T. said this, Shauna called her friend and co-worker Rachel Hamilton. RP 815. Shauna did not call law enforcement, nor CPS. RP 818. Shauna decided that A.T. would not go to the Thompson residence anymore. Id. Shauna arranged to have A.T. go to Cathy Ammann's home, A.T.'s godmother, and Peggy could visit with A.T. there. RP 819. About a month after the initial accusation, A.T. told Shauna that it did not happen. RP 819.

After this Shauna and A.T. moved in with Shauna's friend Rachel Hamilton and Rachel's sister Sigournia Hamilton. RP 820. When A.T. alleged abuse to Sigournia, the three women went to the Thompson home on Crystal Lane Loop and the two Hamilton women went in the home and spoke with Mr. Thompson. RP 825. They did not ask him if he touched A.T. inappropriately, but Sigournia did ask him if he had A.T. perform oral sex on him. RP 1222. Mr. Thompson, without saying anything, rejected the notion: "And he said -- he didn't --actually, he didn't say anything. He was -- he just like shooed me off, like just get out of here kind of thing." Id.

Shauna called the police and A.T. had her first forensic interview on October 2<sup>nd</sup>, 2013. RP 829. For sometime Shauna kept A.T. away from Mr. Thompson, but in 2016 she allowed A.T. to spend nights at the Thompson residence. RP 835. On November 2, 2016 A.T. told her school

counselor, Cassandra Swasey, that she did not have enough food at home. RP 1420. After some discussion, A.T. told Ms. Swasey that Mr. Thompson loves her and touches her. RP 1423-25.

D.W. was 14 years old when she testified. RP 906. D.W. is the daughter of Bethany Orr, who married Mr. Thompson's stepson Jason Orr on November 14, 2014. RP 908-09, 1018-19. While Bethany and Jason spent the first two nights after their wedding at a hotel, D.W. spent two nights at the Thompson home with Jerry and Peggy. RP 1021. D.W. testified that on the second night she fell asleep in Mr. Thompson's bedroom while watching TV. RP 924. She testified that she woke to Mr. Thompson coming into the room. RP 925. D.W. testified that he got on the bed, pulled out a knife and said, "If you make a sound, I'll cut out your fucking vocal cords." RP 927. D.W. testified that Mr. Thompson then raped her. RP 928-31. She testified that Mr. Thompson threatened to hurt her little sister. RP 938. She told the jury that when Mr. Thompson left the room, he turned to D.W. and said, "You're my whore." RP 933.

D.W. testified that the next morning she was to meet her mother at church and Mr. Thompson drove her to church. RP 935. D.W. testified that Mr. Thompson forced her to perform oral sex on him while they were stopped at a stoplight. RP 939-41. When she got to church, she did not

tell either her mother, nor Jason Orr about anything that had happened that weekend. RP 943.

About a month later there was a family Christmas party at the Thompson residence. RP 945. D.K testified that as she was leaving Mr. Thompson “[r]oughly slapped his hand against my butt.” RP 945.

D.W. testified that the next time she saw Mr. Thompson was at the Outback Steakhouse. RP 962. D.W. was at the Outback Steakhouse with her boyfriend and his family. RP 962-63. This occurred in August, 2016. RP 1275. D.W. testified that she saw Mr. Thompson in the parking lot as they arrived at the restaurant. RP 966. She told the jury that she went into the bathroom and as she turned to shut the stall door, she saw Mr. Thompson standing outside the stall. RP 968. D.W. told the jury that he leaned up behind her and said, "You're still my whore." RP 968, 970. D.W. testified that Mr. Thompson then raped her. RP 970-72. D.W. returned to the table where her boyfriend’s family was sitting. She did not tell anybody about this incident. RP 1278.

#### IV. ARGUMENT AND AUTHORITIES

A. MR. THOMSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL AGREED TO JOIN THE SEPARATE CASES INVOLVING A.T. AND K.W. RESULTING IN UNDUE PREDUDICE.

A defendant is guaranteed the right to effective assistance of counsel. *U.S. Amend. VI and XIV; Wash. Const. Art. 1 Sect. 22*. Courts presume counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*McFarland*, 127 Wn.2d at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). "Competency of counsel is determined based upon the entire record below." *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Trial counsel's failure to properly execute a trial strategy may constitute ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003). This includes the failure to object to the admission of impermissible evidence.

[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted.

*State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted).

To establish prejudice based on an improper joint trial, a defendant must show that a competent attorney would have moved for severance, that the motion likely would have been granted, and that there is a reasonable probability he would have been acquitted at a separate trial.

*State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) (citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004)).

The Supreme Court of Washington has long recognized the “great potential for prejudice inherent in evidence of prior sexual offenses”.

*State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154, 157 (1990) (quoting *State v. Harris*, 36 Wn.App. 746, 752, 677 P.2d 202 (1984) and *State v. Ramirez*, 46 Wn.App. 223, 227, 730 P.2d 98 (1986)).

Washington courts “have recognized that joinder is inherently prejudicial.” *Ramirez*, 46 Wn. App. at 226 (citing *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968)). This risk is especially pronounced in cases where multiple sex offenses are charged. *Bythrow*, 114 Wn.2d at

718-19. The potential for hostility-based prejudice is highest in sex cases.

*State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Joinder of charges can impact a defendant's right to a fair trial in many ways. For example:

(1) a defendant may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.

*Harris*, 36 Wn. App. at 750 (quoting *Drew v. United States*, 331 F.2d 85, 88 (D.C.Cir.1964)); *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). *Harris* involved sexual offenses where the court recognized the “ ‘great potential for prejudice inherent in evidence of prior sexual offenses’ ” and held that despite a proper instruction to consider each count separately, prejudice could not be cured. *Harris*, 36 Wn. App. at 752.

The Washington Supreme Court recently reaffirmed its precedent and held trial courts must consider whether joinder of charges will result in undue prejudice to a defendant.

Ever since Washington first allowed for the joinder of offenses, our courts have recognized the close relation of joinder and severance, and have held that joinder should not be allowed in the first place if it will clearly cause undue prejudice to the defendant.

*State v. Bluford*, 188 Wn.2d 298, 307, 393 P.3d 1219 (2017). “[B]oth prejudice to the defendant and judicial economy are relevant factors in joinder decisions, but judicial economy can never outweigh a defendant’s right to a fair trial[.]” *Id.* at 305.

After identifying whether joinder is allowable in accordance with CrR 4.3(a)(1) or CrR 4.3(a)(2), the court should balance the likelihood of prejudice to the defendant against the benefits of joinder in light of the particular offenses and evidence at issue and carefully articulate the reasoning underlying its decision.

*Id.* at 311. Because trial counsel agreed to consolidate the cases, the trial court never balanced the likelihood of prejudice to Mr. Thompson against the benefits of joinder.

There is no fathomable reason why trial counsel would strategically agree to join the cases when it would result in the jury being presented with two victims alleging multiple counts of sexual misconduct by Mr. Thompson.

Trial counsel's failure to object to the State's motion to join was deficient performance. As the courts above noted, the prejudice for a defendant facing multiple victims is overwhelming. No strategic or tactical basis can justify counsel's acquiescence to joinder. Had trial counsel objected to the State's motion to join the two cases involving A.T. and D.W., the trial court likely would have denied joinder to avoid undue prejudice.

Four factors are considered to determine whether joinder would cause undue prejudice: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017). Each factor is considered separately, because the absence of even one mitigating factor may require separate trials. See, e.g., *State v. Ramirez*, 46 Wn. App. at 228 (prejudice not mitigated because one factor absent, abuse of discretion not to sever); *State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984).

When reviewing pretrial joinder, appellate courts review "only the facts known to the trial judge at the time, rather than the events that develop later at trial." *Bluford*, 188 Wn.2d at 310. Here, the record lacks

sufficient information to analyze the first factor – the strength of the State’s evidence for each case. More problematic is the proffer made by the State in its brief supporting joinder of the offenses. The State’s brief told the court that “the court need not consider the overall strength of the State's case. Rather, the question is whether the strength of the State's case on each count is similar.” CP 20. This is not the law. Because defense counsel did not object to the State’s motion to join, there is no information to indicate the arguments defense would have made to dispute this assertion.

In fact, the strength of the counts differed dramatically, as did the nature of the accusations. A.T. was a four year old when the alleged abuse began. The accusations were that Mr. Thompson used A.T.’s love for her grandfather to get her to commit sexual acts and to submit to him. At trial, the State had A.T. testify and then paraded at least seven witnesses to provide child hearsay, including two child interviewers, A.T.’s mother, two of her mother’s friends, a school counselor, and a pediatric nurse.

In contrast, the allegations regarding D.W. were dramatically different. The State’s theory was that Mr. Thompson forcibly raped her on three occasions, threatening to kill her and degradingly calling her his “whore”. RP 933. There were no child hearsay witnesses with respect to

D.W.'s accusations. The allegations related to D.W. were based entirely on D.W.'s testimony.

With respect to the second factor, it appears from the record the defense for all counts was the same – general denial. While conflicting defenses increase the prejudice flowing from a joint trial, incompatible defenses are not a requirement for severance. For instance, although denial was the defense for two counts of indecent liberties, it was nevertheless an abuse of discretion not to sever the charges in *State v. Ramirez*, 46 Wn. App. 223, 225-26, 730 P.2d 98 (1987). Similarly, the Court of Appeals reversed for failure to sever in *State v. Harris*, where the defense to both rape charges was consent. 36 Wn. App. 746, 748-49, 677 P.2d 202 (1984).

The third factor relates to whether the jury can be instructed to consider each count separately. Under this factor, the trial court should: (1) instruct the jury that evidence of each count is to be considered for that count only, and (2) consider the extent to which the jury could be expected to compartmentalize such evidence across the different charges. *State v. Bythrow*, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). “When the issues are relatively simple and the trial lasts only a couple of days, the jury can be reasonably expected to compartmentalize the evidence.” *Id.* at 721 (citing *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978)). However, in this case, the issues were not simple because of the

lengthy charging period and the emotionally-charged nature of the sexual assault allegations. It was unreasonable to expect a jury to separate the evidence corresponding to each charge. Cross-contamination was inevitable under such circumstances.

This is particularly true given the nature of the allegations. A.T. was allegedly groomed and abused for years. Her allegations should have stood on their own. However, with the charges joined the State was able to not subtly assert that Mr. Thompson was a sadistic man taking a knife to the throat of a girl (D.W.) and threatening her: “If you make a sound, I’ll cut out your fucking vocal cords.” RP 927.

In a trial that lasted almost two weeks, and had more than twenty witnesses testify, a jury cannot be expected to compartmentalize these different types of sexual assault allegations.

Finally, the fourth factor required the motion for joinder be denied. The evidence in this case was not cross-admissible under ER 404(b). ER 404(b) provides that evidence of other crimes, wrongs, or acts “may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” However, under ER 404(b), evidence from the other alleged incidents would not be admissible against Mr. Thompson to prove character or criminal propensity. *State v. DeVincentis*, 150 Wn.2d 11, 17,

74 P.3d 119 (2003). A trial court must “begin with the presumption that evidence of prior bad acts is inadmissible.” *Id.* “In doubtful cases, the evidence should be excluded.” *State v. Bluford*, 188 Wn.2d at 312 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

In its pre-trial brief to the court moving the court to join the cases, the State argued the allegations related to A.T. and D.W. were cross-admissible to show common scheme or plan, opportunity as well as motive and intent. CP 25-31.

To be admissible as a common scheme or plan the State must establish a sufficiently high-level of similarity between the prior bad act and the current charge:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan to which the charged crime and the prior misconduct are the individual manifestations.

*State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). The need for a high degree of similarity was reaffirmed in *State v. DeVincentis*. “We emphasize that the degree of similarity for the admission of evidence of a common scheme or plan must be substantial.” *DeVincentis*, 150 Wn.2d at 20.

The allegations made by A.T. and D.W. were not similar enough to be cross-admissible under ER 404(b). A.T.'s allegations were that Mr. Thompson groomed and assaulted her over a long period of time, starting when she was four years old. D.W.'s allegations were that Mr. Thompson violently raped her even though he barely knew her. RP 1123. A.T.'s allegations were that Mr. Thompson assaulted her in his home, away from any prying eyes. While one of D.W.'s allegations involved an assault in the home, it included a threat to cut D.W. with a knife, a far cry from the allegations related to A.T. The other two rape allegations related to D.W. were out in public, in his car at a stop light and in a restaurant bathroom. The brazen risk taking of a person sexually assaulting a girl in public is wholly inconsistent with a common scheme or plan to abuse a child in the privacy of a bedroom.

One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan. There are two instances in which evidence is admissible to prove a common scheme or plan: (1) "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" and (2) where "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes."

*State v. Gresham*, 173 Wn.2d 405, 421–22, 269 P.3d 207, 214 (2012)

(internal citations omitted).

An antecedent mental condition which  
evidentially points to the doing of the act

planned. Something more than the doing of similar acts is required in evidencing design, as the object is not merely to negative an innocent intent, but to prove the existence of *a definite project* directed toward completion of the crime in question.

(Italics ours.) M. Slough and J. Knightly, *Other Vices, Other Crimes*, 41 Iowa Law Review at 329–30 (1956).

Under this definition, it is obvious the two rapes here do not qualify as links in a chain forming a common design, scheme or plan. At most they show only a propensity, proclivity, predisposition or inclination to commit rape. Such evidence is explicitly prohibited by ER 404(b). Cf. *State v. Saltarelli*. Nor, as the State has also urged, was evidence of each rape necessary to prove the absence of mistake or accident. Neither defendant claimed mistake or accident as a defense and the State's argument borders on the frivolous.

Recognizing the “great potential for prejudice inherent in evidence of prior sexual offenses” the *Saltarelli* court draws upon Slough and Knightly for the following pertinent observation:

When deciding the issue of guilt or innocence in sex cases, where prejudice has reached its loftiest peak, our courts have been most liberal in announcing and fostering a nebulous exception, offering scant attention to inherent possibilities of prejudice. Just when protection is most needed, the rules collapse.

41 Iowa Law Review at 334.

*State v. Harris*, 36 Wn. App. 746, 751–52, 677 P.2d 202, 205–06 (1984).

These were not similar crimes. Evidence of the allegations related to D.W. would not have been admissible in a trial related to A.T.'s allegations and vice versa. To be admissible to show a common scheme or

plan, evidence of prior child sexual abuse must show more than a general “plan” to molest children. *State v. Slocum*, 183 Wn. App. 438, 453, 333 P.3d 541 (2014).

How different the two cases were was made clear in the prosecutor’s closing argument.

[A.T.] and [D.W.], they don't have a lot in common, but there is one sad fact they do share, that their innocence was shattered and quite literally stolen by that man sitting right there, the defendant, Jerry Thompson, when he raped and molested both of them multiple times.

For Ava, her papa was supposed to be somebody who loved her, somebody who cared for her, somebody who protected her from the evils in this world. Instead, he was the person who spirited her away into his room in the dark of night, into his bed, where he touched her, he fondled her, he sucked her breasts, he digitally penetrated her, he made her sit on his face, and he performed oral sex on her, or he made her perform oral sex on him, time after time, year after year.

Instead of being her protector, her hero, instead of being her sidekick, the defendant abused the position of trust that is supposed to exist between a grandparent and grandchild when he violated his little Ava bug in the worst possible ways.

For Danielle, the weekend of November 2014 where her mother got married was the first time that she'd ever spent time with the defendant, and for her, she was alone in a big house with two adults that she barely knew, and she was forcibly and violently raped by the defendant, who held a knife to her throat and told her, "I'm going to cut out your fucking vocal cords," and then he proceeded to vaginally rape her.

RP 1481-82.

These two cases were drastically different in so many ways, there is no excuse for not objecting to their joinder, and it obviously prejudiced Mr. Thompson.

With respect to ER 404(b)'s "opportunity" prong, there is nothing about the D.W. allegations that show Mr. Thompson had an opportunity to assault A.T. The fact that the two girls were in Mr. Thompson's home was undisputed. There is nothing about either of the girls' allegations that shows Mr. Thompson's opportunity to assault the other was increased.

The State's brief to the trial court in support of joinder cites several cases with respect to the "motive" prong of ER 404(b), but several of those cases do not reference ER 404(b) at all, or do so in entirely different contexts. The State cited *In Re Aqui*, 84 Wn. App. 88, 929 P.2d 436 (1996) in support of its argument that ER 404(b) "motive" element was satisfied. However, in that case the court did allow evidence of non-sex offenses, but did no ER 404(b) analysis. The State also cited *In State v. Quigg*, 72 Wn. App. 828, 838-39, 866 P.2d 655 (1994), for the proposition that ER 404(b) "motive" was satisfied. In *Quigg* the defendant's objection was that a prior story he had written had been admitted to demonstrate his motive to commit the current offense was hearsay, not authenticated, and irrelevant. *Id.* There was no ER 404(b) analysis. Another case cited in its brief related to ER 404(b) "motive" was *State v. Schimmelpfennig*, 92

Wn.2d 95, 594 P.2d 442 (1979). In *Schimmelpfennig* the court noted that a trial court has discretion to determine the relevance of evidence offered for admission, and admission of evidence to show defendant's intent to communicate with children was not an abuse of that discretion. *Id.*, at 98. The *Schimmelpfennig* court did not conduct an ER 404(b) analysis.

Further, in it's brief to the trial court in this case the State cited *State v. Halstien*, 122 Wn. 2d 109, 857 P.2d 270 (1993). In *Halstien* the Supreme Court concluded that the trial court did not err when it permitted the State to introduce evidence of the defendant's prior contacts with the victim of a burglary in order to show he committed the burglary with sexual motivation. *Id.*, at 126. This is a far cry from admitting evidence of other sexual assaults of **a different victim**.

If defense counsel in the instant case had raised an objection to joinder, she would have found these deficiencies in the State's briefing and been able to challenge the State's motion to join the cases.

Additionally, the State faced a steeper hurdle when seeking to admit sex offense evidence under ER 404(b). An ER 403 analysis was required. See *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 745 (1984) (403 analysis required before 404(b) evidence may be admitted). ER 403 states:

Although relevant, evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This inquiry is vital where sex offenses are involved. ER 403 application must be “careful and methodical” because “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 358, 363, 655 P.2d 697 (1982). The Washington Supreme Court emphasized several times throughout the *Saltarelli* opinion that prejudice reaches its “loftiest peak” when evidence of prior sexual offenses is introduced. *Id.* at 364 (citation omitted). Separate trials are required when prejudice stands unmitigated. *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017); *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1987); *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

The final step in the analysis required the trial court to weigh the prejudice against the need for judicial economy. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). In this case, judicial economy was not significantly furthered by a joint trial. Each purported claim was distinct and victim testimony could easily have been divided between separate trials.

The testimony of most of the witnesses only applied to one or the other girls. Peggy Thompson would have testified in both trials, but beyond that there was little cross-over between the witnesses. D.W. did testify that A.T. told her something happened in the house, but given the extensive child hearsay admitted related to A.T.'s accusations, it is unlikely this testimony would have been elicited in a separate trial. Neither of the girls testified they witnessed the charged abuse allegedly perpetrated upon the other by Mr. Thompson. Judicial economy is not significantly furthered by combining trials into one large spectacle.

[B]ecause the evidence was not cross admissible, the interest in judicial economy loses much of its force because the State would not have been required (or allowed) to call all of its witnesses in each separate trial.

*State v. Bluford*, 188 Wn.2d at 315-16.

Because trial counsel agreed to joinder, the court never did a full ER 404(b) analysis. In determining whether evidence of other crimes, wrongs, or acts is admissible under ER 404(b), a trial court must undertake the following analysis on the record: (1) identify the purpose for which the evidence is sought to be admitted; (2) determine whether under ER 402 the evidence is relevant to the purpose; and (3) decide whether under ER 403 the danger of unfair prejudice substantially outweighs its probative value. *State v. Lough*, 70 Wn. App. 302, 853 P.2d 920, *affirmed*

125 Wn.2d 847, 889 P.2d 487. By failing to challenge joinder, counsel failed to force the court look at the issue of joinder in light of the prejudice to Mr. Thompson.

Counsel's performance fell below an objective standard of reasonableness and resulted in prejudice to Mr. Thompson. Her failure to object to joinder was clearly detrimental to Mr. Thompson. There is no legitimate justification for trial counsel's failure to act. There is no reasonable argument that allowing all counts to be tried together could have furthered Mr. Thompson's interests.

While the defense was general denial, and defense counsel's primary means of challenging the charges was to attempt to attack the credibility of A.T. and D.W., there was no benefit to Mr. Thompson's case to have both girls testify about the allegations. This is not a case in which the girls were alleged to have conspired to make these allegations. They were not close and rarely saw each other. RP 912, 1058.

Any prosecutor knows the powerful impact second victim evidence has in a child sex abuse trial. Jurors are loathed to believe any person could commit such a crime and will give a defendant every benefit of the doubt when there is only one victim. This dynamic is drastically altered if a second alleged victim is marched before the jury. A defendant goes from a man accused of a horrible crime, to a pedophile before opening

statements are done. Jurors will understand the idea that a person can be wrongfully accused of a crime by one person, but when they hear that two people are making allegations, they cannot be expected to compartmentalize the testimony.

Mr. Thompson's right to a fair trial was adversely affected by his trial counsel's deficient performance. It undermined the confidence in the outcome of his trial. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984). As such, Mr. Thompson's convictions must be reversed and his case remanded for a new trial.

**B. TRIAL COUNSEL'S FAILURE TO OBJECT TO IRRELEVANT TESTIMONY ABOUT THE THOMPSONS' DIVORCE AND SEXLESS MARRIAGE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL**

Throughout the trial the prosecution elicited testimony from various witnesses about Peggy Thompson's filing for divorce from Mr. Thompson. RP 1058, 1121, 1140, 1390. This was clearly done to suggest Ms. Thompson believed the allegations and decided to leave Mr. Thompson. There was no objection to this testimony from defense counsel.

In *State v. Montgomery*, the court stated:

However, this court has held that there are some areas that are clearly inappropriate for opinion testimony in

criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. (footnote 5: This rule is well-grounded in the rules of evidence. Testimony that tells the jury which result to reach is likely not helpful to the jury (as required by ER 702), is probably outside the witness's area of expertise (in violation of ER 703), and is likely to be unfairly prejudicial (in violation of ER 403).

*State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267, 274 (2008)

(including footnote). “Obviously, a witness's statement that a particular defendant is guilty goes beyond the pale. In addition, inferential testimony that leaves no other conclusion but that a defendant is guilty cannot be condoned, no matter how artfully worded.” *State v. Cruz*, 77 Wn. App. 811, 815, 894 P.2d 573, 575 (1995).

The State’s efforts to get Ms. Thompson’s prior opinion of Mr. Thompson’s guilt went unchallenged by defense counsel. The testimony created an impression that Ms. Thompson filed for divorce in 2013 after A.T. made her first disclosure and then filed again when A.T. made a subsequent disclosure because she believed A.T.’s claims. The fact that Ms. Thompson considered filing for divorce was not relevant to any issue before the jury and testimony regarding it should have been objected to by defense counsel. Given that it was not relevant, the court would have excluded the testimony and Mr. Thompson would not have been

prejudiced. As it stood the jury basically heard Mr. Thompson's ex-wife testify that when she heard of the allegations, she believed them.

The prosecution asked Shauna Thompson (A.T.'s mother and the daughter of Mr. and Ms. Thompson) about the divorce:

Q. In April of 2013, after Ava disclosed in the bathtub, it was your mother who moved out of the house for two to three weeks; is that right?

A. Yes, she moved out of the house.

Q. And she filed for divorce?

A. Yes, she did.

Q. But she didn't go through with the divorce?

A. No, she did not.

Q. Would it be accurate to say that throughout the duration

RP 1390. There was no objection from defense counsel.

The prosecution also asked Bethany Orr (D.W.'s mother and Peggy Thompson's daughter-in-law) about the divorce becoming final when Peggy Thompson refiled in 2016.

Q. What was Peggy's reaction (to the allegation), without saying anything that she said, what was her general reaction?

A. She was in shock.

Q. And at some point after -- or do you know what happened to Peggy and the defendant's marriage?

A. She filed for a divorce and divorced him.

Q. Was this before or after all of these allegations?

A. After.

RP 1058. There was no objection from defense counsel.

Then when Peggy Thompson took the stand, the prosecutor again raised the issue of the divorce:

Q. How long had you been married?

A. Almost 38.

Q. And you are divorced now?

A. Yes.

Q. And you divorced after these allegations came about in 2016, correct?

A. Yes.

RP 1121. Later in the direct examination of Peggy Thompson, the prosecutor asks about her filing for divorce in 2013, the same year as A.T.'s initial disclosure. RP 1140. Then again in Peggy Thompson's direct examination, the prosecutor continued to ask about the timing of the divorce:

Q. And then you found out that Ava had stated that the defendant touched her again?

A. I heard that through my daughter.

Q. And that was in 2016?

A. Yes.

Q. And then you found out about Danielle, as well, around the same time frame, right?

A. Yes.

Q. And you filed for divorce?

A. Actually, I heard about that before 2016.

Q. So sometime in 2015?

A. Yes.

Q. And what happened to Danielle?

A. Not what happened, but something was going on that she was investigating.

Q. Okay. And so in 2016, after all of these, to a certain degree, came to light, you filed for divorce again, right?

A. Yes.

RP 1167.

When Mr. Thompson testified, the prosecution not so subtly continued to make the argument that Peggy Thompson filed for divorce in 2013 and 2016 because she believed Mr. Thompson committed the crimes.

Q. Was it menopause that made Peggy file for divorce in 2013?

A. Actually --

Q. The question is, was it menopause?

A. I'm trying to think of your answer to give you an answer -- or your question.

Q. Well, listen to my question, Mr. Thompson. My question is --

A. I know -- I don't think that that menopause was the -- I don't know why she filed for divorce, to be honest with you.

Q. So my question is, was it menopause that made her file for --

A. I don't know.

Q. And was it menopause that made her file for divorce in 2016?

A. I can't tell you that either. You're asking me something I have no idea.

RP 5/10/18, pp. 98-99.

Q. Now, Peggy filed for divorce in April of 2013?

A. She did.

Q. Did you -- But you remained married?

A. We did, because she came over and stopped it.

Q. And she didn't go through with it, right?

A. Yeah, pretty much.

Q. And then she filed for divorce again, 2016, '17, about there?

A. Yeah.

Q. And this time she followed through with it?

A. Yeah. She didn't want to, but she did. She was pressured into it.

RP 5/10/18, p. 108.

There was no objection from defense counsel to any of these efforts to get before the jury the theory that Peggy Thompson had believed the allegations against her husband were true in 2013 and again in 2019. This is simply deficient representation. The fact that the two contemplated divorce and later did get divorced has no probative value to the issues at trial. That information was used solely to tell the jury, “see, even the defendant’s wife believed he did it.” This testimony was not relevant to any issue and an objection would have been sustained. There is no strategic reason for defense counsel to allow this testimony, and it certainly prejudiced Mr. Thompson’s right to a fair trial.

The State repeatedly elicited testimony regarding the fact that Mr. and Ms. Thompson were in a sexless marriage. Defense counsel did not object to this testimony and it prejudiced him in that it, combined with the inappropriate hearsay related to him taking A.T. out of her crib, *infra*, left the impression that he was having sex with A.T. rather than with his wife.

The State raised this issue with Shauna Thompson, A.T.’s mother, in its direct examination of her.

Q. And up until they sold the house, those were the sleeping arrangements, your mom upstairs, your dad downstairs?

A. Yes, ma'am.

Q. Did they have separate lives?

A. Yes.

Q. Do you know whether or not your parents were intimate?

A. They were --

Q. I'm sorry?

A. They were not.

RP 802. Evidence which is not relevant is not admissible. ER 402. There was no objection from defense counsel to this irrelevant testimony. If it were the only instance, it might have been innocuous, but it was repeated over and over. In its direct examination of Peggy Thompson, the State, through a series of leading questions that also did not draw an objection, elicited the same information.

Q. And you lived, then, on separate floors of the house?

A. For a few years, because -- mainly because of sleeping issues. I don't sleep well.

Q. That's not really why, Peggy, is it? It's because you didn't live together essentially anymore. You weren't living like married people; isn't that right?

A. Not the way it should be, I guess, no.

Q. So the answer is yes?

A. I'm not sure what the question is.

Q. You were living separate lives, correct?

A. Yes.

Q. And then you lived on different floors of the house because of that, correct?

A. Yeah, we had grown apart, yes.

RP 1125. There was no objection from defense counsel. The State elicited the same information from Puyallup Police Department Officer Tad Miniken when he testified that Peggy Thompson had told him that the couple was not intimate and Detective Shelby Wilcox testified Peggy told

her they lived separate lives and Peggy remained in the house because she did not have enough money to move out. RP 1313, 1332. Defense counsel did not object to the testimony in either instance.

“No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (citations omitted). The State used several witnesses to infer Peggy Thompson filed for divorce because she believed her husband committed the crimes. It is obvious that this evidence was not admissible. Equally inadmissible was the irrelevant evidence as to the couple’s sexless marriage. Counsel should have objected and kept this evidence from going to the jury. Failure to do so was certainly prejudicial in that it lead the jury to conclude that Ms. Thompson believed the allegations made by A.T., and that Mr. Thompson was satisfying his sexual needs with A.T.

The jury had to decide if they believed the allegations A.T. made when she was interviewed by the forensic interviewer. To allow testimony that inferred her grandmother believed her was detrimental to Mr. Thompson’s defense and there was no strategic reason to let it happen.

C. TRIAL COUNSEL’S FAILURE TO OBJECT TO NUMEROUS INSTANCES OF HEARSAY TESTIMONY AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE CUMULATIVE ERROR DOCTRINE.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together, the combined errors denied the defendant a fair trial. *U.S. Const. Amend. XIV; Wash. Const. art. 1, Sect. 3; Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478,488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668, 678 (1984).

Relevant testimony may be excluded from trial if it is hearsay. “ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). “Whether a statement is hearsay depends upon the purpose for which the statement is offered. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay.”

*State v. Garcia*, 179 Wn.2d 828, 845, 318 P.3d 266, 276 (2014) (quoting *State v. Crowder*, 103 Wn.App. 20, 26, 11 P.3d 828 (2000)).

Throughout the trial, defense counsel failed to make standard hearsay objections. If these had been on minor issues, or had not been so ubiquitous, a harmless error analysis might find them unimportant, but given the failure to make any effort to stop the State's repeated effort to solicit inadmissible evidence the cumulative effect was certainly prejudicial.

The State elicited testimony from A.T.'s mother Shauna Thompson that Mr. Thompson would take A.T. out of her crib when A.T. spent the night at the Thompson's house.

Q. Okay. So when [A.T.] spent the night, do you know whether or not she ever slept in the same room with your mom sometimes?

A. Yes.

Q. What about with your dad?

A. When he would take her out of her crib.

Q. And how is it that you knew that he would take her out of her crib?

A. My mother called me.

Q. And she told you?

A. Yes.

Q. Did you -- were you upset?

A. Yes.

RP 811-12. This testimony is obviously hearsay and there was no objection from defense counsel. It supported the State's theory that Mr. Thompson would take A.T. out of her crib and molest her. This hearsay testimony prejudiced Mr. Thompson, and there is no strategic reason to not object to the testimony.

Shauna Thompson also testified about statements made by another witness, Sigournia Hamilton.

Q. Okay. Now, did [A.T.] say anything specific to you about what she had told Sigournia?

A. That she -- that he made her perform oral sex on him.

Q. Is that something that she told you or is that something Sigournia relayed to you?

A. That Sigournia relayed to me.

Q. Okay. Did you ask [A.T.] about that at all, that specifically?

A. No.

RP 824. This is clearly hearsay and should have drawn an objection from trial counsel. Its prejudice is obvious in that another witness is saying A.T. said that she had to perform oral sex on Mr. Thompson. There is no strategic reason not to object to this testimony.

When Bethany Orr testified the following exchange took place related to Ms. Orr's conversation with her daughter D.W.:

Q. So May of 2015 she started letting you in a little bit?

A. Yes.

Q. And what sorts of things would she say?

A. She would tell me something bad happened to me, and you won't believe it or you won't believe me. And I would let her know that I would believe her no matter what she had to tell me, and then she came out and told me that Jerry hurt her very badly. And I told her no matter what you have to say, I'm here to listen to you.

RP 1033. Again, there was no objection, nor a motion to strike. This was simply deficient performance on the part of defense counsel. Through hearsay testimony, the State used Bethany Orr to support its theory that

Mr. Thompson was at the Outback Steakhouse when D.W. went there with the Tate family:

Q. And do you recall what the circumstance of that was?

A. Danielle had gone out with a friend and his family to the Outback in Puyallup, and she had seen Jerry there, and when she came home, she was extremely distraught. She wanted to be left alone.

...

Q. And she told you, not going into specifics about what she said, it was just that she saw him?

A. She saw him, that he was there, she had told me that he cornered her, but wouldn't go into any specific details as to what happened.

RP 1055-56. Again, there was no objection, nor a motion to strike. This was simply deficient performance on the part of defense counsel and prejudicial to Mr. Thompson.

When Sigournia Hamilton testified, the State elicited testimony to support the inference that Peggy Hamilton was aware of the accusations regarding A.T. This was important to the State's case because it had to do all it could to undermine Peggy Thompson's support of Mr. Thompson.

Q. In terms of, when this first disclosure came about, do you know if Peggy was made aware of what Ava had said?

A. Yes, she was.

Q. How do you know that?

A. Because when I -- at first when I came into Shauna's house, she was on the phone with her mother, and she was just going back and forth with her, kind of arguing with her a little bit, and that's when she got off the phone and she started folding clothes, but Peggy knew because she would call her asking her, you know, when can she see her grandchild, and just advising Shauna, like she didn't really

have to handle her that way, as far as not allowing her to see Ava.

RP 1209. Defense counsel made no objection, nor did she move to strike this testimony. A few minutes later in direct examination of Sigournia Hamilton by the State, the following exchange took place as Ms. Hamilton described what happened after the three women left Mr. Thompson's house.

Q. After you left the house, where did you go? Or just exited the house, where did you go?

A. After we left, I got in my vehicle and I parked somewhere, and Shauna asked me what did I think, and I said, "He did it."

RP 1223. While the answer to the question may have been non-responsive, it was hearsay as well as improper opinion evidence, and no objection nor motion to strike was made by defense counsel. The problem persisted moments later when the following exchange between the prosecutor and Ms. Hamilton occurred:

Q. And what happened after Shauna contacted Peggy?

A. Ms. Peggy asked where was Shauna and Shauna said that she was by the house, and she wanted to see her, and she said okay. They were at the property. They had a property, a duplex. So we went by there to talk to Ms. Peggy.

Q. And so that was at the duplex?

A. Yes.

Q. And did you speak to Peggy about what Ava had said?

A. Yes, I did.

Q. And did you mention this conversation that you just had with the defendant?

A. Yes, I did.

Q. And this was that same day?

A. Yes, it was.

Q. And what did Peggy tell Shauna?

A. She told Shauna basically that she was wrong for involving us and that it was something that should have been kept internal with the family, and not discussed with myself and my sister.

Q. That's what Peggy was upset about?

A. Yes, she was.

RP 1224-25. This exchange demonstrates how defense counsel failed to adequately address the attacks against Peggy Thompson, letting the jury infer that she would do nothing to protect A.T. After cross-examination of Ms. Hamilton, the State again elicited hearsay testimony regarding Peggy Thompson's reaction to the allegations.

Q. You had said something like she was upset she had to be dishonest. Can you explain that?

A. Well, because Ms. Peggy would ask [A.T.] not to tell Shauna and myself and my sister that she spent time with her grandfather or that she was at the house with her grandfather.

RP 1240. Ms. Hamilton was clearly relating hearsay from A.T., or Shauna Thompson, because there was never an allegation that Peggy Thompson told A.T. not to tell Shauna about the abuse in Ms. Hamilton's presence. Defense counsel made no objection, nor a motion to strike.

When forensic interviewer Stacia Adams testified the State elicited more hearsay with respect to the interview of D.W.

Q. Did you use the same procedures that you testified to in

conducting the interview?

A. Yes, I did.

Q. And during that time frame, did [D.W.] disclose sexual abuse to you during that time period?

A. Yes, she did.

RP 1302. While Ms. Adams did not specify what D.W. told her, it is nonetheless hearsay for her to tell the jury that D.W. disclosed sexual abuse. Defense counsel made no objection.

Ms. Orr, D.W.'s mother, was recalled to the stand and the following exchange took place.

Q. Just have a couple of brief follow-up questions. During [D.M.]'s second forensic interview in 2017, did you receive a phone call?

A. Yes, I did.

Q. Who from?

A. Peggy Thompson.

Q. And what was this in regards to?

A. She informed me that Jerry was packing up his vehicle and she was worried that he was going to flee the state.

Q. And what was her demeanor?

A. She was worried.

Q. Worried why?

A. Because he had ties in California.

Q. And she was worried he was going leave?

A. Yes.

Q. And did she tell you what he was fleeing in regards to?

A. Because of the rape allegations.

RP 1307-08. This is clearly hearsay and should have drawn an objection.

This testimony was prejudicial because it made it appear as though Mr.

Thompson was fleeing the state in fear of being prosecuted for sex crimes.

If the State had evidence of this, it should have been presented in a manner

that did not violate the rules of evidence and the defendant's constitutional rights. A hearsay objection was appropriate and counsel's failure to do so clearly demonstrates deficient performance.

The hearsay testimony continued with Puyallup Police Department Officer Tad Miniken.

Q. Now, when you made contact with Peggy Thompson, you said that was via phone?

A. Right.

Q. She answered your questions?

A. Yeah, we had a brief conversation.

Q. During that conversation, did she tell you that she and Jerry share the same house and that they each live in different areas and are not intimate?

A. That's correct.

Q. Did she tell you that she lives upstairs and has her own job and they essentially live their own lives?

A. That's correct.

Q. Did she tell you she cannot afford to live on her own so they had agreed to share the house?

A. That is correct.

Q. And that they have had this arrangement for a couple of years?

A. Uh-huh (affirmative).

Q. I'm sorry?

A. Yes, sorry.

Q. Did she tell you that there were a number of occasions that [A.T.] woke up crying, went down to Jerry's room and Peggy went down to get her?

A. Yes.

Q. And so Peggy indicated that she had to go downstairs to Jerry's room to get [A.T.]?

A. Correct.

Q. That's the only time you spoke with Peggy Thompson, right?

A. Correct.

RP 1313-14. The hearsay did not draw an objection from counsel. This was not hearsay on some immaterial matter. The State was clearly insinuating that the defendant's marriage was without sex because he was molesting A.T. To allow such testimony without objection is clearly deficient performance and prejudiced Mr. Thompson.

Next Puyallup Police Department Detective Shelby Wilcox testified. The first part of the exchange was in relation to D.W.'s forensic interview.

Q. With regards to observing that, were you able to observe [D.W.] 's demeanor?

A. Yes.

Q. What was her demeanor like?

A. She was fidgety, nervous.

Q. To the best of your knowledge, did she disclose the sexual abuse at that point?

A. Yes.

Q. After the interview, did you speak to Bethany?

A. Yes.

Q. Did she have some information for you at that point?

A. Yes.

Q. What sort of information?

A. She had been talking to Peggy during [D.W.] 's interview.

Q. And what sort of information did Peggy give her?

A. They were concerned that Jerry was going to leave the state.

Q. And Bethany had relayed this information to you?

A. Correct.

Q. From Peggy?

A. Correct.

Q. At some point after the interview, did you make contact with Peggy?

A. I did. I called her myself after [D.W.] and Bethany left.

...

Q. In terms of that house, to your knowledge, has it been recently sold?

A. Yes.

Q. With regards to the house, did you pull up the sales information with regards to the house?

A. I did.

Q. And what, if anything, do you note about the walls inside the house?

A. It was listed as all walls were soundproof.

Q. So that was a selling point of the house, that the walls were soundproof?

A. Correct.

RP 1324-27. In a short period of time the State elicited hearsay testimony regarding disclosure of sex abuse, Mr. Thompson's plans to leave the state, and the allegation that the house had soundproof walls. Each of these instances of hearsay should have drawn an objection, but counsel said nothing.

The direct of Detective Wilcox continued and so did the hearsay without objection:

Q. After that interview, did you talk to Peggy?

A. Yes.

Q. And at that point, did Peggy tell you that she and the defendant had been living separately in the same house?

A. Yes.

Q. And in terms of talking to Peggy, what was your impression in terms of whether they were doing things together or whether they lived a life apart?

A. She painted the picture that it was completely separate, that she didn't have money to move out, so they just remained in the same house and did their separate things.

Q. In terms of [A.T.] having contact with the defendant or being alone with the defendant, what did Peggy say to you with regards to that?

A. She said that sometimes she left [A.T.] with Jerry when she had to go to work or run an errand.

Q. But in terms of Shauna dropping [A.T.] off alone with Jerry, did she ever say anything like that?

A. No.

Q. Did you talk to Peggy about a stick or anything like that?

A. I asked her if she knew of a stick, yes.

Q. What did Peggy say?

A. She said she knew that he -- that Jerry had made a stick about two years prior, but she didn't know why or where he kept it.

RP 1332. These questions were clearly hearsay, damaging to Mr.

Thompson's case and counsel's failure to try to stop the testimony was inexcusable as well as prejudicial. There is no strategic reason to allow this type of testimony.

When Shauna Thompson was recalled, the State elicited additional hearsay testimony.

Q. Now, prior to [A.T.] disclosing to you in the bathtub, did you come to find out that [A.T.] was -- when she went over to your parents' house -- sleeping in your father's room?

A. Yes.

Q. How did you find that out?

A. Because he would go take her out of her crib.

Q. How did you know that?

A. Because my mom called and told me.

Q. What was it your mom called and say?

A. "Shauna, he keeps on taking her out of her crib. He keeps on taking her out of her crib. I don't know how to stop it."

RP 1385. There was no objection. The prejudice this testimony presents is obvious in that Mr. Thompson is allegedly taking [A.T.] out of her crib to his bedroom, and portrays Peggy Thompson as believing there is sex abuse occurring and doing nothing about it. A jury is naturally going to infer that if the wife of a man accused of a sex crime believes it happened, it probably happened.

D. TRIAL COUNSEL’S FAILURE TO OBJECT TO NUMEROUS INSTANCES OF ADMISSION OF PREJUDICIAL INADMISSIBLE AND IRRELEVANT EVIDENCE, AND IMPROPER QUESTIONING AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Throughout the trial the State elicited testimony that was inadmissible, and/or irrelevant, and defense counsel did nothing to prevent it. The cumulative effect of this failure on defense counsel’s part was both deficient and prejudicial. (*Legal authority supra.*) During direct examination of Shauna Thompson the following exchange occurred.

Q. Now, do you know whether or not your father had an attraction to African-American women?

A. I do.

Q. Is that based on things he would say?

A. Yes.

RP 829. This is wholly inappropriate and irrelevant and there was no objection from counsel. The State may assert that the relevance was A.T. was a mixed race child, but she was a child, not a woman. “Defendants

are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Thus, a prosecutor must function within boundaries while zealously seeking justice.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (internal citations omitted). This error was compounded by the State when it introduced evidence of Mr. Thompson being on a website called blackpeoplemeet.com during its direct examination of Peggy Thompson. RP 1154. There was no objection from defense counsel to this inflammatory, irrelevant testimony.

Defense counsel failed to object to numerous instances of irrelevant testimony that played on the emotions of the jury. A prosecutor may not deliberately appeal to the jury's passion and prejudice and encourage the jury to base the verdict on the improper argument ‘rather than properly admitted evidence. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012). Evidence which is not relevant is not admissible. ER 402. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. ER 611(c). While conducting the direct examination of D.W. the State elicited the following exchange.

Q. Throughout the years, have you had a hard time dealing with just what happened to you, what the defendant did to you?

A. I would say yes.

Q. How so?

A. I have a hard time trusting people now, and it's impacted me a lot. It's impacted my schooling. Sometimes I'll go into like -- I almost want to say fits and then my grades will decline, and then I have to work really hard to put them back up where I want them to be.

Q. Do you have anxiety?

A. Yes, I do.

Q. Depression?

A. Yes.

Q. How do you sleep?

A. Not good.

Q. For a time, did you have nightmares or anything?

A. Yes, I did.

RP 976. The prosecutor was leading the witness, while playing on the jury's emotions and introducing irrelevant evidence. There was no objection from defense counsel.

At several points during the trial the trial the State vouched for D.W.'s testimony by using the term "rape" when questioning the witnesses. "It is misconduct for a prosecutor to personally vouch for the credibility of a witness. Improper vouching generally occurs if the prosecutor expresses his or her personal belief about the veracity of a witness, or if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *State v. Thorgerson*, 172 Wn.2d 438, 462, 258 P.3d 43, 56 (2011) (internal citations omitted). When the prosecutor referred to the allegations as "rape" when questioning the witnesses, this was improper vouching because she was agreeing with the

witness that what happened was legally rape. This occurred at least four times during the trial. During direct examination of D.W. the following exchange occurred:

Q. And all of those things made it hard for you to just deal with life; is that fair?

A. Yes.

Q. And of those things, which one of those things had the most impact on you at that time?

A. Definitely this situation.

Q. And when you say "this situation," what do you mean by that?

A. The incident that had happened with Jerry.

Q. And that's the rape that happened in the bedroom?

A. Yes.

RP 954. There was no objection. The problem persisted when the following exchange occurred between the prosecutor and D.W.

Q. And in talking to the interviewer, do you remember her name?

A. No, I don't.

Q. And do you remember the types of things that you talked about with her?

A. Some stuff, yes. Not fully.

Q. And during this time frame of September 2015, do you remember whether you were ready to talk about the rapes?

RP 960-61. There was no objection. Later, the prosecutor asked D.W. about a picture of Mr. Thompson's bedroom that she had drawn, and the prosecutor continued to vouch for the witness:

Q. Previous to that night in November of 2014, had you ever been in the defendant's room?

A. No.

Q. And after the rape happened, did you ever go back into his room?

A. No.

Q. So when you drew that picture of the defendant's room, it was based on that one time you were in there when you got raped?

A. Yes.

RP 985. There was no objection.

During Detective Wilcox's testimony the prosecutor vouched for

D.W.'s testimony and subtly gets the detective to do so as well.

Q. At some point were you made aware of the rape that occurred at the Outback Steakhouse?

A. Yes.

Q. Based on Danielle's disclosure, did you do a follow-up investigation?

A. Yes.

RP 1329. There was no objection and the testimony was clearly inappropriate vouching, as well as invading the province of the jury.

The failure to object to improper questions was not limited to hearsay and vouching. When Peggy Thompson was called as a witness for the State the following exchange took place during direct examination regarding Ms. Thompson sending photos to Mr. Thompson while he was in jail:

Q. And that even knowing the allegations that he used your little [A.T.] bug for sex, you sent him photos of [A.T.], didn't you?

A. I sent him pictures of the whole family because I'm a proud grandmother of my grand kids and he loves his grand kids too, so...

Q. I bet he does.

A. So I wasn't thinking anything was wrong with that.

Q. You didn't think anything --

A. No.

Q. -- was wrong with sending pictures to the defendant of [A.T.], who was -- said that he --

A. No.

Q. -- raped and molested her, nothing's wrong with that?

A. No.

RP 1171. The "I bet he does." line from the prosecutor was unprofessional and flip. By responding in this manner, the prosecutor was denigrating the witness and this should have drawn an objection. The entire exchange was to make Ms. Thompson look unreasonable and had no relevance to any issue in the trial. Ms. Thompson provided substantial testimony that was contrary to the State's theory of the case, and the State went out of its way to humiliate her before the jury to improperly minimize the value of that testimony. There was no objection, and the denigration of Ms. Thompson was prejudicial.

E. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE'S MOTION TO JOIN TWO CHILD SEX CASSES, FAILURE TO OBJECT TO PREJUDICIAL AND IRRELEVANT TESTIMONY ABOUT THE THOMPSONS' DIVORCE AND SEXLESS MARRIAGE, FAILURE TO OBJECT TO NUMEROUS PREJUDICIAL ADMISSIONS OF HEARSAY EVIDENCE, AND FAILURE TO OBJECT TO NUMEROUS INSTANCES OF ADMISSION OF PREJUDICIAL INADMISSIBLE AND IRRELEVANT EVIDENCE, AND IMPROPER QUESTIONING AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE CUMULATIVE ERROR DOCTRINE.

The cumulative effect of the potentially damaging circumstances can violated the due process guarantee of fundamental fairness. *State v. Coe*, 101 Wn.2d at 789. That is exactly what happened in this case.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together, the combined errors denied the defendant a fair trial. *Williams v. Taylor*, 529 U.S. at 396-98.

The errors analyzed above, do merit reversal standing alone, and also when viewed together. The trial court should not have joined the cases without conducting a full analysis on the record and counsel should have challenged the joinder of the two cases. The State should not have been permitted to elicit testimony about the Thompson divorce. The abundance of evidence put before the jury that was hearsay was certainly prejudicial. And the way the State admitted numerous opinion statements and other inadmissible evidence contrary to the rules of evidence and case law was indicative of deficient performance and prejudicial ineffective assistance of counsel. The jurors should not have been put in the position of deciding the case on the basis of a host of improperly elicited personal opinions. The prosecutor should not have let her zeal to win override her responsibility of fairness. Defense counsel should have done more,

starting with enforcing the most basic of evidentiary rules, as both a shield and a sword.

During the entire trial, defense counsel made a total of two objections. Counsel raised an “asked and answered” objection when the State was asking Peggy Thompson if she saw A.T. in Mr. Thompson’s bedroom. RP 1137. And when Mr. Thompson was subject to cross examination by the State, counsel objected that the State was asking Mr. Thompson to speculate as to Peggy Thompson’s knowledge of what went on in his bedroom while she slept in her bedroom. RP 5/10/18, p. 120.

When a defendant is facing the rest of his life in prison, he deserves more. The law requires he gets more. The defendant’s convictions must be overturned for counsel’s inexcusable cumulative ineffective assistance of counsel.

## V. CONCLUSION

For the reasons stated above, Mr. Thompson requests this court reverse the convictions and remand this case to the trial court for a new, fair trial.

Dated: November 12, 2019

*John M. Sheeran*

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John M. Sheeran, WSBA # 26050  
Attorney for Jerry C. Thompson

CERTIFICATE OF MAILING

I certify that on 11/12/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jerry C. Thompson, DOC# 408107, MCC – WSR, Post Office Box 777, Monroe, WA 98272.

*John M. Sheeran*

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John M. Sheeran, WSBA # 26050

**LAW OFFICES OF JOHN SHEERAN**

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