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NO. 52861-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

DEREK R. NEBREJA,

Appellant.

BRIEF OF APPELLANT,
DEREK R. NEBREJA

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
THE HONORABLE SUZAN CLARK, JUDGE

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I. INTRODUCTION

Derek Nebreja was convicted of second-degree child molestation after a jury trial. The state alleged that he inappropriately touched his twelve-year-old sister-in-law, K.H., over her clothes for a few seconds. At trial, the state presented no evidence proving that Mr. Nebreja acted for the purpose of sexual gratification. The trial court also violated ER 404(b) by admitted evidence of a prior incident with K.H. despite its limited probative value. Finally, the prosecutor committed misconduct by misstating the legal standard and shifting the burden of proof. This Court should reverse Mr. Nebreja's conviction.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by admitting evidence of Mr. Nebreja's prior conduct in an incident with K.H., likely changing the outcome of the case.

Assignment of Error 2: Insufficient evidence supported Mr. Nebreja's conviction for second-degree child molestation.

Assignment of Error 3: The prosecutor committed misconduct, prejudicing Mr. Nebreja, by misstating the law and implying that Mr. Nebreja had the burden of proving he did not act for the purpose of sexual gratification.

Assignment of Error 4: Cumulative error denied Mr. Nebreja a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Did the trial court err by admitting evidence of a prior incident in Beaverton, OR, over Mr. Nebreja's ER 404(b) objection when this incident was far more prejudicial than probative?

Issue 2: Was there insufficient evidence to support Mr. Nebreja's conviction when the state failed to prove beyond a reasonable doubt that Mr. Nebreja acted for the purpose of sexual gratification?

Issue 3: Did the prosecutor commit misconduct, prejudicing Mr. Nebreja, when he repeatedly misstated the law and implied that Mr. Nebreja had the burden of disproving the purpose of his actions?

Issue 4: Did cumulative error deny Mr. Nebreja a fair trial?

IV. STATEMENT OF THE CASE

The state charged Derek Nebreja with second-degree child molestation based on an incident that occurred on September 9, 2017. CP 5; RP at 135. The state alleged that Mr. Nebreja inappropriately touched his twelve-year-old sister-in-law, K.H., by tapping her on her vagina, over her clothes, for a matter of seconds. The case proceeded to trial, and a jury convicted Mr. Nebreja. RP at 221-22.

Mr. Nebreja is married to K.H.'s half-sister, Leelani. RP at 119. Mr. Nebreja and Leelani have three children together. RP at 146. K.H. and Leelani have the same father but different mothers. RP at 145-46. K.H.

and her parents moved from Texas to Vancouver, WA, in about 2016 to be closer to Mr. Nebreja and Leelani. RP at 147.

At trial, K.H. testified about two incidents that occurred with Mr. Nebreja; one in Beaverton, OR, and another in Vancouver, WA. RP at 117, 121, 128, 132. The Vancouver incident led to the charges. CP 1-5. Mr. Nebreja objected to evidence about the Beaverton incident, but the trial court permitted this evidence. RP at 13-14.

The Beaverton incident occurred sometime before September 2017. RP at 132. The family was gathered at Mr. Nebreja's and Leelani's house for their son's blessing. *Id.* K.H. was in the bedroom closet getting shoes when she felt a brief tap on her bottom. RP at 132, 136. Mr. Nebreja was in the room, and she believed the tap came from him. RP at 132. At trial, she testified that they were alone. RP at 132. However, in September 2017 she said in a forensic interview that Leelani was also in the room, in the closet looking through clothes. RP at 157. Regardless, at the time she believed the touch was accidental. RP at 138. She did not tell anyone about it. RP at 132.

K.H. testified that a second incident occurred in Vancouver in September 2017. RP at 121, 135. The family was all gathered together at K.H.'s house. RP at 121. It was evening, and her parents were upstairs asleep. RP at 121, 130. Leelani was also in the house, but in another room.

RP at 121. K.H., the other children, and Mr. Nebreja were in the living room watching a movie. RP at 122. Some of the kids were asleep and some were awake. RP at 121-22, 142.

K.H. testified that she was sitting on the couch with Mr. Nebreja and her niece, his two-year-old daughter. RP at 121-22. She was also holding her infant nephew, Mr. Nebreja's son. RP at 122. K.H. testified that her niece was sitting to her left, forward on the edge of the couch, and her nephew was on her lap on the right side. RP at 123. Mr. Nebreja was sitting to her left, on the other side of her niece. RP at 123, 139-40.

According to K.H., Mr. Nebreja then started making her feel uncomfortable. RP at 125. She testified that he started rubbing her arm with his right hand, then rubbed her thigh. RP at 124-25. She said that he then tapped her vagina, over her clothes, for a few seconds. RP at 126-28, 141. At trial, she did not remember how long the entire incident lasted, but estimated it was short. RP at 142. K.H. testified that she moved her nephew to block Mr. Nebreja, then got up and left the room. RP at 124, 126. She told her mother about the incident the next day, and her mother called the police. RP at 130, 133.

K.H. provided a forensic interview a few days after the incident, on September 18, 2017. RP at 155, 157. In that interview, she said that Mr. Nebreja was tapping the armrest of the couch with his left hand at the time.

RP at 176. She estimated that he touched her crotch over her clothes for about five seconds. RP at 161. Previously, her mother told police that he touched her for a couple seconds. *Id.* K.H. was also interviewed by a defense investigator in August 2018. RP at 175. In that interview, she estimated that Mr. Nebreja tapped her vagina over her clothes for about three seconds. RP at 179. Until trial, she had not disclosed that she moved her nephew to block Mr. Nebreja. RP at 176.

In addition to K.H., four witnesses testified at trial: two police officers, K.H.'s mother, and a defense investigator. RP at 109, 115, 144, 152, 173. At the conclusion of the evidence, the parties presented closing arguments. RP at 195. During closing, the prosecutor argued that Mr. Nebreja acted to gratify sexual desire because the act "speaks for itself. There is no other reason for this touching to occur." RP at 199. The prosecutor reiterated that "the act does speak for itself" and "what we have is a very clear deliberate fact that serves no other purpose beyond [Mr. Nebreja's] own sexual gratification." RP at 215-16. Mr. Nebreja's attorney did not object to these statements. RP at 199-200, 215-16.

A jury convicted Mr. Nebreja of child molestation in the second degree. RP at 221. The judge sentenced him to 24 months incarceration, with 36 months community custody. CP 183-84. Mr. Nebreja appeals. CP 208.

V. ARGUMENT

Numerous errors in this case deprived Derek Nebreja of a fair trial and violated his constitutional rights. The trial court erred by admitting evidence of his prior alleged actions, violating ER 404(b). Mr. Nebreja's conviction was not supported by sufficient evidence because the state failed to prove that he acted for the purpose of sexual gratification. Additionally, the prosecutor erred by repeatedly misstating the law during closing arguments, shifting the burden of proof and undermining the presumption of innocence. This Court should reverse and remand for a new trial.

A. **The Trial Court Erred by Admitting Evidence of Mr. Nebreja's Alleged Prior Actions.**

At trial, K.H. testified about a prior incident that occurred in Beaverton, OR. RP at 132. She said that she believed Mr. Nebreja tapped her on the bottom. *Id.* At the time, she believed it was an accident. RP at 138. Mr. Nebreja objected, but the state argued that this evidence was admissible. RP at 13-14. The trial court admitted this evidence to show a lack of mistake or accident and to show Mr. Nebreja's lustful disposition towards K.H. RP at 13-14, 99. The court erred because the prejudicial value of this alleged prior bad act outweighed its probative value pursuant to ER 404(b).

Pursuant to ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action

in conformity therewith. 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.” An appellate court reviews a trial court’s interpretation of an evidentiary rule de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, once the rule is correctly interpreted, a trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. *Id.*

Courts “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *Id.* Evidence of other misconduct may lead jurors to convict on the basis that the defendant deserves to be punished for a series of immoral actions. *State v. Bowen*, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence “inevitably shifts the jury’s attention to the defendant’s general propensity for criminality,” stripping away “the presumption of innocence.” *Id.* This is especially true for allegations of child molestation because evidence of prior similar acts creates a likelihood that the jury will convict “based solely upon character.” *State v. Krause*, 82 Wn. App. 688, 696, 919 P.2d 123 (1996).

Before admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find

that its probative value outweighs its prejudicial effect. *State v. Baker*, 89 Wn. App. 726, 731-32, 950 P.2d 486 (1997) (citing *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)). In doubtful cases, the evidence must be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, evidence of Mr. Nebreja's alleged prior touching of K.H. should have been excluded because it was far more prejudicial than probative. This error likely changed the outcome of the trial and thus was not harmless. This Court should reverse and remand for a new trial.

1. The prejudicial effect of Mr. Nebreja's alleged prior bad act far outweighed its probative value.

Prior to admitting evidence of prior bad acts, courts must weigh the probative value of the evidence against its prejudicial effect. *Lough*, 125 Wn.2d at 862, 889 P.2d 487. When the other acts are uncharged offenses, they must have substantial probative value. *Id.* at 863. The weighing must appear on the record, and appellate courts review for abuse of discretion. *Id.* at 862-63.

When a defendant stands accused of child molestation, evidence of prior similar acts is highly prejudicial. *Krause*, 82 Wn. App. at 696. This evidence creates a danger that the jury will convict based on the accused's propensity to molest children, an impermissible basis. *Id.* Because the

inference is so prejudicial, some courts have held that the prejudice cannot be cured by an instruction. *Id.*

Courts have held that evidence of prior conduct is admissible where it closely resembles the alleged crime. *See Baker* 89 Wn. App. at 734 (admitting evidence of prior bad acts where both the prior conduct and the allegations at trial involved molesting sleeping children); *Lough*, 125 Wn.2d at 863-64 (admitting evidence of prior bad acts where both the prior conduct and the allegations at trial involved drugging then assaulting women). Prior bad act evidence is especially probative when circumstances create difficulty in assessing the credibility and memory of the complaining witness, such as when the witness was asleep or drugged. *Baker* 89 Wn. App. at 734; *Lough*, 125 Wn.2d at 863-64.

Here, unlike in *Lough* and *Baker*, there was no allegation that K.H. was drugged, asleep, or otherwise incapacitated. Evidence of the prior touching was thus not necessary to corroborate her testimony. As explained below, the probative value of this evidence was further diminished because the factual circumstances differed greatly from the allegations at trial.

The Court of Appeals evaluated a similar case in *State v. Slocum*, 183 Wn. App. 438, 333 P.3d 541 (2014). There, the defendant was accused of molesting his step-granddaughter. *Slocum*, 183 Wn. App. at 442. The trial court admitted evidence of numerous prior bad acts by the defendant

against other relatives when they were children. *Id.* at 445-47. The Court of Appeals reversed, holding that some of the prior acts were admissible but excluding others. *Id.* at 442.

The Court in *Slocum* upheld admitting evidence of prior acts that closely resembled the allegations at trial, specifically that the defendant asked a child to sit on his lap and then rubbed her vagina. *Id.* at 455. The Court excluded evidence about other instances of alleged molestation that were not so factually similar, such as that the defendant touched a child's breasts while applying sunscreen. *Id.* at 455-56. The state argued that the allegations were similar because of the victims: Mr. Slocum was related by marriage to all three alleged victims and had a position of authority over them. *Id.* at 454. The Court rejected this argument. *Id.* at 455-56. The Court held that the factually dissimilar allegations amounted to evidence of a general "plan to molest children," and excluded them as inadmissible propensity evidence. *Id.* at 453-54.

Here, like in *Slocum*, the prior bad act evidence was too factually dissimilar for its probative value to outweigh its prejudicial effect. Although both allegations concerned K.H., the facts varied greatly. The Beaverton incident occurred in passing, during the day, with no one else present in the room. RP at 132. It was a fleeting touch on the bottom, so slight that K.H. believed it was an accident. RP at 138. By contrast, the

charged allegation occurred in the evening, with other children in the room and adults close by. RP at 122, 139. The allegations about Mr. Nebreja's conduct were also vastly different. K.H. testified that in the Vancouver incident, Mr. Nebreja rubbed her arm and thigh before tapping his fingers her on the vagina. RP at 124-28.

These incidents varied in time, location, surrounding persons, and circumstances. They varied in the defendant's actions and K.H.'s perception of those actions. K.H. was not asleep, drugged, or otherwise incapacitated, thus the Beaverton incident was not necessary to counter any credibility issues with the complaining witness. *See Baker* 89 Wn. App. at 734; *Lough*, 125 Wn.2d at 863-64. At most, it amounted to propensity evidence that Mr. Nebreja had a plan to molest children. The trial court abused its discretion because the prejudicial effect of this evidence outweighed its probative value per ER 404(b).

2. The trial court's error in admitting this evidence likely changed the outcome of trial and thus was not harmless.

As explained above, the trial court erred by admitting evidence about the Beaverton incident. Mr. Nebreja's conviction must be overturned unless this error was harmless. *Slocum*, 183 Wn. App. at 456. The court's error was not harmless because there is a reasonable probability that the

result of the trial would have been different had the error not occurred. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Here, K.H. alleged that Mr. Nebreja rubbed her arm, rubbed her thigh, and then tapped his fingers on her vagina. RP at 124-28. She estimated that the incident lasted between two and five seconds. RP at 141, 161. During her initial interview, she stated that Mr. Nebreja was tapping the fingers of his other hand on the armrest of the couch at the same time. RP at 176.

Under these circumstances, it is likely that the jury would conclude that this fleeting contact did not amount to child molestation without evidence of the prior incident in Beaverton. Thus, there is a reasonable probability that the trial court's error changed the outcome of the case and thus was not harmless. *Jackson*, 102 Wn.2d at 695. This Court should reverse and remand for a new trial.

B. The Evidence at Trial was Insufficient to Convict because the State Failed to Prove that Mr. Nebreja Acted for Sexual Gratification.

The state also presented insufficient evidence to support Mr. Nebreja's conviction. Specifically, the state failed to prove beyond a reasonable doubt that Mr. Nebreja touched K.H. for the purposes of sexual gratification. Instead, the evidence showed that the contact was brief, accidental, and terminated immediately. This Court should reverse.

“The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). To determine whether sufficient evidence supports a conviction, courts view the evidence in the light most favorable to the state and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182, 185 (2014).

A claim of insufficient evidence admits the truth of the state’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Child molestation in the second degree occurs when a person has “sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.086. “Sexual contact” means “any touching of the sexual or other intimate parts of a

person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2).

Courts look at whether “a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper.” *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008). “Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.” *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). However, courts require additional proof of sexual purpose when the touching occurred over the child’s clothing. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (citing *Powell*, 62 Wn. App. at 917).

For example, in *Powell*, the Court of Appeals reversed convictions for child molestation because the purposes for the defendant’s conduct were equivocal. 62 Wn. App. at 917. In that case, the accused was an “honorary uncle” of the child. *Id.* at 916 n.1. The charges arose from two occasions. *Id.* at 916. First, the child said that she was sitting with Mr. Powell, and he touched her private parts over her clothes when lifting her off of his lap. *Id.* Second, she said that he touched her thigh over her clothes when they were both sitting in his truck. *Id.*

The Court in *Powell* found that with both of these incidents, the touches were fleeting and “susceptible of innocent explanation.” *Id.* at 918. The Court noted that the child “was clothed on each occasion and the touch was on the outside of her clothes. No threats, bribes, or requests not to tell were made.” *Id.* Under these circumstances, the Court held that no rational trier of fact could conclude beyond a reasonable doubt that the touching occurred for sexual gratification. *Id.*

Here, like in *Powell*, a familial or caretaking relationship existed between Mr. Nebreja and K.H. Mr. Nebreja was K.H.’s brother in law, married to her sister. RP at 118. He is also the father of K.H.’s nieces and nephew, with whom she is very close. RP at 150. There was also no evidence that Mr. Nebreja threatened K.H., bribed her, or told her to keep the incident a secret. RP at 124-28.

Finally, like in *Powell*, the touching was very brief, over K.H.’s clothes, and susceptible to an innocent explanation. K.H. estimated that the entire incident happened over a matter of seconds. RP at 141. She testified that Mr. Nebreja rubbed her arm, which is not an intimate body part. RP at 124. He then rubbed her thigh and tapped her on her vagina, over her clothes. RP at 126-28. Mr. Nebreja was tapping the arm rest of the couch with his other hand. RP at 176. It is likely that he accidentally touched K.H. for a few seconds without thinking.

The state relied on the Beaverton incident to argue that this brief touch was not accidental. RP at 13-14. As explained above, the Beaverton incident should have been excluded as more prejudicial than probative. But even considering this incident, the case closely resembles *Powell* because both touches were fleeting and over the clothes. RP at 132. The Beaverton incident also had an innocent explanation. K.H. testified that she and Mr. Nebreja were in a room together and she was getting clothes out of a closet. RP at 132. It is not unreasonable that in a small space, people may brush against each other or accidentally touch one another. At the time, K.H. believed the touch to be accidental. RP at 138.

Based on this limited evidence, a rational trier of fact would not conclude beyond a reasonable doubt that Mr. Nebreja touched K.H. for the purpose of sexual gratification. At most, this was a very brief instance of accidental touching, over a child's clothes. The state failed to provide any "additional evidence of sexual gratification" to meet its burden of proof. *Powell*, 62 Wn. App. at 917. This Court should reverse.

C. The Prosecutor Misstated the Law and Reversed the Burden of Proof regarding Sexual Gratification.

During closing statements, the prosecutor repeatedly misstated the law. The state essentially reversed the burden of proof and told the jury that Mr. Nebreja must prove that he did not act for the purposes of sexual

gratification. This Court should reverse because the prosecutor deprived Mr. Nebreja of a fair trial.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Courts consider the prosecutor’s alleged improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Anderson*, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009).

In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met in this case.

- 1. The prosecutor committed misconduct by misstating the law and implying that Mr. Nebreja had the burden of proving that he did not act for sexual gratification.**

The prosecutor committed misconduct on this case by repeatedly misstating the standard to prove child molestation. As explained above, a person commits child molestation by having “sexual contact” with a minor.

RCW 9A.44.086(1). Sexual contact “means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2).

Sexual gratification is a defining phrase, not an element of child molestation. *State v. Lorenz*, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004). Nevertheless, to meet its burden of proof, the state must prove that the accused acted with for the purpose of sexual gratification. *State v. Stevens*, 127 Wn. App. 269, 274, 110 P.3d 1179 (2005). Touching that was accidental or done for some other purpose does not constitute child molestation. *Id.*

A jury may infer that touching occurred for sexual gratification when someone directly touches an intimate part of a child. *Powell*, 62 Wn. App. at 917. However, when touching occurs over the child’s clothing, courts “require additional proof of sexual purpose.” *Harstad*, 153 Wn. App. at 21 (citing *Powell*, 62 Wn. App. at 917).

Here, the state did not supply that additional proof. Instead, the state misstated the law and attempted to reverse the burden. Specifically, in closing arguments the prosecutor argued that the “act simply speaks for itself” and “there is no other reason that a twenty-nine-year old man touches a twelve-year old girl like that.” RP at 199. In rebuttal, he reiterated that “sometimes the act does speak for itself” and in this case “what we have is

a very clear deliberate fact that serves no other purpose beyond his own sexual gratification.” RP at 215-16.

Essentially, the prosecutor told the jury that the state does not need to prove that Mr. Nebreja acted for sexual gratification. Instead, the state only needs to prove that touching occurred, and then the act speaks for itself. The prosecutor argued that Mr. Nebreja must then disprove sexual gratification—a misstatement of the law that contradicts *Powell* and *Harstad*. See *Powell*, 62 Wn. App. at 917; *Harstad*, 153 Wn. App. at 21.

2. The prosecutor’s misconduct prejudiced Mr. Nebreja by confusing the jury about the burden of proof.

The prosecutor’s misconduct prejudiced Mr. Nebreja. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Mr. Nebreja did not object at trial and thus must show that a jury instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443. “[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Here, the prosecutor repeatedly misstated the law. The state was responsible for proving that Mr. Nebreja acted for the purpose of sexual

gratification. *Stevens*, 127 Wn. App. at 274. However, in closing the prosecutor reversed this burden, arguing that Mr. Nebreja needed to disprove the purpose of his actions because the acts spoke for themselves. RP at 199, 215-16. At best, this error confused the jury. At worst, it created the expectation that Mr. Nebreja had a burden of proof and eroded his presumption of innocence.

Either way, the prosecutor's misstatement likely changed the outcome of this trial. The state was required to provide additional evidence proving sexual gratification but failed to do so. *See Powell*, 62 Wn. App. at 917; *Harstad*, 153 Wn. App. at 21. Instead, the prosecutor argued that the state did not need to provide this evidence because the act spoke for itself. RP at 199, 215-16. Without this burden shifting, it is unlikely a rational trier of fact would have convicted Mr. Nebreja. The prosecutor's statements prejudiced Mr. Nebreja by improperly shifting the burden of proof, requiring reversal.

D. Cumulative Error Denied Mr. Nebreja a Fair Trial.

Even if each of the errors described above are not sufficient for reversal, their cumulative effect denied Mr. Nebreja a fair trial. This Court should reverse and remand because of the pervasiveness of the errors in this case.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors produce a trial that is fundamentally unfair. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (accumulated errors, including permitting inadmissible evidence and prosecutorial discovery violations, required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

In this case, the errors made by the trial court and prosecutor each warrant reversal. However, even if each error standing alone is harmless, the accumulation of these errors deprived Mr. Nebreja of a fair trial. *See*

Coe, 101 Wn.2d at 789. This Court should reverse. *State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

VI. CONCLUSION

Derek Nebreja's conviction for second degree child molestation must be reversed due to pervasive and significant errors. The trial court erred by admitting evidence of prior bad acts in violation of ER 404(b). The evidence at trial was insufficient to support a conviction. Additionally, the prosecutor committed misconduct by misstating the legal standard during closing arguments and effectively reversing the burden of proof. Mr. Nebreja respectfully requests that this Court reverse his conviction and remanded for a new trial.

RESPECTFULLY SUBMITTED this 14th day of June, 2019.



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CERTIFICATE OF SERVICE

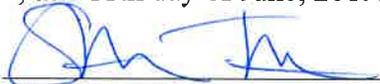
I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On June 11, 2019, I electronically filed a true and correct copy of the **Opening Brief of Appellant, Derek R. Nebreja**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

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SIGNED in Port Orchard, Washington, this 11th day of June, 2019.



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