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NO. 53221-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DARYL ROGERS,

Appellant.

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

The Honorable Robert Lewis, Judge

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. WHEN PROPERLY VIEWED IN THE CONTEXT OF THIS CASE, THE REFERENCES TO ROGERS’ TIME IN JUVENILE DETENTION DEPRIVED HIM OF A FAIR TRIAL. ....	1
2. PARTICULARLY WHEN VIEWED TOGETHER, THE EXPERT WITNESSES’ TESTIMONY AMOUNTED TO FORBIDDEN PROFILE EVIDENCE.....	3
B. <u>CONCLUSION</u> .....	5

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

<u>State v. Alexander</u> 64 Wn. App. 147, 822 P.2d 1250 (1992).....	5
<u>State v. Florczak</u> 76 Wn. App. 55, 882 P.2d 199 (1994).....	3, 4
<u>State v. Gamble</u> 168 Wn.2d 161, 225 P.3d 973 (2010).....	1, 2
<u>State v. Jones</u> 71 Wn. App. 798, 863 P.2d 85 (1993).....	3

A. ARGUMENT IN REPLY

The State addresses several issues in its response brief. With respect to the biased juror argument and the community custody condition that the State concedes must be stricken, Rogers rests on his initial briefing. Rogers addresses the State's remaining arguments below.

1. WHEN PROPERLY VIEWED IN THE CONTEXT OF THIS CASE, THE REFERENCES TO ROGERS' TIME IN JUVENILE DETENTION DEPRIVED HIM OF A FAIR TRIAL.

Despite a pre-trial ruling, the jury was permitted to learn that Rogers had spent time in juvenile detention, strongly suggesting a history of other criminal activity. RP 317-18. The State's arguments on this front should be rejected for three reasons in addition to those discussed in the opening Brief of Appellant. First, Rogers was relatively young when the charged offenses were alleged to have occurred, making his juvenile criminal record particularly prejudicial. Second, this was not a one-time passing reference. Third, the prejudice caused in this sex offense trial, that rested entirely on the testimony of one witness, cannot be compared with State v. Gamble, 168 Wn.2d 161, 225 P.3d 973 (2010), a felony murder case resting on significant physical evidence and the defendant's own statements.

The State argues the prejudice from allowing the jury to learn of Rogers' juvenile criminal history is diminished because this was a reference

to criminal behavior committed as a child rather than as an adult. Brief of Respondent at 11. This argument should be rejected because of Rogers' relatively young age at the time of the charged offenses. The State's point might be valid in a case of an older adult, whose juvenile offenses could be viewed by the jury as occurring far in the distant past. But Rogers was born in February of 1990. Ex. 1. He was, therefore, 15 years old when J.O. moved into the apartment complex where they met in 2005. RP 317-18. The first charged offense was alleged to have occurred between the birth of J.O.'s brother in 2007 and the family's move to Alaska in 2008, when Rogers was 17 and 18 years old. RP 679. The remaining counts were alleged to have occurred after the family returned to Washington in 2010, when Rogers was 20 years old. RP 682-83. The recency of his being in juvenile detention only magnifies the prejudice.

The State portrays this as a one-time reference, but the record shows the witness actually uttered the words "juvenile detention" twice in fairly rapid succession. RP 317-18. Even after Rogers' attorney began to object, the witness continued talking and mentioned it a second time. RP 317-18. That concept was then reinforced by the court's instruction using the same terminology. RP 321-22.

The State's analogy to State v. Gamble, 168 Wn.2d 161, 225 P.3d 973 (2010), should also be rejected. Brief of Respondent at 13. In concluding

that references to criminal history did not deprive the defendant of a fair trial, the Gamble court considered, “the context of the trial as a whole and all the evidence.” 168 Wn.2d at 179. The case at issue in Gamble involved a felony murder committed during a convenience store robbery in which the defendant claimed self-defense. Id. The ballistics evidence and the defendant’s own statements refuted this claim. Id. This context and evidence in Gamble bears no reasonable relationship to the sex offenses alleged in this case, in which the only evidence that any crime occurred was the complaining witness’ testimony. This Court should reject the State’s argument because the danger of unfair prejudice is far greater given the context and evidence presented in this case.

2. PARTICULARLY WHEN VIEWED TOGETHER, THE EXPERT WITNESSES’ TESTIMONY AMOUNTED TO FORBIDDEN PROFILE EVIDENCE.

The State agrees that an expert witness “may not opine that a victim . . . fits the profile of a child sexual abuse victim. Brief of Respondent at 18. As the Court explained in State v. Jones, 71 Wn. App. 798, 819, 863 P.2d 85 (1993), “a general profile to be used to prove the existence of abuse is inappropriate.” By contrast, the court in State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994), found it permissible to testify that a “victim exhibits behavior typical of a group.” Id. at 73. A closer look at the testimony at issue in Florczak helps illustrate the line between the two. The witness in Florczak

testified, “some of the [complaining witness] symptoms . . . could be correlated with a child who has been sexually abused.” Id. The court concluded this did not amount to an opinion that the alleged victim had, in fact, been sexually abused. Id. the witness also testified to a diagnosis of post-traumatic stress disorder but emphasized that she did not diagnose child sexual abuse and that any number of traumatic events could lead to a diagnosis of post-traumatic stress disorder. Id. at 74. This testimony was permissible, the court concluded, because the witness “never indicated, directly or indirectly, that certain behaviors or behavior patterns demonstrate or substantiate sexual abuse.” Id.

By contrast, Garrett’s testimony here was closer to the forbidden profile evidence. She testified that self-harm behavior, which other testimony confirmed J.O. engaged in, had a “strong correlation” with sexual abuse. RP 410. This testimony was more akin to creating a profile of a sexual abuse victim, than merely citing possible correlations as in Florczak.

Copeland’s testimony makes this issue worse because it suggests that the absence of any physical evidence is part of that profile. The State makes much of trial counsel’s lack of objection to Copeland’s testimony. Brief of Respondent at 18-19. However, even unpreserved error can be considered in determining whether the cumulative effect of several errors deprived the accused of a fair trial. State v. Alexander, 64 Wn. App. 147,

822 P.2d 1250 (1992). When viewed together, Garrett's and Copeland's testimony essentially creates a profile of a sexual abuse victim in violation of Rogers' right to a fair trial.

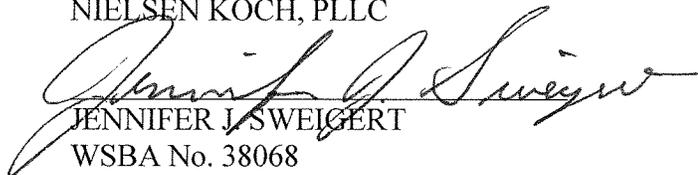
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Rogers asks this Court to reverse his convictions.

DATED this 22<sup>nd</sup> day of January, 2020.

Respectfully submitted,

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