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Court of Appeals
Division III
State of Washington

No. 31719-6-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

TERRY MICHAEL HOEFLER,
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Mr. Hoefler committed attempted rape of a child in the first degree.
2. The trial erroneously admitted lay opinion evidence that was not based on personal knowledge.
3. Mr. Hoefler was denied a fair trial by repeated instances of prosecutorial misconduct.
4. Mr. Hoefler was denied effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Whether the State produced insufficient evidence of attempted rape of a child by failing to produce adequate proof of the substantial step and non-marriage elements?
2. Whether the trial court erroneously allowed a lay witness to opine, without personal knowledge, that Mr. Hoefler had an erection after his show-up?
3. Whether the State committed prosecutorial misconduct during closing argument by submitting evidence that had not been admitted at trial?
4. Whether the State committed prosecutorial misconduct during closing argument by appealing to the jury's passions?
5. Whether defense counsel rendered ineffective assistance by submitting evidence not admitted at trial and by failing to object when the State submitted the same evidence during closing argument?

B. STATEMENT OF THE CASE

Terry Hoefler, Tahti Dilkey, and Kaleb Gunter were driving one night to Mesa, Washington, when their truck broke down near Vieny Sanchez's house. Report of Proceedings (RP) 94, 98-100. Mr. Hoefler searched cars at the house for engine oil but found none. RP 101, 150. So he knocked on the door of the house. RP 151. The door opened as he knocked, and he went inside. RP 151. He called out but no one answered. RP 151. He saw items he could sell as he walked through the house and started gathering them. RP 152.

He went into a bedroom, turned on the light, and was surprised to find three children in a bed. RP 153. Eleven-year-old L.S. woke up. RP 153, 50-52. He carried L.S. to the living room and had her sit on the couch. RP 153. She became hysterical and started screaming. RP 154. Mr. Hoefler told the girl to go back to bed and left. RP 154.

Someone put a bag in L.S.'s mouth and took off her shorts. RP 64, 386. L.S. removed the bag and started yelling. RP 386. Seven-year-old F.M. woke up and saw a man leaving the house. RP 62. The children began screaming and banging on Ms. Sanchez's bedroom door until they were let in. RP 60, 386. L.S. was wearing a shirt and underwear, but no

shorts. RP 61. She said someone had tried to touch her. RP 61. Ms.

Sanchez called 911. RP 62, 132.

Ten minutes later, police stopped Gunter, who looked like he had been running. RP 120, 132. He was heading the opposite direction of Ms. Sanchez's home and matched the description of the man seen in her house. RP 120. F.M. identified Gunter as the man he had seen in the house. RP 241. L.S. was not sure initially. RP 241. But she identified him the next day and at trial as the man who had been in the house. RP 316, 390, 430.

About three hours after the 911 call, police found Mr. Hoefler. RP 68-71, 244-46, 364. He was wearing women's clothing and L.S.'s skirt. RP 71. During a show-up, neither L.S. nor F.M. identified Mr. Hoefler as the man in the house. RP 149.

The State charged Mr. Hoefler with residential burglary and attempted rape of a child in the first degree. Clerk's Papers (CP) 128. During jury selection, Mr. Hoefler pleaded guilty to the residential burglary charge. CP 95-103; RP 20.

Regarding the second count, the Information alleged that Mr. Hoefler entered a residence and attempted to rape L.S. by pushing her down on a couch and pulling down her underwear:

Count II

Attempted Rape of a Child in the First Degree,
[RCW 9A.28.020(1) and 9A.44.073], a class A felony,
committed as follows:

That the said Terry Michael Hoefler in the County
of Franklin, State of Washington, on or about July 22,
2012, then and there, with intent to commit the crime of
Rape of a Child in the First Degree, committed an act, to
wit: pushed L.S. (D.O.B.: 03/20/2001) down on a couch
and pulled down her underwear, which was a substantial
step toward that crime[.]

CP 128-29 (emphasis omitted).

At trial, the court admitted evidence that Mr. Hoefler had denied touching or trying to rape L.S. RP 153, 293. His DNA was excluded from the DNA sample taken from L.S.'s shorts. RP 355. And no semen was found on any of the clothing tested. RP 354.

Over defense counsel's objection, the court allowed testimony that Mr. Hoefler had an erection at the time of the show-up. RP 251-75. Corporal Gordon Thomasson testified that he was familiar with penises and had seen an erection before. RP 277. The corporal took Mr. Hoefler out of the car after the show-up and saw a bulge in the girl's skirt Mr. Hoefler was wearing. RP 278. In Corporal Thomasson's opinion, the bulge was an erection. RP 279. He did not lift the skirt or examine Mr. Hoefler to confirm or deny his suspicion. RP 280.

During closing arguments, the State argued that Mr. Hoefler was not on trial for the burglary because he had admitted to it and that whoever burglarized Ms. Sanchez's home also attempted to rape L.S. RP 484. The State also argued that the offense occurred because the children were screaming and crying. RP 482-83. Defense counsel did not object to these statements. RP 482-84. Instead, she argued that Mr. Hoefler had taken responsibility for his actions by admitting to the residential burglary. RP 504.

The jury found Mr. Hoefler guilty. CP 50. The court sentenced Mr. Hoefler to 57 months for residential burglary and to life without the possibility of early release for attempted rape of a child in the first degree. CP 14.

Mr. Hoefler appeals. CP 2.

C. ARGUMENT

1. The State produced insufficient evidence of attempted rape of a child by failing to prove the substantial step charged and L.S.'s marital status.

Mr. Hoefler's conviction of attempted rape of a child in the first degree must be reversed because the State produced insufficient evidence of the specific substantial step charged and the marital status of L.S. A

challenge to the sufficiency of the evidence implicates the State's burden of production. *State v. Henjum*, 136 Wn. App. 807, 810, 150 P.3d 1170 (2007). The State's evidence and all reasonable inferences from that evidence are considered true. *State v. Jensen*, 125 Wn. App. 319, 325, 104 P.3d 717 (2005). "Circumstantial evidence and direct evidence are equally reliable' in determining the sufficiency of the evidence." *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)).

Due process requires the State to prove "beyond a reasonable doubt, every fact necessary to constitute the crime charged." *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *modified on other grounds*, *State v. Kitchen*, 110 Wn.2d 403, 406, 756 P.2d 105 (1988).

"To convict a defendant on the charge of an attempt to commit a crime . . . , the State must prove that the defendant intended to commit the underlying crime he is charged with attempting." *In re Richey*, 162 Wn.2d 865, 869, 175 P.3d 585 (2008). Thus, attempted rape of a child in the first degree requires the State to prove the elements of criminal attempt and the

age and marriage elements of rape of a child in the first degree. *See State v. Johnson*, 173 Wn.2d 895, 902, 907, 270 P.3d 591 (2012).

“Criminal attempt has two elements: intent to commit the base crime and a substantial step toward doing so.” *Johnson*, 173 Wn.2d at 904 (citing RCW 9A.28.020(1)); CP 64 (to-convict instruction). The intent required for attempted rape of a child is the intent to have sexual intercourse with a child. *Johnson*, 173 Wn.2d at 907. A substantial step is an act that strongly indicates a criminal purpose and is more than mere preparation. CP 65.

Here, the State elected the particular criminal act upon which it relied to establish the substantial step element. The information alleges Mr. Hoefler pushed L.S. onto a couch and pulled down her underwear. But the State produced no evidence at trial that L.S. was pushed or that her underwear was pulled down. The evidence consists of various accounts of L.S. being carried, moved, or taken to the couch, put on the couch, or told to sit on the couch. RP 62-64, 153, 293, 383-85. And it shows that only L.S.’s pants were pulled down. RP 61, 64, 385-86, 392, 433. Because the State failed to prove the specific facts it alleged to establish the substantial step element, Mr. Hoefler’s conviction should be reversed.

The State also failed to produce sufficient evidence of the non-marriage element. Attempted rape of a child in the first degree requires proof that the child is not married to the alleged perpetrator. CP 63. “Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse.” CP 67.

The State asked whether the child’s aunt, Vieny Sanchez, not whether the child, L.S., was married at the time of the alleged offense:

Q. Now this is gonna sound like a silly question, but is Vieny married at this time?

A. No.

RP 53. The State never asked anyone about L.S.’s marital status. Because the evidence shows only that Vieny Sanchez was not married at the time of the alleged offense, the evidence fails to show that L.S. was not married to the perpetrator at the time of the alleged offense. Moreover, the other evidence admitted at trial was not sufficient to establish the non-marriage element.

In *State v. Shuck*, an adult defendant was convicted of two counts of third degree statutory rape when he “engaged in consensual sexual intercourse with two 14-year-old girls” and paid them to be photographed while doing so. 34 Wn. App. 456, 457-58, 661 P.2d 1020 (1983). The

prosecutor failed to address the element of non-marriage, but the appellate court found sufficient evidence of non-marriage because the jury observed the testimony of both victims and knew the girls' ages, the length of their relationship with the defendant, and the girls' other relationships. *Id.* at 458. Both girls were in the ninth grade and never spent the night with the defendant. *Id.* The girls' acquaintance with the defendant lasted only one month, and one of the girls had a boyfriend. *Id.*

Shuck is factually distinguishable from this case. While the jury heard L.S. testify and knew her age, the State failed to develop the type of evidence that was considered substantial circumstantial evidence of non-marriage in *Shuck*. L.S. did not say whether or not she knew Mr. Hoefler or had ever spent the night with him. Mr. Hoefler simply was not the man she saw in her house on July 22, 2012.

In *State v. Rhoads*, 101 Wn.2d 529, 681 P.2d 841 (1984), the court addressed the same issue as *Shuck* and reached the same conclusion. The prosecutor "failed to ask the victim whether she was married to [the defendant]," but based on the "testimony of several witnesses, including the victim," the court concluded that "the victim did not know Rhoades." *Id.* at 532. The *Rhoades* opinion does not set forth the testimony upon which the court based its conclusion. *Id.* at 531-32. For that reason,

Rhoades is not helpful precedent for determining what constitutes substantial evidence of the non-marriage element.

Unlike in *Shuck* and *Rhoads*, the State here produced insufficient evidence of an essential element of the crime of attempted rape in the first degree by failing to establish the non-marriage element. Mr. Hoefler's attempted rape of a child conviction should be reversed.

2. The trial court erroneously allowed a lay witness to testify, without personal knowledge, that Mr. Hoefler had an erection after the show-up.

The trial court erroneously allowed Corporal Thomasson to opine that Mr. Hoefler was aroused after the show-up. The evidence was inadmissible because Thomasson did not have personal knowledge that Mr. Hoefler actually had an erection.

This Court reviews evidentiary rulings for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A decision is manifestly unreasonable if it is not an acceptable choice, given the facts and legal standard. *State v. Dye*, 178 Wn.2d 541, 548, 303 P.3d 1192 (2013). It is based on untenable grounds

if the record does not support a factual finding. *Id.* It is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard. *Id.*

A witness may not testify to a matter unless he has personal knowledge of the matter. ER 602; ER 701. The witness “must have had an opportunity to observe the fact and must have actually observed it.” 5A Wash. Prac., Evidence Law and Practice § 602.1 (5th ed.). A lay opinion must be excluded where it is based on speculation rather than first-hand knowledge. *Gorby v. Schneider Tank Lines, Inc.*, 741 F.2d 1015, 1021-22 (7th Cir. 1984).

Thomasson’s opinion testimony was based on speculation, not personal knowledge of the matter. He did not actually see Mr. Hoefler’s allegedly erect penis. He saw a bulge under the skirt Mr. Hoefler was wearing but unequivocally stated that he did not touch or look under the skirt to see what was causing the bulge:

Q. Did you take him - - take any time to look at this skirt other than just the outside of it?

A. No, I did not touch it, examine it in any way.

Q. So, you don’t know if it had a plastic lining or what the lining was like in the inside or anything?

A. No. No.

Q. Okay, and you didn't actually examine Mr. Hoefler to determine that he had an erection of any kind?

A. I did not lift his skirt to examine him that - - no, I did not.

RP 280-81. Thomasson's opinion that Mr. Hoefler had an erection is based on speculation, not personal knowledge as required by ER 602 and 701. The trial court's admission of the corporal's lay opinion was based on untenable reasons. The facts did not meet ER 602 or ER 701 requirements. Admitting the evidence was an abuse of discretion.

This error was not harmless. When evidence such as opinion testimony is improperly admitted, the trial court's error is harmless if it is minor in reference to the overwhelming evidence as a whole. *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007); *State v. George*, 150 Wn. App. 110, 119, 206 P.3d 697 (2009). The trial court ruled that testimony of Mr. Hoefler's alleged erection was relevant to "his intentions on the evening in question." RP 35. The intent required for attempted rape of a child is the intent to have sexual intercourse with a child. *Johnson*, 173 Wn.2d at 907.

The erection was the State's primary evidence of intent. Without the erection testimony, the State presented evidence that, while Mr. Hoefler was stealing women's and girls' clothing and accessories, he

carried L.S. to the living room, and someone placed a bag in her mouth and removed her shorts, but not her underwear. She was not touched otherwise.

The remaining evidence of intent suggests Mr. Hoefler has a fetish with women's and girls' clothing and intended to steal them. He was wearing women's and girls' clothing when he was found. Without the erection testimony, the State did not produce overwhelming evidence of Mr. Hoefler's intent to have sexual intercourse with a child. Thomasson was a police officer whose opinion may have been given undue weight by the jury, and the factual foundation for his impression was unclear enough that the jury was in danger of being misled into believing he had seen something that he had not. One cannot be certain that the jury was not affected by the erection evidence. The court's erroneous admission of Thomasson's erection testimony was not minor. Mr. Hoefler's conviction for attempted rape of child should be reversed.

3. The State committed prosecutorial misconduct during closing argument by submitting evidence that was not admitted at trial.

The State committed prosecutorial misconduct by informing the jury of Mr. Hoefler's residential burglary guilty plea – a matter it had no right to consider.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper, prejudicial arguments that may have affected the trial's outcome. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The allegedly improper argument is reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Id.* Where there is no objection, a new trial is required when the misconduct is so flagrant and ill-intentioned that it could not have been cured by instruction. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." *Belgarde*, 110 Wn.2d at 508. "[I]t is error to submit evidence to the jury that has not been admitted at trial." *In re Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). "Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced." *State v. Rinkes*, 70 Wn.2d 854, 862, 425 P.2d 658 (1967).

The prosecutor submitted not just any evidence that had not been admitted at trial. It submitted evidence that Mr. Hoefler had already

pleaded guilty to residential burglary, and proceeded to repeatedly argue that whoever burglarized the house also attempted to rape L.S.:

Let's look at the evidence we went over, and I don't think we can overstate this. *The defendant admits to the burglary, okay? We're not on trial today for burglary.* The defendant in his statement to Detective Nunez and Deputy Conner said very clearly, "I burglarized that house."

And, of course, you can't argue with the physical evidence that was found on and around him, okay? *That burglary is irrevocably intertwined with that rape - - with that attempted rape. Those two things connect together, and there is no doubt that the person that committed one committed the other.*

...

We also see that *this burglary includes numerous items of women's and little girl's clothing.*

...

So, there isn't really any reason why, if you're stealing clothing, you would end up only with women's and little girl's clothing, but yet that's what those pictures depict. So, *the burglary itself very much is consistent with the act of attempted rape, and as we see what was stolen from the house and what was done to those items maybe begin to kind of unfold and unveil this motive behind what [L.S.] said happened to her that night.*

...

Perhaps most importantly, the defendant, the first thing the defendant says when he is brought into custody is, "It was me [who entered the house]." Because initially he doesn't want to get anyone else in trouble. He says, "It was me who did it. Those other two had nothing to do with it." So, *knowing that the person who entered the house is the attempted rapist, and the only man who entered the house is the defendant.*"

RP 484-88 (emphasis added);

He's not gonna confess to a rape. *He's gonna confess to the burglary because he has all the items on him.* He has to, but he's not gonna tell you what's going on in his head.

RP 491-92;

You never heard any testimony about [clothing] evidence leading anywhere else. It's not going north or south of Glade Road right there. It's not leading toward Mr. Gunter. It's not leading towards Ms. Dilkey. It's leading squarely towards the defendant. *There's only one reasonable conclusion in this case.*

RP 498.

The theme of the State's closing argument was that the person who committed the burglary was the person who attempted to rape L.S. And, because Mr. Hoefler already pleaded guilty to the burglary, he is therefore the person who attempted to rape L.S. The State repeatedly emphasized how the burglary and attempted rape of a child were "irrevocably intertwined," "connect"ed, how there is "no doubt" the same person committed both offenses, how "the burglary itself very much is consistent with the act of attempted rape," how "knowing that the person who entered the house is the attempted rapist, and the only man who entered the house is [Mr. Hoefler]," and how "there is only one reasonable conclusion." In short, the State invited the jury to draw an inference of guilt from the unadmitted evidence. And it invited the jury to draw this

inference because such a finding was reasonable – not because the State proved the charged crime beyond a reasonable doubt.

Before the State’s closing argument, the jury did not know Mr. Hoelfer had already pleaded guilty to residential burglary. His guilty plea to the residential burglary charge was not admitted as evidence at trial. Mr. Hoefler did not testify. Police officers testified that Mr. Hoefler said the door opened when he knocked on it. He entered the house, saw things he could sell, went through clothes, and bagged things up. No one else was involved, and he did not want anyone else getting into trouble.

The prosecutor invited jurors to consider evidence not admitted at trial and to disregard the presumption of innocence by telling them repeatedly that the burglar committed attempted rape of a child and Mr. Hoefler pleaded guilty to residential burglary. “The presumption of innocence does not stop at the beginning of deliberations; rather, it persists until the jury, after considering all the evidence and the instructions, is satisfied the State has proved the charged crime beyond a reasonable doubt.” *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011). The State’s invitation to disregard the presumption seriously diluted the State’s burden of proof. *Id.* at 643-44.

While the jury was instructed on the presumption of innocence and that it was supposed to reach a verdict based on the evidence admitted at trial, neither these instructions nor a curative instruction could have erased the jurors' knowledge that Mr. Hoefler pleaded guilty to burglary or restored in the jurors' minds that Mr. Hoefler was presumed innocent of the charge before it. The State's closing argument deprived Mr. Hoefler of fundamental components of a fair trial – the State's burden of proof and the presumption of innocence. His conviction must be reversed.

4. The State committed prosecutorial misconduct during closing argument by appealing to the jury's passions.

The State committed prosecutorial misconduct during closing argument by appealing to the passions of the jury.

Here, the State had to prove an attempted rape of a child occurred and Mr. Hoefler did it. To persuade the jury that the attempted rape occurred, the prosecutor improperly focused the jury's attention on the children's emotional reactions at the time of the burglary and L.S.'s composure while testifying at trial:

What we see here was that there was an attempted rape of a child that night, and there could be no doubt about it. We see the child, we see the testimony, we see the aftermath. We heard Viny and Raphael describe that there was terror in these children, this screaming and yelling. The way a child would react in those circumstances.

We heard about the sad story of Letecia trying to pull her shirt down to cover herself up. The act that a child makes when they're ashamed of something. When they think their modesty has been violated.

We saw the tears in Letecia's eyes when she said what that man tried to do to her. Now, Letecia obviously had a very difficult time coming here and saying that, but you could see in the tears on her face that this really happened.

RP 482-83.

The prosecutor focused far more on the terror, screaming, yelling, and crying of 11-year-old L.S., 7-year-old F.M., and 5-year-old I.M., than on the evidence of attempted rape of a child. A prosecutor may not make comments designed to appeal to the passion and prejudice of the jury, or encourage a verdict based on emotion rather than evidence. *Belgarde*, 110 Wn.2d at 507–08.

Rather than arguing that the defendant committed the offense, the prosecutor focused on the children's terror, screaming, yelling, and crying and used their youth and emotions to appeal to the passion and prejudice of the jury. The prosecutor encouraged the jury to find Mr. Hoefler guilty because the children were terrorized by someone. L.S. is the only child who might have witnessed the offense. So it was inaccurate for the prosecutor to suggest that all three children were screaming and yelling because someone attempted to rape L.S. Exaggerating the evidence by

arguing that three children were terrorized by an attempted rape, and emphasizing the children's emotions rather than the evidence shows the State's argument was flagrant and ill-intentioned and substantially likely to have affected the verdict.

The State's misconduct could not have been cured by instruction. The jury was instructed that the attorneys' arguments are not evidence, to disregard all statements by counsel inconsistent with the evidence and the court's instructions, and to decide the facts based upon the evidence admitted at trial and not sympathy, emotion, or prejudice. CP 52-54. Neither these instructions nor a curative instruction could have erased the images of terror conjured by the State's argument of the children's screams or the disgust jurors would have felt if they had believed the prosecutor's description of the children's responses to the attempted rape. The prosecutor's misconduct justifies reversal of Mr. Hoefler's conviction.

5. Defense counsel rendered ineffective assistance by introducing evidence not admitted at trial and by failing to object to the prosecutor's introduction of the same evidence.

Defense counsel provided deficient representation and prejudiced the defendant by failing to object to the prosecutor's improper statements during closing arguments that introduced evidence not admitted at trial.

Defense counsel provided further deficient representation by also mentioning that evidence.

To prevail on a claim of ineffective assistance of counsel, Mr. Hoefler must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance is performance that falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Counsel's conduct is not deficient if it "can be characterized as legitimate trial strategy or tactics." *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Defense counsel should have objected and moved for a mistrial when the State submitted evidence that Mr. Hoefler pleaded guilty to residential burglary. Instead of objecting, defense counsel drew further attention to the guilty plea:

Mr. Hoefler admits to the residential burglary. He admits to it. He's admitted to it. Taken responsibility.

RP 504.

Counsel's response to the State's misconduct was not a legitimate trial tactic because it furthered the submission of evidence that was not admitted at trial. Submitting evidence to the jury that has not been admitted at trial is error. *Glasmann*, 175 Wn.2d at 704. This error was prejudicial because it invited the jury to consider evidence that Mr. Hoefler was guilty of a crime that was not before the jury but that was committed at the same time as the crime at issue. There is reasonable ground to believe that the jury considered the guilty plea in its deliberations because both attorneys referred to it. Consideration of Mr. Hoefler's guilty plea vitiated the jury's verdict. Mr. Hoefler's conviction should be reversed.

D. CONCLUSION

For the reasons stated above, Mr. Hoefler's conviction for attempted rape of a child should be reversed.

Respectfully submitted on March 6, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 6, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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