

No. 32723-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DENNIS GASTON

Appellant.

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

The Honorable Judge Brian Altman

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Dennis Gaston appeals his conviction of second-degree child molestation. The admissible evidence supporting his conviction was the testimony of J.W. that Mr. Gaston put his hand down the child's pants, rubbed his penis for about a minute and asked if J.W. was getting hard.

However, there is a significant likelihood that the jury would not have convicted Mr. Gaston but for the overwhelming admission of other inadmissible evidence, particularly since the child's retelling of the details was not always consistent and was countered in part by defense evidence showing that certain statements could not have been true.

First, the court erred by admitting evidence that the defendant told police he had "urges." This evidence should have been excluded, because it was not clear that "urges" referred to pedophilia as opposed to adult homosexuality. Mr. Gaston always vehemently denied touching J.W., the child of a long-time family friend.

Next, the court erred by failing to conduct an ER 404(b) analysis. Had such analysis been conducted, the defendant's admission to having "urges" should have been excluded as improper propensity evidence. This evidence was, as the court called it, the "knock-down blow" and resulted in a conviction based on the appearance that Mr. Gaston must be the type of person who would molest children. Moreover, defense counsel was

ineffective for failing to insist on an ER 404(b) analysis and a limiting instruction.

Also, the court erred by admitting J.W.'s testimony that the defendant was "enjoying" what he was doing. J.W. offered no details to form the foundation for such opinion testimony, such as personal observations or descriptions of Mr. Gaston's behaviors or appearance.

And, the court erred by admitting testimony from J.W.'s mother that the child told her, a mental health professional, law enforcement officers, and several family members about the accusations. The child's story did not become more truthful with the number of times he told it outside of court. The mother's testimony constituted irrelevant, unduly prejudicial hearsay that improperly bolstered J.W.'s credibility.

Additionally, the prosecutor committed misconduct by sympathizing with the jury that it was difficult to think of these things our children go through. She also argued facts not in evidence by telling the jury that the defendant had asked J.W. if he was enjoying the touching. And, the prosecutor improperly vouched for J.W. by telling the jury that the child had testified "candidly."

Finally, the community custody condition pertaining to pornographic materials must be stricken as it is not supported in law.

Give each error in this trial, or the cumulative effect, Mr. Gaston's conviction must now be reversed and the matter remanded for a new trial.

B. ASSIGNMENTS OF ERROR

1. The court erred by admitting evidence that the defendant had "urges."
2. The trial court erred by failing to conduct an ER 404(b) analysis on the record.
3. Defense counsel was ineffective for failing to insist on an ER 404(b) propensity analysis and a limiting instruction for the "urges" evidence.
3. The trial court erred by admitting J.W.'s testimony that the defendant was "enjoying" the inappropriate touching.
4. The trial court erred, and defense counsel was ineffective for failing to renew his objection, when the mother testified about J.W. telling her and several other persons his allegations against Mr. Gaston.
5. The prosecutor committed misconduct by sympathizing with the jury that it was difficult to think about these things our children go through.
6. The prosecutor committed misconduct by arguing facts not in evidence.
7. The prosecutor committed misconduct by arguing that J.W. had testified "candidly."
8. The court erred by imposing the community custody condition to not possess or view pornographic materials.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred pursuant to ER 401 and ER 403 by admitting the statements about Mr. Gaston's "urges" where the statements were out-of-context, had no relevance when viewed in context, and were unduly prejudicial given their vague nature.

Issue 2: Whether, alternatively, the statements about Mr. Gaston's "urges" should have been excluded as inadmissible propensity evidence under ER 404(b).

- a. The trial court's failure to conduct an ER 404(b) analysis on the record before admitting the "urges" propensity evidence warrants reversal.
- b. None of the exceptions in ER 404(b) apply to otherwise allow the propensity evidence in this case.
- c. The erroneous admission of ER 404(b) propensity evidence was not harmless.

Issue 3: Whether trial counsel was ineffective for failing to specifically object to and request a limiting instruction on the propensity evidence.

Issue 4: Whether the court abused its discretion by permitting J.W. to speculate that Mr. Gaston enjoyed touching him.

Issue 5: Whether significant portions of the mother's testimony constituted prejudicial hearsay, improper vouching or irrelevant evidence.

Issue 6: Whether the prosecutor committed misconduct during closing argument by sympathizing with the jury that these "are difficult things to--think that our children go through..." by arguing facts not in evidence, and by informing the jury that J.W. testified "candidly."

Issue 7: Whether the community custody condition relating to viewing or possessing pornographic material should be stricken as it is not reasonably crime related, is unconstitutionally vague and is not narrowly tailored.

Issue 8: Whether the cumulative error doctrine requires reversal and remand for a new trial in this case.

D. STATEMENT OF THE CASE

In August 2013, Dennis Gaston was accused of second-degree child molestation as to then 13-year-old J.W., the son of a long-time family friend. (RP 46-47, 66, 69-70, 99; CP 1-2)

J.W. (DOB: 10/22/1999) testified that sometime in the spring of 2013, he was riding his bicycle from his mother's to his grandmother's home and, on the way, he stopped by Mr. Gaston's home when he saw Mr. Gaston outside. (RP 45, 72) They chatted in Mr. Gaston's adjacent carport about cars. (RP 76-82) J.W. believed Mr. Gaston was working on a maroon Plymouth in the carport at the time (RP 76-77), though the Plymouth was originally tan and receipts showed it had been towed away for its maroon paint job on February 14, 2013, where it remained for the subsequent six to seven months (RP 145-50).

Regardless, J.W. alleged that, while they were in the carport, Mr. Gaston asked J.W. if he had a girlfriend or had ever had sex with a girl. (RP 84-85) J.W. answered that he had not. (*Id.*) Then, J.W. said, Mr. Gaston reached down the front of J.W.'s pants beneath his underwear and rubbed his hand up and down J.W.'s penis for about a minute. (RP 85-86, 88, 100) J.W. said that Mr. Gaston asked him if he was "getting hard." (RP 86-87) J.W. said he felt uncomfortable, shocked, and confused, and he did not say anything because Mr. Gaston was enjoying what he was doing. (RP 89) J.W.'s provided some inconsistent details, including which month this occurred, switching his description of the hand that Mr. Gaston supposedly used, whether the incident happened after school or on a weekend and whether Mr. Gaston was asking him questions of a sexual

nature during the incident. (RP 76-77, 107, 111) J.W. said he left for his grandmother's home and did not initially share his allegation. (RP 90-91)

In August 2013, J.W. was talking on the phone with his mother, Julie Woolery, to arrange a ride from the fairgrounds. (RP 47-48, 91-92) At some point, Ms. Woolery suggested that J.W. go to Mr. Gaston's workplace and call her or get help from Mr. Gaston for a ride. (*Id.*) J.W. hung up on his mother and thereafter told his allegations to several family members and his mother's friend, a mental health counselor. (RP 50-51, 91-92, 94) J.W. was then interviewed by law enforcement at his mother's insistence. (RP 52-53, 115-18)

On August 29, 2013, officers interviewed Mr. Gaston regarding J.W.'s allegations. (RP 120, 123) Officer Matulovich testified to certain portions of that interview, including that Mr. Gaston remembered J.W. stopping by his house that spring to visit about cars, and that at some point Mr. Gaston had patted J.W. on the shoulder and grabbed J.W.'s inner thigh close to his groin to get his attention (which Mr. Gaston said he should not have done). (RP 124, 126, 128-29) But Mr. Gaston vehemently denied putting his hand down J.W.'s pants or doing anything of a sexual nature. (RP 134, 137) The officer then testified, over objection¹, that when confronted with the allegations Mr. Gaston said:

¹ Defense counsel argued it was improper to admit the statements about the defendant's "urges," because a review of the full transcript of the interview in context showed that the

I've had urges... I'm not going to lie to you... cause I like both of you and respect you both... I've had urges. I haven't acted on them like I wanted to, you know, 'cause I know it's wrong... [A]nd I feel like if I did do something bad I'd wind up going to jail... It would ruin my marriage and everything else. That's why I haven't... That's the only thing that probably stopped me is... [t]he fact that I have a good wife... I work my ass off because it...keeps from the urges.

(RP 132-33)² Finally, the officer testified, again over objection that the statement was out of context, that Mr. Gaston said he has gone to counseling in the past, but that counseling did not help. (RP 133)

The jury returned a verdict of guilty to second-degree child molestation and Mr. Gaston, who had no criminal history, received a standard-range sentence of 18 months. (RP 201, 204, 207-08; CP 63, 72-80) Mr. Gaston continued to proclaim his innocence through sentencing, and this timely appeal followed. (CP 68-71, 87) Additional facts may be referenced below where pertinent to the particular issue raised.

defendant was admitting to homosexual urges with adult males who had relayed his sexual advances to police in the past, rather than admitting to urges of pedophilia. (RP 10-11, 20-22) Pursuant to the defendant's motion in limine (CP 14-15), evidence of Mr. Gaston's homosexual inclinations was excluded, and counsel argued that these out-of-context statements of "urges" would be vague and unduly prejudicial if submitted to the jury. (*Id.*) The court agreed that this evidence was "pretty prejudicial to the defendant. Maybe even the knock-down blow...", but it allowed the evidence anyway. (RP 22)

² The full transcript was not admitted (Exhibit 1), but it has been provided to the court in a supplemental designation of exhibits and will be discussed in greater detail in Issue 1 below.

E. ARGUMENT

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (quoting Slough and Knightly, *Other Vices, Other Crimes*, 41 Iowa L.Rev. 325, 333-34 (1956)) (reversing for erroneous admission of sexual propensity evidence).

Issue 1: Whether the court erred pursuant to ER 401 and ER 403 by admitting the statements about Mr. Gaston’s “urges” where the statements were out-of-context, had no relevance when viewed in context, and were unduly prejudicial given their vague nature.

What the jury heard of Mr. Gaston’s “urges,” including that he had gone to “counseling” and it did not help (RP 133), suggested that he was inclined to molest 13-year-old boys. However, in context, the defendant’s “urges” and counseling more likely related to homosexuality with male adults. While Exhibit 1 (the transcript of the defendant’s interview with police) was not admitted below, a review of that Exhibit shows that the trial court erred by allowing the officer’s piecemeal testimony pertaining to Mr. Gaston’s “urges.”

First, a trial court’s evidentiary rulings are reviewed for an abuse of discretion. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). “A trial court abuses its discretion when its decision is manifestly

unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *Id.* (quoting *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009)). In close cases, the balance must be tipped in favor of the defendant. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

Irrelevant evidence is inadmissible. ER 402. “Relevant evidence” is that “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401; *State v. Mee*, 168 Wn. App. 144, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011 (2012). Even if evidence is 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.” *Mee*, 168 Wn. App. at 157; ER 403. “The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.” *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013).

Mr. Gaston's interview with officers, by way of summary, set forth the following information in the following sequence:

An officer informed the defendant that there was an allegation of inappropriate touching by J.W. (Exhibit 1 pg. 1) Mr. Gaston said he remembered J.W. stopping by and talking in the carport about cars, but he only patted J.W.'s shoulder. (*Id.* at pg. 2, 4) The officers said they were starting to see a pattern with Mr. Gaston because of past complaints by adult males that the defendant had tried to "get with" them in a homosexual way. (*Id.* at pg. 5, 8-9) The officers told Mr. Gaston that he could get help if needed and asked if anything happened with J.W. (*Id.* at 6) Mr. Gaston said he touched J.W. on the leg to get the boys attention and shouldn't have, but that he did not go down J.W.'s pants at all or rub his penis. (*Id.* at 6-7).

Mr. Gaston responded to officers that he did not have an attraction [to J.W.] and thinks of those kids as his own. (Exhibit 1 pg. 7) The touch or grab on J.W.'s inner thigh was just to get the boy's attention. (*Id.* at 8) Mr. Gaston said he had known J.W. all of his life and just couldn't believe this. (*Id.* at 9) The officer then challenged that the situations were similar, a male adult complaining about Mr. Gaston's homosexual advances, and a 13-year-old boy complaining of sexual advances. (*Id.*) The officer said that if Mr. Gaston was having "urges", they could help with that. (*Id.* at 10) The officer went on that Mr. Gaston could get help so the urges do not take him over. (Exhibit 1 pg. 11) The officer asked if Mr. Gaston did not get help, where would it stop? (*Id.*) Mr. Gaston asked what kind of help a person could offer, saying there is no help. (*Id.* at 12) The officer responded that the legal system would help with counseling to help Mr. Gaston rid himself of demons because it is against the law. (*Id.*)

Mr. Gaston then made the following statements, which were introduced to the jury: "I've had urges... I'm not going to lie to you... cause I like both of you and respect you both... I've had urges. I haven't acted on them like I wanted to, you know, 'cause I know it's wrong..."

[A]nd I feel like if I did do something bad I'd wind up going to jail... It would ruin my marriage and everything else. That's why I haven't... That's the only thing that probably stopped me is... [t]he fact that I have a good wife... I work my ass off because it...keeps from the urges. (Exhibit 1, pg. 12-13; RP 132-33) Mr. Gaston also told the officer that he had been to counseling, but there was nothing the counselors could do to help. (*Id.* at 14-16, 20)

The officer then asked what happened with J.W. (*Id.* at 16) Mr. Gaston repeated that they had been in the carport talking, that he had only touched J.W.'s shoulder and touched or grabbed his thigh to get his attention. (*Id.*) The officer responded that he did not believe Mr. Gaston that that was all that happened. (*Id.*)

The officer again challenged that they had two circumstances very similar (an adult male and a 13-year-old male telling police of sexual advances by Mr. Gaston), and the officer encouraged Mr. Gaston to just come clean on the urges he had. (Exhibit 1 pg. 17) Mr. Gaston said, "That's all that happened... I'm straight with you. I mean I wouldn't do anything to hurt [J.W.] at all." (*Id.*) The officers then proceeded to tell Mr. Gaston what they thought was the truth (*id.* at 18), and Mr. Gaston responded, "That's all that happened that I can remember." (*Id.* at 19) The officer concluded by asking Mr. Gaston what he experiences when he has urges, and Mr. Gaston responded that he feels a sense of loneliness and being unwanted. (*Id.*)

The court erred by admitting evidence of the defendant's "urges," implying to the jury that the urges must have related to molestation. When taken in context, the "urges" more likely related to Mr. Gaston's past urges of homosexuality with adult males, which had absolutely no relevance in terms of proving or disproving child molestation. In admitting the evidence of "urges," the trial court relied on unsupported

facts, that the defendant said he had urges to molest children. This view of the defendant's statement is not reasonable in light of the entire transcript of the interview and, thus, was an abuse of discretion.

The defendant told officers he had no attraction to J.W. Then, when officers mentioned adult males who had complained to police in the past about Mr. Gaston's homosexual advances toward them, the defendant acknowledged he had urges. At no time did Mr. Gaston indicate that he had sexual urges involving young boys as opposed to urges with adult males. Mr. Gaston did mention that he did not act on his urges, because he had a good wife and did not want to go to jail. Given that the adult males had contacted the police in the past, alleging Mr. Gaston wanted to "get with" them, Mr. Gaston's fear of going to jail as a result of his homosexuality was rational. But evidence of a person's homosexuality does not make it more probable that he would commit child molestation. The trial court abused its discretion by relying on "facts" that were unsupported by the actual record of the interview and by taking a view of the evidence no reasonable person would take.

Additionally, the "urges" testimony, when presented to the jury out of context, was unfairly prejudicial. The trial court properly granted defense counsel's motion to exclude evidence of homosexuality so as not to taint the jury with preconceived notions of homosexuals being inclined

to molest children. But the court erred by then denying defense counsel's motion to exclude the piecemeal "urges" evidence. (RP10-22) The "urges" evidence, particularly since the jury heard no evidence regarding the defendant's homosexuality, most certainly misled the jury into believing that the defendant's urges could have only pertained to molesting children. Such evidence was likely to stimulate an emotional rather than a rational response from the jury, leaving the jury with only one possible conclusion, that Mr. Gaston was inclined to molest children. This evidence should have been excluded pursuant to ER 401 or ER 403.

Issue 2: Whether, alternatively, the statements about Mr. Gaston's "urges" should have been excluded as inadmissible propensity evidence under ER 404(b).

Even if this Court determined that the evidence of Mr. Gaston's "urges" was clear and unambiguous enough to be relevant to help prove child molestation as opposed to mere homosexuality, this evidence should have been excluded as improper propensity evidence pursuant to ER 404(b). "In no case... , regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *Saltarelli*, 98 Wn.2d at 362. Prior to admitting the "urges" evidence in this case, the trial court was required to analyze the factors for admitting such evidence on the record. Its failure to do so requires reversal. Alternatively, if this Court reviewed

those same factors, it remains clear that the “urges” evidence constituted inadmissible propensity evidence that should have been excluded.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). Admitting evidence of a criminal defendant’s prior bad acts “presents a danger that the defendant will be found guilty not on the strength of evidence supporting the current charge, but because of the jury’s overreliance on past acts as evidence of his character and propensities.” *Slocum*, 183 Wn. App. at 442. “This potential for prejudice from admitting prior acts is ‘at its highest’ in sex offense cases.” *Id.* (quoting *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (quoting *Saltarelli*, 98 Wn.2d at 363)). “Evidence of prior bad acts is presumptively inadmissible.” *McCreven*, 170 Wn. App. at 458.

To that end, “ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order show action in conformity therewith.” *Slocum*, 183 Wn. App. at 448. “The same evidence may be admissible for other purpose, depending on its relevance and the balancing of the probative value and danger of unfair prejudice.” *Id.* (citing *Gresham*, 173 Wn.2d at 420). For example, such evidence may be admitted as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

ER 404(b). To be admissible, prior bad acts must be “relevant for a purpose other than showing propensity.” *Slocum*, 183 Wn. App. at 456.

ER 404(b) does not only apply to testimony by others who may have witnessed the defendant’s prior bad acts; the rule also restricts the admissibility of the defendant’s own references to prior crimes, confessions or admissions. 5D Wash. Prac. Handbook Wash. Evid. ER 404 (2014-15 ed.) (citing *State v. Fuller*, 169 Wn. App. 797, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013); *State v. Perrett*, 86 Wn. App. 312, 936 P.2d 426 (1997)).

“Before admitting evidence of bad acts, the trial court is required to ‘(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.’” *Slocum*, 183 Wn. App. at 448 (quoting *Gresham*, 173 Wn.2d at 421). This analysis, including identifying the purpose of the evidence and conducting the requisite balancing test, “must” be conducted on the record by the trial court prior to admitting evidence of the prior bad act. *Id.* (citing *State v. Sublett*, 156 Wn. App. 160, 195, 231 P.3d 231 (2010), *aff’d*, 176 Wn.2d 58 (2012)); *Wade*, 98 Wn. App. at 334.

“A trial court’s failure to articulate its balancing process may be harmless if the record as a whole permits appellate review.” *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004) (citations omitted). Abuse of discretion may be shown where the trial court fails to analyze the admission of evidence under ER 404(b) or fails to follow the requirements of ER 404(b) prior to admitting improper propensity evidence. *Fuller*, 169 Wn. App. at 828, 830.

“The burden of demonstrating proper purpose for admitting evidence of a person’s prior bad acts is on the proponent of the evidence.” *Slocum*, 183 Wn. App. at 448. “Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith.” *Wade*, 98 Wn. App. at 334. “Doubtful cases should be resolved in favor of the defendant.” *Id.* (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). When a proper ER 404(b) “analysis is scrupulously applied by the trial court, it effectively prohibits mere propensity evidence.” *Id.* (internal quotation omitted).

a. The trial court’s failure to conduct an ER 404(b) analysis on the record before admitting the “urges” propensity evidence warrants reversal.

As a threshold matter, the trial court here committed reversible error by failing to conduct an ER 404(b) analysis on the record prior to admitting evidence that Mr. Gaston had “urges” in the past.

In *State v. McCreven*, the trial court admitted gang-related propensity evidence “over numerous defense objections as to the relevance and prejudicial impact of [the same evidence...].” 170 Wn. App. at 459. The Court of Appeals did not question whether counsel sufficiently preserved the propensity issue and instead acknowledged the general requirement that the trial court conduct an ER 404(b) analysis on the record prior to admitting prior bad acts. *Id.* at 458. The Court then indicated that it failed to see the nexus between the gang-related evidence and the defendant’s charged conduct; it noted that the evidence was highly prejudicial; and it questioned the sufficiency of the limiting instruction that was required when admitting propensity evidence. *Id.* at 459-61. Ultimately, the Court concluded, “because the record before us is devoid of any consideration by the trial court as to the relevance or admissibility of the inflammatory Bandidos evidence as required before admitting evidence under ER 404(b), we must reverse the codefendants’ convictions...and remand for a new trial.” *Id.* at 461.

Here too, defense counsel strenuously objected to admission of the “urges” evidence as being irrelevant and unduly prejudicial. (RP 10-22) As a result, like held in *McCreven, supra*, the trial court should have conducted an ER 404(b) analysis on the record to (1) find by a preponderance of the evidence that the “urges” actually related to child molestation, (2) identify the purpose for admitting the “urges” evidence, (3) determine whether the “urges” evidence was relevant to prove the crime pursuant to that stated purpose, and (4) weigh the probative value of the evidence against its prejudicial effect.

The trial court did not conduct this required analysis on the record. It did not analyze whether Mr. Gaston had urges toward molesting children, as opposed to urges toward homosexuality. The court did not identify any ER 404(b) purpose for admitting such evidence or determine the evidence’s relevance pursuant to that purpose. And the court did not weight the probative value of the evidence against its prejudicial effect in terms of prior bad act evidence. The court simply noted that the “urges” evidence was very prejudicial, “maybe even the knock-down blow,” and proceeded to admit the evidence. The trial court’s analysis did not comport with the requirements of ER 404(b) and its progeny. The conviction should, therefore, be reversed and remanded for a new trial.

b. None of the exceptions in ER 404(b) apply to otherwise allow the propensity evidence in this case.

If this Court finds the record sufficient to review the issue itself, despite the trial court's failure to conduct the requisite analysis, this Court should find that no ER 404(b) exceptions apply that would allow the evidence that Mr. Gaston had "urges." *See Acosta*, 123 Wn. App. at 432-35 (where trial court failed to conduct the required ER 404(b) analysis on the record, Court of Appeals analyzed some of the potential ER 404(b) exceptions for propensity evidence and determined none of them applied).

First, the evidence of the defendant's "urges" was not admissible under the ER 404(b) exceptions to show the defendant's state of mind, including intent, knowledge, absence of mistake or accident. "If the only relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error." *State v. Pogue*, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001).

For example, in *State v. Acosta*, the Court held that it was improper to admit evidence of the defendant's criminal past, including that he had repeatedly committed the same crimes for which he was currently on trial. 123 Wn. App. at 434-35. The Court indicated that such evidence was not relevant and that any potential probative value was far outweighed by the potential to prejudice the jury, unfairly suggesting "bad character, which is inadmissible to show conformity, and highly prejudicial." *Id.* at 435

(citing ER 404(a); ER 403; and *Commonwealth v. Boulden*, 116 A.2d 867, 873 (Pa. 1955) (“the state of mind that will permit the admission of an unrelated crime is the state of mind at the time of the commission of the offense as shown by the acts or words of the defendant so close in time to the alleged offense as to have bearing upon his state of mind at that time.”))

Also, in *State v. Wade*, the Court reminded that “there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense. 98 Wn. App. at 334 (emphasis in original). “[B]efore prior acts can be admitted to show intent, the prior acts ‘must have some additional relevancy beyond mere propensity.’” *Id.* at 336 (quoting *State v. Holmes*, 43 Wn. App. 397, 400-01, 717 P.2d 766 (1986)). In *State v. Wade*, the Court held that evidence of the defendant’s prior drug deliveries was not admissible in his current trial for possession with intent to deliver drugs. *Id.* at 336. The Court explained:

It is the facts of the prior acts, not the propensity of the actor, that establish the permissive inference admissible under ER 404(b)... [Whereas here,] ER 404(b) forbids such inference because it depends on the defendant’s propensity to commit a certain crime. This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person’s guilt or innocence... For this reason, we do not generally allow propensity, or character evidence, to establish a basis for criminal conviction.

Wade, 98 Wn. App. at 336 (emphasis added).

Here, evidence that the defendant had “urges” was too general and unrelated to the charged offense to pass the relevancy threshold analysis under ER 404(b). To be relevant, in theory, such a statement would have to show the defendant’s state of mind at the time of committing the offense against J.W. But the defendant’s statements did not refer to any state of mind at the time of committing the offense. He consistently denied committing the offense. Instead, the defendant’s statements related to, at most, his urges unrelated to the particular offense in question. To be admissible under this ER 404(b) exception, the “urges” statement would have had to relate to the offense in question as opposed to revealing some general propensity of the actor to be inclined toward homosexuality or even inclined to molest children. The evidence could not pass the relevance test of an ER 404(b) analysis and, given that this is a sex offense where the risk of prejudice is at its highest, the evidence should have also been excluded as unduly prejudicial in the ER 404(b) analysis.

The evidence was also not admissible under the ER 404(b) exception to show “motive.” “For ER 404(b) purposes, motive ‘goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.’” *Fuller*, 169 Wn. App. at 829. But “the State may not show motive by introducing evidence that the defendant committed or attempted to commit an unrelated crime in the

past.” *Id.* (internal citations omitted). In *State v. Fuller*, it was improper to admit evidence that the defendant had earlier told an acquaintance he was considering committing robbery in order to make it more likely he intended to rob the victim in the present case. *Id.* at 830-31. This evidence was inadmissible propensity evidence. *Id.* at 831.

Also, in *State v. Mee*, where the defendant was charged with murder with extreme indifference, the Court held that it was improper to admit evidence of “gang culture” rules, including that gang members are expected to assist other gang members in a fight or risk losing respect.

168 Wn. App. at 159-60. The Court explained:

[The contested evidence] was extremely prejudicial because it invited the jury to make the ‘forbidden inference’ underlying ER 404(b): that Mee’s gang membership showed his propensity to commit the charged crimes... Simply put, generalized evidence regarding the behavior of gangs and gang members, absent (1) evidence showing adherence by the defendant or the defendant’s alleged gang to those behaviors, and (2) that the evidence relating to gangs is relevant to prove the elements of the charged crimes, serves no purpose but to allow the State to ‘suggest[] that a defendant is guilty because he or she is a criminal-type person who would be more likely to commit the crime charged.

Mee, 168 Wn. App. at 159 (internal citations omitted).

Here, the defendant’s generalized admission to having urges, even if it could be viewed as sexual urges toward boys, was still not admissible under ER 404(b). The evidence did not prove that Mr. Gaston had an unsavory motive toward J.W.; the evidence merely suggested that Mr.

Gaston had a propensity to molest children if given the opportunity. This evidence invited the jury to make the “forbidden inference” that Mr. Gaston was the child-molesting type. The evidence was inadmissible.

Lastly, the evidence was not admissible to show a criminal “plan” or other related ER 404(b) exception. In *State v. Slocum*, the trial court admitted prior bad act evidence as a criminal “plan” that, if presented the opportunity, the defendant would molest girls. *Slocum*, 183 Wn. App. at 442. This Court held, “[s]omething that amorphous is not a plan within the meaning of ER 404(b); it is a criminal propensity.” *Id.* This Court reiterated that, “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 of which the charged crime and the prior misconduct are the individual manifestations.” *Id.* at 450. Simply put, “random similarities are not enough...; the degree of similarity...must be substantial...and admission of this kind of evidence requires more than merely similar results.” *Id.* (quoting *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)). A common plan by a defendant to molest children if given the opportunity is inadmissible propensity evidence that is categorically barred. *See id.* at 453-56.

Likewise here, Mr. Gaston's conviction must be reversed, because the jury was introduced evidence that suggested the defendant simply had urges to molest children. A plan or urge to molest children, if given the opportunity, without establishing a commonality of features and similarity between the defendant's prior "urges" statement and the current offense, is inadmissible propensity evidence that is categorically barred. J.W.'s allegations and the defendant's generalized statement about urges do not have sufficient commonality of features to be admissible. The officer suggested during his interview with Mr. Gaston that the "situations" were very "similar," a 13-year-old alleging inappropriate touching and an adult male alleging that Mr. Gaston tried to "get with" him. But there is not sufficient similarity between molesting a child and prospecting an adult male. Also, the defendant said when he had "urges," he felt loneliness. He did not say when he felt urges, he turned on children.

Even if this Court assumed that the defendant had "urges" toward males of all ages, such evidence is categorically barred, without more proof of commonality of features and similarity in results, as inadmissible propensity evidence. The jury should not have been permitted to convict Mr. Gaston simply because it believed he had urges to molest children. Yet there is a very high risk that the jury did just that. The evidence was an improper character attack that is inadmissible pursuant to ER 404(b)

and created an enormous risk that Mr. Gaston was convicted, not on the jury's weighing of J.W.'s testimony, but on its inflamed passions against a man who had unspecified "urges."

c. The erroneous admission of ER 404(b) propensity evidence was not harmless.

Finally, the erroneous admission of ER 404(b) propensity evidence was not harmless in this case. "Under the applicable nonconstitutional harmless error test, the question is whether within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Slocum*, 183 Wn. App. at 456 (citing *Gresham*, 173 Wn.2d at 433). If the improperly admitted evidence "is of little significance in light of the evidence as a whole..." the error in admitting propensity evidence may be deemed harmless. *Fuller*, 169 Wn. App. at 831. But if it is "within reasonable probabilities that[,] but for the [improper propensity evidence] the jury may have acquitted [the defendant,]" this Court should reverse the defendant's conviction. *Pogue*, 104 Wn. App. at 988.

In *State v. Slocum*, like here, the verdict essentially resulted from a jury determination to believe the child who alleged the sexual acts, in light of the propensity evidence it was offered. 183 Wn. App. at 457. In *Slocum*, like in this case, the child's recounting of the details was not necessarily clear or consistent between interviews, and both the defendant there and here had an alibi to some extent. *Id.*

In this case, the vehicle that J.W. said was in the carport during the alleged touching had, according to towing receipts, been removed from the premises months before the alleged incident. And J.W.'s description of the details of the touching changed between his interview with family members, officers and trial testimony. There was no evidence to support J.W.'s allegations, other than his own testimony. The trial court noted that the "urges" statements were "pretty prejudicial" to the defendant, "maybe even the knock-down blow." It is at least reasonably probable under these circumstances that the outcome of the trial was materially affected by the erroneous admission of the propensity evidence. A new trial is warranted.

Issue 3: Whether trial counsel was ineffective for failing to specifically object to and request a limiting instruction on the propensity evidence.

If counsel was required to object on propensity grounds, he was ineffective for failing to do so. And, he was ineffective for failing to request a limiting instruction after the "urges" evidence was admitted.

To demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different.

Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The competency of counsel is based on the entire record, and there is a strong presumption that counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, “strategy must be based on reasoned decision-making[.]” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

If ER 404(b) evidence is admitted, “an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose or purposes.” *Saltarelli*, 98 Wn.2d at 362 (citing *State v. Goebel*, 36 Wn.2d 367, 378-79, 218 P.2d 300 (1950)). “A trial court is not required to sua sponte give a limiting instruction for ER 404(b) evidence, absent a request for such a limiting instruction.” *State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011).

Here, as set forth in Issue 2 above, the trial court erred by admitting ER 404(b) evidence – that the defendant had “urges” – where the trial court neglected to conduct the proper ER 404(b) analysis on the record prior to admission, and where a review of those factors weighed in

favor of excluding the propensity evidence. Defense counsel objected to the “urges” evidence as being irrelevant and unduly prejudicial (see Issue 1). Like in *McCreven*, 170 Wn. App. at 458-59, this objection should be sufficiently specific to then also have required the trial court to conduct its required ER 404(b) analysis and determine whether the “urges” evidence was improper propensity evidence. However, if this Court determines that a more specific objection on propensity evidence should have been made in order to alert the trial court to its required ER 404(b) analysis, counsel was ineffective in this case for failing to make that objection. There was no tactical reason for the “urges” evidence being entered or for counsel failing to object on propensity grounds.

Counsel was also ineffective for failing to request a limiting instruction when the defendant’s prior bad admissions, as described above, were submitted to the jury. The Appellant believes it extremely unlikely that the “urges” evidence would have been admitted if a proper ER 404(b) analysis had been conducted. But, even assuming *arguendo* that the evidence could be admitted, a limiting instruction that identified the purpose of the “urges” evidence was imperative in this case to ensure that the jury convicted Mr. Gaston based on factual evidence rather than based on its belief that he was the type of person who had urges to molest

children. There was no tactical advantage in this case by trial counsel's failure to request the limiting instruction.

Finally, the prejudice Mr. Gaston suffered from the erroneous admission of this evidence has been set forth above in Issue 2 and is now incorporated by reference for this argument as well. In sum, the results of this proceeding, which should have been based on the testimony of J.W. rather than improper propensity evidence, would likely have been different absent this "knock-down blow" (RP 22) of the defendant's "urges."

Issue 4: Whether the court abused its discretion by permitting J.W. to speculate that Mr. Gaston enjoyed touching him.

The trial court abused its discretion by allowing the following speculative and improper opinion testimony from J.W.:

J.W. testified that he did not say anything to Mr. Gaston during the alleged inappropriate touching because Mr. Gaston "was enjoying what he was doing." (RP 89)

Defense counsel objected as speculative, and the trial court asked that the questioned be rephrased. (*Id.*)

The State then said, "What do you mean that you didn't want him to feel -- uncomfortable in -- when you were looking at him. We can't -- You don't really know what he was feeling, so --" (*Id.* at 90)

Defense counsel again objected to the form of the question and the trial court overruled. (*Id.*)

J.W. then responded, "He was enjoying what he was doing and I don't like seeing people, you know, uncomfortable or anything..." (*Id.*)

(RP 89-90) (emphases added).

“A witness must testify based on personal knowledge, and a lay witness may give opinion testimony if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or the fact in issue.” *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697, *review denied*, 166 Wn.2d 1037 (2009) (citing ER 602, 701, other cites omitted). “A witness may not offer opinion testimony by a direct statement or by inference regarding the defendant’s guilt, but testimony is not objectionable simply because it embraces an ultimate issue the trier of fact must decide.” *Id.* (citing ER 704, other cites omitted).

“Opinion on the guilt of the defendant may be reversible error because it violates the defendant’s ‘constitutional right to a jury trial, which includes the independent determination of the facts by the jury.’” *George*, 150 Wn. App. at 117n.2 (quoting *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)). Ultimately, “[u]nder Rule 701 and Rule 602, the witness must have personal knowledge of matter that forms the basis of testimony of opinion; the testimony must be rationally based upon the perception of the witness; and of course, the opinion must be helpful to the jury (the principal test).” *State v. Russell*, 125 Wn.2d 24, 70-71, 882 P.2d 747 (1994) (citations omitted).

A trial court's ruling admitting evidence is reviewed for abuse of discretion. *George*, 150 Wn. App. at 117. "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons." *Id.*

As an example of testimony relating to an ultimate jury determination, a lay witness may not testify regarding the identity of a person unless there "is some basis for concluding that the witness is more likely to correctly identify the defendant from [the evidence] than is the jury." *George*, 150 Wn. App. at 118 (citations omitted). In other words, prior to testifying to an ultimate fact that the jury would otherwise determine, there must be a foundation showing that the lay witness' opinion testimony is "rationally based upon the perception of the witness" so that he has personal knowledge of the matter that would be more helpful to the jury than its own deduction from the evidence shared. *See id.*; ER 701; ER 602.

A person is guilty of second-degree child molestation when the person has sexual contact with another who is at least 12-years-old but less than 14-years-old and not married to the perpetrator and the perpetrator is at least 36-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).

J.W.’s testimony that Mr. Gaston was “enjoying” the touching presumably went to proving sexual touching “for the purpose of gratifying sexual desire...” RCW 9A.44.010(2). The Appellant does not dispute that such evidence would be relevant in that regard. Rather, J.W.’s testimony lacked sufficient foundation to be admitted as proper opinion testimony, because J.W. did not testify to the bases for his perceptions or inferences or any facts that supported his ultimate opinion.

By way of analogy, a trial court should not admit an officer’s testimony that a defendant appeared “drunk,” “under the influence,” or “intoxicated,” unless the officer’s testimony “is supported by proper foundation,” such as detailed testimony about the officer’s observations of the defendant’s physical condition and performance that would support the ultimate opinion. *City of Seattle v. Heatly*, 70 Wn. App. 573, 581-82, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994).

Here, J.W.’s testimony that Mr. Gaston was “enjoying” the touching was an unsupported opinion lacking proper foundation; it was an ultimate determination that should have been left to the jury. Had J.W. described those physical or verbal observations of the defendant that made him conclude that the defendant “was enjoying” what he was doing, the

opinion testimony may have been admissible like in *Heatley, supra*. But the defendant did not describe any facts that formed the basis for his opinion testimony. J.W. did not testify to any personal observations that supported his ultimate opinion and, thus, the evidence should have been excluded, with caution to the jury to disregard the testimony, pursuant to ER 701, ER 602 and the cases noted above.

J.W.'s improper testimony was especially prejudicial in this case. The ultimate guilt determination was based on whether to believe a single witness who had some difficulties recounting the details, and the verdict likely resulted from other erroneously admitted evidence that unfairly prejudiced the fact finding process. Also, J.W.'s improper opinion testimony was emphasized by the State during closing argument, thereby exacerbating the prejudice concern. (*See* RP 173, 179, 191) Even though the State seemed to agree with defense counsel's objection during the time of questioning (the State initially tried redirecting J.W., "You don't really know what he was feeling, so...", RP 90), the State then emphasized J.W.'s speculative testimony to the jury during closing argument (discussing the touching being enjoyed) and asked it to convict on this basis (RP 172-73, 179, 191).³

³ As addressed further in Issue 6 below, the State misconstrued the facts that were presented and informed the jury that Mr. Gaston asked J.W. if he was enjoying the touching, contrary to the evidence actually presented in the form of J.W.'s opinion that Mr. Gaston was enjoying what he was doing.

Issue 5: Whether significant portions of the mother's testimony constituted prejudicial hearsay, improper vouching or irrelevant evidence.

Defense counsel moved to exclude the testimony of Julie Woolery (J.W.'s mother) based on hearsay rules. (CP 14) Ms. Woolery did not testify to any details J.W. shared with her of the alleged molestation. Instead, during the presentation of its case, the mother's testimony was carefully limited to only those actions she took upon hearing J.W.'s allegations against Mr. Gaston (i.e., that she called her friend who is a mental health counselor, discussed the allegation with J.W. and other family members, and contacted law enforcement).

But this testimony about Ms. Woolery's actions upon hearing of J.W.'s allegations was not relevant; it did not prove or disprove the child molestation charge. It was also simply a back-door method for telling the jury that J.W. had made his allegations against Mr. Gaston outside of court to his family members and others (i.e., hearsay, an out of court statement/assertion). Finally, J.W.'s allegations did not become more credible with the number of times he repeated his story outside of court; the mother's testimony improperly bolstered her child's credibility.

Defense counsel was ineffective for failing to object to Ms. Woolery's testimony on relevance grounds, failing to renew his hearsay objection and failing to argue improper bolstering of J.W.'s testimony.

Again, to demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *Aho*, 137 Wn.2d at 745. Since “testimony concerning an opinion on guilt violates a constitutional right, it generally may be raised for the first time on appeal.” *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005) (internal citations omitted). Ultimately, whether a defendant seeks review of the alleged error in this case as one of constitutional magnitude, or as one gleaned from ineffective assistance of counsel, the defendant is required to show two traits common to each: (1) that the inadmissible testimony occurred and (2) that the outcome of the trial would have been different if the improper testimony had been excluded. *State v. We*, 138 Wn. App. 716, 722-23, 158 P.3d 1238 (2007), *review denied*, 163 Wn.3d 1008 (2008) (citing *State v. Warren*, 134 Wn. App. 44, 57, 138 P.3d 1081 (2006) (manifest constitutional error); and *State v. Hakimi*, 124 Wn. App. 15, 22, 98 P.3d 809 (2004) (ineffective assistance of counsel).

“Evidence which is not relevant is not admissible.” ER 402.

Relevant evidence is that which has any tendency to make the existence of any material fact more or less probable. ER 401. Even relevant evidence may be inadmissible if the danger of unfair prejudice substantially

outweighs its probative value. ER 403. “The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.” *McCreven*, 170 Wn. App. at 457.

Additionally, out-of-court statements may not be admitted to prove the truth of a matter asserted; such hearsay is generally inadmissible in court. ER 801(c); ER 802.

Also, one witness may not bolster another witness’ testimony with improper opinion or inference testimony. *State v. Welchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); *Thach*, 126 Wn. App. at 312; *State v. Carlson*, 80 Wn. App. 116, 123-24, 906 P.2d 999 (1995). ER 701 provides that:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge...

ER 701 (emphasis added).

Several evidentiary rules are at issue with Ms. Woolery’s testimony and are viewed together for purposes of this issue. That is, prior out-of-court statements that are cumulative of a witness’s live testimony are not probative of whether the witness is telling the truth. A witness’ accusations are “not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be

cumbersome to the trial and is ordinarily rejected.” *Pardo v. Florida*, 596 So.2d 665, 668 (Fl. 1992) (citing 4 John H. Wigmore, *Evidence* § 1124 (Chadbourn rev. 1972)). Without such safeguarding rules,

“a witness’s testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness. This danger would seem to us to be especially acute in criminal cases like the present where the prosecutrix is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers... psychologists,... specialists, ...and the like... By having the child testify and then by routing the child’s words through respected adult witnesses...there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony.”

Id. (internal quotations omitted) (emphases added). In other words, testimony that a child repeated his allegations out of court to various persons is not a measure of accuracy. Stephen J. Ceci and Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 41 (2000).

Care must be taken to ensure that a child’s prior out-of-court statements do not merely constitute vouching for the child’s accusations or cumulative evidence of live testimony. See *State v. Dunn*, 125 Wn. App. 582, 588, 105 P.3d 1022 (2005) (court ultimately found the young child’s statements admissible under RCW 9A.44.120, which is not applicable in

this case); *Thomas v. French*, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983) (“In general, the testimony of a witness cannot be bolstered by showing that the witness has made prior, out-of-court statements similar to and in harmony with his or her present testimony on the stand.”)

Here, there were numerous evidentiary reasons to exclude most of the mother’s testimony, including irrelevance, undue prejudice, hearsay and bolstering using improper inferences. Other than the testimony regarding J.W.’s age and the fact that the defendant and J.W. had a social relationship to possibly show opportunity for the alleged incident, the remainder of Ms. Woolery’s testimony was irrelevant, unduly prejudicial, hearsay, and/or improper inference testimony designed to bolster J.W.’s credibility.

Most of the mother’s testimony did not tend to prove any of the elements of second-degree child molestation. Most of her testimony should have been excluded, including that J.W. had told his allegations to Ms. Woolery and other family members (which the jury would hear about in detail after the mother’s testimony), that Ms. Woolery called her friend who specialized in mental health after speaking with J.W. to join her for further questioning of the child, and that Ms. Woolery contacted law enforcement after they spoke with J.W. about the allegations. *See* RCW 9A.44.086. There is a real risk in this case that the reliability of J.W.’s

accusations would seem greater simply because the jury heard that he had told his mother, a mental health professional, law enforcement and other family members about these same allegations before testifying to the details of the allegations moments later.

The fact that J.W. made several out of court statements regarding his allegations against Mr. Gaston, even if the statements were not introduced in detail to the jury, still implicates hearsay and relevance concerns. The fact that the mother did not share the details of the allegations is of no moment. She shared that J.W. made the allegations directly to her, a mental health professional, law enforcement and family members. Introducing the fact that J.W. had made these accusatory statements out of court was simply an effort to circumvent the hearsay rules and bolster J.W.'s subsequent testimony with the inference that he would be telling the truth, because, after all, he had told so many persons about those same allegations already.

If J.W.'s out-of-court statements were offered to prove child molestation, they should have been excluded as inadmissible hearsay. If this same testimony was offered to bolster J.W.'s subsequent testimony of the allegations and make him appear more credible given the number of times he repeated the accusations outside of court, such testimony was irrelevant, unduly prejudicial and constituted improper inference

testimony under ER 701. Either way, the evidence should not have been introduced to the jury and defense counsel should have objected.

The prejudice Mr. Gaston suffered from this improper evidence was significant. Other than J.W.'s own testimony, there was no other evidence that proved the molestation had occurred. The "urges" evidence was irrelevant, unduly prejudicial and/or improper propensity evidence that should not be considered, as set forth above. All that was left to prove the accusation was J.W.'s testimony, the details of which changed between retellings or was contradicted by a towing receipt that showed the car J.W. described could not have been present (as J.W. said it was) during the alleged incident. The fact that J.W. told his accusation to his mother, a mental health professional, law enforcement officers and family members did not make his allegations more truthful, despite the inference otherwise to the jury. Mr. Gaston should be retried.

Issue 6: Whether the prosecutor committed misconduct during closing argument by sympathizing with the jury that these "are difficult things to--think that our children go through...," by arguing facts not in evidence, and by informing the jury that J.W. testified "candidly."

The prosecutor committed misconduct during closing argument that should result in a new trial in this case. The prosecutor improperly inflamed the passions of the jury by telling the jury these are difficult things to think "our children" go through (RP 197), she argued facts not in

evidence (that Mr. Gaston asked J.W. if he was enjoying the touching, RP 173, 179, 191) and she improperly vouched for the State's key witness by stating that J.W. had testified "candidly" (RP 197).

"To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). If the defendant fails to properly object to the misconduct, "a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)).

"Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (*citing State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). "[B]ald appeals to passion and prejudice constitute misconduct." *Id.* at 747 (*citing State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174

(1988)). “Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, the prosecutor's duty is to ensure a verdict free of prejudice and based on reason.” *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (internal citations omitted) (citing *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968)). A prosecutor may not urge a jury to convict based upon an appeal to the jury’s sympathy for the victim. *See id.* at 849-51.

A prosecutor must also not argue facts to the jury that are not supported by the record. Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *Thorgerson*, 172 Wn.2d 448, a prosecutor must “seek convictions based only on probative evidence and sound reason.” *State v. Casteneda-Perez*, 61 Wash.App. 354, 363, 810 P.2d 74 (1991); *Huson*, 73 Wn. 2d at 663. ““A person being tried on a criminal charge can be convicted only by evidence, not innuendo.”” *State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007) (quoting *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950)). “[A] prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact.” *Id.* *See also State v. O’Neal*, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), *aff’d*, 159 Wn.2d 500 (2007) (“A prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence.”)

Finally, a prosecutor may not vouch for a witness's credibility. Improper vouching for a witness's credibility occurs "if a prosecutor expresses his or her personal belief as to the veracity of the witness" *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *see also State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). A prosecutor improperly vouches for the credibility of a witness by arguing that a witness is telling the truth. *State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011) (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they "were just telling you what they saw and they are not being anything less than 100 percent candid." (emphasis added).

Here, the prosecutor stated during closing argument:

And if you will recall, J.W. testified that as this event was happening, Mr. Gaston was saying, "Are you getting hard," "Are you enjoying this."

...

[Defendant r]ubbed his penis. Asked if he was enjoying it.
Asked if he was getting hard.

...

A once in a lifetime event. What was the once in a lifetime event. It was that a man put his hands down J.W.'s pants, rubbed his penis up and down, and asked him if he was enjoying it and he was getting hard.

(RP 173, 179, 191) (emphases added).

The prosecutor then closed her argument on rebuttal by stating:

Ladies and gentlemen, I know you'll do the right thing... And it's difficult facts. These are difficult things to -- to think that our children go through. And as we talked about in voir dire, there are false allegations of child molestation and sexual abuse. Children who come forward and say something happened and then recant...

But in this case, you consider what this child did, how he responded. He didn't go running out seeking attention from people. He didn't talk to a lot of people about it. He's not making a big deal. The only time he's really been discussing it after the parental interrogation has related to the prosecution of this case.

And you watched him. He started out kind of calm. He was getting tenser and (inaudible). But he did not back down on what he was saying, and he continued to answer candidly.

Please take that into account as you consider whether he suffered the sexual assault that the state has alleged. We believe you will find beyond a reasonable doubt that he did.

And thank you for your attention.

(RP 197) (emphases added).

First, arguing that the jury will do the right thing and that these are “difficult things” to think that “our children go through” was misconduct; this argument improperly appealed to the jury's passions and prejudices. *See Fisher*, 165 Wn.2d at 747 (citing *Belgarde*, 110 Wn.2d at 507-08); *Clafin*, 38 Wn. App. at 849-51. The prosecutor's duties required that she seek conviction in a manner that is fair to the criminal defendant and increased the chances that the jury's verdict was based solely on the facts

presented. The prosecutor's reference to thinking about "our children" who suffer these types of crimes was particularly improper, because it encouraged the jurors to think of their own child(ren) while deliberating and to focus on child victims in general rather than only focusing on the facts that were presented in this case.

Next, the prosecutor committed misconduct by arguing facts not in evidence when she told the jury three separate times that the defendant asked J.W. if he was "enjoying" it while he was touching him. (RP 173, 179, 191) There is no evidence that the defendant ever asked J.W. if he was enjoying the touching. J.W. testified that Mr. Gaston asked him if he was getting hard, not asked him if he was enjoying the touching. (RP 86-87) The only evidence regarding Mr. Gaston "enjoying" the touching was when J.W. testified in a speculative manner that Mr. Gaston was enjoying what he was doing. (RP 88-89) (See Issue 4 above as to why J.W.'s testimony that Mr. Gaston was "enjoying" what he was doing constituted inadmissible opinion testimony lacking proper foundation.) The prosecutor encouraged the jury to render a verdict based on facts that were not in the record. There was no evidence that Mr. Gaston asked J.W. if he was "enjoying" the alleged touching.

The prosecutor also committed misconduct by arguing that some children make false statements but that J.W. testified “candidly.”⁴ Only J.W. and Mr. Gaston know exactly what happened on the date of the alleged incident. There was no other evidence that proved that J.W. was being truthful in the accusations he made. The prosecutor’s statement that J.W. testified “candidly” (i.e., truthfully and honestly) improperly vouched for J.W.’s credibility. *Ramos*, 164 Wn. App. at 341n.4 (prosecutor’s argument that the officers were “candid” in their testimony constituted improper vouching).

Finally, the prosecutor’s misconduct during closing argument “was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.” *O’Donnell*, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336). The majority of comments were made after defense counsel had already presented argument on Mr. Gaston’s behalf, and the prosecutor’s statements were the final words the jury heard before returning to the deliberation room. Had defense counsel objected at this time and received a curative instruction, it remains unlikely that the jury would have forgotten or entirely ignored the

⁴ “Candidly” is defined as “truthful and straightforward.” Oxford Dictionaries, available at http://www.oxforddictionaries.com/us/definition/american_english/candid, last visited 3/6/2015. It is also defined as “expressing opinions and feelings in an honest and sincere way.” Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/candid>, last visited 3/6/2015.

prosecutor's final argument to think about "our children," or that J.W. had testified "candidly."

The risk of prejudice is at its highest in sex offenses, and inflaming the passions of the jury with improper argument or vouching for a child witness has an incredibly significant impact on a jury. If the defendant is to now have a criminal record for child molestation, this Court should ensure that such a conviction only stands upon a fair presentation of facts rather than improper argument by the prosecutor. The only fair and just remedy in this situation is a new trial.

Issue 7: Whether the community custody condition relating to viewing or possessing pornographic material should be stricken as it is not reasonably crime related, is unconstitutionally vague and is not narrowly tailored.

Mr. Gaston anticipates this Court remanding for a new trial, but he invites this Court to address this community custody condition issue in case it arises after any retrial. The following community custody condition must be stricken (or not re-imposed after any retrial) because it was not crime-related, is unconstitutionally vague and was not narrowly tailored: "14. Do not purchase, possess or view any pornographic material." (CP 82)

The trial court may order a defendant, as a part of any term of community custody, to comply with any crime-related prohibition. *State v. Wilson*, 176 Wn. App. 147, 151, 307 P.3d 823 (2013), *review denied*,

179 Wn.2d 1012 (2014) (citing RCW 9.94A.703(3)(f)). “A ‘crime-related prohibition’ is defined, in relevant part, as ‘[a]n order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.’” *Id.* (internal cites omitted). “Unauthorized conditions of a sentence may be challenged for the first time on appeal.” *Id.* (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

“A general restriction on accessing or possessing pornographic materials is unconstitutionally vague.” *Wilson*, 176 Wn. App. at 151 (citing *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008)) (Court held that condition prohibiting Mr. Wilson from possessing or pursuing pornographic materials was unconstitutionally vague and not narrowly tailored where it implicated First Amendment free speech rights; the Court remanded for a more narrowly tailored condition).

Here, the trial court imposed the same general prohibition on purchasing, possessing or viewing pornographic materials that was set aside in *Wilson*, *supra*, and *Bahl*, *supra*. In this case, the condition was not crime-related. That is, there were no facts showing that pornographic materials had anything to do with Mr. Gaston’s alleged crime. Furthermore, like in *Wilson* and *Bahl*, the condition, which infringes on free speech rights, is not narrowly tailored and is too vague to pass

constitutional muster. Accordingly, the condition should either be stricken at this time, or it should be omitted or more narrowly drawn (consistent with the suggested remedy in *Wilson, supra*) if Mr. Gaston is re-convicted.

Issue 8: Whether the cumulative error doctrine requires reversal and remand for a new trial in this case.

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the prejudicial errors in this case warrants reversal. *See e.g. State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (holding, “a series of errors, each of which is harmless, may have a cumulative effect that is prejudicial.”)

“It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless.” *State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999). “Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence.” *Id.* “Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error.” *Id.* Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” *Id.*

Here, Mr. Gaston received an unfair trial. The child's testimony may not have resulted in a guilty verdict, given the varying details he shared and the contradictory evidence presented by the defense, without the support of the inadmissible evidence challenged above. J.W.'s testimony was unfairly bolstered by improper admission of the "urges" statements, which were either irrelevant or unduly prejudicial, or constituted inadmissible propensity evidence. J.W. also improperly speculated that Mr. Gaston enjoyed what he was doing when touching him. Moreover, counsel's performance was lacking in certain respects, and the child's mother should not have been able to bolster J.W.'s testimony with irrelevant, unduly prejudicial and hearsay testimony. Given the cumulative effect of these errors, it cannot be said that any reasonable jury would have reached the same conclusion. It is within at least reasonable probabilities that the errors materially affected the outcome of this trial. The matter should be remanded for a new trial.

F. **CONCLUSION**

Based on the individual errors identified above, or their cumulative effect, Mr. Gason beseeches this Court to reverse his conviction so that the matter can be remanded for a new and fair trial.

Respectfully submitted this 10th day of March, 2015.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 32723-0-III
vs.) No. 13-1-00145-6
)
DENNIS N. GASTON) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 10, 2015, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Dennis N. Gaston, #376379
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

Having obtained prior permission from the Respondent, I also served a true and correct copy of the same document on Jessica Blye at jessicab@klickitatcounty.org and DAVIDQ@klickitatcounty.org using Division III's e-service feature.

Dated this 10th day of March, 2015.

/s/ Kristina M. Nichols
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