

No. 34110-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA GATHERER,

Appellant.

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

The Honorable Scott Gallina

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REPLY BRIEF

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## A. REPLY ARGUMENT

### **1. The State concedes that the trial court failed to conduct the required on-the-record analysis of the steps for admission of ER 404(b) evidence.**

Mr. Gatherer has argued that the confrontation call's contents of extensive assertions by caller Summer Smith, in which she claims that the defendant had raped her in the past, was ER 404(b) evidence in this case where the appellant was charged with a sex offense. AOB, at pp. 8-16.

The Respondent argues that the evidence did not implicate ER 404(b) at all. BOR, at p. 21 (arguing that confrontation call statements did not require assessment under propensity evidence prohibition). However, Mr. Gatherer replies that whether the confrontation call was offered for purposes of Mr. Gatherer's statements about the present incident involving Katie Watkins, and/or as part of the narrative of how the present case came to the attention of law enforcement, it plainly contained evidence of prior bad acts – the claims of Summer Smith that Mr. Gatherer had raped her multiple times during their relationship. These assertions were particularly prejudicial to Mr. Gatherer in that he was only charged with indecent liberties as to complainant Watkins. CP 1, 4-5.

The Respondent State of Washington does not contend that defense counsel's ER 404(b) objections were inadequately, or improperly lodged. The objection therefore required the State, as the proponent of admissibility, to show how the evidence was admissible under the Rule.

However, the trial court's reasoning in response to Mr. Gatherer's ER 404(b) objections to the prior bad acts was not on the record, and therefore not adequate to ensure that the court was not admitting propensity evidence. AOB, at pp. 12-16.

The case of State v. Gogolin, 45 Wn. App. 640, 727 P.2d 683 (1986), cited by Respondent at p. 27, allows that the failure to conduct ER 404(b) analysis on the record may be excused where the record allows the appellate court to determine that a court would have deemed the evidence not overly prejudicial.

But Gogolin was a case in which the prior bad act, a previous assault on the same victim, was plainly admissible for the purpose of rebutting the defendant's claim that he injured the victim by accident; further, Gogolin merely involved a failure to conduct the final step, balancing probative value compared to prejudice step of ER 404(b). Gogolin, 45 Wn. App. at 645.

Here, “determin[ing] the non-propensity purpose the evidence is being proffered for” when admitting Summer Smith’s claims of prior rape by the defendant was the crucial first step of the ER 404(b) analysis that the trial court failed to conduct on the record. AOB, at p. 13 (citing ER 404(b) and State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289 (1993)).

**2. Conducting the evidentiary analysis on the record would have resulted in exclusion of harmful propensity evidence.**

As can be seen, even agreeing with the Respondent’s offer of the confrontation call as simply a vehicle for allegedly confessional statements by Mr. Gatherer, the *extensive* factual assertions of rape by Summer Smith were not necessary to introduce Gatherer’s statements. A brief background of the call, as based on the concerns of a former girlfriend who was a friend of the present complainant, Watkins, was all that was necessary.

***i. On-the-record analysis would have resulted in proper application of ER 404(b).***

The prosecution is entitled to prove its case, but where prior bad act evidence is concerned, the necessity for the evidence and the potential for propensity prejudice requires careful trial court analysis under the Evidence Rules, on the record. State v. Foxhoven, 161 Wn.2d

168, 175-76, 163 P.3d 786 (2007) (ER 404(b) analysis must be conducted on the record) (cited at AOB, p. 14)); see also State v. Gunderson, 181 Wn. 2d 916, 925, 337 P.3d 1090 (2014) (careful and methodical consideration of the steps for ER 404(b) admission results in reduction of propensity prejudice by requiring court to identify proper purpose).

***ii. State concedes analysis was not done on the record***

The State concedes that the trial court did not conduct an ER 404(b) analysis on the record, admitting that the court's analysis was "not fully fleshed out" and "truncated." BOR, at p. 25.

But the record as a whole indicates that propensity prejudice was interjected into the case, and absent a clear ruling from the bench trial court, prejudice was caused requiring reversal, even considering the Read presumption.<sup>1</sup>

As argued infra, the prejudicial, propensity impact of Summer Smith's claims of prior rapes is demonstrated by the testimony of Detective Eylar, which the appellant has also challenged on an independent basis, as improper opinion testimony. See AOB, at pp. 29-32.

**2. As to Detective Eylar and the other State’s witnesses, the Respondent does not describe the entire course of testimony by the witnesses who Mr. Gatherer argues gave improper opinions on credibility.**

Although it is important to note that Detective Eylar, who gave improper opinion testimony, is only one witness and one aspect of the defendant’s argument that improper opinions on credibility were allowed into the case, both as to the accused and as to the accuser(s), Eylar’s testimony also serves to illustrate that Summer Smith’s recorded statements carried propensity prejudice into the case. See argument at Part 1, supra; see AOB, Parts 2(a) through (e) (pp. 17-32) (as to testimony of Detective Eylar, and Detective Nichols, regarding the credibility of the complainant, the defendant, and Summer Smith).

***i. Relation to ER 404(b) issue.***

First, as to Summer Smith, Smith was not a complainant, but instead imported prior bad acts of the defendant, toward her, into Mr. Gatherer’s trial, including acts that were more serious sexual offenses of rape. The Respondent urges that Summer Smith’s recorded statements were not propensity evidence – yet Detective Eylar testified, improperly, about Summer Smith and opined on he credibility of her claims of bad sexual acts by Mr. Gatherer. Detective Eylar explained that the “confrontation call” as an investigative tool, and the process of

conducting such calls, will themselves have “the effect of screening out perhaps fraudulent reports by victims” because “a lot of times you can figure out real quick” if the victim is “not telling the truth.” RP 221.

Detective Eylar’s claims that Summer Smith was a credible rape accuser would not have been included in the State’s case if the prosecution was not interjecting Smith’s claims in part because of their propensity prejudice. This shows that Summer Smith’s statements were indeed offered as ER 404(b) evidence – requiring the court to conduct on-the-record analysis.

***ii. The defense preserved the errors regarding improper opinion testimony, and the errors also constituted manifest constitutional error and/or flagrant misconduct.***

Importantly, the defendant preserved the issues for appeal, by means of an objection that was sustained but failed to stop the State from eliciting improper opinion testimony; further, as argued, the errors were also preserved (1) under the manifest constitutional error doctrine of RAP 2.5(a)(3) applicable to nearly explicit comments, and (2) the principle that flagrant incurable misconduct may be appealed. AOB, at 18-19, 21,22, 24, 27-29, 35-39.

The Respondent has not addressed the standards of manifest constitutional error argued in the Opening Brief, failing to dispute that

Kirkman, or the flagrancy standard for misconduct of Jones, allows appeal even if there had been no objection. State v. Jones, 117 Wn. App. 89, 90-93, 68 P.3d 1153 (2003) (reversing for incurable misconduct where prosecutor elicited that officer did not believe defendant and his statement that there was no way the defendant did not know about a gun); State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) (unconstitutional opinion testimony is manifest error appealable without objection where the witness comments directly or nearly explicitly on credibility or guilt). See AOB, at pp. 19-20.

This Court of Appeals, as a matter of course, has applied those standards to allow appeal, provided that the requirements for RAP 2.5(a)(3) and/or flagrancy are truly met. For example, in the recent case of State v. Flook, No. 34220-4-111 (July 11, 2017) (at pp. 5-7, 12-14) (not precedential, cited pursuant to GR 14.1), the Court applied the manifest constitutional error standard of RAP 2.5(a)(3) and Kirkman, when it held that the appellant could seek review of the testimony of a law enforcement officer who commented on credibility by testifying how witnesses compared to his training to detect deceptiveness. The court held that under Kirkman, where the testimony contained opinions on credibility that came from a law enforcement officer and amounted to

opinions on guilt in a sexual abuse case, the errors were impermissible opinion testimony. Flook, at pp. 14-16. See also AOB, at pp. 36-38 (citing Kirkman, and State v. Montgomery, 163 Wn.2d 577, 599-92, 183 P.3d 267 (2008)).

This is exactly what occurred in this case. In general, the Respondent's argument is that trial witnesses are entitled to describe the demeanor of persons during an interview. BOR, at p. 28. But that fails to describe the testimony at issue.

The State responds only in passing to Mr. Gatherer's arguments regarding the improper opinions offered as to Ms. Watkins' believability, addressing only the issue of a witness' discussion of delayed reporting, see BOR, at pp. 29, 36, and does not respond at all to the appellant's arguments regarding the improper comments on the credibility of *Summer Smith*. AOB, at pp. 23, 29-34.

As Mr. Gatherer has argued, the combined opinion testimony of the law enforcement officers in this case, Eylar and Nichols, amounted to both opinions on credibility, and guilt. Because the witnesses first described their training and experience in detecting truth-telling, or deception, and *then applied this training and experience* to Mr. Gatherer

and Ms. Watkins, their comments on credibility were nearly explicit – thus raising the errors to the level of manifest under Kirkman.

The Respondent cites State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1995). BOR, at pp. 28-29.

But that case, which involved improper comments on the right to silence, simply stands for the proposition, mentioned in dicta, that it is not improper to describe a person’s demeanor in an interview, by making factual observations. Easter, 130 Wn.2d at 243 (noting that the 5<sup>th</sup> Amendment ruling in the case did not preclude prosecutors from presenting “pre-arrest evidence of a non-testimonial nature about the accused, such as physical evidence, demeanor, conduct, or the like.”).

In this case, however, the officers described their training and experience in detecting truthfulness and deception, then went on to evaluate the accuser and the defendant pursuant to the criteria they described. That is very different from merely describing factual observations of a person’s demeanor. The Easter case is inapplicable.

***iii. In particular, the State offers no substantive response to Mr. Gatherer’s Reid technique argument.***

The Respondent’s failure to address the substance of Mr. Gatherer’s arguments regarding Detective Eylar’s testimony about the *Reid* technique, and his use of this technique to make an assessment of

the believability of Watkins, and the lack of credibility of the appellant Gatherer, is particularly noticeable. See AOB, at pp. 29-34, 38-39.

The sort of testimony offered by this officer has specifically been deemed improper in a published Washington case. State v. Barr, 123 Wn. App. 373, 379-82, 98 P.3d 518 (2004) (police officer opined on credibility and guilt when he claimed he was trained in the “Reid technique” to recognize when a defendant’s body language manifested guilt, and then offered his opinion that the defendant’s behavior indicated deception).

The State’s sole response is to argue in a conclusory manner that these were not comments on credibility, BOR, at p. 28, but that is exactly what Barr prohibits and what occurred here. Barr, 123 Wn. App. at 382. Detective Eylar explained that he had undergone federal training in interviewing and interrogation, and had been trained in the Reid interview technique, all of which allowed him to identify “clues” of deception. RP 215. He then applied his special training and expertise to (a) rape accuser Summer Smith and (b) to the defendant Joshua Gatherer. RP 220-23. This is expressly prohibited by Barr.

**3. The topic of remarking on the defendant's action in the courtroom has not been substantively addressed by the State, except to argue that the matter was raised by the defense first, which is not correct.**

This issue also involves the Respondent's claim that the defense did not preserve the issue of comments on credibility by witnesses, and by the prosecutor, in the form of misconduct.

The first witness to mention the defendant's coat, and how he wanted to remove it during his police interview, was Detective Nichols. That witness began to discuss the defendant being deceptive, and the defendant objected, and when the witness began to talk about the defendant wanting to remove his coat, the defense again objected that the court should instruct the witness to not "make generalized conclusory statements about whether or not Mr. Gatherer was telling the truth." RP 50-51. RP 54.

As Mr. Gatherer has argued, further objection would have been futile, as the prosecutor simply continued eliciting testimony that the officer saw signs of deception in the defendant (again, Mr. Gatherer also argues that this was flagrant misconduct, and thus appealable on that additional basis). In the record at RP 64 and RP 90, the detective again testified about Mr. Gatherer wanting to take his coat off.

Mr. Laws, the defendant's lawyer, did try to neutralize the harm of this testimony, by pointing out in cross-examination of Nichols that any person would be nervous in circumstances of a police interview. RP 92.

Then at RP 243, the prosecutor again elicited testimony from Detective Eylar about the defendant wanting to take his coat off.

It was subsequently that, during the trial testimony of Detective Eylar, the prosecutor remarked that the defendant, sitting at counsel table, removed his coat in the courtroom when the recorded Summer Smith confrontation call was played as evidence. This remark expressly referenced both detectives' improper opinion testimony that Mr. Gatherer had removed his coat when he was interviewed prior to trial by the two detectives, who had testified that their special training informed them that this conduct showed that Gatherer was guilty and was being deceptive. AOB, at p. 34 et seq. (citing RP 255).

Contrary to the Respondent's arguments, this was not invited by the defense. See BOR, at p. 32. In a brief remark prior to the State's re-direct examination of the detective, wherein the prosecutor made this flagrant remark, defense counsel noted that the defendant was wearing the same coat in the courtroom as he was wearing during his interview.

RP 253. But as can be seen, it was the State that had already raised this improper area of inquiry previously. The defense did not invite the error complained of.

**4. Reversal is required, despite the *Read* presumption.**

The State concedes that evidentiary errors can be reversible error in a bench trial. See BOR, at pp. 35-36. The presumption under State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002), can be rebutted. “[T]he Read presumption is only that—an assumption that appellate courts begin with, but do not necessarily end with, depending on the case.” State v. Gower, 179 Wn.2d 851, 855, 321 P.3d 1178 (2014).

The Respondent argues that the trial court did not rely on incompetent evidence. BOR, at p. 25. But the point of the presumption is that the trial judge is presumed to necessarily know and correctly apply the law, even absent a recitation of the correct legal rule. State v. Gower, at 855-56 (citing State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970)). Here, as argued in the Opening Brief, the trial court described in Finding 15 that Katie Watkins believed the defendant had committed sex offenses against others, after speaking with Smith. CP 17-18. This finding would not be necessary if, as the Respondent

contends, the evidence from Summer Smith had solely the purpose of introducing alleged confessions by Mr. Gatherer.

Likewise, in Finding 18, the court described how Summer Smith, in the telephone call, compared what Mr. Gatherer “did to her” with “what he had done to Katie Watkins.” CP 18. The court also explicitly included in its findings Summer Smith’s most damning accusation of Mr. Gatherer – that he probably would have raped Katie Watkins just like he raped Smith, if Watkins had not resisted. CP 18. None of this is related to admissible statements by Mr. Gatherer – and to the contrary, it suggests to the defendant that the court relied on Summer Smith’s own accusations.

The Respondent also argues that the trial court recognized that opinion testimony was inadmissible. BOR, at p. 35. But in response to the defense objection, the court allowed the detective to continue testifying about “impressions” of the defendant. RP 50-51. This ruling was an abuse of discretion, where the witness was testifying to the impressions of credibility and guilt that the detective formed based on past training. The witness continued on to offer opinion testimony, as did Detective Eylar.

The Respondent does not respond to Mr. Gatherer's argument that the court remarked that it understood that the State was trying to show that Mr. Gatherer was displaying deceptiveness when he took his coat off. AOB, at p. 48. This statement shows that the court considered incompetent evidence of opinions on credibility. RP 92.

This Court should find the Read presumption rebutted, and should reverse for the prejudice of the errors.

## **B. CONCLUSION**

Based on the foregoing, Mr. Gatherer requests that this Court reverse his conviction.

Respectfully submitted this 17th day of July, 2017.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 34110-1-III
	)	
JOSHUA GATHERER,	)	
	)	
APPELLANT.	)	

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