

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.

---

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

The Honorable Scott Gallina

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APPELLANT'S OPENING BRIEF

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OLIVER R. DAVIS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## **I. ASSIGNMENTS OF ERROR**

1. In Joshua Gatherer’s Asotin County bench trial on a charge of indecent liberties, the trial court erred when it admitted ER 404(b) evidence regarding an Idaho rape investigation.

2. The trial court erred in admitting opinion testimony by Asotin County Detective Jackie Nichols as to victim believability and the defendant’s deceptiveness and guilt.

3. The trial court erred in admitting similar opinion testimony by Lewiston Idaho police detective Nick Eylar.

4. The prosecutor engaged in misconduct by eliciting the opinion testimony.

5. The prosecutor engaged in misconduct in violation of Fourteenth Amendment Due Process, and the Fifth Amendment right to silence, by remarking on the defendant’s courtroom demeanor.

6. Cumulative error denied Gatherer a fair trial, despite the Read presumption<sup>1</sup> that trial courts do not consider inadmissible evidence.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The trial court admitted ER 404(b) evidence regarding an Idaho rape investigation, in the form of a recorded “confrontation call”

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<sup>1</sup> State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002).

arranged by Idaho police to be made by one Summer Smith, to Mr. Gatherer, and related law enforcement officer testimony about the call and the Idaho police questioning of the defendant, which was also recorded. In the call, Smith confronted the defendant by accusing him of raping her, and repeatedly compared her sexual allegations to those made by the complainant in the present case, Katie Watkins, including by stating that Mr. Gatherer would have raped Watkins if she had not resisted. In testimony, and in the recorded interview of Mr. Gatherer, the Idaho detective questions the defendant and challenges his honesty. The court failed to conduct any ER 404(b) analysis on the record, including failing to identify a proper purpose for the evidence, which was unnecessary to show how Katie Watkins' allegations came to the attention of Washington law enforcement, and which was unduly prejudicial. Did the trial court abuse its discretion?

2. The trial court admitted testimony by Asotin County Detective Jackie Nichols, who testified extensively as to her training and experience and her resulting opinions of the believability of Katie Watkins, and her opinions of the deceptiveness and guilt of the defendant, Mr. Gatherer. Was the evidence improperly admitted, as an abuse of discretion, and error under RAP 2.5(a)(3)?

3. The trial court admitted similar opinion testimony by Detective Nick Eylar, who testified extensively to his training and experience in the Reid technique of clues of deception, and his resulting opinions of the honesty of Summer Smith, the believability of Katie Watkins, and the deceptiveness and guilt of the defendant. Was the evidence improperly admitted, and error under RAP 2.5(a)(3)?

4. It is improper for a prosecutor to elicit opinion testimony commenting on the believability of witnesses, and the credibility and guilt of the defendant. Washington law, including State v. Barr,<sup>1</sup> which disapproved of Reid technique testimony, clearly establishes that such evidence is improper. Did the prosecutor engage in flagrant misconduct?

5. During the trial testimony of Detective Eylar, the prosecutor remarked that the defendant, sitting at counsel table, removed his coat 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

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<sup>2</sup> State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004).

Gatherer was guilty and was being deceptive. Did the prosecutor engage in flagrant misconduct?

6. Do the individual errors require reversal?

7. Does cumulative error require reversal?

### **III. STATEMENT OF THE CASE**

#### **A. Investigation and Trial.**

Joshua Gatherer, age 29, was charged with indecent liberties with forcible compulsion pursuant to RCW 9A.44.100(1)(a). The offense, in which his friend Katie Watkins was the complainant, was alleged to have occurred in the Big Beach Area of the Snake River, in Asotin County, in August of 2014. CP 1, 4-5. Mr. Gatherer proceeded to a bench trial before the Asotin County Superior Court in December, 2015. RP 12.

*(1). Authorities learned of Katie Watkins' indecent liberties allegation without need of the Summer Smith rape "confrontation" call, and Watkins testified to her allegations at trial.*

Law enforcement learned of Katie Watkins' allegations through several sources. According to the affidavit of probable cause, Detective Jackie Nichols of the Asotin County Sheriff's Department was contacted in early October of 2014 by Clarkston, Washington police officer Greg

Adelsbach. Officer Adelsbach stated that Watkins wanted to report a sex offense that had occurred in Asotin County. CP 4.<sup>3</sup>

Later in October, Detective Nichols heard directly from Watkins, who said she wanted to report a sexual assault occurring at the Snake River in August. CP 4. Watkins stated that she, Joshua Gatherer, and a number of other friends had attended a camping and drinking party at the river on the night of August 16, and Gatherer had touched her private areas against her will, by holding her down. CP 5-7.

Detective Nichols testified at trial about the course of this investigation. RP 35. She detailed how the allegations came to be known to the Sheriff's Department, including through Officer Adelsbach. RP 41-44. Detective Nichols also testified about her interview of Watkins, which was also attended by Sarah Kern, the sexual assault advocate from Quality Behavioral Health. RP 47-50. Watkins described her claims about the alleged incident at Big Beach on the Snake River, to her and to Ms. Kern. RP 49.

Also at trial, Watkins testified about how she brought her claims against Mr. Gatherer to the attention of law enforcement. RP 122-25.

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<sup>3</sup> Because the court's pre-trial ruling on the admissibility of the Summer Smith matter was based in part on the State's offer of proof and documents relating to the procedural history of the case prior to the evidence phase, the cited Clerks Papers are pertinent to Mr. Gatherer's arguments in Part IV.1.

***(2). Substantive trial testimony.***

Regarding her allegations, Watkins testified that on the night of the camping party, Joshua Gatherer tried to kiss her while she was sitting in a chair. RP 101-04. When she resisted kissing or any sexual contact with him, she claimed that Mr. Gatherer allegedly threw her over his shoulder, and carried her from the campsite to the beach area. RP 107-113. Ms. Watkins stated that when she was picked up and carried through the campsite, she tried to grab for a picnic table and then other items like a cooler. RP 107-08. She alleged that Gatherer held her down on the beach, and touched her breasts and had other sexual contact with her. RP 107-113. Watkins reported that she had told Mr. Gatherer that she did not want the contact. She then walked away from him and back to the campsite; she stated that Gatherer followed after her, and told her she liked it. RP 114-116. See CP 15-19 (CrR 6.1 Findings of Fact).

Chaz Bolon, another attendee at the party, did not hear or see anything amiss. He testified that during the night, he stepped out of his camper and saw Joshua and Katie sitting on a cooler and in a chair. RP 155-59. Later, he heard them talking, but he noticed nothing else, and the campsite equipment did not appear to be disturbed the next morning. RP 177-82. Bolon said that Katie told him the next day that the

defendant had “tried to rape her.” RP 161. He also testified, however, that there was a lot of drinking of alcohol at the party. RP 171. Later, Mr. Gatherer told him that he felt he had gone too far with Katie, in that he was embarrassed because he was in another relationship at the time. RP 164, 176; see CP 15-19 (CrR 6.1 Findings of Fact).

Mr. Gatherer’s defense counsel argued in closing that the claim of a struggle, and Mr. Gatherer supposedly picking up and carrying Ms. Watkins to the beach was simply not believable, given the presence of all the other party-goers in the camping area. He also argued that when Mr. Gatherer spoke with Mr. Bolon, he was simply saying that it may have been inappropriate for him to be with Katie when his own girlfriend was also present at the party. RP 346-58.

*(3). Despite abundant evidence regarding how the allegations came to the attention of law enforcement, the trial court admitted ER 404(b) evidence of the Summer Smith recorded confrontation call arranged by the Idaho detective.*

**i. Objections and ruling.** Despite the presence of abundant evidence showing how Watkins’ allegations came to the attention of Washington law enforcement in October of 2014, the State was also permitted to play the recorded telephone call that Summer Smith made to Mr. Gatherer at the behest of Lewiston, Idaho police detective Nick

Eylar. RP 226.<sup>4</sup> This evidence, including Detectives Eylar’s and Nichols’ testimony regarding the call, was admitted over repeated defense objection that the evidence violated ER 404(b), because it was not relevant to any non-character purpose, because it was overly prejudicial, because it was unnecessary to the presentation of how the case arose, and because it carried high propensity prejudice. RP 12, 14, 65, 213, 226.

The trial court ruled that the evidence as to Mr. Gatherer’s conduct toward Summer Smith was being admitted “for the purpose substantiated in the case,” and as part of the confrontation call. RP 226. The court agreed with the prosecutor that no ER 404(b) analysis was actually required. RP 19-20, 213, 226. See Part IV.1, infra.<sup>5</sup>

**ii. The telephone “confrontation” call.** In 2014, Detective Eylar of Lewiston, Idaho, had arranged for Summer Smith to make a secretly-recorded “confrontation” call to Joshua Gatherer, regarding her allegations that he had engaged in forcible intercourse with her in their

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<sup>4</sup> The court found that the confrontation call, which was recorded without Gatherer’s consent, was initiated by the Lewiston, Idaho police to investigate Smith’s claims, without knowledge of Washington authorities. RP 29.

<sup>5</sup> The recorded call was played for the court. RP 226-41.

prior relationship. These incidents were described by Detective Eylar as having occurred “substantially distant in the past.” CP 4; RP 222.

Detective Eylar said that he arranged for Smith to tell Gatherer that she was calling because of other claims she had heard, about him recently engaging in wrongful sexual conduct toward Katie Watkins. RP 222-23. During the call, Ms. Smith discussed the alleged prior incidents with her, and extensively questioned Gatherer about the claims of her friend Katie. RP 226 et seq.; Supp. CP \_\_\_\_, Sub # 36 (Exhibit P4.<sup>6</sup>).

In the call, Summer Smith compared her claims of rape to what had allegedly occurred with her friend Ms. Watkins, and she told Gatherer that he would likely have sexually assaulted Watkins more severely. RP 226, 230-31, 237-39; (Exhibit P1).

As the trial court found in its bench findings on guilt, Summer Smith stated that “what [the Defendant] had done to her was rape, and he agreed[.]” CP 18. Ms. Smith also “confronted the Defendant with what he had done to Katie Watkins and compared that event to what he had done to her.” CP 18. She told Mr. Gatherer that “she didn’t have any

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<sup>6</sup> According to the prosecutor’s statement when examining Detective Eylar the next court day, Mr. Gatherer, while seated at counsel table, removed his coat when this recorded confrontation call was played in court during trial. RP 255.

doubt that if there hadn't been people around and Ms. Watkins hadn't threatened to scream, that he would have raped her." CP 18.

After Detective Eylar reported the call to Detective Nichols in Washington, they interviewed Mr. Gatherer jointly. CP 4; RP 241.

**B. Verdict and sentencing.**

The trial court found Mr. Gatherer guilty of indecent liberties with forcible compulsion. RP 369-74. The court entered findings. CP 15-19. At sentencing, the court imposed a standard range indeterminate term with a 51 month minimum. CP 22; RP 393-98. Mr. Gatherer appeals. CP 34.

**D. ARGUMENT**

**1. The trial court abused its discretion in admitting the ER 404(b) evidence where it failed to identify a proper non-propensity purpose, the evidence was unnecessary to show the context of how the victim's allegations became known to law enforcement, and the evidence was overly prejudicial.**

**(a). Mr. Gatherer's proper objections to exclude failed to garner the ER 404(b) analysis that is required in the context of prior bad act evidence.**

Prior to the start of trial, the prosecutor argued that the alleged wrongful sexual conduct toward Summer Smith showed "the context in which the victim of that case confronts him about both the allegations" as to her, and her friend Katie. RP 19-20.

When defense counsel maintained his ongoing objection to the evidence, the State again urged the court that the confrontation call, and officer testimony about the call, should be considered, not as prior bad acts, but merely showed “the context of the conversation.” RP 19, 213.<sup>7</sup>

Mid-trial, the court ruled, and before playing the tape (Exhibit P1) dismissed the defense contention that the evidence in question violated ER 404(b):

P1 is being admitted for the purpose substantiated in the case – (pause) – the case *sub judice*. As far as the 404 B evidence that was complained of . . . it’s not being considered for any purpose other than as simply being part of the confrontation call . . .

RP 226; CP 54-55.<sup>8</sup> In addition, counsel renewed his ER 404(b) objection before the testimony of Detective Eylar describing his questioning of the defendant, before Detective Nichols’ testimony regarding the Idaho investigation, and before the playing of the recording of the joint interview of the defendant which was conducted by Deputy Nichols, but also with Detective Eylar. RP 44, RP 65, RP 213.

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<sup>7</sup> In addition, the prosecutor stated that because this was a bench trial, the ER 404(b) objection was irrelevant. RP 21. See infra.

<sup>8</sup> The original report of proceedings at RP 226 contained numerous untranscribable portions because the court recording was inaudible. The record is now supplemented by the trial court’s findings settling the record as to the language of the ER 404(b) ruling. CP 54-55 (Findings of Fact After Reference Hearing to Settle Record).

**(b). However, the trial court’s evidentiary ruling failed to identify a proper, non-propensity purpose or otherwise conduct any ER 404(b) analysis on the record.**

When the justification for offering evidence lacks logic or necessity, the evidence carries only prejudice. This Court should reject the prosecution’s claim that the evidence of Summer Smith being raped by the defendant was “not” ER 404(b) evidence in the first instance. The evidence was not properly admitted for context as “part of” the telephone call, because no such evidence was necessary – even considering the general rule that the prosecution is entitled to prove its case. See RP 19-20,65, 213, 226 (State’s trial arguments and court’s rulings).

It was erroneous to admit the Summer Smith evidence, both the recorded call and the law enforcement witnesses’ testimony about the Summer Smith allegations. The trial court did not identify a proper non-propensity purpose for admission of this evidence, and failed to address the evidentiary rule on the record.

Following ER 404(b)’s required steps would have identified such a purpose – if there had been one - and would have at least begun the process of satisfying the additional components of the ER 404(b) analysis, including exclusion of overly prejudicial material.

**(c). The dictates of ER 404(b) are deemed crucial to admission, but here, they were not followed.**

Broadly speaking, ER 404(b) prohibits admission of evidence that is not relevant to a proper non-propensity purpose, or where prejudice outweighs probative value. The Supreme Court has stated that admission of prior act evidence requires the court to determine the non-propensity purpose the evidence is being proffered for; to determine whether it is relevant to prove an element of the crime charged, and then, crucially, the trial court must weigh the probative value of the evidence against its prejudicial effect. ER 404(b); State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289, 302 (1993); State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003).

Importantly, in assessing the propriety of a claimed purpose, and in determining whether its prejudice outweighs its probative value, the court must consider the party's *need* for the evidence:

A trial court must also determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b)[.]

State v. Powell, 126 Wn. 2d 244, 264, 893 P.2d 615 (1995); State v. Smith, 106 Wn.2d 772, 774-75, 725 P.2d 951 (1986) (“ER 404(b) must be read in conjunction with ER 402 and 403.”) (also stating that in close

cases, ER 404(b) evidence must be excluded). When the probative value of evidence is outweighed by its unfair prejudice under ER 403 – including because the need for the evidence is *de minimis* – the evidence must be excluded.

Finally, the entire ER 404(b) analysis must be conducted on the record. State v. Foxhoven, 161 Wn. 2d 168, 175–76, 163 P.3d 786 (2007) (citing State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984)).

None of these requirements were met. Had the analysis been conducted, it would have shown that there was no need for the evidence relating to Summer Smith’s claims and her accusations regarding what she thought the defendant might have done to Watkins. The trial court had already admitted evidence of Katie Watkins’ “hue and cry,” that is to say, her initial claim of sexual misconduct as revealed to Detective Nichols and Officer Adelsbach, and to Chaz Bolon. See State v. DeBolt, 61 Wn. App. 58, 63, 808 P.2d 794 (1991); State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983). Although the timeliness factor was not applied strictly in every instance, the fact of a complaint was admitted, and was useful to the State, as it tends to show that the complainant made a report to others. Most significantly, this evidence was part of a

clear, and more than adequately thorough explanation of how the matter came to the attention of Asotin County law enforcement.

Certainly, this was not context or res gestae, under State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Washington courts recognize a res gestae or “same transaction” exception to ER 404(b). The res gestae exception makes “evidence of other crimes admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” Lane, 125 Wn.2d at 831 (internal quotations omitted). However, evidence is only properly admitted under the res gestae exception if it is necessary to depict a complete picture. State v. Filitaula, 184 Wn. App. 819, 825, 339 P.3d 221 (2014) (citing Lane, 125 Wn.2d at 832)). In this case, that requirement was not met. The extended testimonial time, and time spent playing the Summer Smith recording, were simply unnecessary to show how the matter came to the attention of police.

**(d). Undue prejudice.**

The narrative regarding Summer Smith was not necessary for any proper purpose; however, it was also overly prejudicial. “Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative

value.” State v. Lough, 125 Wn. 2d 847, 863, 889 P.2d 487 (1995); see State v. Gunderson, 181 Wn.2d 916, 923-24, 337 P.3d 1090 (2014) (emphasizing that the final step of ER 404(b) implicates ER 401, 402 and 403); State v. Gresham, 173 Wn. 2d 405, 421, 269 P.3d 207 (2012) (ER 404(b) imports ER 403).

Probative value, if any, was greatly outweighed by prejudice. In this case, the danger of prejudice was great because the prior acts against Summer Smith were crimes but they were not subject of convictions. There was no proper relevance, but even if there was, the Summer Smith evidence and investigation and the “context” rationale was merely a conduit for the overwhelming propensity prejudice it carried. No reasonable trial court could conclude that the prejudice and confusion of the issues that was carried by these alleged prior crimes – which were crimes of rape and more serious than the present charge of indecent liberties -- nonetheless allowed the evidence to be admitted in Mr. Gatherer’s trial.

As argued below, reversal is required in this case for the ER 404(b) error, and for cumulative error that rendered the trial unfair – even considering that the present case was tried to bench. See Part IV.3, infra.

**2. Reversal is required for prosecutorial misconduct, the prejudice of Detective Eylar’s and Detective Nichols’ opinions on guilt and credibility, and the prosecutor’s further misconduct in commenting on the defendant’s courtroom reaction to the accusatory Summer Smith confrontation call.**

**(a). Opinion testimony as to credibility and guilt is constitutionally improper as it violates the right to an impartial factfinder, it is inadmissible under ER 701, and it is misconduct to elicit it.**

Testimony in the form of mere observations that a witness made of a defendant’s behavior, is not an improper opinion on the defendant’s guilt or a witness’ credibility, particularly where the testimony is brief and isolated. State v. Rafay, 168 Wn. App. 734, 806-10, 285 P.3d 83, 120 (2012) (officers’ testimony that defendants appeared “concerned” when faced with accusations were not inadmissible, whereas testimony that officer did not believe defendant was improper) (citing City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993)).

However, in general, Evidence Rule 701 bars lay opinion testimony. Further, a witness may not give an opinion, either directly or by inference, as to a defendant's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

It is accordingly thoroughly improper for a witness to offer his or her opinion of the credibility or guilt of the defendant or the credibility of another witness. State v. Barr, 123 Wn. App. 373, 382, 98 P.3d 518

(2004). In a trial with a jury as factfinder, this sort of opinion testimony would be constitutional error in violation of the jury trial right. State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993); U.S. Const. amend. 6.

Importantly, the constitutional guarantee of a trial before an impartial jury applies to a trial before a judge. State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), overruled on other grounds, City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993). Thus, in a bench trial as well as a jury trial, a witness's opinion regarding the defendant's guilt improperly invades the province of the impartial fact finder. Carlin, 40 Wn. App. at 701–02. Finally, even under State v. Read, infra, inadmissible opinion testimony can be reversible error in a bench trial. See State v. Read, 106 Wn. App. 138, 147, 22 P.3d 300 (2001), aff'd, 147 Wn. 2d 238, 53 P.3d 26 (2002)

**(b) The defendant objected, and the elicitation of such testimony can be flagrant and incurable misconduct.**

In this case, Mr. Gatherer's counsel objected. However, the occasional admonitions he was able to secure from the court did nothing to derail the State's strategy of using law officers to opine as putative experts on the victim's truthfulness, and the defendant's guilt and deceptiveness. In any event, eliciting improper opinions is misconduct. State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827, 829 (2005).

Further, viewed as an invasion of the province of the factfinder, the testimony itself was so direct and express that it was akin to manifest error under RAP 2.5(a)(3), both circumstances allowing appellate review. State v. Barr, 123 Wn. App. at 379-82 (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); 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).

**(c). Commenting that the defendant’s courtroom demeanor shows guilt can constitute flagrant misconduct.**

Further, it is also misconduct, in violation of the Fifth Amendment right to not testify, the Sixth Amendment right to be tried solely upon evidence properly admitted, and the fundamental fairness guarantees of the Fourteenth Amendment right to Due Process, for a prosecutor to offer the courtroom demeanor of the defendant as evidence

of guilt. Here, the prosecutor's pronouncement during trial that Mr. Gatherer had removed his coat in the courtroom when the Summer Smith confrontation call was played, was a personal opinion on credibility and guilt, and misconduct. RP 255. See Part IV.2(e)(3), infra. Although there was no objection to the prosecutor's remark, appeal should be allowed. The State's case was infused with its strategy of eliciting improper opinions that the defendant's demeanor – including removing his coat when interviewed by detectives – showed his deceptiveness and his guilt, based on their special training. This sort of evidence is well-established as barred. As a result, it was flagrant, and incurable misconduct where the prosecutor then capped off this strategy by remarking that the defendant – who did not testify- now appeared to be exhibiting the very same indicators of deception and guilt in the trial courtroom.

Lastly, in the circumstances of this case, the multiple errors and their cumulative prejudice require reversal, despite the fact that Mr. Gatherer was tried to the bench.

**(d). First, the prosecutor elicited Detective Nichols’ opinions on the “rape” victim Katie Watkins’ believability, and on Mr. Gatherer’s untruthfulness and his guilt, as shown by “signs of deception” such as removing his coat when the Summer Smith telephone call was played for him in his November 2014 interview.**

During trial, on December 9, 2014, the prosecutor called Detective Jackie Nichols, of the Asotin County Sheriff’s Department, who interviewed Mr. Gatherer. RP 35.

***1. Training to detect true victims, and deceptive suspects.***

Detective Nichols was first permitted to testify, based on her training and experience, about reasons a person like Katie might delay reporting a sexual assault by someone they know, including fear of reprisal. RP 36-38.

**▪ Objection to speculation overruled, “opinion” testimony allowed.** This testimony was given over two defense objections to speculation, to which the prosecutor responded that this was a detective who had been doing sexual assault investigations for eight years, thus, “[h]er opinion is not just speculation.” RP 37-38.

The court allowed the questioning, stating that the witness should testify not about why somebody would delay, but could testify about what reasons Nichols had perceived for people’s delay. RP 37-38.

Thereafter, the prosecutor went on to elicit extensive, further “opinion” testimony from Detective Nichols asking her to detail here long experience and “cues that you look for” when interviewing suspects in these sorts of acquaintance “rape” cases. RP 38. First, the detective stated that she had learned how to look for “signs of deception [and] signs of truthfulness,” particularly regarding how the acquaintance refers to the victim in a way that tries to “discredit [the] victim.” RP 38-39.

The prosecutor asked,

Q: So they – cast aspersions upon the victim in order to paint the victim in a poor light?

A: Correct.

RP 39. The prosecutor continued to elicit testimony from Nichols regarding her training and experience that allowed her to opine on “the credibility of the statements that have been made.” RP 39.

Q: And can you explain to the court, again, those – those clues that you look for, with regard to – clues of deception?

A: Well, what I’m looking for is – is overall clues, whether it’s corroborating someone’s telling me the truth or someone’s being deceptive, signs of deception. There’s many signs of deception and – and one particular thing doesn’t mean that the person’s being deceptive; it’s kind of the totality of – everything they do. But typical signs of deception are – self-grooming techniques – People basically when they’re being deceptive they are uncomfortable, and because they’re uncomfortable that starts to come out in various physical ways.

They'll be fidgety. They may not make eye contact. They – their speech may change and they talk more rapidly, softly, louder – there's just some noticeable change in behavior.

They may become – their posture may become closed. They may – nod their head when they're saying no, or shake their head negatively when they're saying yes. Just – there's – there's many small signs of deception. And when you start seeing several of these signs put together, that's when you – can ascertain that someone's being deceptive.

RP 40.

**2. *Believability of Watkins.*** Next, turning to her training and years of experience as relevant to assessing the victim in the present case, Detective Nichols described how she interviewed complainant Katie Watkins after learning of the Summer Smith confrontation call.

RP 47.

When the prosecutor followed up his questioning about why Watkins stated she had waited to report the alleged indecent liberties, Nichols said Watkins said she was fearful. RP 50. Nichols then stated that the victim was “believable, straightforward, didn't show signs of deception,” and she was also appropriately emotional. RP 50.

Next, the prosecutor asked whether Detective Nichols observed Katie Watkins exhibiting any of the “indicators of deception, that you've talked about-?” RP 50. The answer was, “No.” RP 50.

*3. Untruthfulness and guilt of defendant Gatherer.* Turning to the defendant Mr. Gatherer, Detective Nichols next gave her expert opinion of his lack of truthfulness, and his guilt. Nichols, along with Detective Eylar (whose opinions would be elicited the next court day), had interviewed Mr. Gatherer in a non-custodial interview in November of 2014. RP 51-52; Exhibit P4.

The detective opined, in answer to questioning, that she “knew the answers he [Gatherer] was giving [during the interview] were not truthful,” or were at least inconsistent with statements he made during the confrontation call. RP 50.

▪ **Objection.** The defense 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.

The court told Detective Nichols that she could not comment on the “ultimate veracity of any statement,” but also told the witness, “You can testify what you observed and your impressions.” RP 51.

Accordingly, the prosecutor continued to elicit Detective Nichols’ impressions of the defendant’s credibility, based on her training to recognize signs of deception.

At first, Nichols did not recall Mr. Gatherer's posturing or posture changes while being questioned, but she opined, "just overall there was signs of deception." RP 51. The prosecutor elicited from Nichols that Gatherer tried to denigrate the victim, by saying she had one-night stands, which was a sign of deception in sex cases, as noted in Nichols' previous description of her training. RP 57-58.<sup>9</sup>

The prosecutor then drew out the topic of Mr. Gatherer removing his coat during the November interview. RP 64. Nichols responded that she had noticed a change in Mr. Gatherer's behavior when the Summer Smith confrontation call was played for him during the interview.

- A: Yeah. Definitely when the confrontation call was played.
- Q: What – what was – what was his – physical reaction to that.
- A: He was uncomfortable and – didn't – I believe that's at the point where he took off his coat, - he – he just was in general displaying signs of deception.
- Q: Indicated it was suddenly getting hot in there?
- A: Yes.
- Q: And you state for the record about how long the interview had been going on at that point.

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<sup>9</sup> Later in trial, the prosecutor would reference Detective Nichols' opinion that defendants will often denigrate a victim if they are guilty, by asking Detective Eylar if Mr. Gatherer was making similar "derogatory" statements about Katie during his interview. RP 254-55. The detective said that he was, or at least was saying things that didn't need to be said, such as about her having "one-night stands." RP 254-55.

A: I believe about 30 minutes.  
Q: Was – had there been any change in the ambient room temperature?  
A: No.

RP 64. The prosecutor then played certain portions of the recorded interview of Mr. Gatherer, in which Mr. Gatherer is asked to react to the Summer Smith confrontation call. RP 67-79; Exhibit P4. Detective Eylar, with assistance from Nichols, can be heard challenging Mr. Gatherer by telling him that they needed “to make sure you’re telling me the truth” and saying, “I don’t – I don’t feel like you’re there yet,” and “you’ve got to tell us the whole truth.” RP 72; Exhibit P4. Detective Eylar also states again, “I don’t feel like you’re telling us the truth.” RP 78; Exhibit P4.<sup>10</sup>

The prosecutor stopped the interview recording at that time, and asked the witness, Nichols, if this was the juncture where Mr. Gatherer was being made to listen to the confrontation call recording, and asked to take his jacket off:

*Playback stopped*

Q: And that’s – that’s the point at which he took off his jacket – asked to take his jacket off?

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<sup>10</sup> Playing recordings in which police officers express opinions of the defendant’s credibility when interviewing him is just as much improper opinion evidence as a trial witness commenting in court on credibility. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

A: Yes.

Q: All right.

And the remainder of the interview is – does it say – fair to say that – that it’s a lot of Det. Eylar talking to him about – needing to be more honest, (inaudible).

A: Yes.

RP 78; see Exhibit P4.

▪ **Objection, futile.** The court *sustained* the defense objection to speculation when the prosecutor asked Detective Nichols if Mr.

Gatherer’s statement that Ms. Watkins had engaged in one-night stands was “trying to denigrate her.” RP 88. This was a reference to Nichols’ earlier discussion of her training and experience that “discredit[ing]” the victim is a sign of deception in acquaintance sex cases. See RP 38-39.

However, the prosecutor then asked essentially the same question about why the defendant spoke about Watkins in this manner. RP 89.

Responding to the re-raised defense objection – that the defense’s earlier objection had been sustained – the prosecutor argued that it was Mr.

Gatherer’s use of “particular language” that was significant as showing deceptiveness. The court permitted Nichols to answer, and Nichols agreed that “[y]es,” it was. RP 89.

On cross-examination, defense counsel attempted to address the issue of Mr. Gatherer taking his jacket off, asking Detective Nichols if people generally become stressed or uncomfortable when questioned by

police about sexual assault. RP 87. On re-direct examination, the prosecutor then delved more deeply into the topic. RP 90-92. The prosecutor asked Nichols if there was any temperature-based reason for Mr. Gatherer to take his coat off during the interview (there wasn't), and asked if her techniques of detecting clues of deception *already took into account* the fact that being interviewed by police is generally stressful:

Q: Does sort – does the – the – the technique concerning – identifying deceptive – changes in behavior or – clues of deception take into consideration that the environment itself is somewhat stressful:

A: Yes.

RP 91. Finally, the prosecutor asked the detective to overall compare victim Watkins' credibility, as "contrasted" to defendant Gatherer's credibility, from their separate interviews. RP 91-92. Nichols stated that while Katie Watkins' behavior was not suggestive of deception, Mr. Gatherer's "was consistent with deception." RP 91-92.

On final cross-examination, defense counsel tried again to ask if being interviewed by police about a recorded telephone call was inherently stressful. RP 92. When the State objected on the basis of speculation, the court stated:

THE COURT: If it helps both counsel, I didn't just land here from Mars. I understand that they're saying that - he was uncomfortable and taking off his coat because he was

being deceptive; the defense is saying he took off his coat because he was being questioned about rape by a couple of cops, and that made him understandably nervous. I get it.

RP 92.<sup>11</sup>

**(e). Next, the prosecutor elicited Detective Eylar’s opinions on Summer Smith’s truthfulness, and on Mr. Gatherer’s guilt and deceptiveness – including as shown by Gatherer removing his coat during his interview.**

On December 10, the prosecution called Idaho police detective Nick Eylar, and continued the State’s strategy of eliciting opinions on credibility and guilt from the law enforcement witnesses, premised on their training to recognize truth-tellers and lying persons.

The prosecutor asked Detective Eylar to tell the judge that he had been specially trained to identify “signs of deception” – both when assessing or interviewing accusers, and when interviewing defendants to determine whether they are “telling you the whole truth[.]” RP 215.

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. Eylar discussed how deception can be shown not

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<sup>11</sup> This statement by the court is one of the indications that, in this case, rebuts the Read presumption that a bench trial court always inherently employs an understanding that incompetent evidence is not to be considered. See Part IV.3, infra.

only by verbal words, but also by body language, such as fidgeting, or being unsure of how to answer. RP 215-16. He also noted that the training he had received was in specific reference to cases of “acquaintance *rape*” where the defendant knows the victim, such as this one. RP 216-17 (Emphasis added.).

***1. Eylar testifies that the confrontation call, and his training, showed who was telling the truth and who was a deceptive sexual assailant.*** Detective Eylar had applied his special training and expertise to (a) rape accuser Summer Smith and (b) to the defendant Joshua Gatherer. RP 220-23.

Eylar explained that the “confrontation call” proposal as an investigative tool, and the process, 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. He described the value of asking Summer Smith to call Mr. Gatherer, and stated that these calls from a victim will:

- cause the offender to “be more honest,” and
- “if they did something wrong be more apologetic,” and
- to be more “honest and open . . . than just talking with a police officer in an interview room.”

RP 220-21. Detective Eylar then gave the court his impressions of the honesty and guilt of the participants to the recorded call, based on his Reid training:

First, Eylar discussed how Mr. Gatherer seemed to become upset and possibly suicidal over Smith's accusations, during her call to him.

RP 223-24. The prosecutor played several portions of the call, wherein Summer Smith accuses Gatherer of conduct toward Katie Watkins, and Mr. Gatherer states he was drunk and he apologized. RP 226-27; Exhibit P4. Smith then accused Mr. Gatherer of raping her multiple times, and Mr. Gatherer apologized to her, stating, "I know, I'm sorry." RP 231.

In additional portions of the call that were played for the detective, Smith accused Gatherer of sexual assault while she was telling him to stop, and Gatherer says, "That happened a few times." RP 231-33. She elicits another statement of being sorry from Gatherer, and then another "I'm sorry." RP 234-35.

Throughout the call, the topics of what Mr. Gatherer allegedly did to Watkins and what he allegedly did to Smith were intermingled in discussion, and purposefully related to each other, by Smith. In a portion of the call, Smith accuses Gatherer of trying to take Katie Watkins' clothes off and touch her, and Mr. Gatherer replies that he understood

this was not okay. RP 234-35. Then, in the next portions of the call, Smith accuses Gatherer of raping her, and he states that he “just didn’t – wholly believe you that - you didn’t want to.” RP 236-37. The call ends when it appears to result in Gatherer despondently looking for bullets and saying that he is going to fix the problem, leading Smith to exclaim “Josh! Josh!” and “what are you doing?”. RP 239. At this point Eylar decided to end the recorded call, and he had local authorities travel to Gatherer’s home to ensure that the defendant had not harmed himself. RP 237-39.

*2. Eylar testifies that Mr. Gatherer was deceptive in his police interview, as shown by the many clues that the Detective was trained to recognize, including Gatherer removing his coat when the “confrontation call” was played.* Next, the prosecutor turned to Detective Eylar’s impressions of the guilt and lack of credibility of Joshua Gatherer, as assessed during Gatherer’s police interview. Explicitly building upon the detective’s earlier testimony regarding his training to discern deception, the prosecutor asked the detective about his, and Detective Nichols’ questioning of the defendant as to Summer Smith’s, and Katie Watkins’ allegations. RP 241 *et seq.*

When asked whether he noticed anything about Mr. Gatherer's overall demeanor in the interview, Eylar opined that Gatherer would not "come forth with everything," and he felt that Mr. Gatherer was "minimizing, and not kind of telling the whole truth." RP 241. Based on what Summer Smith had alleged in the telephone call, Eylar felt that Gatherer was "not being completely truthful about it." RP 242.

Specifically, drawing upon his statements that people reveal clues such as body language when they are being deceptive, the detective noted that Mr. Gatherer showed physical signs of nervousness when asked about Smith's rape allegations. RP 243. Significantly, Mr. Gatherer asked to take his coat off in the interview room. RP 243. This was noticeable because the detective was not warm himself, and the "temperature hadn't changed" in the interview room. RP 243.

Next, when Detective Nichols joined in Eylar's questioning of Gatherer and asked him about the allegations of Katie Watkins, Mr. Gatherer became "on edge." RP 243. The prosecutor asked again about Gatherer apparently asking to take his coat off, and asked, "what was the temperature in the interview room?" RP 246. When the detective answered that it was 70 or 71 degrees, the prosecutor again asked Detective Eylar to confirm that there "hadn't been any change in the

ambient room temperature” during Nichols’ questioning about Katie Watkins, which Eylar confirmed. RP 246.

*3. Next, the prosecutor personally remarked that Mr. Gatherer removed his coat during trial the previous day, when the “confrontation call” was played in the court room.* Detective Eylar had testified that it is a clue of deception when suspects become fidgety and uncomfortable, which was shown in this case by Mr. Gatherer removing his coat when confronted with the Smith confrontation call during his November interview. RP 215-16, 243-56.<sup>12</sup>

During continued examination of Detective Eylar, the deputy prosecutor personally commented on Mr. Gatherer’s demeanor in the courtroom. He asked Detective Eylar if he had noted that Mr. Gatherer was wearing the same jacket in court that he took off during his police interview when the confrontation call was played for him. RP 255. The detective stated that this was true. RP 255. The prosecutor then remarked, and the witness answered, as follows:

Q: Did you notice that he took the jacket off after hearing the confrontation call in this courtroom?

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<sup>12</sup> Detective Nichols had testified similarly, that her training and experience allowed her to detect when a person is being deceptive, as revealed by body language and changes in behavior and demeanor such as Mr. Gatherer removing his coat. RP 40, 64.

A: I notice it's off now.

(Emphasis added.) RP 255. The detective stated that he saw that the defendant's jacket was off now, but said he did not see when he took it off. RP 255.

**(f). Manifest constitutional error and flagrant incurable misconduct.**

*1. Preserved for appeal.* This series of events – an extensive presentation of the case based on repeated, express, law enforcement opinions on credibility and guilt, ending with a pronouncement by the prosecutor himself that the defendant was exhibiting the same clues of deception in the courtroom that the two officer witnesses had spent two days categorizing as proof of his deceptiveness and guilt, was manifest error and flagrant incurable misconduct.

First, Mr. Gatherer's several objections during the testimony of Detective Nichols, and their ultimate futility, preserved the errors for appeal. RAP 2.5(a). Although some of the initial objections complained that the error was "speculation," in context, it is clear that the defense was objecting that the witness was testifying about the topic of believability outside of her or his proper ability to judge. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (if the ground for objection is apparent from the context, objection is sufficient to preserve the issue).

Additionally, when Mr. Gatherer objected to questions that sought opinions on veracity, the trial court nonetheless allowed the officer to continue to give her impressions that various witnesses, and the defendant, were either believable or deceptive, based on her training. RP 37-39, 50-51, 88-89.

The court abused its discretion by allowing this testimony, over objection. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (court abuses its discretion in admitting evidence where its ruling is legally untenable).

***2. Flagrant misconduct and manifest constitutional error.***

Further, with regard to the testimony of both Detective Nichols and Detective Eylar, the misconduct of eliciting such direct opinions on credibility and guilt was flagrant, and incurable, and can be appealed for that reason. State v. Jones, *supra*, 117 Wn. App. at 91 (flagrant incurable misconduct to elicit officer's opinion that he did not believe defendant and that defendant must have known gun was in the car, and to then remark upon the opinion in argument) (citing State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)).

The improper testimony itself was also manifest constitutional error in violation of the right to an impartial factfinder, which can be

appealed under RAP 2.5(a)(3). See Carlin, supra, at 701. The Washington Supreme Court has stated that some lay opinions may be admissible, depending on the type of witness, and the nature of the testimony, the charges, and the defense – but opinions on credibility and opinions on guilt are not among the admissible opinions:

[T]his court has held that there are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. Demery, 144 Wn.2d at 759, 30 P.3d 1278; Kirkman, 159 Wn.2d at 927, 155 P.3d 125; State v. Farr-Lenzini, 93 Wn. App. 453, 463, 970 P.2d 313 (1999).

(Footnote omitted.) State v. Montgomery, 163 Wn.2d 577, 599-92, 183 P.3d 267 (2008) (officer’s opinion that persons buying over the counter drugs were engaged in manufacture, based on his experience, was improper opinion) (citing U.S. Const. amend. 6; Wash. Const. art. 1, §§ 21, 22); see State v. Engelstad, 183 Wn. App. 1040 (Unpublished, COA 30640-2-III (2014 WL 490855) (not precedential, cited pursuant to GR 14.1) (holding that improper questioning of officer as to whether witness/victim was “not being false” at the scene, and officer’s improper opinion on victim’s credibility by describing her as “candid and open,” was constitutional error) (citing Kirkman, 159 Wn.2d at 927).

The prohibition on opinion testimony in this context includes both opinions on credibility and guilt that are offered either directly, or indirectly by inference. State v. Montgomery, 163 Wn.2d at 594.

However, in this case, the improper comments on credibility and guilt were direct, and express -- thus also making the constitutional errors manifest. Kirkman, 159 Wn.2d at 936 (where improper opinions are “explicit or almost explicit,” rather than merely indirect, this will make out *manifest* error allowing issue to be raised for the first time on appeal under RAP 2.5(a)(3)).

The present case is very much like State v. Barr, supra, in which a police officer opined directly on credibility and guilt, and the error carried identifiable prejudice, allowing appeal despite the absence of objection. State v. Barr, 123 Wn. App. at 380-82 (“The officer’s assessments concerning Mr. Barr’s and A.J.’s credibility were a crucial part of the State’s case - Officer Koss not only gave his opinion, but bolstered that opinion with statements related to his Reid training. In the context of this case, the error here had ‘practical and identifiable consequences’ at trial.”); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

In this case, Detective Nichols’ and Detective Eylar’s opinions on honesty, credibility and guilt, equal or surpass what is necessary to make out manifest error and flagrant misconduct.

***3. Further misconduct in remarking on the defendant’s courtroom demeanor.*** The final nail in the coffin of Mr. Gatherer’s chance of a fair trial was hammered in when the deputy prosecutor employed those two detectives’ improper opinions – their impressions of the participants’ credibility and Mr. Gatherer’s guilt, based on their training – to then turn his personal attention to the defendant’s conduct in the courtroom while seated at counsel table.

“A prosecutor who comments on the defendant’s [courtroom] demeanor is ‘strolling in a minefield’ strewn with both constitutional and evidentiary hazards.” State v. Barry, 183 Wn. 2d 297, 305 note 4, 352 P.3d 161 (2015); State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000) (improper to comment on a defendant’s laughing during trial, but error not manifest).

In this case, the prosecutor engaged in misconduct by offering prosecutorial opinions on credibility or guilt by means of a “clear and unmistakable” expression of the prosecutor’s personal opinion. State v.

McKenzie, 157 Wn.2d 44, 56, 134 P.3d 221 (2006) (citing State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

The prosecutor in this case made his own personal observations of the defendant's behavior, and evaluated them to be demonstrative of the very same deceptiveness and guilt as to which the law enforcement witnesses had offered their own already improper opinions. RP 255.

On a constitutional scale, this error violated Mr. Gatherer's Fourteenth Amendment right to a fair trial under Due Process. U.S. Const., amend. 14; see United States v. Pearson, 746 F.2d 787, 796 (11th Cir.1984) (prosecutor's closing argument commenting on the defendant's behavior of sitting at counsel table with "his leg going up and down" that showed he was "afraid" violated his 5th Amendment Due Process right to a fair trial).

The prosecutor's misconduct also violated Mr. Gatherer's right to be free from compelled examination. The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington State Constitution also states that "[n]o person shall be compelled in any criminal case to give evidence against himself." Under both provisions, a defendant has a right to not testify at trial.

RCW 10.52.040; State v. Epefanio, 156 Wn. App. 378, 388, 234 P.3d 253 (2010).

The prosecutor's misconduct violated these rights. For example, in United States v. Schuler, 813 F.2d 978 (9th Cir.1987), the prosecutor told the jury it should consider the defendant's behavior during trial, including his laughter, as evidence of guilt, which violated the defendant rights under the Fifth Amendment. Schuler, 813 F.2d at 982; U.S. Const. amend. 5.

The Schuler Court reasoned that the defendant might feel compelled to testify to explain his courtroom conduct. The same is true here, and further, by testing and comparing the defendant's conduct in reaction to the trial testimony, and pronouncing it as evidence of guilt, the prosecutor effectively compelled Mr. Gatherer to give evidence against himself. See Schuler, 813 F.2d at 982.

The error was also manifest because of the directness of the deputy's damning personal assessment of Mr. Gatherer, and the prosecutor's misconduct was flagrant because it was not merely wrong in itself but it was premised on the extensive law officer testimony that so clearly violated the principles exemplified by State v. Barr

(prohibition on ‘Reid technique’ testimony). State v. Lynn, 67 Wn. App. at 345; State v. Belgarde, 110 Wn.2d at 507.

Relying on the foundation of flagrant misconduct and manifest error of eliciting the officers’ opinions that the defendant showed deceptiveness and guilt, the prosecutor stated his own personal impressions of the defendant, and related them directly to the officers’ previous testimony. When the prosecutor announced that Mr. Gatherer had taken off his coat in the courtroom when the Summer Smith confrontation call was played, he was pointing out that the defendant had now done exactly the same thing he did when the recorded call was played for him in his police interview before trial, which the detectives had classified as showing he was guilty as accused. RP 255.

This conduct during the interview had been described by the law enforcement witnesses, at great length, as being a clue of deceptiveness and guilt pursuant to their training and experience.

In the context of this trial, these individual errors require reversal, and the cumulative prejudice resulting from all of the errors requires reversal because Mr. Gatherer’s right to a fair trial was violated. This is so, even considering that the case was tried to the court.

**3. Individual and cumulative error requires reversal of Mr. Gatherer's conviction and a new trial, despite the fact that Mr. Gatherer's case was tried to the court.**

**(a). Cumulative error can deny a defendant a fair trial.**

The cumulative prejudice of constitutional and non-constitutional errors can be so significant as to prejudice the right to a fair trial, and therefore require reversal. U.S. Const. amend. 14; State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992).

Under the cumulative error doctrine, the constitutional requirement of a fair trial is so important that a reviewing court has the power under RAP 2.5(a)(3) to review every error that contributes to cumulative prejudice, even where some errors may have been inadequately preserved. Russell, at 93-94; Alexander, at 150-51.

**(b). The errors in this case included errors that individually, and cumulatively, require reversal.**

As to the Summer Smith recording, and the officer testimony regarding that investigation and Summer Smith's claims and the interview of the defendant on those allegations, the improper admission of evidence under ER 404(b) is harmless unless, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76

(1984). Here, the broad range of Summer Smith evidence, because it introduced a significant amount of material asserting the defendant's bad character and propensity for sexual offending, was tremendously prejudicial. Within reasonable probabilities, the fact-finder would not have convicted Mr. Gatherer absent this evidence.

As to opinions on credibility and opinions on guilt, these are constitutional violations in contravention of the right to an impartial factfinder. See Montgomery, *supra*, 163 Wn.2d at 589-91; Carlin, at 701. Such errors are presumed prejudicial; the State must prove beyond a reasonable doubt that they were was harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction); see Barr, 123 Wn. App. at 373 (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

Finally, in a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The present case strongly merits reversal where the evidence was not overwhelming, and where a significant aspect of the defendant's

trial was premised on the improper opinion testimony of police officers who condemned him as a deceptive sexual offender, while at the same time holding up Ms. Watkins – and Ms. Smith – as believable and honest. All of which was crowned by the flagrant misconduct by which the prosecutor held Mr. Gatherer’s in-court demeanor to the fire, testing whether his reaction to the Summer Smith trial evidence caused him to demonstrate the very same clues of deception and guilt that the two detectives had spent two court days opining upon.

Further, under the cumulative error doctrine, multiple constitutional errors are more likely to cause cumulative error than nonconstitutional errors. Russell, 125 Wn.2d at 94. Mr. Gatherer’s case involves multiple constitutional errors, and prosecutorial misconduct that took direct advantage of improper, unconstitutional opinion evidence.

**(c). Reversal is required despite the fact that this was a bench trial with a presumption of absence of error under *Read*.**

The State’s strategy of presenting a prosecution case premised centrally on the inadmissible credibility opinions of law enforcement officers, in direct violation of State v. Barr, supra, was error that pervaded the entire trial. It faced primarily unsuccessful attempts at challenge from defense counsel, and the slightest if any interference from the trial court.

It is true that there is a presumption in bench trials that the court, when serving as fact-finder, implicitly understands the law and will disregard any inadmissible evidence. In the case of State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002), the Supreme Court properly held that “in the absence of evidence to the contrary, we presume the judge in a bench trial does not consider inadmissible evidence in rendering a verdict.” State v. Read, 147 Wn.2d. at 242, 245 (noting that the presumption arises because of the “unique demands” bench trials place on judges, “requiring them to sit as both arbiters of law and as finders of fact.”).

However, the Read presumption 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 presumption is based on the notion that the trial judge necessarily knows and correctly applies 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)). It is, therefore, inapplicable when the judge actually considers matters which are inadmissible when making his or her findings. Read, at 245-46.

In this case, the presumption is rebutted. The court considered the range of ER 404(b) evidence of the Summer Smith allegations in its written findings. Despite the fact that there was abundant evidence of how the complainant Ms. Watkins' allegations came to the attention of law enforcement, in addition to evidence that Watkins made allegations about Mr. Gatherer immediately after the incident to Chaz Bolon, the trial court described in Finding 15 that Ms. Watkins learned that she was "not the only victim," by speaking with Summer Smith and hearing that the defendant "had forced her to have sex with him." CP 17-18.

And in Finding 18, despite the State's argument that the evidence was merely offered for context, 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. Considering, also, the existing evidence showing that Katie Watkins' complaints independently came to the attention of the sheriff's office in Asotin County by her act of contacting that office, these discussions of the defendant allegedly engaging in similar past conduct as that charged in the case tends to rebut the presumption that the court did not consider the Summer Smith allegations in deeming itself persuaded of guilt. In fact, in this indecent liberties trial, 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. This evidence had nothing to do with the context of the discovery of Watkins' allegations, and carried only propensity and bad character prejudice.

As to the improper opinions on credibility and guilt, wrongly elicited by the State and testified to by Detective Nichols and Detective Eylar, the trial court's most specific ruling, in response to a defense objection, expressly allowed Detective Nichols to continue with her "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 she formed based on her training. The witness continued on to offer opinion testimony, as did Detective Eylar.

And when 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, this statement must militate strongly against any presumption that the court had silently acknowledged that the entire line of questioning by the State with these witnesses was improper. RP 92.

Of course, these two law enforcement witnesses' discussions of their assessments of the credibility of the various participants, and Mr.

Gatherer's deceptiveness and guilt, occupied a significant bulk of the testimony on two successive trial days. See Gower, at 856 (reversing for trial court's inadvertent but ultimately erroneous admission of ER 404(b) evidence under briefly-in-force RCW 10.58.090 evidence statute, where the 404(b) witness's testimony occupied over 105 pages of the 600 page transcript and was reflected in the findings).

This Court should not apply a Read presumption, and should reverse for the prejudice of the errors. This case began with an audio recording and testimony that contained and related some admissions by the defendant, but which was replete with unnecessary, highly prejudicial accusations by another alleged victim, who claimed that the defendant had committed worse sexual conduct toward her, and who accused Mr. Gatherer of being willing to commit a rape of Katie Watkins. Two law enforcement witnesses were allowed to relate details of Summer Smith's claims and the defendant's reaction to them. The trial court, instead of excluding these matters that had no proper purpose, agreed with the prosecutor that the matter did not implicate ER 404(b).

The two detectives then spent a significant amount of trial time improperly testifying to their training and experience in recognizing believable victims – including not only Katie Watkins, but also Summer

Smith, who had alleged rape. The effort that the State spent to present evidence of the honesty of Summer Smith gave lie to the notion that her accusations in the “confrontation call” were being offered without any wrongful purpose of showing the bad character and propensity of Mr. Gatherer. Then, the two detectives used their training and experience to opine, at length, in violation of Barr, about how and why Mr. Gatherer had demonstrated his deceptiveness, and his guilt, during their investigation. This sort of testimony is plainly inadmissible, yet it occupied a significant bulk of the bench trial. Given the profusion of inextricably intertwined non-constitutional, and constitutional errors in this case, Mr. Gatherer should be entitled to a new trial.

## **V. CONCLUSION**

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

Respectfully submitted this 28th day of April, 2017.

s/ OLIVER R. DAVIS  
Washington Bar Number 24560  
Washington Appellate Project-91052  
1511 Third Avenue, Suite 701  
Seattle, WA 98102  
Telephone: (206) 587-2711  
E-mail: [Oliver@washapp.org](mailto:Oliver@washapp.org)

**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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**Washington Appellate Project**  
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1511 Third Avenue  
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