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No. 35402-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

GABRIEL M. GOMEZ

Appellant.

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

The Honorable Judge Alex Ekstrom

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

The presumption of innocence is a fundamental characteristic of American criminal justice. Admitting evidence of previous crimes, wrongs, or acts committed by a defendant taints that presumption because it shows the defendant to be a 'bad person.' Jurors no longer view the defendant in a neutral way. They assume that a defendant who has been in trouble with the law before is more likely to be guilty now.

Eric D. Lansverk, Comment, *Admission of Evidence of Other Misconduct In Washington To Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L.Rev. 1213 (1986).

Gabriel Gomez was convicted of child molestation in the third degree after a trial in which the state indiscriminately used ER 404(b) evidence to generate a theme that Mr. Gomez preyed on young women in church and was therefore predisposed to molest 15-year-old N.A.

Mr. Gomez's conviction should be reversed. The trial court erred in admitting irrelevant and prejudicial ER 404(b) evidence that Mr. Gomez was frequently admonished for hugging young women in the church, inappropriately communicated with N.A., and attempted to date an 18-year-old member of the church. All of this evidence was irrelevant except for the improper purpose of suggesting that because Mr. Gomez had an untoward proclivity for young women, he molested N.A. As defense counsel pointedly

argued: “[the 404(b) evidence] seems to suggest to the jury that, again, he is the creepy guy at church who is molesting and grooming children when that’s simply not the case.” (RP 20)

Despite the state’s repetitive use of this evidence during trial, defense counsel failed to request a limiting instruction or a pre-trial order limiting the cumulative use of the evidence. These failures compounded the prejudice. Because a jury is naturally inclined to treat ER 404(b) evidence as evidence of criminal propensity, the admission of the evidence without a limiting instruction tainted the jury’s deliberations and the presumption of innocence. Further, by failing to request an order limiting the presentation of ER 404(b) evidence to that necessary to make the point for which it was admitted, the state had free reign to present needlessly cumulative and detailed evidence of Mr. Gomez’s behaviors with young women, resulting in a verdict based on emotion, not reason.

Finally, the prosecutor committed prejudicial misconduct by using evidence that Mr. Gomez asked a teenage member of the church for a date as propensity evidence to infer that he sexually molested N.A. Fully aware of the pre-trial ruling admitting the evidence for the sole purpose of explaining why N.A. came forward, the prosecutor nevertheless argued:

“And you know, [Mr. Gomez] likes girls significantly younger than him... You learned that he asked out an 18-year-old Christi Walker when he was 32 years old.” (RP 362) The prosecutor’s use of this evidence to taint Mr. Gomez as a virtual child predator deprived him of a rational jury capable of objectively and critically evaluating the evidence. By the time N.A. testified, Mr. Gomez was irrevocably tainted as the “creepy guy” at church who preyed on young women, rendering the presumption of innocence a fiction. The state’s improper use of this highly prejudicial evidence during closing argument, alone, warrants reversal for a new trial.

Mr. Gomez’s conviction should be reversed and the matter remanded for a new trial. The multiple errors in this case were both individually and cumulatively so prejudicial that justice cannot be satisfied by anything short of a new trial.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred by admitting evidence pursuant to ER 404(b) that Mr. Gomez was admonished for hugging young women to rebut the non-existent defense of mistake.
2. The trial court erred by admitting evidence pursuant to ER 404(b) that Mr. Gomez had FaceTime communications with N.A.
3. The trial court erred by admitting evidence pursuant to ER 404(b) that Mr. Gomez attempted to date an 18-year-old female member of the church.
4. Mr. Gomez received ineffective assistance of counsel due to counsel's failure to request a limiting instruction and a pre-trial order limiting the presentation of ER 404(b) testimony to that necessary to make the point for which it was admitted.
5. Prosecutorial misconduct violated Mr. Gomez's right to a fair trial.
6. Cumulative error deprived Mr. Gomez of his right to a fair trial.
7. The trial court erred in imposing the following condition of community custody: "Immediately notify your community corrections officer and therapist of any romantic or sexual relations you are involved with." (CP 162)
8. The trial court erred in prohibiting contact with minor males as a condition of community custody.

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

Issue 1: Whether the court erred by admitting ER 404(b) evidence that Mr. Gomez was repeatedly admonished for hugging young women in the church, attempted to date an 18-year-old member of the church, and engaged in a FaceTime communication with N.A. when such evidence was irrelevant to establish the res gestae of the crime or rebut a defense.

- a. The trial court erred by permitting ER 404(b) evidence that Mr. Gomez was constantly reproached for hugging young women at church to rebut a non-existent defense of mistake.

- b. The trial court erred by admitting evidence that Mr. Gomez communicated with N.A. via FaceTime as res gestae evidence when the communication at issue was remote in time and place from the charge at issue.
- c. Evidence that Mr. Gomez asked an 18-year-old member of the church for a date was irrelevant to explain N.A.'s disclosure when the circumstances of the disclosure were not at issue.
- d. The error in admitting the ER 404(b) evidence was not harmless where the state used the evidence to generate a theme that Mr. Gomez preyed on young women in the church, which deprived him of the presumption of innocence.

Issue 2: Whether defense counsel's failure to request a limiting instruction and an order limiting the presentation of cumulative ER 404(b) evidence resulted in prejudice where the state presented needlessly repetitive evidence of prior misconduct and improperly used the evidence during closing argument to infer guilt of the charged crime.

Issue 3: Whether the prosecutor committed prejudicial misconduct during closing argument by using evidence that Mr. Gomez liked women "significantly younger than him" as propensity evidence. (RP 362)

Issue 4: Whether the cumulative error doctrine requires reversal and remand for a new trial.

Issue 5: Whether the condition of community custody requiring Mr. Gomez to notify his therapist and probation officer of any romantic or sexual relationship is void for vagueness.

Issue 6: Whether the condition of community custody prohibiting contact with minor males should be stricken because the prohibition has no relationship to the circumstances of the crime.

Issue 7: Whether this court should exercise its discretion to decline to award costs if the State substantially prevails on appeal.

#### **D. STATEMENT OF THE CASE**

Gabriel Gomez was a longtime member of the Word of Faith Church in Kennewick, Washington, and often volunteered in the children's youth programs. (RP 232-34, 253) In 2015, he worked with teens, including N.A., who was 15, in the church's media program. (RP 253, 275, 285) This occasionally involved working in a small sound board room with the youth. (RP 253)

In January 2016, N.A. told a youth pastor that Mr. Gomez had hugged her in the sound room and touched her breasts. (RP 299) N.A. waited a few weeks to disclose the incident because she feared her parents and Mr. Gomez's family would be angry with her for reporting the incident. (RP 298)

Detective Holly Baynes interviewed N.A. shortly after the incident and recorded her statement. (RP 269, 319) N.A. told the detective that Mr. Gomez touched her breasts "a little bit" and speculated the touching may have been accidental. (RP 319) The state charged Mr. Gomez with child molestation in the third degree. (CP 97)

Before trial, the state moved to admit evidence under Evidence Rule (ER) 404(b) that Mr. Gomez was repeatedly asked to modify his behavior around young women in the church, maintaining it was relevant to show absence of mistake. (CP 87-88) It argued:

[Mr. Gomez] was told numerous times to modify his behavior by this church...

The church has a rule that they had to do side hugs not full frontal hugs from the front or from behind. And Mr. Gomez acknowledges that he had to change the way he hugged young people to conform with what the church wanted and he indicated that he did.

The child in this case will testify that his behavior was not modified in this situation and as such the State is asking to put on evidence that he was told on several occasions to modify his behavior around young people and to show absence of mistake in this case.

(RP 13)

Defense counsel strenuously objected to the admission of the evidence as irrelevant character evidence, arguing the state was trying to show that “because [Mr. Gomez] hugs people it is likely that he is a child molester.” (CP 94) At the hearing, defense counsel continued:

[T]his is an impermissible character trait of Mr. Gomez. The fact that he may or may not be known around the church as a hugger and hugs people on a regular basis: men, women, children, has no bearing on whether he molested a young woman who is just almost 16 years old. It shows that he is an affectionate individual but he hasn't done anything wrong in those situations.

The church didn't like it. They said, hey, you are a hugger. Stop. Don't do it. Do the side hugs. To turn that around and parlay that into, well, because he is kind of the creepy guy at church he has got to be a child molester, that is impermissible, in our opinion...

And we take the position that is just completely prejudicial because it's not illegal what he has been doing. It's not a

violation of any law or not whether he hugs people or not at church...

[T]he defense and the state should just stick to the case, and the allegation that he molested a young woman named [N.A.] and not that he was the hugger.

(RP 13-14)

The court admitted the evidence as “re gestae” evidence to show absence of mistake. (RP 18) In balancing the prejudice and probative value, the court concluded, “[t]he act of hugging an individual is not itself a criminal act . . . . the risk of unfair prejudice is outweighed by probative value.” (RP 14)

The state also moved to present testimony that Mr. Gomez attempted to enter into a dating relationship with Christie Walker, an 18-year-old member of the church, to explain why N.A. did not immediately report the abuse. (RP 18, CP 18) The prosecuting attorney explained that a church leader contacted N.A. after Ms. Walker complained of Mr. Gomez’s behavior, which, in turn, prompted N.A.’s disclosure. (RP 21)

Mr. Gomez indicated he had no intention of making an issue of the circumstances of N.A.’s disclosure and objected that the evidence was irrelevant and prejudicial. (RP 24, CP 95) The court gave its initial thoughts on the issue:

The Court: [A]s I understand it, the allegations here came to light during an interview with the young lady that was prompted by this other matter, the 18-year-old.

So it seems to me there are a series of res gestae Hobson choices that the Defense faces which is that the State has to be able to explain why it is that she was talked to. And there are some dangers in sanitizing what happened. To be perfectly blunt, if it's sanitized in some ways it may very well lead the jury to conclude erroneously that they are not hearing about other similar conduct.

So I think the State has a right to explain how they got there. But I'll hear from you as to how: how that occurs, how that is described in a neutral way, or in the alternative as to a limiting instruction.

(RP 18)

Defense counsel reiterated that the evidence was irrelevant to the charge at issue:

[T]here is evidence out there that a young woman in the church named Christie was approached by Mr. Gomez to date after she turned 18 years old.

So discussions were had. Mr. Gomez met with church leaders and was told to leave the church. The church leadership turned around and told everybody that he left voluntarily. But people started asking questions...

It is in this situation is when [N.A.] comes and says, well, this is what happened to me. Gabe did this to me in the sound board room. Christie is 18. She was 18 at the time. Asking her to date him has absolutely nothing to do with this case. She made no accusation that he improperly touched her at any point. There is no evidence being offered towards any crime committed against Christie.

It seems to suggest to the jury that, again, he is the creepy guy at church who is molesting and grooming children when that's simply not the case. So I think the State can be – can easily get all the evidence that they want to present in

by saying [N.A.] came forward with an allegation and go from there. We don't need to know about Christie.

(RP 19-20)

The state responded that credibility was central to its case and the evidence was needed to show that N.A. had no "agenda" or motive to lie about the abuse. It explained the evidence was "part of the res gestae of how this case came about." (RP 22-23)

The court admitted the evidence, reasoning that without it, the jury would "speculate erroneously as to how it is this young lady was contacted and what it was that prompted that disclosure." (RP 24)

At trial, the state elicited detailed testimony about Mr. Gomez's conduct with young women in the church. Koni Kincaid, a youth pastor at the church, testified that she had to repetitively ask Mr. Gomez to modify his behavior around young girls. (RP 235-37) She cited an incident where Mr. Gomez made a college age woman feel "very uncomfortable" by standing too close to her in the church's sound room. (RP 236) She also testified that she had asked Mr. Gomez to replace front hugs with side hugs. (RP 237)

Eric Slater, the director of youth education, testified that he also had to repeatedly ask Mr. Gomez to modify his behavior around young girls: "I had to constantly bring it to Koni's attention...that [Mr. Gomez] would go behind girls and tickle their sides, or he would become a jungle

gym and have kids hanging all around him when he was supposed to be monitoring the entire classroom.” (RP 248) Mr. Slater also had to tell Mr. Gomez to stop holding the hands of young women: “[Mr. Gomez] was just hovering over them and just kind of – the girls felt extremely uncomfortable. And he would grab their hand and move the keyboard around and just things that are just borderline completely inappropriate.” (RP 249)

Mr. Slater testified that he eventually removed Mr. Gomez from the church due to concerns about his texting and involvement with Ms. Walker. (RP 257, 266) He explained, “[w]e felt he used his position of leadership to persuade a relationship with someone directly involved, directly underneath him in the ministry.” (RP 265)

N.A. testified that she had known Mr. Gomez as a youth leader in the church for many years. (RP 283) She stated that he occasionally invaded her personal space in the media sound room by putting his arms around her or putting his hand on top of hers and moving the computer mouse. (RP 285, 287)

In the middle of N.A.’s testimony, defense counsel objected to anticipated questions about a FaceTime communication in which Mr. Gomez asked N.A. to clean his house. (RP 291) The state argued the communication was relevant to prove sexual motivation and absence of

mistake. (RP 293) When the court questioned the prosecutor about the time frame of the communication, the prosecutor explained that the charged offense occurred in late December or early January and that the communication at issue occurred in “August, September, October, November, something like that.” (RP 292)

The court overruled the defense objection, reasoning “[i]n light of the time frame involved I would find that it is res gestae...[a]ny probative value is not outweighed by unfair prejudice in light of the fact that these are the defendant’s own statements close in time to the charged act.” (RP 293)

After some prompting by the prosecutor, N.A. recalled that the FaceTime communication occurred a few weeks after the youth group obtained a “LINE app”, which N.A. testified was “probably” between August and October. (RP 293-94) N.A. then stated that sometime between December 2015 and January 2016, Mr. Gomez entered the sound booth room where she was typing on a computer. (RP 294, 310) According to N.A., he proceeded to wrap his arms around her and then touched her breasts for 20 to 30 seconds. (RP 296-97)

Defense counsel questioned N.A.’s version of events, pointing out during cross-examination that shortly after the incident, N.A. told Detective Baynes that she thought the touching may have been accidental.

(RP 306) He also questioned her about her failure to tell the detective that the touching had lasted for 20 to 30 seconds. (RP 308)

Mr. Gomez moved to dismiss the charge at the end of the state's case, arguing fleeting contact was insufficient to establish sexual gratification. (RP 314) The court denied the motion. (RP 315) Mr. Gomez did not testify.

During closing argument, the state emphasized Mr. Gomez's failure to modify his behavior at the church:

[Y]ou can take into consideration when you think about the sexual contact that he was asked to modify his behavior on numerous occasions by this church. Don't pick up young ladies. Don't give full front hugs. Give side hugs. Don't hover over them on the computer. Don't touch their hands while they are manipulating the mouse. He was told to modify his behavior and continued to not.

(RP 357)

The prosecutor then added, "And you know, [Mr. Gomez] likes girls significantly younger than him. You learned that during trial. You learned that he asked out an 18-year-old Christie Walker when he was 32 years old." (RP 362)

During closing, defense counsel denied that the molestation occurred, pointing out the contradictions in N.A.'s statements, which included telling the detective that Mr. Gomez had touched her "a little bit" to telling the jury "475 days" later that the touching lasted 20 to 30

seconds. (RP 365) Citing N.A.'s contradictory testimony and the fact that the door to the sound room was always open, defense counsel argued N.A.'s version of the offense did not make sense "because it didn't happen." (RP 366)

The jury returned a verdict of guilt for child molestation in the third degree. (RP 373) The court imposed a lower end standard range sentence of 7 months. (CP 188) Additional facts may be referenced below as pertinent to the particular issue raised on appeal.

#### **E. ARGUMENT**

**Issue 1: Whether the court erred by admitting ER 404(b) evidence that Mr. Gomez was repeatedly admonished for hugging young women in the church, attempted to date an 18- year-old member of the church, and engaged in a FaceTime communication with N.A. where such evidence was irrelevant to establish the res gestae of the crime or rebut a genuine defense.**

**The presumption of innocence is the foundation of American criminal law. The trial court undermined this presumption by erroneously admitting ER 404(b) evidence that was irrelevant except to taint Mr. Gomez as a man who preyed upon young women in the church. As such, the admission of this evidence led to an emotionally based, rather than a factually based jury verdict.**

Evidence of other crimes or bad acts for which the defendant is not on trial is among the most damaging and unfairly prejudicial evidence that a jury may hear in a criminal trial. *State v. Saltarelli*, 98 Wn.2d 358, 360, 655 P.2d 697 (1982). Accordingly, evidence of a defendant's prior misconduct is categorically barred under ER 404 to demonstrate a

defendant's propensity to commit the charged offense. *State v. Holmes*, 43 Wn. App. 397, 401, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986).

ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

There are no exceptions to this rule. *State v. Gresham*, 173 Wn.2d 405, 421, 173 Wn.2d 405 (2012). Instead, "there is one improper purpose and an undefined number of proper purposes." *Gresham*, 175 Wn.2d at 421.

Because of the highly prejudicial nature of character evidence, courts must closely scrutinize its admission. To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) find by a preponderance of the evidence that the prior misconduct occurred; (2) identify a non-propensity purpose for the evidence; (3) determine the relevance of the prior misconduct to prove an element of the crime or rebut a defense; and (4) weigh the probative value against the prejudice. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

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 where it fails to abide by the rule’s requirements.” *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

A defendant’s past bad acts are presumptively inadmissible. *State v. Fuller*, 169 Wn. App. 797, 828-29, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013). In close cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983).

The linchpin of ER 404(b) is relevance, *i.e.*, “evidence having any tendency to make 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. Accordingly, ER 404(b) must be analyzed in conjunction with ER 401, ER 402, and ER 403 to ensure the court carefully evaluates the relevance of the evidence and to ensure that the probative value of such evidence is not substantially outweighed by its prejudicial effect. *Saltarelli*, 98 Wn.2d at 360. ER 402 provides that irrelevant evidence is not admissible and ER 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the unfair prejudice. “Only after the court has concluded...that the evidence is relevant, can it appropriately balance the probative value against the prejudicial effect under ER 403. *Id.* at 363.

**(a) The trial court erred by permitting ER 404(b) evidence that Mr. Gomez was reproached for**

**hugging young women at church to rebut a non-existent defense of mistake.**

The trial court admitted highly prejudicial evidence that Mr. Gomez had frequently been told to modify his behavior around young women, particularly hugging, as relevant to show absence of mistake. (RP 18) This was error for two reasons: (1) mistake was not at issue - Mr. Gomez did not claim that he accidentally or mistakenly touched N.A., and (2) even if mistake had been an issue, the evidence did not directly negate the defense.

Prior bad acts may be admitted under ER 404(b) to rebut a claim of accident or mistake. *State v. Roth*, 75 Wn. App. 808, 819, 881 P.2d 268 (1994), *abrogated on other grounds by State v. Hampton*, 182 Wn. App. 805, 332 P.3d 1020 (2014). But such evidence is admissible only if (1) the defendant actually claims that the charged crime was an accident or mistake and (2) the proffered evidence directly negates the defense of mistake. *Roth*, 75 Wn. App. at 819; *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1986).

Mistake is never a material issue unless first raised by the defendant. *State v. Harris*, 36 Wn. App. 746, 751, 677 P.2d 2021 (1984). “[A] material issue of accident arises where the defense is denial and the defendant affirmatively asserts that the victim’s injuries occurred by happenstance or misfortune.” *Roth*, 75 Wn. App. at 819. In a sex offense

case, it is the defendant's claim of accidental touching that triggers the absence of mistake theory of admissibility. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The state may not impute the accused with the defense in order to rebut it at the outset. *Jackson*, 102 Wn.2d at 694-95.

Mr. Gomez did not raise a claim of mistake in this case. During his opening statement, defense counsel conceded “[t]here was contact” between Mr. Gomez and N.A., but maintained the case had been “blown out of proportion” and denied any evidence of sexual motivation. (RP 230, 231) There was no mention of accidental or mistaken touching.

Admittedly, the word “accidental” came up when defense counsel cross-examined N.A. about her initial statement to Detective Baynes that Mr. Gomez had only briefly touched her and that she thought the touching may have been accidental. (RP 306) However, the purpose of this questioning was not to support a defense of mistake, but to undermine N.A.'s claim at trial that Mr. Gomez touched her breasts for as long as 20 to 30 seconds. During closing argument, Mr. Gomez argued that N.A. contradicted herself and “[came] up with new stuff in front of you”, but did not use the contradictions to support a defense of mistake. (RP 366-67)

Moreover, when defense counsel moved to dismiss the charge at the close of the state's case, he did not claim mistake or accident. Instead,

citing *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991), a case which held that the fleeting touch of a girl's chest and buttocks was insufficient to support an inference of sexual gratification, he argued that his similarly brief touching of N.A. did not support a finding of sexual gratification. (RP 314)

Cross-examining N.A. about her musings that Mr. Gomez's touching may have been accidental did not trigger the defense of mistake. Admissibility of prior bad acts evidence to prove absence of mistake is dependent on proof of a genuine claim of mistake and a showing that the claim must be negated. *Ramirez*, 46 Wn. App. at 228. The crux of Mr. Gomez's case was that N.A. contradicted herself and that the evidence was insufficient to support a finding of sexual motivation, not that he mistakenly touched her. The state effectively created a collateral issue of accident and then used ER 404(b) evidence to impeach its own invention.

With that noted, even if mistake had been a genuinely disputed issue in this case, something Mr. Gomez does not concede, Mr. Gomez's history of nonsexual contact with young women in the church would not directly negate the defense. Evidence that Mr. Gomez was frequently admonished for nonsexual behavior with youth is entirely irrelevant to whether he mistakenly touched N.A.

In the absence of an affirmative claim by Mr. Gomez that he mistakenly touched N.A., the trial court abused its discretion in admitting the evidence. The evidence had no probative value except to tell the jury that Mr. Gomez had a predisposition to touch young girls. Denial of the state's motion to admit the evidence would not have deprived the state of any relevant evidence, but its admission tainted the presumption of innocence and deprived Mr. Gomez of a fair trial. As such, the probative value was far outweighed by its prejudicial effect.

The weighing of prejudice against probative value is particularly vital in sex abuse cases where the danger of prejudice is at its highest. *Saltarelli*, 98 Wn.2d at 363. The court here, however, grossly underestimated the danger of prejudice.

The fact that Mr. Gomez was repeatedly admonished about hugging young women in the church likely led the jury to view him as an immoral person with a proclivity for young women. It would have been a short link in the chain of logic and inferences to connect this behavior with the molestation at issue. As defense counsel tried to explain to the court, the evidence suggested that Mr. Gomez was the "creepy guy at church who was molesting and grooming children when that's simply not the case". (RP 20)

“The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.” *State McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013). It is difficult to conceive of a juror who would not be prejudiced by the repetitive and detailed evidence of Mr. Gomez’s prior acts with young women in the church. By the time the jury heard all of this evidence, the presumption of innocence was a fiction. *See D. Lansverk, Admission of Evidence of Other Misconduct*, 61 Wash. L.Rev. at 1236, fn.3 (“Studies by the London School of Economics and the Chicago Jury project show that jurors take the beyond a reasonable doubt standard seriously only until they find out the defendant is a bad person.”)

**(b) The trial court erred by admitting evidence that Mr. Gomez communicated with N.A. via FaceTime as res gestae evidence when the communication at issue was remote in time and place from the charge at issue.**

The trial court also erred in admitting evidence that Mr. Gomez asked N.A. via FaceTime to come to his home and clean as relevant res gestae evidence.

Evidence may be admissible under ER 404(b) if it is part of the res gestae of the offense charged. Karl B. Tegland, *Courtroom Handbook on Washington Evidence*, 236 (2008-09); *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). Res gestae evidence is admissible to “complete

the story of the crime” by proving its immediate context in time and place; however, the state must show it is an “inseparable” part of the whole crime. *State v. Tharp*, 27 Wn. App. 198, 204-05, 616 P.2d 693 (1980); *State v. Schaffer*, 63 Wn. App. 761, 769, 822 P.2d 292 (1997), *aff’d*, 120 Wn.2d 616, 845 P.2d 281 (1993).

For example, in *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971), an unlawful possession of narcotics case, the court found no error in the admission of evidence that the defendant was found with needle marks in his arm and drug paraphernalia nearby because the evidence was integral to the charged crime. *Jordan*, 79 Wn.2d at 483.

The state made no such showing here. As detailed above, the communication occurred in N.A.’s home and weeks before the incident in the church. At trial, N.A. could only recall that the FaceTime conversation occurred a few weeks after the church youth group obtained a Facetime App, which she stated was obtained sometime in August, September, or October. (RP 193-94) At a minimum, this leaves over a month between the conversation and the incident at the church.

Given the remoteness in time and place between the FaceTiming and the charged offense, the state failed to show that this evidence had any relevant connection to the charge before the jury, except to show bad character and a propensity for inappropriate conduct with N.A. Without a

showing that this evidence was inseparably part of the story of the crime, the trial court abused its discretion in admitting the evidence.

Even if there was some conceivable purpose for admitting this prior misconduct, which Mr. Gomez does not concede, any probative value was far outweighed by the prejudice. Testimony that Mr. Gomez asked N.A. to clean his house strongly suggested that he had an inappropriate interest in N.A. It is hard to conceive of a jury that would not unduly rely on this as evidence of guilt, instead of confining itself to the actual merits of the case. As such, the trial court erred in its evaluation of potential prejudice: the evidence improperly shifted the jury's focus from the merits of the case to an overestimation of the prejudicial character evidence.

**(c) The trial court erred in admitting evidence that Mr. Gomez asked an 18-year-old member of the church for a date as “res gestae” evidence when the circumstances of N.A.’s disclosure were not at issue.**

Finally, the court erred in admitting evidence that Mr. Gomez attempted to date Christie Walker, an 18-year-old member of the church, as relevant to explain why N.A. came forward to report the molestation. While res gestae evidence may be allowed to explain why an alleged victim delayed reporting sexual abuse, such evidence is generally irrelevant and inadmissible if the defendant does not make an issue of the delay. *Fisher*, 165 Wn.2d at 745.

Mr. Gomez did not make an issue of the circumstances of N.A.'s disclosure. Despite the state's argument that the evidence was crucial to show that N.A. did not have an agenda in coming forward, nothing in the record suggests that N.A. had any reason to fabricate the incident. N.A. adequately explained the reason she hesitated to disclose, and Mr. Gomez explicitly told the court he had no intention of questioning N.A. about the circumstances of her disclosure. (RP 124)

The state argued during trial that N.A. had a "secret" and insinuated that N.A. didn't feel safe to report the incident until Mr. Gomez left the church. (RP 223, 353) But there was no evidence Mr. Gomez asked N.A. to keep a secret or threatened to harm her if she disclosed the incident. Her explanation that she feared the anger of her parents and Mr. Gomez's family was sufficient to explain the delay. Nothing in this explanation would lead the jury to speculate that she had an agenda or motive to lie. Again, the state created an issue where none existed.

Eventually, the state's argument was revealed to be no more than a transparent propensity argument. During closing argument, the state exposed its true purpose when it argued that the Ms. Walker evidence showed Mr. Gomez "liked girls significantly younger than him." (RP 362)

The prejudice from the overtly improper use of this evidence cannot be overstated. The argument focused the jury's attention on Mr.

Gomez's character to improperly infer that he was guilty of the crime.

This improper shift in focus denied Mr. Gomez a fair trial.

**(d) The error in admitting the prior misconduct evidence was not harmless when the State overtly used the evidence to generate a theme that Mr. Gomez preyed on young women in the church.**

An error in admitting evidence under ER 404(b) is harmless unless there is a reasonable probability that the result of the trial would have been different had the error not occurred. *Jackson*, 102 Wn.2d at 695. Stated another way, an error is harmless if the improperly admitted evidence is of little significance in light of the evidence as a whole. *State v. Everybodytalksabout*, 145 Wn.2d at 456, 468-69, 39 P.3d 294 (2002).

The state cannot establish that any reasonable jury would have reached the same conclusion absent the erroneous admission of the ER 404(b) evidence. The state's case contained weaknesses that were likely overcome by the prejudicial testimony. However, the jury was inundated with repetitive and cumulative evidence of Mr. Gomez's inappropriate contact with young girls in the church. The jury heard evidence that girls felt "uncomfortable" around him and that he persistently hugged them. (RP 236, 249)

The prejudice was reinforced by the state's use of the evidence to generate a theme during the entire trial that Mr. Gomez preyed on young women in the church, which, in turn, suggested guilt of the charged crime.

During opening statement, the state emphasized Mr. Gomez had been asked to modify his behavior around young girls, that he was repeatedly told he “shouldn’t be picking up any young girls”, and that he would “privately chat” with young girls. (RP 223, 224, 226, 227) As detailed above, the state elicited extensive testimony relating to these behaviors and told the jurors in closing they could properly consider Mr. Gomez’s proclivity for young girls.

The absence of a limiting instruction exacerbated the prejudice. Because a jury is naturally inclined to treat ER 404(b) evidence as evidence of criminal propensity, the jury likely used the evidence to infer that Mr. Gomez acted with sexual motivation. The erroneous admission of the highly prejudicial evidence irrevocably tainted Mr. Gomez’s character, undermined the presumption of innocence, and most certainly altered the outcome of the trial. Reversal and retrial is the only appropriate remedy.

**Issue 2: Whether defense counsel’s failure to request a limiting instruction and an order limiting the presentation of cumulative ER 404(b) evidence resulted in prejudice where the state presented needlessly repetitive misconduct evidence and improperly used the evidence during closing argument to infer guilty of the charged crime.**

**Defense counsel was ineffective for failing to request a limiting instruction and a pre-trial order limiting the testimony of extrinsic misconduct to that strictly necessary to make the point for which it was admitted. Given the state’s focus on the ER 404(b) evidence at trial, defense counsel’s failure to request limits on the use of this evidence cannot be dismissed as a reasonable trial strategy.**

Effective assistance of counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. Amend. VI; Wash. Const. Art. 1, sec. 22. A claim that counsel was ineffective is a mixed question of law and fact that is reviewed de novo. *Strickland*, 466 U.S. at 698.

To reverse a conviction for ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687. Legitimate trial strategy or tactics do not count as deficient performance, but the presumption of reasonable performance can be rebutted by showing “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A defendant is prejudiced by counsel’s deficient performance if, but for counsel’s errors, there is a reasonable probability the outcome of the proceeding would have been different. *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009).

Here, defense counsel twice declined the court’s offer to give a limiting instruction, explaining that he avoids limiting instructions “at all costs” and that a cautionary instruction in this case had the potential to “backfire” by highlighting the damaging evidence. (RP 24-25, 339)

Generally, a failure to request a limiting instruction is deemed a legitimate trial tactic to avoid reemphasizing the damaging evidence. *State v. Dow*, 162 Wn. App. 324, 335, 162 Wn. App. 324 (2011); *State v. Kloepper*, 179 Wn. App. 343, 317 P.3d 1088 (2014). But here, where the prior misconduct evidence was repeatedly referenced and used to generate a theme throughout trial that Mr. Gomez had a propensity for young girls, no legitimate strategy can be discerned. Multiple pages of trial transcript are devoted to this damaging character evidence (*see* Statement of the Case above), while direct testimony regarding the charge at issue spans roughly two pages. (RP 296-97)

A decision to forgo a limiting instruction may be appropriate where ER 404(b) evidence is incidental to the state's case, but where, as here, the evidence is the focus of the state's case, the decision cannot by any measure be deemed reasonable.

Moreover, once the court admitted the evidence, defense counsel should have requested an order strictly limiting the testimony of the extrinsic misconduct to that necessary to make the point for which it was admitted. Without such an order, the state introduced an avalanche of repetitive and damaging evidence that far exceeded the basis for its admission. Such cumulative testimony was unnecessary to establish absence of mistake or *res gestae*, and could have been curtailed by a pre-

trial order limiting the number of witnesses testifying to such evidence. *See State v. Dunn*, 125 Wn. App. 582, 588, 105 P.3d 1022 (2005) (ER 403 grants the trial court discretion to exclude “needless presentation of cumulative evidence.”)

To show prejudice for counsel’s failure to make a motion, a defendant must show the motion likely would have been granted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004). Here, the court strongly indicated it would have granted such an order, if requested. Acknowledging the potential prejudice of the ER 404(b) evidence, the trial court asked defense counsel whether there was some way of “structuring ...this in some way to attempt to remove the potential prejudice or a limiting instruction making clear this is not illegal conduct.” (RP 24)

In view of this record, it is likely that the court would have given both a limiting instruction and an order limiting the amount of ER 404(b) evidence. If the jury had been instructed to confine the use of the evidence to its proper purpose and the state had been precluded from presenting needlessly cumulative testimony, there is a reasonable probability the outcome of the trial would have been different. Instead, the state presented inherently damaging evidence far beyond the scope

necessary for the limited purpose for which it was offered. The jury was certainly prejudiced.

**Issue 3: Whether the prosecutor committed prejudicial misconduct during closing argument by using evidence that Mr. Gomez liked women “significantly younger than him” as propensity evidence.**

**The prosecuting attorney committed prejudicial misconduct by appealing to the prejudices of the jury by using 404(b) evidence as propensity evidence.**

The prosecuting attorney represents all of the people and is presumed to act only in the interest of justice. *Fisher*, 165 Wn.2d at 727 (2009)(citing *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)). This means that prosecuting attorneys also represent defendants and have a duty to defendants to ensure their right to a constitutionally fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Prosecutorial misconduct is grounds for reversal if “the prosecuting attorney’s conduct was both improper and prejudicial.” *Fisher*, 165 Wn.2d at 747. The prosecutor’s allegedly improper comments are reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given.” *Monday*, 171 Wn.2d at 675 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Prejudice is established if there is a substantial likelihood that the misconduct affected the jury’s verdict. *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 704, 708, 286 P.3d 673 (2012).

Prosecutors are accorded wide latitude in closing arguments and are allowed to draw reasonable inferences from the evidence, but “arguments calculated to inflame the passions or prejudice of the jury” constitute misconduct. *Glassman*, 175 Wn.2d at 704; *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)).

The prosecuting attorney here violated this caveat by using the evidence Mr. Gomez asked Ms. Walker for a date to argue that Mr. Gomez “likes girls significantly younger than him.” (RP 362) Because defense counsel did not object to the argument, Mr. Gomez anticipates that the state will contend that he waived the issue. Defense counsel’s failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct is “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice.” *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

However, the Washington Supreme Court has held that the losing party to a pre-trial evidentiary ruling “is deemed to have a standing objection where a judge has made a final ruling on the motion.” *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)). Here, the trial court made a final ruling that admission of the Ms. Walker evidence was for the sole purpose of explaining why N.A. came forward

with her allegation against Mr. Gomez. The court also ruled that the state was barred from making comments “intended to inflame, impassion, or prejudice the juror.” (RP 10) Accordingly, Mr. Gomez has a standing objection to the 404(b) evidence for purposes of this court’s review on appeal. *Fisher*, 165 Wn.2d at 748.

The prosecutor’s argument openly violated the court’s pre-trial orders. Given the exhaustive pre-trial discussions regarding the admissibility of the evidence, the prosecutor was well aware of the court’s rulings. Nevertheless, she then used the evidence to appeal to the prejudices of the jury by portraying Mr. Gomez as a man who preyed on young women in the church. In the context of the entire record, the prosecutor’s use of this evidence can only be seen as a deliberate attempt to appeal to the emotions of the jury. This was misconduct.

The *Fisher* case is instructive. There, the trial court made a pre-trial ruling conditioning the admission of certain ER 404(b) evidence on the defendant raising the issue of the victim’s six-year delay in reporting the alleged abuse. *Fisher*, 165 Wn.2d at 749. Although the defense never raised the issue, the prosecutor used the 404(b) evidence to show that the defendant’s sexual abuse of the victim was consistent with his prior physical abuse of his stepchildren. *Id.* at 748.

The Court held that the prosecutor's use of the evidence to demonstrate propensity "after receiving a specific pretrial ruling regarding the evidence clearly goes against the requirements of ER 404(b) and constitutes misconduct." *Id.* The Court also found the "emphasis on the evidence during closing argument had a substantial likelihood of affecting the jury." *Id.*

The misconduct here was similarly prejudicial. Reviewing prejudice is not a matter of determining whether there is sufficient evidence to convict. *In re Glassman*, 175 Wn.2d at 710. Rather, the standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. *Id.* Here, there is no question that the State's use of the ER 404(b) evidence unduly influenced the jurors. Fully aware that the defense had declined a limiting instruction, the prosecutor nevertheless used the evidence to taint Mr. Gomez as a virtual child predator, thereby depriving him of a jury capable of objectively and critically evaluating the evidence.

Viewed in the context of the entire trial, the prosecutor's use of the ER 404(b) evidence to demonstrate propensity to commit the charged crime had a substantial likelihood of affecting the jury's decision. The branding of Mr. Gomez as the "creepy guy at church" irrevocably tainted

his character and so infected the trial that the only fair remedy is to reverse and remand for a new trial. (RP 13, 14)

**Issue 4: Whether the cumulative error doctrine requires reversal and remand for a new trial in this case.**

**The cumulative effect of the improper admission of the ER 404(b) evidence, defense counsel’s failure to properly request limits on the use of the evidence, and the prosecutor’s use of the evidence to effectively characterize Mr. Gomez as a child predator deprived Mr. Gomez of a fair trial.**

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 warrants reversal. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). “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 harmless.” *State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

Here, the combined effect of the improperly admitted ER 404(b) evidence, defense counsel’s failure to request limits on the use of this evidence, and the prosecutor’s blatant use of the evidence as propensity evidence materially affected the outcome of the trial. The jury was inundated with irrelevant and cumulative evidence of Mr. Gomez’s misconduct with young women in the church and then told it could use this evidence to show that he had a proclivity for young girls. From there,

it was a short and quick leap to a conviction on the child molestation charge. The only remedy is to reverse and remand for a new trial.

**Issue 5: Whether the condition of community custody requiring Mr. Gomez to notify his therapist and community custody officer (CCO) of any romantic relationship is void for vagueness under the Fourteenth Amendment to the United States Constitution.**

**Due process requires that laws not be vague. The community custody provision requiring Mr. Gomez to notify his therapist and CCO before entering into a romantic relationship is open to arbitrary enforcement. Without objective criteria to define the term “romantic”, the condition is unconstitutionally vague. This Court should strike the condition.**

The Fourteenth Amendment to the United States Constitution and Article I, section 3 of the Washington Constitution require that citizens have fair warning of proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A condition is void for vagueness if the condition either (1) does not define the prohibition “with sufficient definiteness that ordinary people can understand what conduct is proscribed” or (2) does not “provide ascertainable standards of guilt to protect against arbitrary enforcement.” *State v. Norris*, 1 Wn. App. 87, 404 P.3d 83 (2017)(quoting *State v. Sanchez Valencia*, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)). “A condition will withstand a vagueness challenge if “persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement.”

*Norris*, 1 Wn. App. at 87 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)).

Generally, the imposition of community custody conditions is discretionary with the sentencing court and will be reversed only if manifestly unreasonable. *Bahl*, 164 Wn.2d at 753. An unconstitutional condition is manifestly unreasonable. *Id.*

“A defendant may assert a preenforcement challenge to community custody conditions for the first time on appeal if the issues are primarily legal, do not require additional factual development, and the challenged action is final. *Id.* at 751. These conditions are met here. The challenge to the constitutionality of the prohibition is purely legal, does not require additional factual development, and is final.

In *United State v. Reeves*, 591 F.3d 77 (2d Cir. 2010), the Second Circuit concluded that a condition requiring the offender to notify probation “when he establishes a significant romantic relationship” was insufficiently defined:

What makes a relationship “romantic,” let alone “significant” in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy; and for still others, all of these elements could be present yet the relationship, without promise of exclusivity, would not be significant.

*Reeves*, 591 F.3d at 81.

Here, the community custody condition requiring Mr. Gomez to “immediately notify your community corrections officer and therapist of any romantic or sexual relations you are involved with” is similarly vague. (CP 162) Mr. Gomez should not have to guess whether his CCO might deem a friendship “romantic” and cite him with a violation. In *Reeves*, the court noted that the offender’s “continued freedom during supervised release should not hinge on the accuracy of his prediction of whether a given probation officer, prosecutor, or judge would conclude that a relationship was significant or romantic.” *Id.* Mr. Gomez asks the court to strike this unconstitutionally vague condition.

**Issue 6: Whether the condition of community custody prohibiting contact with minor males should be removed because the prohibition has no relationship to the circumstances of the crime.**

**This court should strike the portion of community custody provision five, prohibiting contact with minor males, as overbroad. This prohibition has no relationship to the circumstances of the crime, which involved Mr. Gomez’s inappropriate contact with young women, not young males.**

Community supervision is a period of time during which a person convicted of a felony is subject to crime-related prohibitions and other sentence conditions. RCW 9.94A.030(7). “A crime related prohibition is an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000). No causal link

need be established between the crime and the imposed condition, but again, the condition must be directly related to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

Here, community custody condition five prohibited Mr. Gomez from having “contact with any minors (*males* or females under the age of 18) unless approved by a therapist.” See Appendix F to Judgment and Sentence at CP 161 (emphasis added). However, this prohibition has no relationship to the circumstances of the crime, which involved inappropriate contact with young women, not young males. Accordingly, this court should strike the portion of the community custody condition referencing “males” as overbroad. (CP 161)

**Issue 7: Whether this court should exercise its discretion to decline to award costs if the state substantially prevails on appeal.**

**Mr. Gomez was found indigent at the end of trial in the superior court. Because the presumption of indigency continues throughout the review process, this court should decline to impose appellate costs.**

If the state substantially prevails on appeal, Mr. Gomez requests that no costs of appeal be authorized under Title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the state is the substantially prevailing party. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s

discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The sentencing court found Mr. Gomez “lacks sufficient funds to prosecute an appeal and applicable law grants defendant a right to review at public expense.” (CP 208) The presumption of indigency continues throughout the review process. *Sinclair*, 192 Wn. App. at 393. RAP 14.2 provides:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency.

The State is unable to provide any evidence that Mr. Gomez’s financial situation has improved since he was found indigent by the trial court. If the state substantially prevails on this appeal, this court should exercise its discretion to deny any request for appellate costs.

#### **F. CONCLUSION**

Based on the foregoing, Mr. Gomez respectfully requests that this Court reverse his third degree child molestation conviction and remand for a new trial. The matter should be remanded for resentencing to strike community custody conditions five and nine.

If the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Gomez who is indigent.

Respectfully submitted this 20<sup>th</sup> day of February, 2018.

/s/ Kristina M. Nichols  
Kristina M. Nichols, WSBA #35918  
Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON ) COA No. 35402-4-III  
Plaintiff/Respondent )  
vs. ) Benton Co. No. 16-1-00648-9  
)  
GABRIEL M. GOMEZ )  
) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 20, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Gabriel M. Gomez (Appellant)  
1632 Broadway Box 127  
Eureka, CA 95501

Having obtained prior permission, I served the Benton County Prosecutor's Office at prosecuting@co.benton.wa.us by email using the Washington State Appellate Courts' Portal.

Dated this 20<sup>th</sup> day of February, 2018.

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**Note: The Filing Id is 20180220121831D3755919**