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No. 35402-4-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE 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

NO. 16-1-00648-9

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BRIEF OF RESPONDENT

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. The trial court properly admitted evidence that the defendant was repeatedly admonished for hugging young women, and the defense raises this objection for the first time on appeal.
- B. The trial court properly admitted evidence of video chat communications, and such evidence was not character evidence.
- C. The trial court properly admitted evidence on redirect that the defendant made a romantic overture to an adult member of the youth ministry after the subject was raised in cross-examination.
- D. The defendant was not denied effective assistance of counsel, and defense counsel's affirmative rejection of a limiting instruction regarding character was legitimate trial strategy.
- E. The prosecutor's statement during closing argument that the defendant sought romantic relationship with a younger adult woman was permissible.
- F. The cumulative error doctrine does not apply, and the defendant's trial was not fundamentally unfair.
- G. The State concedes that the community custody condition related to romantic relationships should be stricken.

H. The State concedes that the community custody condition related to minor males is not related to the crime of which the defendant was found guilty.

## II. STATEMENT OF FACTS

N.A. is the victim in this case, and at the time of the events she was a 15-year-old youth group member at Word of Faith Church in Kennewick, Washington, where she volunteered with the media presentation aspects of the church. RP at 274, 281-83. Gabriel Gomez is the defendant in this case, and at the time of the charged conduct was a male in his early thirties. RP at 254. As early as 2006, the defendant was a member of the Word of Faith Church in Kennewick, Washington. RP at 247. There, the defendant volunteered within the children and youth ministry programs. RP at 234. In 2015, the defendant's volunteer responsibilities included direct supervision over many youth group members and Sunday school pupils. RP at 234, 253-54. Specifically, the defendant would supervise youth group members in the operation of the sound and media systems of the church. RP at 253. N.A. was at times supervised by the defendant during her participation in the youth ministry. RP at 285.

While he was a volunteer for the church, the defendant was repeatedly asked to modify his behavior in how he would physically

interact with children. RP at 235-37, 248, 263. Specifically, the defendant was asked to no longer embrace minors with anything other than a “side-hug.” RP at 254. This was a policy for those in the church’s leadership positions. *Id.* The policy aimed to not only protect the youth group members, but also to protect the leadership members by avoiding “anything questionable.” *Id.*

The defendant had a personal relationship with the victim and would routinely interact with her both as a youth group leader and on a private level. RP at 283. The defendant would speak with N.A. over texts and a video chat service outside the presence of others. RP at 290-95. On one such occasion, the defendant spoke to N.A. by video from his home and showed her his bedroom, closet, porch, and invited N.A. to come and clean his home. RP at 294. On another occasion, the defendant invited N.A. to a New Year’s Eve party at his home, and after N.A. declined the invitation, the defendant stated that N.A.’s brothers could also come along. RP at 294-95. The defendant also bought N.A. at least one gift, a little teddy bear that she had discussed with a friend, not the defendant. RP at 295. The defendant had “pet names” for N.A. and would regularly compliment her on her appearance. RP at 283-86. The defendant would routinely discuss with N.A. the other members of the youth group that the defendant liked or, if allowed, which he would like to date. RP at 287. The

defendant discussed with N.A. their age discrepancy and mathematical equations involved in determining what an appropriate age range would be in a younger romantic partner. RP at 287. Occasionally, N.A. would ask the defendant not to hug her, which he would respect for 12 to 15 minutes before returning to hugging her again. RP at 304.

N.A. frequently worked in the sound booth of the church facilities. RP at 286. These sound booths are described to be very small spaces that include a standing workstation equipped with a computer and sound board. RP at 262, 287. Sometime in the months prior to January 24, 2016, the defendant embraced N.A. from behind while she was working at the standing workstation. RP at 296. During that embrace, the defendant also had grasped and squeezed her breasts for 20-30 seconds. RP at 296-97. The two were the only individuals in the sound booth at the time. *Id.*

For her own reasons, N.A. did not disclose this event until after the defendant resigned from his volunteer duties with the church. RP at 298-300. According to the testimony of Mr. Eric Slater, the church leadership believed that the defendant had “used his position of leadership to persuade [sic] a relationship with someone . . . directly underneath him in the ministry.” RP at 265. In fact, N.A. only spoke up about the incident after she learned that the defendant had been asked to resign from the youth group ministry after attempting a romantic relationship with an 18-

year-old youth group member by the name of Christie Walker. RP at 265. Ms. Walker declined the defendant's advances and asked the church leadership to intervene with the defendant. RP at 266. The church asked the defendant to step down from the youth ministry in the course of an investigation into the incident with Ms. Walker. RP at 265. It was during this investigation that N.A. spoke to church leadership about the molestation. RP at 299.

The defendant was charged with one count of Child Molestation in the Third Degree. CP 1. At trial, the jury found Mr. Gomez guilty of this charge. CP 149; RP at 373. The defendant now appeals that verdict. CP 204-05.

### **III. ARGUMENT**

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or to show that the person acted in conformity with that character. ER 404(a). However, such evidence may be admissible for other purposes. ER 404(b). The non-propensity purpose of other-acts evidence need not be of those listed by ER 404(b). *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012) (“... there is one improper purpose and an undefined number of proper purposes.”). In order to be admitted, ER 404(b) evidence must survive a four-part test wherein the trial court:

must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charges [sic], and (4) weigh the probative value against the prejudicial effect.

*State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The party seeking to introduce the evidence has the burden of establishing the first three elements. *Id.*

There appeared to be no dispute at trial as to whether these acts underlying any ER 404(b) evidence occurred and the court made no specific finding on the matter. The Brief of Appellant also makes no issue of whether there was a preponderance of the evidence that these circumstances took place. Therefore, the State will focus the discussion on the remainder of the four-part test.

In his argument, the defendant assigns multiple errors to predominately three categories of evidence admitted at trial: (1) repeated admonishments for hugging, (2) attempting to date a younger member of the congregation, and (3) engaging in at least two video chats with the victim.

**A. The trial court properly admitted evidence of repeated admonishments for hugging.**

**1. The defendant raises this objection for the first time on appeal.**

The Court is hearing an objection to that evidence on the basis of relevance for the first time on appeal. The trial record is silent regarding any defense objection challenging the relevance of any evidence in the absence of the defense of mistake or accident.

To preserve an evidentiary argument on appeal, the grounds of the evidentiary objection at trial must also serve as the basis for the assignment of error on appeal. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). A defendant may not “remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). If made, any objection must be timely and specific. *State v. Morley*, 46 Wn. App. 156, 162, 730 P.2d 687 (1986); *State v. Alden*, 73 Wn.2d 360, 363, 438 P.2d 620 (1968). Such specificity affords the trial court the opportunity to proactively correct any potential error before prejudice occurs. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); ER 103(a)(1).

Defense counsel did not raise the argument—either in a written motion or at the pretrial hearing on motions in limine—that the evidence

of repeated admonishments and the hug policy would be irrelevant if accident or mistake was not an issue. CP 94; RP at 12-17. The grounds for the objection at the trial court were that the characterization of the defendant being a “teddy bear,” or otherwise a hugger, as an impermissible character trait. *Id.* There was no pretrial discussion that such evidence was irrelevant in the absence of a claim of accident or mistake. *Id.* There were no objections to this evidence on the basis of relevance during the State’s entire presentation of evidence. *See* RP at 231-311. It is for the first time here that the defendant asserts this evidence is irrelevant in the absence of the affirmative defense of mistake.

**2. The defendant put accident or mistake at issue.**

Defense counsel was traveling under a theory of accident prior to and at trial, without affirmatively claiming that defense, and has hereafter abandoned this theory. The State agrees that evidence offered to rebut accident or mistake remains irrelevant until a claim of accident or mistake is made by a defendant. *State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984). However, the State disagrees with the defendant that these defenses *only* “arise[] where the defense is [general] denial and the defendant affirmatively asserts that the victim’s injuries occurred by happenstance or misfortune.” *State v. Roth*, 75 Wn. App. 808, 819, 881

P.2d 268 (1994) (citing *State v. Gogolin*, 45 Wn. App. 640, 727 P.2d 683 (1986), and *State v. Fernandez*, 28 Wn. App. 944, 628 P.2d 818 (1980)).

To read *Roth* as outlining a single pathway to rebutting accidents and mistakes is simply too restrictive. *See, e.g., State v. Maesse*, 29 Wn. App. 642, 649, 629 P.2d 1349 (1981) (holding that evidence rebutting the possibility of accidental arson was admissible under ER 404(b) despite there being no asserted defense of mistake). This reading would allow a defendant who never “affirmatively asserts” mistake or accident to argue the same at any pretrial hearing, during voir dire, during opening statements, throughout trial, and closing arguments, etc., while any opportunity to hear evidence rebutting the possibility of mistake or accident would be foreclosed.

Here, the defendant did exactly as this restrictive reading of *Roth* would suggest. Prior to trial, the defendant identified general denial as the only defense. Omnibus Order<sup>1</sup> at 3. During voir dire, defense counsel attempted to examine potential jurors on the issue of “accidental touchings [sic] that happen in our society . . . .”<sup>2</sup> RP at 193. The jury was instructed

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<sup>1</sup> Incorporated into the record in the State’s Supplemental Designation of Clerk’s Papers filed May 22, 2018.

<sup>2</sup> It very well may be that defense counsel was correct in attempting to identify at trial that incidental touching in our society occurs, and that the intent of that touch can be mistaken. The circumstances shift and change if a hug is between males, between females, or between a male and a female. *See generally Zetwick v. Cty. of Yolo*, 850 F.3d 436, 442 (9th Cir. 2017) (holding that a reasonable juror could conclude that the hugging of men and women included differences in the ways men and women routinely interact

that the defendant's plea of not guilty put every material element at issue, to include seeking sexual gratification. CP 138; RP at 348; WPIC 4.01.

Later, during opening statements, defense counsel declared that "there was no sexual motivation, no sexual contact that my client was trying to achieve in any situation with [N.A.]." RP at 230. Further, defense counsel stated to the jury that this was "not a case where my client did any act with any sort of sexual motivation," and that "[t]his case is blown out of proportion." RP at 231. The fair inference from these statements is that a simple hug had been mistakenly or accidentally perceived as a sexual advance, resulting in the situation being overblown. This was the defense's theory of the case.

The same is confirmed by the trial record. In the defense counsel's cross-examination of N.A., the defendant inquired as to whether N.A. previously asked the defendant to stop hugging her. RP at 304. Whereupon she stated that she had, and for a period of time the defendant would refrain from hugging her, but thereafter continue despite her request. *Id.* Defense counsel asked whether this was offensive to her, or "[was] it just a game?" *Id.* Later, during defense counsel's attempt to impeach N.A. with inconsistencies, the question was asked "Do you

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with members of the same sex and of the opposite sex); *Drew v. First Sav. of New Hampshire*, 968 F.Supp. 762 (D.N.H. 1997) (holding that two uninvited hugs by female

remember telling [the detective] that you thought this might have been an accident on Mr. Gomez's part?" RP at 306. The issue of whether N.A. characterized the incident as an accident came up in the defendant's own case-in-chief. A majority of the direct examination of the detective involved defense counsel asking about whether N.A. had stated that "she thought it might have been an accident[.]" RP at 319-20.

The defendant presented all the trappings of a defense of mistake or accident, yet never affirmatively asserted such defense. The contest at trial was always going to be on whether there was some measure of misunderstanding surrounding the defendant's actions. Furthermore, to say that such evidence is irrelevant because the defendant did not "affirmatively assert" defense of accident ignores the purpose behind the definition of sexual contact, as the offense of child molestation requires a showing of sexual gratification precisely because the touching may be mistaken or accidental and therefore not sexual contact. *See State v. Gurrola*, 69 Wn. App. 152, 157-58, 848 P.2d 199 (1993) ("Offenses such as child molestation or indecent liberties reasonably require a showing of sexual gratification because the touching may be inadvertent."). Therefore, this evidence was relevant to rebut a very strong theory of accident or mistake that was put to the jury at trial.

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branch manager while giving female employees paychecks were not sufficiently severe

**3. The evidence is nevertheless admissible for the non-propensity purpose of proving of intent.**

Even if the defendant properly preserved the issue for appeal, and even if the defendant did not put mistake at issue, the State nevertheless believes that this evidence is highly relevant to a material issue of intent.

It appears that for some time, trial courts in Washington State have repeatedly admitted ER 404(b) evidence to negate the unvoiced defense of mistake or accident and have thereafter struggled mightily with how to shoehorn what they intuitively know to be a non-propensity purpose of ER 404(b) evidence into what appears to be an irrelevant rebuttal of accident. 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, 1214 (1986) (discussing confusion in trial courts on how to properly handle ER 404(b) when offered to show absence of mistake).

Here, what the trial court and respective trial counsel collectively mislabeled as absence of mistake or accident can more accurately be called intent to seek sexual gratification. The trial court's analysis of this is absent from the record; however, a reviewing court can nevertheless review the trial court's decision in this light from reading the whole trial record. *See generally State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697

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or pervasive incidents of harassment).

(1982) (holding that a trial court record that is silent as to which purpose ER 404(b) evidence is to be admitted does not preclude a review of other possible purposes and their relevance to the crime). A reviewing court may uphold a trial court decision on any correct grounds. *Gresham*, 173 Wn.2d at 419.

Had the trial court and counsel identified intent as a logical non-propensity purpose of this evidence, (1) it still would have been highly relevant evidence of his intent to seek sexual gratification; (2) the probative value of that evidence would have outweighed the prejudicial effect; and (3) the trial outcome would not have been materially affected by this error, and the defendant cannot show prejudice.

**a. Repeated admonishments for hugging are relevant evidence of intent.**

A defendant is guilty of Child Molestation in the Third Degree if he or she had sexual contact with a child between the ages of 14 and 16 years old, and the defendant is at least two years older than the child. RCW 9A.44.089. Sexual contact is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party . . . .” RCW 9A.44.010(2); WPIC 45.07. The breasts are an “intimate part” as a matter of law. *Matter of Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979); WPIC 45.07. To

prove the existence of sexual gratification and sexual contact, it is not enough to simply show the criminal act occurred, as this “intent” is not swallowed up in the proof of the act. *See State v. Smith*, 103 Wash. 267, 268, 174 P. 9 (1918) (discussing that guilty intent is inherently proven by the criminal act in many circumstances, making proof of intent immaterial if the act is proven).

The definition of sexual contact was presented to the jury in this case. RP at 349; WPIC 45.07. While sexual gratification is not an essential element of the crime of child molestation, evidence tending to show that the purpose of the contact was for sexual gratification also tends to prove that the contact was sexual in nature, making “[i]ntent . . . relevant to the crime of . . . child molestation because it is necessary to prove the element of sexual contact.” *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006) (en banc); *see also State v. Lorenz*, 152 Wn.2d 22, 30-36, 93 P.3d 133 (2004). Past encounters with a particular victim need not be explicit sexual conduct and need not be criminal to be admissible under ER 404(b). *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953); *State v. Golladay*, 78 Wn.2d 121, 142, 470 P.2d 191 (1970), *overruled on other grounds by State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976).

The defendant was repeatedly told to change how he hugs the younger members of the congregation. RP at 236-37, 248. Despite that

reproach, the defendant continued to hug the young women of the congregation in the manner proscribed by the leadership. RP at 248. Those direct requests were designed to protect the youth of the church, but also to protect the church faculty, including the defendant. RP at 254. N.A. herself specifically and repeatedly asked the defendant not to hug her, which resulted in the defendant refraining for a short period before going back to hugging her. RP at 304. Regardless of all these compelling reasons to refrain from hugging N.A., the defendant chose to hug N.A. from behind and, on this occasion, grasp her breasts.

The previous encounters and admonishments give color and depth to this act—that, for the defendant, the purpose of performing this act outweighed the importance of the church’s policy or the victim’s wishes. It puts the probable conclusion that this was for sexual gratification at odds with the improbable purpose of expressing platonic affection in his own way despite the church policy and its purposes. Without the foregoing evidence (i.e., without the full story), the defendant’s conduct can reasonably appear innocent or accidental. With it, a reasonable jury can fairly and fully consider whether sexual gratification was an important enough reason to act in light of all this evidence of policies and admonishments, and still have an abiding belief in the charge following that deliberation.

**b. The probative value of this evidence vastly outweighed the prejudicial effect.**

The balancing test between probative value and prejudicial effect is a relative one. *See State v. Grier*, 168 Wn. App. 635, 650, 278 P.3d 225 (2012). Therefore, if the threshold of prejudicial effect is very low, the threshold of probity is also very low. In most instances of ER 404(b) evidence, the prejudicial effect is at its highest, as previous criminal conduct is commonly used by juries to impugn a defendant before the conclusion of evidence. Furthermore, testimony of a child-victim serves as the only evidence in a great many number of cases of child molestation. This results in one side of this balance receiving significant attention—with the risk of prejudice at its maximum, the primary question is whether the evidence is probative.

However, the circumstances here are radically different. The previous conduct is neither criminal nor is it necessarily bad conduct—it is simply a previous act that might easily be described as thoughtless. Considering the other evidence that would speak to the defendant seeking sexual gratification—such as repeated comments on her appearance and the pet names that the defendant would give—the picture becomes much clearer; this was a groping and was not intended to display platonic affection. That picture is fully rounded out by the introduction of the

church hug policy and the repeated reminders the defendant received about that policy.

**c. The outcome of the trial was not materially affected by such an error and the defendant cannot show prejudice.**

Assuming for the sake of argument that the trial court committed error in the ER 404(b) analysis, such an error was harmless and does not warrant reversal.

An error in admitting evidence under ER 404(b) is not of a constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). A trial court's ruling will not be overturned unless there is a reasonable probability that the outcome of the trial would have been different if the error had not occurred. *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). To determine if the outcome of the trial would have reasonably been different, the court's analysis would have had to come to a different result, and there simply is no reason to believe that the trial court's rulings would have been any different. Arguably, there would have been more support for a finding that the evidence is logically relevant to intent versus absence of accident or mistake, and the probative value of the offered evidence still outweighs the prejudicial effect.

The evidence of the continued proscribed and unwanted hugs tends to make sexual gratification as the purpose for those hugs more probable

than it would without the evidence. ER 401. Evidence tending to show that an act was for sexual gratification is material to the issue of whether sexual contact occurred. *Stevens*, 158 Wn.2d at 310. The defendant needed to be reminded on how to behave around female youth ministry members making the fact that he acted for the sexual gratification of either himself or the victim more probable by removing the reasonable chance that this was an incidental contact. Therefore, the evidence meets the relevancy requirements set out by ER 401 and ER 403.

Again, given that the nature of the “bad” acts is minimal, the prejudicial effect is also quite diminished. The only evidence of the sexual contact was the testimony of N.A. Before any witness even speaks a word of testimony, the potential that this was an incidental, mistaken, or accidental contact is very high. The existence of a church leadership hug policy—and that the defendant was constantly reminded of that policy in response to his conduct—makes this evidence substantially more probative than prejudicial. ER 403.

Furthermore, the defendant cannot show prejudice before a jury in the absence of the trial defense counsel’s tactical decisions regarding limiting instructions. As part of the trial strategy of the defendant, the jury was never instructed on which limited purpose this evidence could be considered. Additionally, nothing in the record signals that defense

counsel would have chosen differently if this evidence was offered to show intent as opposed to absence of accident or mistake—in fact, just the opposite. RP at 339 (“If I can avoid them at all costs I do and my client is in agreement.”). Regardless of trial counsel’s stated strategy, the trial court was not required to sua sponte issue a limiting instruction on the prior acts evidence. *State v. Russell*, 171 Wn.2d 118, 122-24, 249 P.3d 604 (2011). To do so might very well have been error. *See State v. Grier*, 171 Wn.2d 17, 45, 246 P.3d 1260 (2011).

**B. Attempt to date a younger member of the congregation.**

**1. This was a proper inquiry on redirect.**

Indeed, the question of disclosure was not at issue and was substantively resolved prior to trial by the trial court’s limiting instruction to counsel. RP at 26. It is clear that prior to trial, the parties believed that the subject of the romantic overture to Christie Walker would arise in the context of N.A.’s disclosure to the church leadership about the molestation.

However, the subject of Ms. Walker arose during the cross-examination by defense counsel of Eric Slater about the dismissal of the defendant. On direct, the State only brought out testimony that the defendant was asked to step down from the youth ministry because of an “incident” with an adult member of the youth ministry. RP at 257. In their

cross-examination of Mr. Slater, the defense counsel elicited testimony that he had misinformed another witness about the circumstances of the defendant's departure from the youth ministry. RP at 263. In so doing, the defense did not fully explore the incident that caused the dismissal, but merely left the examination off with whether the defendant's departure was voluntary or not, and that Mr. Slater had intentionally misinformed another witness. Following the cross-examination by the defense, the State thereafter elicited testimony that rounded out the story: this "incident" involved an attempt to date an adult-aged youth ministry member, and the church leadership had concerns that the defendant had used his position to be able to ask out this young woman. RP at 265-66. The essence of the full story was that Mr. Slater—and the church leadership—intentionally misinformed the youth ministry members because the leadership understood the potential impact this might have on the defendant's reputation in the church.

On redirect, the prosecution may clear up confusion from cross-examination, rehabilitate witnesses, or otherwise meet the testimony on cross-examination. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971) (en banc). Here, the circumstances of the church's position regarding the defendant's dismissal were unclear, and defense counsel's questioning made it appear that Mr. Slater lied about this dismissal. What is more, the

prosecutor never ran afoul of the original pretrial ruling and limited the inquiry into the name and age of the adult member of the youth ministry, and the circumstances that led Mr. Slater to ask the defendant to step down. RP at 265-66.

**2. The State’s closing argument was proper.**

During closing arguments, the prosecutor made an argument that the evidence showed that the defendant liked “girls significantly younger than him.” RP at 362. The prosecutor went on to remind the jury of the young woman’s age, of the defendant’s age, and that this episode occurred when the defendant was in a leadership position over her. *Id.* Defense counsel neither objected at the time, nor moved for a mistrial due to the statements of the prosecutor during closing arguments. *See id.*

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Despite the absence of any objection during trial, appellate review on this issue is not precluded if the alleged prosecutorial misconduct is so “flagrant and ill-intentioned that a curative instruction from the court could not have obviated the resulting prejudice.” *State v. Klok*, 99 Wn. App. 81, 82, 992 P.2d 1039 (2000); *see also State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988) (en banc). It is this standard, “not the manifest error test of RAP 2.5(a), [that] provides

the appropriate standard for determining the reviewability of a prosecutor's argument to which the defendant did not raise an objection in the trial court." *Klok*, 99 Wn. App. at 83. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Lastly, the prosecutor's comments during closing arguments are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The defendant argues that the prosecution's sole purpose for admitting this evidence was to present it as non-permissible propensity evidence, and that the "true purpose" is illustrated by this closing argument. Br. of Appellant at 24. However, as discussed above, the evidence was the subject of redirect of the State's witness following the defense's cross-examination concerning Ms. Walker. Here, the argument framed for the jury the fact that the defendant was willing to place a great deal at risk for sexual gratification—this was an attraction strong enough to cause the defendant to choose to place his position in the church in peril. There was no inflammatory language, nor any suggestion that this episode was in any way disgusting or morally reprehensible. This is not

flagrant and ill-intentioned; certainly, a curative instruction could have obviated any prejudice to the defendant, if one had been requested.

**C. N.A. testimony regarding video chats with the defendant.**

**1. This is not character evidence.**

The defendant's objection and assignment of error is misplaced. Ironically, it is the defense counsel who was and is painting the defendant as "the creep in the church" to recolor permissible evidence under ER 403 as impermissible propensity evidence barred by ER 404. Despite counsel's characterization, the evidence of video chats between the defendant and N.A. was not offered to show that the defendant acted in conformity with any pertinent character trait. Quite simply, this is relevant and limited evidence of the nature of the newly-developing, extra-parental, and private relationship between the defendant and this child, and is admissible under ER 403.

ER 404 does not apply to evidence that is not character evidence. *State v. Nichols*, 184 Wn. App. 1020, \*7 (2014) (unpublished)<sup>3</sup>; *In re Meistrell*, 47 Wn. App. 100, 109, 733 P.2d 1004 (1987). Character evidence is that which speaks to a "generalized description of a person's

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<sup>3</sup> This unpublished opinion, attached as App. A, is a nonbinding authority that has no precedential value but is cited for such persuasive value as the

disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness, that usually is regarded as meriting approval or disapproval.” KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 195, at 574 (7th ed. 2016).

N.A.’s recollection of these two instances of video chats do not speak to a general trait of the defendant and can hardly be described as meriting approval or disapproval. This is direct evidence of the nature of the relationship between the defendant and N.A. and is circumstantial evidence of the direction the defendant wished to take that relationship—both of which are highly relevant to whether the crime charged was aimed toward sexual gratification or was a simple display of affection. This evidence was not offered to prove any character trait of the defendant and thus, by inference, a propensity toward crime.

**2. These instances were not remote in time.**

Even if this is evidence of a character trait, other conduct is admissible if it is so connected in time, place, circumstances, or means employed that proof of such other conduct constitutes proof of the history of the crime charged. *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981). It logically follows that being connected in time and place is relative to the

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Court deems appropriate. GR 14.1; *Crosswhite v. Dep’t of Soc. and Health Servs.*, 197 Wn. App. 539, 389 P.3d 731 (2017).

circumstances of the crime—crimes between lovers have a different time and place horizon than those between strangers.

By their very nature, relationships are creatures of time. *See generally* Jeffrey A. Hall, *How Many Hours Does It Take to Make a Friend?*, JOURNAL OF SOCIAL AND PERSONAL RELATIONSHIPS, March 2018. There is no contention that there existed a relationship between the defendant and N.A., and such relationship was a longstanding one. RP at 283. N.A. testified that she knew the defendant since she was around eight years old. RP at 282. It should also be noted that one conversation was about an upcoming New Year's Eve party, so this presumably occurred sometime in late December. RP at 294-95. Given the breadth of the relationship, it is very reasonable to assert that two video chats between these two within one to four months of the crime is closely connected in time as contemplated by the rules governing *res gestae*. Such evidence was necessary to provide context to the defendant's relationship to N.A. and allowed the jury to view a more complete story of the crime charged. *Tharp*, 96 Wn.2d at 594.

**D. Defense counsel's choice to not request a limiting instruction did not deny the defendant effective assistance of counsel.**

A criminal defendant has the constitutional right to counsel, to include effective assistance of counsel. *Strickland v. Washington*, 466 U.S.

668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Assistance can be ineffective if the choices and conduct of counsel “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686. To prevail on appeal on a claim of ineffective assistance of counsel, the defendant must show both ineffective representation and resulting prejudice. *State v. Jury*, 19 Wn. App. 256, 262-63, 576 P.2d 1302 (1978) (collecting cases).

**1. Defense counsel affirmatively elected to forego a limiting instruction for tactical reasons.**

Ineffective representation does not include an exhaustive list of things a defense attorney must accomplish, but rather it “entails certain basic duties,” to include “the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions,” and more generally “to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland*, 466 U.S. at 688. The defendant carries the burden to show deficient performance and overcome a strong presumption that counsel performed effectively. *Grier*, 171 Wn.2d at 33; *State v. West*, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015). Generally, trial tactics and trial strategy cannot form the basis of a finding of deficient performance. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *State v.*

*Johnston*, 143 Wn. App. 1, 16, 177 P.3d 1127 (2007). Here, the defense counsel clearly gave voice to a trial strategy that avoided limiting instructions, and further that he had discussed this strategy with the defendant who agreed to it. RP at 339 (“If I can avoid them at all costs I do and my client is in agreement.”).

**2. The trial court was not required to issue a limiting instruction sua sponte.**

The trial court was under no duty to issue a limiting instruction absent a request from defense counsel. *Grier*, 171 Wn.2d at 45 (“[S]uch a rule would be an unjustified intrusion into the defense prerogative to determine strategy . . .”). Upon the trial court’s offer, defense counsel rejected to include a limiting instruction, stating clearly that he personally believed that they tended to bring too much attention to the prior act evidence. RP at 24; *see also State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). In this circumstance, it would have been improper for the trial court to sua sponte issue a limiting instruction over the wishes of defense counsel.

**E. The cumulative error doctrine does not apply here.**

If several trial court errors are independently found to be harmless, the cumulative effect may still compel reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385

P.2d 859 (1963); *State v Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Evidentiary issues are not of a constitutional magnitude, and therefore only require reversal if, within reasonable probabilities, those errors materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *Tharp*, 96 Wn.2d at 599. There is no talismanic number of harmless errors that then become cumulative, but rather a defendant is entitled to a new trial when the constituent errors combine to produce a trial that is fundamentally unfair. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) (en banc).

If any errors did occur, the defendant has not been able to identify which, if any, materially affected the outcome of the trial, and furthermore has failed to demonstrate the requisite prejudice to entitle him to a new trial.

**F. Community custody conditions 5 and 9.**

The State concedes on Issues 5 and 6 in the Brief of Appellant with regard to community custody conditions 5 and 9 and agrees this case should be remanded to the superior court to modify the conditions as set forth in the Brief of Appellant.

**G. Award of costs.**

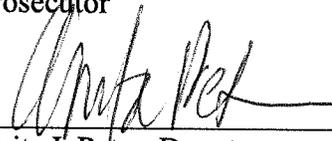
The State is not requesting appellate costs and concedes this issue.

#### **IV. CONCLUSION**

Based on the foregoing, the State respectfully requests that this Court find the trial court committed no error and uphold the jury trial's finding of guilt and the court's ruling of conviction for Child Molestation in the Third Degree. This case should be remanded to modify the community custody conditions as set forth in the Brief of Appellant.

**RESPECTFULLY SUBMITTED** on May 22, 2018.

**ANDY MILLER**  
Prosecutor

A handwritten signature in cursive script, appearing to read "Anita Petra", written over a horizontal line.

Anita I. Petra, Deputy  
Prosecuting Attorney  
Bar No. 32535  
OFC ID NO. 91004

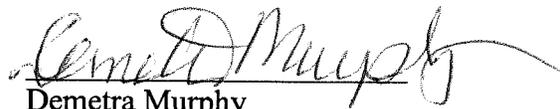
**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Maurina A. Ladich  
Eastern Washington Appellate Law  
PO Box 19203  
Spokane, WA 99219-9203

E-mail service by agreement  
was made to the following  
parties: admin@ewalaw.com

Signed at Kennewick, Washington on May 22, 2018.

  
Demetra Murphy  
Appellate Secretary

## Appendix A

*State v. Nichols*, 184 Wn. App. 1020 (2014)  
(unpublished)

184 Wash.App. 1020

NOTE: UNPUBLISHED OPINION, SEE WA R GEN  
GR 14.1

Court of Appeals of Washington,  
Division 3.

STATE of Washington, Respondent,  
v.

Christopher George NICHOLS, Appellant.

No. 31037-0-III.

|  
Oct. 28, 2014.

Appeal from Stevens Superior Court; Honorable Patrick  
Monasmith, J.

**Attorneys and Law Firms**

Kenneth H. Kato, Attorney at Law, Spokane, WA, for  
Appellant.

Timothy Rasmussen, Lech Radzimski, Stevens County  
Prosecutors Office, Colville, WA, for Respondent.

**UNPUBLISHED OPINION**

SIDDOWAY, C.J.

\*1 Christopher Nichols felt the full weight of the changes in sentencing law made by the 1995 “Hard Time for Armed Crime” Act when he received a 127.5-year sentence for crimes arising out of a single incident: a burglary, in which the ex-felon stole a gun safe containing 23 firearms. He appeals, arguing that the trial court erred in admitting evidence of a roughly contemporaneous murder committed by his accomplice in the burglary, and in refusing to consider his request for an exceptional downward sentence. Because we find no error and a statement of additional grounds filed by Mr. Nichols has no merit, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

On July 20, 2012, a community corrections officer made a call to the Stevens County home of a probationer, and the door was answered by the probationer's brother,

Eric Booth. Lacerations and contusions on Booth's face matched a description of injuries the officer had been told had likely been sustained by a person involved in the murder of 63-year-old Gordon Feist several days earlier. Feist had been found dead in the driver's seat of his utility vehicle, which had crashed into a power pole off a road near his home. Examination of his body revealed that before the crash (and evidently precipitating it) Feist had been shot twice in the right side of his head. Damage to the windshield and dashboard suggested that the shooter had been sitting in the front passenger's seat, had been thrown forward violently when the utility vehicle crashed into the pole, and would have sustained significant facial injuries as well as injury to one or both knees.

Deputies had recovered two handguns at the scene of the accident. The first was a revolver belonging to Mr. Feist and the second was a .22 magnum Derringer pistol, which had been used to kill Mr. Feist. The serial number on the Derringer showed that it was one of 23 firearms that had been stolen (along with other items) from Stevens County resident Robert Hannigan about a month earlier.

Given Mr. Booth's injuries, and because he was acting nervous, the corrections officer contacted the sheriff's department and Detective Michael Gilmore traveled to the Booth home. Within the prior week, the sheriff's department had been contacted by witnesses who had come across both a Honda car that had been taken during the burglary of the Hannigan home and a number of the stolen guns. The Honda car had been found abandoned, pushed over an embankment. The guns had been found after the owner of property on Old Dominion Road came across a pried-open gun safe on state land near his property. When sheriff's deputies searched the area, they found other items stolen in the Hannigan burglary, including the guns, which had been buried in black trash bags.

Upon seeing Mr. Booth's injuries, Detective Gilmore found them to be consistent with those that would have been suffered by Mr. Feist's passenger. He also saw a box of trash bags with red drawstrings inside the Booth home that were identical to the bags recovered with the buried firearms. The detective arrested Mr. Booth on suspicion of murder after Mr. Booth's father told the detective that he first saw his son's injuries on the prior Sunday night or Monday morning—timing consistent with the Feist murder—that he did not believe his son's story about having

sustained the injuries in a motorcycle accident, and that his son had performed work at Mr. Feist's property several weeks earlier. A search of Mr. Booth's vehicle pursuant to a search warrant resulted in the discovery of a Walther .22 caliber pistol and other items stolen from the Hannigan home.

\*2 Mr. Booth confessed to the murder of Mr. Feist on July 26. He told detectives that on the day of the murder, he and two friends, Collette Pierce and Jesse Fellman-Shimmin, had driven to Mr. Feist's house intending to burglarize it. Mr. Booth knew from performing a plumbing job at the residence that Mr. Feist owned a safe containing money and other valuables. The three friends parked about a mile down the road and walked up to the house. Mr. Booth had brought the Derringer, which he had obtained several weeks earlier when he and the defendant, Christopher Nichols, burglarized the Hannigan home. Mr. Feliman-Shimmin was armed with a crowbar. When they arrived at the house, Ms. Pierce knocked on the door and, when Mr. Feist answered, told him a story about running out of gas.

Mr. Feist, who was armed with a revolver, retrieved a can of gas from his garage, put it in the back of a utility vehicle and told the three that he would give them a ride to their car. They climbed aboard but as they drove toward the car, Mr. Booth became worried that Mr. Feist was going to figure out what they were up to and would shoot him—so Mr. Booth shot first, hitting Mr. Feist twice in the head. Mr. Feliman-Shimmin was the only one able to jump out of the vehicle before it crashed into a power pole. Mr. Booth and Ms. Pierce were thrown forward and Mr. Booth lost hold of the Derringer. Unable to find it, he left it at the scene of the accident.

The three ran back to Mr. Feliman-Shimmin's car and drove to a nearby campground, where they started a campfire and burned their bloodied clothing. Mr. Feliman-Shimmin called Mr. Nichols to say they needed help and Mr. Nichols drove to the campground to meet them. Upon learning that Mr. Booth had left the stolen Derringer behind, Mr. Nichols was upset. He drove to the reported scene of the accident, only to have to turn back because the sheriff's department was already there.

Mr. Booth confessed to the Hannigan burglary as well, telling Detective Gilmore that he had previously worked at the Hannigan home and had burglarized it with Mr.

Nichols. Mr. Booth drove, and left his car outside a locked gate on the driveway. After he and Mr. Nichols determined that no one was home, they found a way in and took a number of items, including jewelry, \$10,000 worth of ammunition, and a locked gun safe located in a bedroom closet, which they moved outside using a dolly. They took a Honda car from the garage, loaded the stolen items into it, and Mr. Nichols drove the car to the driveway gate, where the two men cut the lock. They then drove in separate cars to a piece of remote state land not far from Mr. Booth's home, where they hid the stolen property. Mr. Nichols told Mr. Booth that he knew a place to dump the Honda car; Mr. Booth followed him to a spot on Cole Road, where Mr. Nichols put the car in neutral and pushed it off the road into a ravine.

Mr. Booth told detectives that at some point after the burglary, Mr. Nichols enlisted the help of Mr. Fellman-Shimmin to break into the safe. Mr. Fellman-Shimmin worked at a wrecking yard and had access to heavy tools. Mr. Nichols drove to the wrecking yard to pick up Mr. Fellman-Shimmin, who brought two crowbars, and the two men drove in Mr. Nichols's truck to where the safe was hidden under a large pile of brush. They were soon joined by Mr. Booth. After they pried open the safe, they sorted the guns based on their value and which would be easiest to sell.

\*3 Mr. Fellman-Shimmin kept two guns as compensation for opening the gun safe. The men took some of the guns with them and placed others in garbage bags and buried them in the ground.

Mr. Booth told officers that Mr. Nichols and he had later driven into Spokane, where Mr. Nichols had pawned two of Mr. Hannigan's rings at a Pawn 1 store and the men had scrapped Mr. Hannigan's belt buckles at Pacific Steel and Recycling. Detective Gilmore was quickly able to confirm that Mr. Nichols had pawned two rings at Pawn 1 and drove to Mr. Nichols's home the same day to question him about any involvement with Mr. Booth, Mr. Fellman-Shimmin, or Ms. Pierce in the Feist murder or burglaries involving firearms. Mr. Nichols denied involvement on all counts.

Detective Gilmore thereafter traveled to Pawn 1, determined that it had required picture identification from Mr. Nichols, obtained the receipt signed by Mr. Nichols, and obtained the Hannigan's identification of the pawned

rings. Based on that evidence and Mr. Booth's statement, the State charged Mr. Nichols and an arrest warrant issued on August 8. Mr. Nichols was charged with one count of residential burglary, nine counts of theft of a firearm, one count of theft of a motor vehicle, nine counts of first degree unlawful possession of a firearm, and one count of first degree trafficking in stolen property.

Based on Mr. Booth's admission that he and Mr. Fellman-Shimmin had shot some of the stolen firearms at the home of Mr. Nichols's girl friend, detectives executed a search warrant at her home on August 17. They found ammunition and two of the firearms stolen from Mr. Hannigan. A lab analysis matched fingerprints on one of the guns to those of Mr. Nichols.

At the time Mr. Booth provided his statement to detectives, Mr. Fellman-Shimmin was in jail, having been arrested for a probation violation. Ms. Pierce was arrested the day after Mr. Booth provided his statement. Both Mr. Fellman-Shimmin and Ms. Pierce initially denied any involvement in the Feist murder, but both later relented and agreed to provide statements that proved to be consistent with Mr. Booth's. Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce all eventually reached plea agreements requiring that they testify against Mr. Nichols. Among other inculpatory information they could provide, all three told detectives that when Mr. Nichols met them on the night of the Feist murder, he had several of the stolen Hannigan firearms with him.

Among pretrial motions in limine filed by Mr. Nichols was a motion to preclude the State from "making any reference to the contact that allegedly occurred with Christopher Nichols, Jesse Fellman-Shimm[i]n, Eric Booth, or Collette Pierce on the night of the Feist murder or any other reference to any alleged involvement in the crime." Clerk's Papers (CP) at 199. The trial court denied the motion, explaining that it viewed evidence of the events of that night of the Feist murder as *res gestae*. The court indicated it would consider a limiting instruction as to the evidence, but the defense never requested one.

\*4 Evidence at Mr. Nichols's trial included the testimony of Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce as to the events of the night of the Feist murder. All three were cross-examined by the defense about their agreements to testify against Mr. Nichols in exchange for reduced sentences for the murder. Other evidence against

Mr. Nichols included the testimony of an employee of Pawn 1 who testified that Mr. Nichols had indeed pawned the two Hannigan rings on July 6, and a surveillance video from Pacific Steel taken the same day, which captured Mr. Nichols and Mr. Booth selling the Hannigan belt buckles for scrap. The evidence included a recorded telephone call from the Stevens County Jail between Mr. Nichols and his girl friend, in which she informed Mr. Nichols that she had come home the prior night to find law enforcement executing a search warrant at her home, during which they found a bag with guns in it, bullets, and bullet casings on the ground outside the home. Among statements made during the call were Mr. Nichols's statement that his mother need not worry about hiring a particular defense lawyer because "I'm fucked now," and Mr. Nichols's agreement that his girl friend should say that she did not know which of Mr. Nichols's friends had been in and out of her house when she was not there, or who had "brought shit in and out of [her] house." Report of Proceedings (RP) at 720-21.

The jury found Mr. Nichols guilty of each of the 21 counts charged. Given the standard range for the offenses and the statutory requirement that the unlawful possession of a firearm counts and firearm theft counts run consecutively to one another, those 18 counts alone would result in a standard sentence of 123 to 163.5 years.

The defense asked that the court impose an exceptional sentence downward by either running the 21 counts concurrently or imposing terms below the standard range. It argued that a life sentence was excessive for a single act of theft, was disproportionate compared to the punishment imposed on like offenders, and was disproportionate considering the comparatively low sentences that Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce received for the murder—26.5 years, 25 years, and 15 years, respectively.

The State responded that a standard range sentence was not excessively harsh given Mr. Nichols's criminal history and the fact that the object of the burglary was to steal a gun safe. It argued that the sentence was consistent with the Hard Time for Armed Crime Act (HTACA), Laws of 1995, chapter 129, which was intended to result in lengthy sentences for armed career criminals.

The court acknowledged the harshness of the sentence but observed that the legislature clearly intended that firearm

offenses should receive harsh punishment. It imposed 90 months for each first degree unlawful possession of a firearm and 80 months for each firearm theft. For the residential burglary, theft of a motor vehicle, and trafficking in stolen property charges, the court imposed standard range sentences of 84 months, 50 months, and 80 months, respectively. As provided by statute, it ordered that the firearm offenses run consecutively to one another and that they run concurrently with the sentences for burglary, theft, and trafficking. The result was a total sentence of 127.5 years. Mr. Nichols appeals.

### ANALYSIS

\*5 Mr. Nichols makes two assignments of error: first, that the trial court erred by admitting evidence of an “unrelated murder” in which he was not involved; and second, that it erred by failing to consider his request for an exceptional sentence downward. We address the assignments of error in turn.

#### *1. Evidence of Gordon Feist murder*

One of Mr. Nichols's 14 pretrial motions in limine sought to exclude certain evidence relating to the murder of Gordon Feist. It is important to focus on precisely what Mr. Nichols was seeking to exclude. His 14th motion in limine asked the court to prohibit the State

from making any reference to the contact that allegedly occurred with Christopher Nichols, Jesse Fellman-Shimm[i]n, Eric Booth, or Collette Pierce on the night of the Feist murder or any other reference to any alleged involvement in the crime.

CP at 199.

When the motion was argued, Mr. Nichols's lawyer was clear that the “contact” he was talking about was his client's “supposedly” traveling to the campground after the “Feist burglary gone bad ... had been done, and-and, you know, conversations taking place, certain conduct.” RP at 127. The prosecutor responded that Mr. Nichols was in possession of two of the stolen firearms that night, and expanded on evidence of the contact:

After Mr. Feist was shot, those three individuals went out to Rocky Lake, they were burning their clothes. They made contact with Mr. Nichols. It's alleged that Mr. Nichols then comes out, he's got the Taurus Judge with him that was then later recovered during a search warrant at his girlfriend's house, as well as the AK-47, which is-both those firearms are counts in this-case.

He's alleged to be in possession of them. He's alleged to be waving it around, pointing at them. He's extremely upset because he wasn't included in that burglary. At one point the witnesses will testify that he heard a car coming, he believed it to be law enforcement so he ran up on a hill with the AK-47 and was prepared to open fire on law enforcement.

RP at 130.

Mr. Nichols's lawyer conceded that to the extent that the State was offering the testimony of Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce that his client had possessed two stolen firearms that night, “it's kind of difficult to argue that they can't reference him being in possession of it.” RP at 128. But he continued:

But all this commentary about the —about the Feist murder, and all these other things, I don't think are particularly relevant.

*Id.*

The court denied the motion, explaining:

THE COURT: ... [T]hat's how it appears to me, is more of ... a *res gestae* thing. I mean, certainly the defense is able to cross examine each of these witnesses about, of course, their alleged involvement, or their bias, prejudice, ability to perceive, I mean, the kind of standard impeachment issues. And how do we un-ring that bell?

I don't know that it's possible to preclude the [S]tate from making any reference to that contact without—really limiting the [S]tate in presenting its case, such as it is.

\*6 So, I don't think I can—I can grant that motion in limine. I will listen closely to be sure that it kind of meets with this entire *res gestae* idea, but otherwise ... I don't think the [S]tate can be precluded from ... testimony that

would implicate Mr. Nichols in what they're charging him with through these witnesses, who just happen to have been involved in this other activity.

And maybe there's, you know, a limiting instruction of some sort. I don't think there is, but I think it has to be something that relies on cross examination perhaps to develop, as far as those witnesses and their credibility.

So, I say no, I guess, because I see this as a *res gestae* issue.

RP at 131–32.

Mr. Nichols's brief in this court analyzes the trial court's denial of his 14th motion in limine as if it were a ruling on character evidence governed by ER 404(b). Thus analyzed, he argues that evidence of the Feist murder was improperly admitted because (1) it did not fall within the *res gestae* exception, (2) the trial court failed to conduct the required analysis on the record, and (3) the court failed to give a limiting instruction to minimize the damaging effect of such evidence. The State counters that the evidence about which Mr. Nichols complains on appeal was not character evidence and its admission was not governed by ER 404(b). We agree with the State.

Under ER 404(b), evidence of an individual's other crimes, wrongs, or acts is inadmissible to prove an individual's propensity to act in conformity therewith. Evidence of other bad acts may nevertheless be admissible for other purposes, such as to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). Another proper purpose for admitting evidence of an individual's other crimes, wrongs, or acts, is as *res gestae*, to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting *State v. Sharp*, 27 Wn.App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)).

In support of treating the trial court as faced with a character evidence issue, Mr. Nichols points to the fact that his written motion, after itemizing his 14 concerns, stated that “[a]s to the motions set forth in 8 through 14, said motions are based upon ER 401, 402, 403 and 404.” CP at 199 (emphasis added). He also relies on the fact that *res gestae* was the focus of the trial court's reasoning and is recognized as a proper purpose for which

evidence of a criminal defendant's other crimes, wrongs, or acts can be offered consistent with ER 404(b). But Mr. Nichols's generalized citation of 4 evidence rules in support of 6 motions is not particularly enlightening. His trial lawyer never relied on ER 404(b)—either by name or conceptually—when he orally argued his 14th motion in limine. And the concept of *res gestae* has a long history that extends beyond its application under ER 404(b).

\*7 The principal flaw in Mr. Nichols's ER 404(b)-based argument on appeal, however, is that the trial evidence about which he is complaining is evidence of crimes, wrongs, or acts by *others*, yet his concern is with the conclusion the jurors might have drawn about *him*. He argues that admitting evidence of the Feist murder was highly prejudicial, as he was “essentially convicted of the murder, a crime unrelated to him, rather than the offenses with which he was charged.” Br. of Appellant at 21. By its plain terms, ER 404(b) simply does not apply. The trial court was not required to engage in ER 404(b) analysis. In substance, Mr. Nichols's objection to the evidence is one based on ER 401, 402, and 403: that evidence of the murder was either irrelevant, or, if relevant, that its probative value was substantially outweighed by the danger of unfair prejudice.

A party is entitled to admit relevant evidence except as limited by constitutional requirements or as otherwise provided by statute or the evidence rules. ER 402. A party may assign evidentiary error on appeal only on a specific ground made at trial, thereby having given the trial court the opportunity to prevent or cure any error. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); ER 103(a)(1). The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983).

At the hearing on Mr. Nichols's motions in limine, the trial court, having Mr. Nichols's written motion before it, gave his lawyer, Mr. Maxey, an opportunity to clarify the concern addressed by his 14th motion:

[THE COURT:] ... I think that takes us up to number fourteen, which-by which the defense asks that the [S]tate make no reference to contact allegedly occurring between the defendant and certain of the [S]tate's intended witnesses.

Now, what's your thinking here, Mr. Maxey?

....

... What is the nature of the contact that is alleged to have occurred?

RP at 127. It was incumbent upon the defense to specify its objection in response to this request by the trial court. It was in responding to the court that Mr. Nichols's lawyer made his statement that "all this commentary about the about the Feist murder, and all those other things, I don't think are particularly relevant." RP at 128.

Yet the State had a legitimate need to offer evidence of Mr. Nichols's possession of two of the stolen firearms on the night of the Feist murder. It had a legitimate interest in offering evidence of Mr. Nichols's concern over retrieving the stolen Derringer and his travel to the site of the utility vehicle accident, only to find that the sheriff's department was already there. The State reasonably anticipated that Mr. Nichols's lawyer would cross-examine Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce about the plea deals under which they were testifying and it reasonably raised their murder convictions preemptively, in its direct examination of each of the three witnesses. Mr. Booth's identification and arrest for the murder of Mr. Feist is the most logical and natural way to explain the Stevens County sheriff department's discovery of evidence that Mr. Nichols participated in the Hannigan burglary. It would be impossible for the State to demonstrate to the jury that the presence of the Derringer at the utility vehicle accident site corroborated Mr. Booth's testimony against Mr. Nichols without presenting evidence that Mr. Booth was involved in the accident and lost the gun at that location.

\*8 The trial court reasonably concluded that excluding evidence of the murder would "really limit[ ] the [S]tate in presenting its case." RP at 131. The testimony of Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce was not admitted for propensity reasons-Mr. Nichols can point to no evidence or argument from which a confused jury might have believed that he participated in the botched burglary and subsequent murder of Mr. Feist. Instead, the testimony of Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce linked Mr. Nichols to the theft and possession of the firearms stolen from Mr. Hannigan and served to complete a coherent story. Mr. Nichols has failed to

demonstrate that the trial court abused its discretion in denying the motion in limine.

Finally, and fastening on the trial court's comment that it might give a limiting instruction, Mr. Nichols argues that the trial court erred in failing to give one. He again assumes that ER 404(b) applies and relies on case law holding that when a trial court admits evidence under ER 404(b), a defendant is entitled to have a limiting instruction to minimize the prejudicial effect of such evidence. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). However, even where ER 404(b) applies—and here, it does not—"[t]he failure of a court to give a cautionary instruction is not error if no instruction was requested." *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Mr. Nichols never requested a limiting instruction.

*II Failure to consider an exceptional downward sentence*  
Mr. Nichols's remaining assignment of error is that the trial court failed to consider his request for an exceptional downward sentence. He points to seemingly inconsistent statements made by the court during the sentencing hearing as to whether it enjoyed sentencing discretion.

A defendant generally cannot appeal a standard range sentence such as the sentence imposed on Mr. Nichols. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). He can appeal a failure by the sentencing court "to comply with procedural requirements of the [Sentencing Reform Act of 1981, chapter 9.94A RCW,] or constitutional requirements." *State v. Osman*, 157 Wn.2d 474, 481–82, 139 P.3d 334 (2006); RCW 9.94A.585(2). Where a defendant appeals a sentencing court's denial of his request for an exceptional sentence below the standard range, "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997). "A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range." *Id.* "The failure to consider an exceptional sentence is reversible error." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

\*9 RCW 9.94A.589(l)(c) provides that where “an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm ... and for the felony crimes of theft of a firearm[.] ... [t]he offender *shall serve consecutive sentences for each conviction ...*, and for each firearm unlawfully possessed.” (Emphasis added.) RCW 9.41.040(6) similarly provides:

Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm ... and for the felony crimes of theft of a firearm ... then the offender *shall serve consecutive sentences* for each of the felony crimes of conviction listed in this subsection.

(Emphasis added.) These provisions reflect the policy of the HTACA, which was intended to “provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms.” Laws of 1995, ch. 129, § 1(2)(c).

In *State v. Murphy*, 98 Wn.App. 42, 48–49, 988 P.2d 1018 (1999), the court held that “under the plain language of the HTACA, the trial court should have run each of [the defendant's multiple] firearm theft and unlawful possession convictions consecutively to one another.” See also *State v. McReynolds*, 117 Wn.App. 309, 343, 71 P.3d 663 (2003) (holding that RCW 9.41.040(6) “clearly and unambiguously prohibits concurrent sentences for the listed firearms crimes”).

In *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), however, the Washington Supreme Court held that the same sentences that are mandated to run consecutively under subsection (l)(b) of RCW 9.94A.589 (serious violent offenses that are not the same criminal conduct) may be ordered to run concurrently as an exceptional sentence “if [the sentencing court] finds there are mitigating factors justifying such a sentence.” *Id.* at 327–28. RCW 9.94A.535, the exceptional sentence statute, provides that “[a] departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).”

The State in *Mulholland* argued that the exceptional sentence statute does not apply when the sentencing is under RCW 9.94A.589(l)(b), which requires that sentences for separate serious violent offenses to be served consecutively, but the Supreme Court disagreed. Because the statute “does not differentiate between subsections (l)(a) and (l)(b),” it ruled that the plain language of RCW 9.94A.535 “leads inescapably to a conclusion that exceptional sentences may be imposed *under either subsection of RCW 9.94A.589(1)*.” 161 Wn.2d at 329–30 (emphasis added). It pointed to the fact that an exceptional sentence may be appealed by either the offender “or the State” under RCW 9.94A.535 as further support for its construction, since the State will be the aggrieved party when an exceptional sentence is imposed under RCW 9.94A.589(1) only when “concurrent sentences are imposed where consecutive sentences are presumptively called for.” *Id.* at 330. For these reasons, it held that the sentencing court erred in sentencing Mr. Mulholland under the “mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which he may have been eligible.” *Id.* at 333.

\*10 In this case, consecutive sentencing was required under subsection (l)(c) of RCW 9.94A.589, dealing with firearm offenses, rather than under subsection (l)(b), which was at issue in *Mulholland*. But the language of RCW 9.94A.535 that “[a] departure from the standards in RCW 9.94A.589(1) ... governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section” has equal application to sentences required by RCW 9.94A.589(1) to run consecutively, whether they are serious violent offenses or firearm offenses. The State does not argue otherwise on appeal. Its response to this assignment of error is not that the trial court *could not* run Mr. Nichols's sentences for firearm offenses concurrently as an exceptional sentence. Its response is that the trial court knew that it could, considered Mr. Nichols's request, and ultimately rejected it.

We turn, then, to the court's explanation of its sentencing decision but first provide the context in which it was delivered. Mr. Nichols filed a sentencing memorandum in which he pointed out that the court must first determine the standard sentencing range for his offenses, but “[b]ecause the standard sentencing range for Mr. Nichols' firearms convictions is clearly excessive in light of the purposes of the Sentencing Reform Act, Mr. Nichols[ ]

is entitled to an exceptional sentence downward,” citing RCW 9.94A.535(l)(g). CP at 313. Mr. Nichols devoted a section of his memorandum to “Factors Justifying an Exceptional Sentence Downward,” in which he pointed out that when imposing an exceptional sentence, “the Court has discretion to shorten sentences or impose concurrent sentences or a combination of both.” CP at 314. Mr. Nichols’s sentencing memorandum was filed several days before the July 31, 2012 sentencing hearing and it is clear from the court’s comments during the sentencing hearing that it had read it.

At the sentencing hearing, the State presented its recommendation first. At the outset of addressing consecutive versus concurrent sentences for the firearm offenses, the State made it clear that it did not want the court to jump immediately to its discretion to impose an exceptional sentence. It wanted the court to first consider the presumptive sentences for the crimes and seriously consider the legislative intent. The following exchange occurred:

[PROSECUTOR RADZIMSKI:] ... [A]fter we get done talking about the offender score, which is nine-plus in this situation, we’re left to—the big dispute that we have is what to do with the firearms charges.

And going a little bit out of order, Mr. Maxey has two suggestions: One that the court can run the sentences concurrently with one another, that you can take 1 through 9 and 13 through 21, and disregard the RCWs, the two RCWs that state the court shall run these sentences consecutively. I don’t know how we quite get there, but Mr. Maxey seems to think that the court has discretion. That simply does not fit with the statutes, nor does it fit with—

\*11 THE COURT: *Does the court have authority pursuant to an exceptional sentence to run concurrent? I think that’s probably what he was getting at.*

MR. RADZIMSKI: I think—We can’t—If the court phrases this as concurrent sentences for those offenses I think that’s reversible error. *The only way that the court can get away with some kind of lesser sentence would be to impose an exceptional downward on those 18 offenses.*

I think other than that the court is obligated, given the holdings in *Murphy* and *McReynolds*—In *Murphy* what the court tried to do is they tried to run multiple gun

charges, the unlawful possessions together then the theft of a firearm together and stack those. The Court of Appeals says you can’t do that, the statute is clear, it’s unequivocal, you have to run each one of these offenses consecutive to one another,

RP at 891–92 (emphasis added). The prosecutor returned later to why the court should give great weight to the legislative purpose behind the presumptively consecutive sentences before moving on to consider exceptional sentencing:

[MR. RADZIMSKI:] Judge, the biggest hurdle that I don’t think the defense can overcome is the legislative purpose behind the statute. And it’s not the Sentencing Reform Act that we’re talking about; it’s the Hard Time for Armed Criminals Act. And that statute has one purpose: to give out lengthy sentences for armed career criminals.

Look at Mr. Nichols’ criminal history. That’s what he is, Judge. He’s got an extensive criminal history. He steals guns. Facts like these are why that law is on the books.

Now, the Hard Time for Armed Crime came into effect in 1995. That law, the Sentencing Reform Act, had been on the books since #84. So the legislature knew very well the types of sentences that could be passed and handed out by courts when they passed this law. And Judge, that that law has been on the books since 1995 without any change. The legislature knows full well the types of sentences that this—this statute can—can dole out.

Now, your Honor, Mr. Maxey brings up that had this offense been committed in Idaho that Mr. Nichols would only be facing five or ten years. Well, Judge, Mr. Maxey also neglected to talk about Idaho’s persistent violator statute, that says if you have three or more felony convictions your sentence range is five years to life imprisonment. So had this offense in fact been committed in Idaho Mr. Nichols would be looking at a life sentence, much like the one we’re asking the court to impose.

Judge, even in Washington sentences like this are not uncommon. I recently got some feedback from prosecutor’s [sic] across the state. Kittitas County gave out a 500–month sentence for this type of offense. Thurston County gave an individual 90 years for—weapons offenses, Judge. These are not unusual sentences.

RP at 896–97. The prosecutor told the court that he was not going to make a specific sentencing recommendation, because there was not much difference between the low end or top end standard range sentence. He concluded, “But I think a standard range sentence is appropriate. And I would ask that the court sentence Mr. Nichols somewhere within the standard range.” RP at 898.

\*12 When it was Mr. Nichols's turn to respond, his lawyer stated, “We have suggested to the court to consider an exceptional sentence in this case for a number of reasons.” RP at 900. He went on to talk about challenges in Mr. Nichols's background, the fact that Mr. Nichols's criminal history was entirely nonviolent crimes, and the lack of proportionality in imposing a life sentence on Mr. Nichols when Mr. Booth, Mr. Fellman–Shimmin, and Ms. Pierce were all serving less–than–27–year sentences. He argued

there are a number of alternatives. We've asked that the court consider as an exceptional sentence running them concurrently. Or the court could give an exceptional sentence, depending on however the court fashioned to deem it, you know, giving a year on each offense, giving more on one, less on another; it's within the discretion of the court to give a sentence that we feel would be appropriate under the circumstances.

RP at 905.

Having reviewed the parties' briefing, heard their argument, and heard from the defendant, the court announced Mr. Nichols's sentence, explaining it at some length. We reproduce the portion of the court's explanation that Mr. Nichols relies upon in asserting error on appeal:

I am painfully aware that you are a human being and that you don't have a history of violence. And I can tell you that I had no idea at [the] time of trial that the— the ultimate sentencing range was anywhere near this. And like your attorney, I guess, I had that initial look and said, “This just can't be,” that folks who are charged with and ultimately plead guilty to murder would end

up with the sentences they did compared to the range that we look at here.

And your attorney reminds me of that, and he asks me to look at the purpose of the Sentencing Reform Act to determine whether the range here is clearly excessive. And there's a nonexclusive list of policy goals. He first talks about proportionality, seriousness of offense, and your—and your history.

And he mentions in his briefing, that “Well, there might not have been guns in this safe and had there not been guns it would have been a different story.” And to that extent it's true. But as I think about that, you've been in prison, you have this criminal history. You are very well aware that anything having to do with guns is kryptonite; I mean, you're to keep away. And yet the safe was clearly a target. There was also jewelry and other items, and had it been just jewelry and other items we wouldn't be having this discussion today. But you targeted a safe with a pretty good idea, I think, that it might have weapons in it, weapons that could be fenced, sold, to generate money for other purposes.

And I thought about that. And that seemed to me to be precisely the reason why the legislature would pass 9.41.040(6), the-hard time for armed crime statute. But it's just that. It's the risk of firearms finding their way into a criminal population, into the hands of people [who] have demonstrated that they can't own or possess weapons responsibly.

\*13 So while we talk about seriousness of offense and criminal history, felons who are stealing and possessing guns, by legislative fiat, present an unacceptable risk of safety-risk to the public and public safety.

()27

[Defense counsel] then says, “Well, you know, what is essentially a life sentence or the possibility of life sentence doesn't provide respect for the law by providing a just punishment.” *Yet in State v. Murphy, a case cited by the [S]tate, there's a quote: “It's the province of the legislature if it chooses, not the appellate court or a superior court, to ameliorate any undue harshness arising from”—from consecutive sentences for multiple firearm counts.”*

*The idea there is that it's—the way that the court promotes respect for the law is to abide by the law, and to*

*enforce the law, not to make the law. And here, to a large degree, your attorney—who is ever—ever representing you zealously—suggests that I overlook the very clear language of two statutes in particular, 9.94A.589 and 9.41.040, which both make it mandatory that there be consecutive sentences. And I think Mr. Radzimski's right: were the court to impose anything other than consecutive sentences that it would be reversible error.*

....

... And as someone who knows you can't be around weapons, you know, you opened the safe, you distributed the weapons, and ultimately one of the weapons that was involved in this—in this burglary, whether or not it was in the safe or not, resulted—or was used to commit a murder.

There has to be just punishment recognizing that's what happened, but I—I again look—look past that, I don't make too much of that, and rather just look at the offense here, where it's very clear that Mr. Booth didn't have the ability to plan or execute an offense like this, that you had spent, you know, nearly the last decade in jail or prison, you knew that you weren't supposed to have weapons, you targeted a gun safe. It's had [sic] to say that that—that didn't put you on notice that you knew there were going to be guns involved, and you knew that there were significant punishments for guns involved but you made that choice.

....

*And it does seem harsh. I am the first to admit that.*

....

And therefore, as we look to the-the counts, on Counts 1 through 9 of unlawful possession of a firearm in the first degree, with a standard range of 86 to 116 months, with nine counts, I'll sentence you to 90 months on each count, to run consecutive. That's 810 months.

On Counts 13 through 21 the standard range is 77 to 102 months. Nine counts, I'll sentence you to 80 months on each count to run consecutive. And that creates 1,530 months, 125 years or so.

And I recognize it's a life sentence. I—I have been painfully aware of that and thinking about it since I understood that this is what the range looked at—or, was—was calculated at.

*And again, I don't feel I have a choice. And I think it's, in this case, also appropriate.*

\*14 With regard to the residential burglary, with your history of burglary I think it's appropriate to impose a sentence of 84 months to run concurrently with each of the other two sentence [sic].

For theft of a motor vehicle, a mid-range sentence of 50 months, again to run concurrent with the other sentences.

For trafficking in stolen property a sentence of 80 months, towards the top of the range, also to run concurrent. And that's based on this history of theft.

*Again, I'm aware that there's no violent offenses in your history. And I'm aware that those who were convicted of the most violent offense are looking at significantly less time than you. And I—I've thought about it. I don't like it.*

*Nevertheless, this is my duty. It's my duty to uphold the law. And the legislature has determined that this is the appropriate—appropriate type of sentencing in cases like this, and it is therefore my—my obligation to follow the law as the legislature directs it.*

So that will be the sentence of the court.

RP at 909–15 (emphasis added).

Viewed in isolation, the highlighted language might be viewed as suggesting that the trial court was mistaken about its discretion to impose concurrent sentencing through an exceptional downward sentence. But when the entire record is reviewed, it is clear that the option of an exceptional sentence had been briefed to the court, conceded by the State, and advocated for by Mr. Nichols. It is clear that it was understood and considered by the court.

Before imposing a sentence outside the standard range, the trial court must find “substantial and compelling reasons” justifying an exceptional sentence and that mitigating circumstances are established by a preponderance of the evidence. RCW 9.94A.535. When the court's statements are viewed in the context of the parties' briefing and argument, it is clear that the trial court did not find mitigating circumstances or substantial and compelling reasons for an exceptional downward sentence as required

by the statute. It accepted the State's analysis that however much it might *dislike* the sentence required by the presumptive sentencing statutes, if it could not find a basis for imposing an exceptional sentence, it was bound by the presumptive sentence established by the legislature. Thus understood, there was no error. A trial court has exercised its discretion if it "has considered the facts and has concluded that there is no basis for an exceptional sentence." *Garcia-Martinez*, 88 Wn.App. at 330.

#### STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Nichols states several. We address them in turn.

*Procedural Deficiencies.* Mr. Nichols makes two complaints about his opportunity to file the SAG. First, he claims that he had not received a transcript of the parties' opening statements at the time he completed his statement. Where provided at public expense, however, a verbatim report of proceedings will not include opening statements unless ordered by the trial court. RAP 9.2(b); RAP 9.2(e)(2)(D).

\*15 Second, Mr. Nichols asserts that he did not have priority access or adequate legal access for the first 10 days after receiving the notice of appeal. This issue involves factual allegations outside the record of this appeal. His remedy is to seek relief by a personal restraint petition. *State v. Norman*, 61 Wn.App. 16, 27–28, 808 P.2d 1159 (1991); *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

*Prosecutorial Misconduct.* Mr. Nichols argues that the State committed prosecutorial misconduct by failing to proactively correct witness Crystal Fellman–Shimmin, Mr. Fellman–Shimmin's sister, when she falsely denied having been offered lenient treatment by the State in exchange for her testimony. Defense counsel had been notified by the prosecutor that Ms. Fellman–Shimmin had, in fact, reached an agreement with the State.

After the defense pointed out Ms. Fellman–Shimmin's perjurious denial to the court, the parties agreed to a procedure for correcting the record: the State would inform Detective Gilmore of the agreement reached with Ms. Fellman–Shimmin and to allow him to be questioned about it. The detective testified as follows:

Q And are you aware, now, that there were negotiations between Ms. Crystal Fellman–Shimmin, her attorney and the prosecuting attorney's office resulting in an offer to her?

A I'm aware of that now.

Q And as part of this arrangement with Crystal Fellman–Shimmin, isn't it true that in return for her agreement to testify in this case, that she would, once the case was done—that being this case—then she would go plea to tampering with physical evidence?

A Yes, that's what the email says.

Q Okay. And if you know, tampering with physical evidence is a gross misdemeanor?

A Yeah.

Q Okay. Is possession of stolen firearms a felony?

A Correct.

RP at 743–44. Detective Gilmore's testimony was a solution agreed to by Mr. Nichols through his lawyer and was sufficient to inform the jury of Ms. Fellman–Shimmin's plea deal.

*Insufficient Evidence.* Mr. Nichols argues that the evidence was insufficient to support the jury's findings of guilt because Mr. Booth was asked twice to identify him in the courtroom and was unable to do so either time. "A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt." *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). Mr. Booth identified Mr. Nichols by name and other witnesses identified him in the courtroom. The identification was sufficient.

*Confrontation.* Mr. Nichols argues that his right to confrontation was violated when Detective Gilmore testified that a rail mounting piece for an assault rifle found during execution of the search warrant at Mr. Nichols's girl friend's residence was believed by the detective to have been stolen from Mr. Hannigan.

\*16 The Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The primary right protected by the confrontation clause is the right to effective cross-examination of the adverse witness. The standard of review on a confrontation clause challenge is *de novo*. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

When the subject of the rail mounting piece was first raised during the detective's direct examination, he began to volunteer hearsay from Mr. Hannigan but was met with a prompt objection by defense counsel, which was sustained. In response to a reframed question, the detective testified only that he believed the rail mount was stolen from Mr. Hannigan, without offering hearsay or any other explanation. No objection was raised. Mr. Nichols fails to explain how the detective's testimony raises a Sixth Amendment issue. We will not consider the argument further. *See* RAP 10.10(c).

*Recorded Conversation.* Mr. Nichols claims that because the State did not establish that he and his girl friend were on notice that his phone calls from jail were being recorded, the introduction of the recording of their jailhouse call violated his right to due process and Washington State statute.

In laying a foundation for the recording, the State's witness, the chief corrections deputy for the Stevens County sheriff's office, testified that inmates are made aware that their calls will be recorded by signs posted throughout the facility. He testified that an automated recording at the outset of a call that the phone call is being recorded also puts both the inmate and the recipient of the call on notice that the call is being recorded. He admitted that once a recipient becomes aware of how the jail's call system works, he or she can press a button to “accept” a call immediately and thereby skip the notice that the call is being recorded. RP at 709, The recording offered at trial did not include the automated notice of recording. It was the State's position that Mr. Nichols's girl friend accepted the call before the notice could be played.

Mr. Nichols's lawyer was allowed to *voir dire* the corrections deputy and, after doing so, objected there was insufficient evidence of notice required under a Washington statute (evidently referring to RCW 9.73.030 and .050) “that does not allow you to record people

without their consent. And it says that if you do so it's not admissible for any purpose.” RP at 715. The trial court overruled the objection.

Preliminary questions concerning the admissibility of evidence are determined by the court. ER 104(a). A court's rulings on the admission of evidence are reviewed for an abuse of discretion. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 264, 840 P.2d 860 (1992). Mr. Nichols fails to show an abuse of discretion in light of the testimony of the chief corrections deputy that procedures were in place to give both callers and recipients notice of the jail's practice of recording calls.

\*17 Were that not the case, we would find the admission of the recording harmless. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole and did not affect the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). In assessing whether an error was harmless, we must measure the admissible evidence of a defendant's guilt against the prejudice, if any, caused by the inadmissible testimony.

Here, the admissible evidence against Mr. Nichols included the testimony of the only witness to the burglary, Mr. Booth; his testimony and that of Mr. Fellman–Shimmin to the prying open of the safe; the testimony of those two and Ms. Pierce to Mr. Nichols's possession of the stolen guns; the evidence from Pawn 1 and Pacific Steel that Mr. Nichols had pawned or sold property stolen from the Hannigans; and evidence that stolen property bearing his fingerprint was found at his girl friend's home. The recording, by contrast, contained only statements from which inculpatory inferences might be drawn—evidence of minor significance that could not have affected the outcome of trial.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: FEARING, and KORSMO, JJ.#

State v. Nichols, Not Reported in P.3d (2014)

184 Wash.App. 1020

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**Appellate Court Case Title:** State of Washington v. Gabriel M. Gomez  
**Superior Court Case Number:** 16-1-00648-9

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