

FILED
Court of Appeals
Division III
State of Washington
12/27/2019 9:25 AM

No. 36488-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN B. NAVE,

Appellant.

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

ADDITIONAL BRIEF OF APPELLANT'S
ASSOCIATED COUNSEL

DAVID L. DONNAN
Attorney for Appellant

MERYHEW LAW GROUP
200 Broadway, Suite 301
Seattle, Washington 98122
(206) 264-1590

TABLE OF CONTENTS

A. <u>SUMMARY OF APPEAL</u>	1
B. <u>ADDITIONAL ASSIGNMENTS OF ERROR</u>	1
C. <u>ISSUES PERTAINING TO ADDITIONAL ASSIGNMENTS OF ERROR</u>	2
D. <u>STATEMENT OF FACTS</u>	4
E. <u>ARGUMENT</u>	5
1. The evidence was insufficient to establish that Mr. Nave sexually assaulted I.V. where she testified she never saw or spoke with her assailant	5
a. Sufficient evidence requires a quantum adequate to convince the jury of the proposition unanimously	5
b. The evidence definitively established ample reason to doubt given the lack of reasonable identification.....	6
c. The evidence was insufficient to identify Mr. Nave as the perpetrator of the alleged offenses.....	10
d. Where the evidence fails to establish the identity of the defendant as the perpetrator of the alleged crimes, reversal is required	16
2. The trial court abused its discretion by admitting evidence Mr. Nave went to New York following disclosure because any motive was speculative and overly prejudicial, outweighing its minimal probative value.....	17
a. Defense timely sought to exclude irrelevant and prejudicial evidence	17
b. Rules of Evidence and constitutional right to due process limit the admissibility of minimally relevant and highly prejudicial evidence such as this	19

c. The improper admission of this overly prejudicial evidence compromised Mr. Nave’s right to a fair trial.....	21
3. The trial court abused its discretion by admitting irrelevant and prejudicial testimony regarding Mr. Nave’s physical contact with I.V. years before the alleged offenses	25
a. Defense sought to exclude this irrelevant and prejudicial evidence.	25
b. Evidence which is minimally relevant and unduly prejudicial should be excluded	26
c. Admission of irrelevant and prejudicial evidence compromised the defendant’s right to a fair trial	30
4. The trial court abused its discretion and compromised Mr. Nave’s constitutional right to present his defense by excluding evidence that I.V.’s cousin, with whom she was very close, made similar disclosures of sexual abuse in the same time frame.....	31
a. The defense objected to exclusion of evidence of similar disclosures which may have influenced I.V.’s reporting.....	31
b. The accused has a constitutional guarantee of the right to present evidence was relevant and necessary to the defense	32
c. Exclusion of a contemporaneous disclosure by a close friend or relative was constitutional error	34
d. Where constitutional error was not harmless, remand for a new trial is required.....	37
5. The trial court abused its discretion in permitting cross-examination of Mr. Nave which went far beyond the limited scope of the direct examination	38
a. The defendant objected to the scope of the cross examination	38

b. Cross examination is generally limited by the scope of the direct examination.....	39
c. Admission of the extraneous evidence was error.....	40
d. Defendant was prejudiced.....	42
6. Cumulative error in the admission of irrelevant and prejudicial evidence and the improper exclusion of evidence denied appellant a fair trial.....	43
F. <u>CONCLUSION</u>	44

TABLE OF AUTHORITIES

Washington Supreme Court

<u>Carson v. Fine</u> , 123 Wn.2d 206, 867 P.2d 610 (1994)	26
<u>City of Bremerton v. Corbett</u> , 106 Wn.2d 569, 723 P.2d 1135 (1986)	14
<u>In re Dependency of Penelope B.</u> , 104 Wn.2d 643, 709 P.2d 1185 (1985)	35
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	27
<u>State v. Anderson</u> , 46 Wn.2d 864, 285 P.2d 879 (1955)	41
<u>State v. Aten</u> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	14, 15
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	30
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006)	14, 15
<u>State v. Bruton</u> , 66 Wash.2d 111, 401 P.2d 340 (1965)	21
<u>State v. Clark</u> , 187 Wn.2d 641, 389 P.3d 462 (2017).....	33
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	40, 43
<u>State v. Darden</u> , 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)	32
<u>State v. Deatherage</u> , 35 Wash. 326, 77 P. 504 (1904)	20
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003)	27, 29
<u>State v. Dow</u> , 168 Wn.2d 243, 227 P.3d 1278 (2010).....	15
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	33
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	30, 33
<u>State v. Golladay</u> , 78 Wn.2d 121, 470 P.2d 191 (1970)	41
<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	29

<u>State v. Homan</u> , 181 Wn.2d 102, 330 P.3d 182 (2014).....	5
<u>State v. Jeane</u> , 35 Wn.2d 423, 213 P.2d 633, 638 (1950).....	39, 40
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	33, 36, 37
<u>State v. Kalebaugh</u> , 183 Wn.2d 578, 355 P.3d 253 (2015).....	5
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	27
<u>State v. Mack</u> , 80 Wn.2d 19, 490 P.3d 1303 (1971).....	24
<u>State v. Meyer</u> , 37 Wn.2d 759, 226 P.2d 204 (1951).....	15
<u>State v. Miles</u> , 77 Wn.2d 593, 464 P.2d 723 (1970).....	40
<u>State v. Robideau</u> , 70 Wn.2d 994, 425 P.2d 880 (1967).....	39, 41
<u>State v. Pettit</u> , 74 Wash. 510, 133 P. 1014 (1913).....	20
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	5
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	29, 37
<u>State v. Stentz</u> , 33 Wash. 444, 74 P. 588 (1903).....	20
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	35
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	6
<u>State v. Unga</u> , 165 Wn.2d 95, 196 P.3d 645 (2008).....	15
<u>State v. Vy Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	27
<u>State v. Whelchel</u> , 115 Wn.2d 708, 801 P.2d 948 (1990).....	37
<u>State v. Wilson</u> , 26 Wash.2d 468, 174 P.2d 553 (1946).....	20, 40
<u>State v. Wittenbarger</u> , 124 Wn.2d 467, 880 P.2d 517 (1994).....	33
<u>State v. Yates</u> , 161 Wn.2d 714, 168 P.3d 359 (2007).....	33

Constitutional Provisions

Sixth Amendment	30, 32, 33, 36
Fourteenth Amendment.....	5, 24
Wash. Const, art. I § 22.....	5, 24, 32

Washington Court of Appeals

<u>State v. Beasley</u> , 126 Wn.App. 670, 109 P.3d 849 (2005).....	6
<u>State v. Carver</u> , 37 Wn.App. 122, 678 P.2d 842 (1984)	34
<u>State v. Cayetano-Jaimes</u> , 190 Wn.App. 286, 359 P.3d 919 (2015)	36
<u>State v. Cobb</u> , 22 Wn.App. 221, 589 P.2d 297 (1978)	21
<u>State v. Colquitt</u> , 133 Wn.App. 789, 137 P.3d 892 (2006)	5
<u>State v. Donald</u> , 178 Wn.App. 250, 316 P.3d 1081 (2013)	33
<u>State v. Grant</u> , 83 Wn.App. 98, 920 P.2d 609 (1996).....	26
<u>State v. Hendrix</u> , 50 Wn.App. 510, 749 P.2d 210 (1988).....	6
<u>State v. Jefferson</u> , 11 Wash.App. 566, 524 P.2d 248 (1974)	20
<u>State v. Kilgore</u> , 107 Wn.App. 160, 26 P.3d 308 (2001).....	34
<u>State v. Knapp</u> , 14 Wn.App. 101, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975).	32
<u>State v. Solomon</u> , 5 Wn.App. 412, 487 P.2d 643 (1971).....	40
<u>State v. Stevens</u> , 58 Wn.App. 478, 794 P.2d 38 (1990).....	35
<u>State v. Thomson</u> , 70 Wn.App. 200, 852 P.2d 1104 (1993), <i>aff'd</i> , 123 Wn.2d 877 (1994).....	6
<u>State v. Whyde</u> , 30 Wn.App. 162, 632 P.2d 913 (1981)	41

United States Supreme Court

<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).....	36
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	37
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	6
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).....	33
<u>Dowling v. United States</u> , 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990).....	22
<u>Estelle v. McGuire</u> , 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).....	22
<u>Manson v. Brathwaite</u> , 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)	11
<u>Old Chief v. United States</u> , 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).....	19
<u>United State v. Solerno</u> , 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).....	24
<u>United States v. Scheffer</u> , 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).....	37
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	36
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	22

Federal Courts

<u>United States v. Ajjola</u> , 584 F.3d 763 (7th Cir.2009).....	23
<u>United States v. Bahe</u> , 40 F.Supp.2d 1302 (D.N.M. 1998).....	12, 13

<u>United States v. Benedetti</u> , 433 F.3d 111 (1 st Cir. 2005)	24
<u>United States v. Frederick</u> , 78 F.3d 1370 (9th Cir. 1996).....	43
<u>United States v. Hankins</u> , 931 F.2d 1256 (8th Cir. 1991).....	23
<u>United States v. Jackson</u> , 572 F.2d 636 (7 th Cir. 1978)	23
<u>United States v. Myers</u> , 550 F.2d 1036 (5th Cir. 1977).....	23
<u>United States v. Orrico</u> , 599 F.2d 113 (6th Cir. 1979).....	13
<u>United States v. Peltier</u> , 585 F.2d 314 (8th Cir. 1978)	23
<u>United States v. Russell</u> , 662 F.3d 831 (7th Cir. 2011)	22, 23
<u>United States v. Williams</u> , 33 F.3d 876 (7th Cir.1994)	22

Other Jurisdictions

<u>Acosta v. State</u> , 417 A.2d 373 (Del. 1980)	12
<u>Beber v. State</u> , 887 So.2d 1248 (Fla 2004)	11
<u>Brower v. State</u> , 728 P.2d 645 (Alaska App. 1986)	12
<u>In re A.W.</u> , 92 A.3d 1094 (D.C. 2014)	10
<u>In re Miguel</u> , 32 Cal.3d 100, 185 Cal.Rptr. 120, 649 P.2d 703 (1982)....	12
<u>Lowe v. State</u> , 668 So.2d 274 (Fla.App. 1996).....	12
<u>People v. Redmond</u> , 71 Cal.2d 745 (1969).....	11
<u>People v. Tripp</u> , 151 Cal.App.4th 951 (2007).....	11
<u>State v. Green</u> , 667 So.2d 756 (Fla. 1995).....	12
<u>State v. Maestas</u> , 92 N.M. 135, 584 P.2d 182 (N.M.App. 1978)	12
<u>State v. Moore</u> , 485 So.2d 1279 (Fla. 1086)	12
<u>State v. Ramsey</u> , 782 P.2d 480 (Utah 1989)	13
<u>State v. Robar</u> , 157 Vt. 387, 601 A.2d 1376 (Vt. 1991)	13

<u>State v. Sexton</u> , 115 Wis.2d 697, 339 N.W.2d 367 (Wis.App.1983).....	13
<u>State v. Werneke</u> , 958 S.W.2d 314 (Mo.App. 1997).....	13
<u>State v. White Water</u> , 194 Mont. 85, 634 P.2d 636 (Mont. 1981)	13

Evidence Rules

ER 402.....	19, 27
ER 404.....	3, 26, 27, 29
ER 611.....	4, 39, 42

Other Authorities

Am.Jur.2d, Evidence (1967).....	21
C. Torcia, Wharton's Criminal Evidence (13th ed. 1972).....	21
Kenneth S. Broun et al., McCormick on Evidence (7th ed. 2013).....	15
Meisenholder, Wash.Prac. (1965)	40
Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L.Rev. 891 (2004)	16

A. SUMMARY OF APPEAL

Nathan Nave was wrongfully convicted based on insufficient evidence following a series of erroneous evidentiary rulings which put minimally relevant and unduly prejudicial evidence before the jury while unduly limiting his ability to present his defense. These errors individually, and cumulatively, deprived Mr. Nave of his constitutional right to a due process of law and a fair trial. Reversal of his conviction is required.

B. ADDITIONAL ASSIGNMENTS OF ERROR

1. The State failed to present sufficient evidence from which a reasonable jury could find guilt beyond a reasonable doubt given the lack of evidence establishing the identity of the alleged perpetrator.

2. The trial court abused its discretion in admitting evidence Mr. Nave went to New York City the day after I.V.'s disclosure of alleged sexual abuse.

3. The trial court abused its discretion by admitting evidence of alleged physical contact in the form of otherwise innocuous massaging of I.V.'s legs occurring years before the sexual abuse alleged at trial.

4. The trial court abused its discretion and compromised Mr. Nave's constitutional right to present his defense by excluding evidence

that I.V.'s cousin, with whom she was very close, made similar disclosures of sexual abuse in the same time frame.

5. The trial court abused its discretion by permitting cross examination of Mr. Nave which went far beyond the reasonable scope of his direct examination and compromised his right to a fair trial.

6. Cumulative error deprived Mr. Nave of his constitutional right to a fair trial.

C. ISSUES PERTAINING TO ADDITIONAL ASSIGNMENTS OF ERROR

1. The State must establish each element of an alleged offense and a jury's unanimous determination of that fact must be supported by evidence sufficient to each point. Where the complaining witness's testimony established she never saw or spoke with her alleged assailant, is there sufficient evidence to sustain a conviction?

2. The Rules of Evidence and the constitutional right to due process of law serve to bar evidence whose probative value is outweighed by its prejudicial effect. The trial court rejected Mr. Nave's challenge to the admission of evidence he went to New York City following I.V.'s allegations. The State sought to imply consciousness of guilt based upon an inference he was fleeing from prosecution. The enormous prejudicial impact of such speculation given the minimal probative value of the

evidence was so likely to distract the and confuse the jury admission was clearly prejudicial. Did the trial court abuse its discretion and compromise Mr. Nave's right to a fair trial?

3. ER 404(b) bars evidence of a person's character or a trait of character to prove action in conformity therewith on the occasion of the alleged offense. Such evidence is relevant only if it tends to otherwise establish an element of the crime and is still subject to exclusion if it is unduly prejudicial. ER 403. Evidence of Mr. Nave's massage of the legs of a child in his care years before the sexual abuse alleged by the government is not relevant to prove the alleged abuse occurred and is highly prejudicial given the propensity to produce unfounded speculation. Did the trial court abuse its discretion in admitting such evidence?

4. The constitutional right to a confrontation and due process of law require the accused be allowed to present evidence which undercuts the reliability and trustworthiness of the State's case. The defense sought to elicit evidence of similar allegations by a close friend and relative of the complaining witness. Did the trial court improperly exclude this evidence and thereby compromise the defendant's fundamental constitutional right to a fair trial?

5. The scope of cross examination is generally limited to topics raised in direct examination. ER 611. Mr. Nave's testimony was limited to his denial of sexual misconduct, however, the prosecutor was allowed to cross examine on a number of extraneous matters which produced highly inflammatory inferences regarding Mr. Nave's abandonment of his family. Did the trial court err by permitting this wide-ranging and highly prejudicial examination?

6. The right to a fair trial may be eroded by a series of errors which together compromise the fact-finding process. Here the introduction of inflammatory and irrelevant evidence, and the prosecutor's apparent vouching for her witness, distracted the jury from its constitutional function. Did the cumulative errors described deny appellant a fair trial?

D. STATEMENT OF FACTS

The trial testimony is detailed in the Appellant's Opening Brief and is incorporated herein by this reference. Brief of Appellant at 1-10. To the extent additional facts are necessary for the issues presented here, they are further detailed in the individual arguments presented herein.

E. ARGUMENT

1. The evidence was insufficient to establish that Mr. Nave sexually assaulted I.V. where she testified she never saw or spoke with her assailant

a. Sufficient evidence requires a quantum adequate to convince the jury of the proposition unanimously

It is a fundamental principle of our criminal law that any person accused of a crime is presumed to be innocent unless and until the State proves all of the elements of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV, § 1 (“No state shall ... deprive any person of life, liberty, or property, without due process of law”); Constit. Art. I, sec. 22; State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015); State v. Colquitt, 133 Wn.App. 789, 796, 137 P.3d 892 (2006). In a challenge to the sufficiency of the evidence, the reviewing court examines whether, when viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This requires that all reasonable inferences that may be drawn from the evidence in favor of the prosecution are, and are interpreted against the defendant. Salinas, 119 Wn.2d at 201.

Among the elements the State must prove beyond a reasonable doubt is the identity of the defendant as the individual who committed the offense. State v. Thomson, 70 Wn.App. 200, 211, 852 P.2d 1104 (1993), *aff'd*, 123 Wn.2d 877 (1994). Identity is, therefore, an issue of fact the jury determines. See State v. Hendrix, 50 Wn.App. 510, 515, 749 P.2d 210 (1988); State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) *abrogated in part on other grounds*, Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); State v. Beasley, 126 Wn.App. 670, 689, 109 P.3d 849 (2005) (“Circumstantial evidence and direct evidence have equal weight.”).

In Mr. Nave’s case, however, even when taken as whole, and viewed in a light most favorable to the jury’s verdict, the evidence failed to support a finding, beyond a reasonable doubt, that Mr. Nave committed the charged offenses given the fundamentally contradictory nature of the testimony and I.V.’s undisputed testimony that she never saw or spoke with her alleged assailant.

b. The evidence definitively established ample reason to doubt given the lack of reasonable identification.

Given the nature of the allegations, there was little evidence available and proof was all dependent on the testimony of I.V. She testified that “Sometime last year, it was in my room. It was late at night,

and I woke up to him touching me again.” RP 53-54. I.V. explained, however, that she would usually fall asleep “On my side facing the wall or on my back – I mean, stomach.” RP 54. The prosecutor inquired: “So you’d be facing to the left where the wall it?” I.V. answered “Yes.” RP 54. When asked “Was he saying anything?” in an effort to identify the assailant, I.V. said directly, “No.” RP 54.

When asked, “What did you do after that started happening?” I.V. said, “I didn’t do anything.” RP 55. The prosecutor continued to inquire:

Q: Could you see his face while that was happening?

A: No.

Q: How come?

A: Because I was facing the wall.

Q: Did you stay facing the wall the whole time?

A: Yeah.

RP 55. I.V. testified that the “same thing happened,” “three or four times a week,” for a “few months,” before she told her mother. RP 56-57.

I.V. was equally certain, however, that she never saw her alleged assailant nor did either speak during these numerous encounters.

Q: Were there some times when he did this that you were facing him so that you could see his face?

A: No.

Q: Were you always facing towards the wall?

A: Yes.

Q: As best you can remember, did he ever say anything during any of the times that he did this?

A: No.

RP 58. At times, I.V. “would just move closer to the wall.” RP 59.

Furthermore, I.V. reiterated this point in her interview with the investigating detective:

Q: Okay. Do you, also, recall telling Detective Armstrong that you usually sleep on your stomach?

A: Yes.

RP 75. I.V. repeated:

Q: And at the times that you were touched on your vagina, you were sleeping on your stomach?

A: Yes.

Q: Okay. And under the covers?

A: Yes.

Q: And usually wearing clothing of some sort?

A: Yes.

Q: Either regular clothes or pajamas?

A: Yes.

RP 76.

I.V. explained that her room would usually be dark, except for the occasional morning light, but she “would cover [her] head...[b]ecause [she] didn’t want him to see that I had woken up.” RP 65, 67. This was particularly problematic because I.V. testified she did not know if she was accurately perceiving what was happening.

Q: Okay. Do you recall that when you were addressing that issue about not telling, and this relates to both the first time and the second time and the ones after that, that you didn't know if it was real?

A: Yes.

Q: That you didn't know if it was really happening?

A: Yes.

RP 73. In the pretrial defense interview she reiterated this uncertainty.

Q: And you would -- you indicated that you would cry yourself to sleep. Do you recall telling me that it would scare me because I didn't know if it was actually happening?

A: Yes.

RP 73. And at the close of the season:

Q: You never saw --

A: No.

Q: -- anybody?

A: No.

Q: You never spoke to anybody?

A: No.

RP 76.

Q: And no one spoke to you?

A: No.

Q: At any time on any of these occurrences?

A: No.

RP 77. Furthermore, there was no other communication:

Q: Okay. You didn't look at him, so I take it didn't ask you to look at him?

A: No.

Q: Didn't ask you to touch him?

A: No.

RP 78. I.V. confirmed on redirect:

Q: Mr. Phelps, also, asked you some questions about the way that you were sleeping. You said there were times you slept on your stomach?

A: Yes.

Q: Were

A: Yes.

Q: Kind of how you drew on that picture, was there ever a time that you would be looking at Mr. Nave when he came in?

A: No.

Q: So whether it was on your stomach or your side, you were you still facing away from your door?

A: Yes.

RP 79-80.

c. The evidence was insufficient to identify Mr. Nave as the perpetrator of the alleged offenses.

“‘[T]he reasonable doubt’ standard of proof is a formidable one. It ‘requires the factfinder to reach a subjective state of near certitude of the guilt of the accused.’” In re A.W., 92 A.3d 1094, 1101 (D.C. 2014). Even where a complaining witness makes some form of identification at trial, that evidence must be viewed against the totality of the evidence, including potential conflicts within the witness’s testimony. The sufficiency of the evidence must, therefore, be considered in the context in which it arises. Id., at 1099.

Where the evidence of identification provided by the complaining witness is internally contradictory then it fails to produce the necessary degree of certitude. In Mr. Nave’s case, where the complaining witness is unequivocal in her testimony that she never saw her assailant and he never spoke, the evidence fails to provide the degree of certitude necessary to support the identification beyond a reasonable doubt.

In the absence of evidence supporting identification of Mr. Nave as the assailant, his mere proximity is not sufficient to infer guilt. In the

absence of direct evidence establishing the identification, evidence that merely raises a strong suspicion of guilty is still insufficient to support a guilty verdict. See e.g. People v. Tripp, 151 Cal.App.4th 951 (2007).

“Evidence which merely raises a strong suspicion of the defendant guilty is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.” Id., citing People v. Redmond, 71 Cal.2d 745, 755 (1969). Such circumstantial evidence is only sufficient when it supports reasonable inferences suggesting guilt. An inference is unreasonable when it is based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guess work. Tripp, supra.

The United States Supreme Court has long noted its concerns in the use of potentially unreliable eyewitness identification evidence and reiterated that the “totality of the circumstances” are critical and that “reliability is the linchpin....” Manson v. Brathwaite, 432 U.S. 98, 113, 97 S.Ct 2243, 53 L.Ed.2d 140 (1977). When viewed in its entirety here, the evidence below was so internally inconsistent regarding the complaining witnesses state of consciousness, her ability to accurately perceive and then speculate regarding the identity and conduct of her alleged assailant, it cannot sustain conviction beyond a reasonable doubt. See also Beber v.

State, 887 So.2d 1248 (Fla 2004)¹ and United States v. Bahe, 40 F.Supp.2d 1302 (D.N.M. 1998).² I.V.'s initial report to her mother alleging Mr. Nave assaulted her is similarly insufficient in light of her testimony at trial that she never saw or spoke with her alleged assailant. In cases in which an inconsistent out-of-court statement was admitted as substantive evidence of the charged sexual acts and no other evidence was presented, courts have nearly uniformly concluded that there was insufficient evidence to support the conviction. See e.g. Brower v. State, 728 P.2d 645, 646-48 (Alaska App. 1986); In re Miguel, 32 Cal.3d 100, 105-107, 185 Cal.Rptr. 120, 649 P.2d 703 (1982) (conviction for burglary rev'd where based only on recanted out-of-court statement); Acosta v. State, 417 A.2d 373, 375-77 (Del. 1980) (conviction aff'd. for acts testified to in-court, rev'd for acts for which only out-of-court statements were presented); Lowe v. State, 668 So.2d 274, 275 (Fla.App. 1996); State v. Maestas, 92 N.M. 135, 584 P.2d 182 (N.M.App. 1978) (conviction for

¹ In Beber the defendant was convicted solely on the victims pretrial statement describing a sexual act by the defendant as the victim's testimony at trial contradicted the videotaped statement. Id. at 1252. In reversing Beber's conviction, the Florida Supreme Court cited its decisions in State v. Moore, 485 So.2d 1279 (Fla. 1086) and State v. Green, 667 So.2d 756 (Fla. 1995), which held that a "prior inconsistent statement standing alone is insufficient to prove guilty beyond a reasonable doubt." Beber, 887 So.2d at 1252 (quoting Moore, 485 So.2d at 1281).

² The federal district court in New Mexico reached the same conclusion in United States v. Bahe, 40 F.Supp.2d 1302, 1303 (D.N.M. 1998), where the defendant's conviction rested solely on the victim's prior out-of-court statements which were contradicted by the victim's trial testimony.

physical abuse of child rev'd where only evidence presented was out-of-court statement); State v. Werneke, 958 S.W.2d 314, 317-20 (Mo.App. 1997) (judgment of acquittal entered on counts for which only inconsistent out-of-court statements presented, judgment afrd. as to counts on for which complaining witness actually testified); State v. White Water, 194 Mont. 85, 634 P.2d 636, 637-39 (Mont. 1981); State v. Ramsey, 782 P.2d 480,482-84 (Utah 1989); State v. Robar, 157 Vt. 387, 601 A.2d 1376 (Vt. 1991) (burglary conviction based only on prior inconsistent statement rev'd); State v. Sexton, 115 Wis.2d 697, 339 N.W.2d 367 (Wis.App.1983) (published in table only; conviction for operating vehicle without license based solely on unsworn statement rev'd); see also United States v. Orrico, 599 F.2d 113 (6th Cir. 1979) (check fraud conviction based only on prior inconsistent statement rev'd).

The Bahe court explained that the primary problem with basing a conviction on nothing more than an out-of-court statement which is contradicted by the witness's trial testimony "is that the fact finder has no logical basis for determining which statement is true and may even be falsely persuaded by the presentation of the out-of-court statement." Bahe, 40 F.Supp.2d at 1310. The evidence against Mr. Nave is equally inconsistent and cannot therefore support a finding of guilty beyond a reasonable doubt.

d. The alleged “1, 2, or 3” conversation fails to overcome the corpus delicti rules limitations on sufficient evidence.

I.V. testified that she was confused and thought her allegations might be part of a dream until after a brief and nebulous conversation with Mr. Nave on the way to school. RP 63, 74. Mr. Nave’s alleged statement, however, is not sufficient by itself to sustain the convictions either.

The doctrine of corpus delicti protects against convictions based on false confessions by requiring evidence of the “body of the crime.” State v. Aten, 130 Wn.2d 640, 655-57, 927 P.2d 210 (1996).³ The body of the crime “usually consists of two elements: (1) an injury or loss (e.g., death or missing property) and (2) someone's criminal act as the cause thereof.” City of Bremerton v. Corbett, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986).

The corpus delicti must be proved by evidence sufficient to support the inference that a crime took place. The defendant's confession “alone is not sufficient to establish that a crime took place.” State v. Brockob, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006). Specifically, “[t]he State must present other independent evidence ... that the crime a defendant described in the [confession] actually occurred.” Id. at 328.

³ A criminal defendant may raise corpus delicti for the first time on appeal as a sufficiency of the evidence challenge. State v. Cardenas-Flores, 189 Wn.2d 243, 401 P.3d 19 (2017).

Essentially, corpus delicti is a corroboration rule that “prevent[s] defendants from being unjustly convicted based on confessions alone.” State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010); see also 1 Kenneth S. Broun et al., McCormick on Evidence § 145, at 802 n.7 (7th ed. 2013) (“The corroboration requirement rests upon the dual assumptions that [the] risk[] of inaccurac[ies] are serious ... and that juries are likely to accept confessions uncritically.”).

"Under the Washington rule, ... the evidence must independently corroborate, or confirm, a defendant's" confession. Id. “The independent evidence need not be of such a character as would establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it prima facie establishes the corpus delicti.” State v. Meyer, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951). “Prima facie corroboration ... exists if the independent evidence supports a 'logical and reasonable inference of the facts'” the State seeks to prove. Brockob, 159 Wn.2d at 328 (internal quotation marks omitted) (quoting Aten, 130 Wn.2d at 656).

This approach acknowledges the reality that individuals sometimes confess to imaginary crimes. See State v. Unga, 165 Wn.2d 95, 115 n.10, 196 P.3d 645 (2008) (“We must disabuse ourselves of the notion that an innocent person would not confess to a crime he or she did not commit.”);

Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L.Rev. 891, 920-21 (2004) (“While it is not presently possible to provide a valid quantitative estimate of the incidence or prevalence of interrogation-induced false confessions in America, the research literature has established that such confessions occur with alarming frequency. Social psychologists, criminologists, sociologists, legal scholars, and independent writers have documented so many examples of interrogation-induced false confession[s] in recent years that there is no longer any dispute about their occurrence.” (footnotes omitted)).

d. Where the evidence fails to establish the identity of the defendant as the perpetrator of the alleged crimes, reversal is required.

There was a complete lack of any physical evidence offered in support of the allegations. RP 184. As a result, the only evidence available to the jury was the trial testimony of I.V. in which she was insistent that she never saw her alleged assailant and nothing was spoken during the numerous encounters she described. In the absence of any means of reliably identifying the perpetrator of these acts of alleged sexual contact, the evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt. Reversal is required.

2. The trial court abused its discretion by admitting evidence Mr. Nave went to New York following disclosure because any motive was speculative and overly prejudicial, outweighing its minimal probative value

a. Defense timely sought to exclude irrelevant and prejudicial evidence

Mr. Nave moved in limine to exclude evidence that he traveled to New York City following I.V.'s disclosure. RP 25-30.

I would object to those statements coming in regarding. I'm sure the State would want to introduce it as risk of flight to some degree, but we would object to that, Your Honor.

RP 25. The prosecutor argued for admission:

the State's position is that all of his actions since they are immediately after the disclosure by the victim and being kicked out of the house, that all goes to his consciousness of guilt, the fact that he was confronted and then he instantly went to New York.

RP 26. The trial court initially reserved ruling on the question, but then dissected the several facets of the evidence, finding evidence of Mr. Nave's travel to New York would be admissible. RP 29-30.

When Danielle Valentine subsequently testified, she indicated that after I.V.'s allegation, she confronted Mr. Nave and "told him he needed to pack his bags, go to his mom's house," which he did. RP 91. Ms.

Valentine was then asked:

Q: Did Mr. Nave ultimately call you from somewhere other than Spokane?

A: Yes.

Q: Where did he call you from?

A: New York.

Q: About how soon after Bella disclosed this did you receive that call?

A: It was the day I took her in to do her statement with [Detective Brandon Armstrong].

Q: Did Mr. Nave have any family in New York you were aware of?

A: No.

Q: Did he ever to your knowledge travel for business at Umpqua Bank?

A: No.

RP 96.

Detective Armstrong was permitted to testify similarly with regard to his efforts to locate Mr. Nave, whose mother had filed a missing person report:

Q: Were you ultimately able to determine where Mr. Nave was?

A: I was.

Q: Where was that?

A: In New York City.

Q: Based on the information you obtained, did you close the missing person report for him?

A: I did. On May 18th, I settled that missing person report.

RP 107. Mr. Nave continued to object to the prosecutor's effort to admit evidence of a "suicide call." RP 120-24. The court sustained the objection to this particular line, but nevertheless permitted the testimony Mr. Nave was contacted in New York. RP 107. The prosecutor was again permitted to elicit, over objection During Mr. Nave's testimony, his

acknowledgement that he had traveled to New York the day after I.V. made the allegations. RP 146.

b. Rules of Evidence and constitutional right to due process limit the admissibility of minimally relevant and highly prejudicial evidence such as this

ER 402 provides that “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations Evidence which is not relevant is not admissible.” ER 401 defines “relevant evidence” as “evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

ER 403 then provides that even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403’s concern for unfair prejudice “speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilty on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

The law in Washington is that evidence of "flight" is insufficient in itself to establish guilt. State v. Pettit, 74 Wash. 510, 133 P. 1014 (1913). Where present, however, it may be taken into consideration with all the other facts and circumstances of the case in determining whether or not a person charged with a crime is in fact guilty. Id. *citing* State v. Stentz, 33 Wash. 444, 74 P. 588 (1903).

To constitute flight, it is not necessary that there be an escape from jail or from an officer, but may consist of a departure from the place of the crime by one conscious of guilt even before suspected of the crime. State v. Jefferson, 11 Wash.App. 566, 524 P.2d 248 (1974) (failure to appear at trial is admissible as circumstantial evidence of guilt). In it is said: "It is not necessary, in order to prove the flight of one charged with crime, to show that he escaped from jail or from an officer having him in custody, for it often happens that persons conscious of guilt seek safety by flight, even before they are suspected of crime. "The wicked flee when no man pursueth." Petit, 74 Wash. at 522; State v. Deatherage, 35 Wash. 326, 77 P. 504 (1904).

In several Washington cases escape from custody prior to trial has been equated with "flight," State v. Wilson, 26 Wash.2d 468, 482, 174 P.2d 553 (1946), The rationale which justifies the admission of evidence of "flight" is that, when unexplained, it is a circumstance which indicates a

reaction to a consciousness of guilt. 29 Am.Jur.2d Evidence § 280 (1967); 1 C. Torcia, Wharton's Criminal Evidence § 214, at 450 (13th ed. 1972). In many cases, the justification for evidence of flight is that it is a manifestation of an instinctive or impulsive reaction, but Mr. Nave's departure was the following day rather than something which was "instinctive" or "impulsive." Id.

Certainly, where the record failed to reveal any other basis for the defendant failure to appear at some scheduled event, or to account for his absence thereafter, then the evidence may be admissible as circumstantial evidence of guilty knowledge because the nexus is apparent. State v. Bruton, 66 Wash.2d 111, 401 P.2d 340 (1965); State v. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978). As to Mr. Nave, however, he made himself available for the Court as soon as he was advised of the warrant and moved to facilitate his appearance on the matter. He has not failed to appear and therefore the probative value of the evidence was minimal at best and prejudicial in its likelihood to induce unsupported speculation.

c. The improper admission of this overly prejudicial evidence compromised Mr. Nave's right to a fair trial

Mr. Nave timely moved to exclude this evidence because it was not relevant to proving the elements of the alleged crimes. When balanced against this unmoored speculation, the prejudicial effect runs the risk of

violating due process by depriving Mr. Nave of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (introduction of improper evidence deprives defendants of due process where “the evidence is so extremely unfair that its admission violates fundamental conceptions of justice”).

In Mr. Nave’s case, the prejudicial impact of that irrelevant evidence has been well noted by the courts. United States v. Williams, 33 F.3d 876, 879 (7th Cir.1994). The Supreme Court itself has "consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." Wong Sun v. United States, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 415 n. 10, 9 L.Ed.2d 441 (1963). Because the probative value of flight evidence is often slight, there is a danger that the inferential leap will follow the jury’s giving undue weight to such evidence. See Williams, 33 F.3d at 879; United States v. Russell, 662 F.3d 831 (7th Cir. 2011).

Whether evidence of a defendant's flight may be probative of a consciousness of guilt, and therefore admissible, “depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the

crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.” United States v. Peltier, 585 F.2d 314, 323 (8th Cir. 1978) (internal quotation marks omitted); United States v. Jackson, 572 F.2d 636, 639 (7th Cir. 1978). Courts must “carefully consider whether there are a sufficient number of evidentiary manifestations to support these inferences.” United States v. Hankins, 931 F.2d 1256, 1261 (8th Cir. 1991).

The chronology of events, and in particular the passage of time between the commission of a crime or the defendant being accused of a crime and his purported flight, is a material consideration in the assessment of the probative worth of flight evidence. Jackson, 572 F.2d at 640-41. Where a defendant flees in the immediate aftermath of a crime or shortly after he is accused of committing the crime, the inference that he is fleeing to escape capture and prosecution may be stronger, See Jackson, (quoting (citing United States v. Myers, 550 F.2d 1036, 1049-51 (5th Cir. 1977)). The importance of the immediacy factor is greatly diminished, if not rendered irrelevant, when there is evidence that the defendant knows that he is accused of and sought for the commission of the crime charged. United States v. Ajijola, 584 F.3d 763, 765-66 (7th Cir.2009); Jackson, 572 F.2d at 641; United States v. Russell, 662 F.3d 831 (7th Cir. 2011). Evidence that tends to support the third inference includes a defendant's

full awareness of the charges against him and the absence of other offenses that could explain the defendant's flight. See Id. at 1262.

In Mr. Nave's case, his travel reflects little more than the reality that he had lost home when he left at the direction of his wife. The prejudicial speculation engendered by this evidence far exceeded what was necessary for the prosecution to tell its story. Instead, it served to distract the jury from its central function of weighing the credibility of the State's witnesses regarding the allegations of criminal conduct. United States v. Benedetti, 433 F.3d 111, 116 (1st Cir. 2005).

This testimony illustrates the danger of admitting minimally probative and unfairly prejudicial evidence; because it compromises an accused person's right to a fair trial which is a fundamental part of due process of law. United States v. Solerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, secs 3, 22. This includes the right to tried for only the offense charged, not extraneous matters like these. State v. Mack, 80 Wn.2d 19, 21, 490 P.3d 1303 (1971).

3. The trial court abused its discretion by admitting irrelevant and prejudicial testimony regarding Mr. Nave's physical contact with I.V. years before the alleged offenses

a. Defense sought to exclude this irrelevant and prejudicial evidence.

The State moved in limine to “admit some instances of the defendant’s sexual contact with the victim occurring prior to the charging period of January 1st to May 12th, 2017.” RP 6.

I do anticipate the victim will talk about an incident when she was about 11 or 12, again, when she was around 13 and then that the conduct escalating [sic] when she was 14. All of that would include statements regarding abuse that happened prior to the charging period. The State’s position is it is admissible to show the aggravating circumstance in this case, as well as lack of accident, mistake, goes toward the sexual gratification element that the state has to prove.

RP 7.

Mr. Nave objected. He argued that the prior conduct would not have been criminal in the first place. The two incidents several years apart in which Mr. Nave allegedly touched or massaged I.V.’s thigh. Neither incident were overtly sexual in any way. There was no contact with a sexual or private area. RP 8. The evidence fails to establish the “ongoing pattern of sexual abuse” for which it was purportedly offered in the absence of any indication of Mr. Nave’s sexual gratification. RP 8.

Nevertheless, the court ruled, “At this time, I’ll allow it. I’ll let you object if it starts to go outside those, but with the lack of accident, mistake or intent, the fact that they charged it as an aggravating, as an ongoing pattern of sexual abuse, she can testify to that.” RP 10. The court then noted the defendant’s standing objection to the admission of the evidence. RP 11.

b. Evidence which is minimally relevant and unduly prejudicial should be excluded.

As noted already, even relevant evidence may not be admitted if its probative value is outweighed by the danger of unfair prejudice. Carson v. Fine, 123 Wn.2d 206, 222, 867 P.2d 610 (1994); ER 403. Unfair prejudice occurs where the evidence is likely to arouse an emotional response rather than a rational decision among the jurors. Carson, 123 Wn.2d at 223. Evidence is unfairly prejudicial if it “appeals to the jury’s sympathies, . . . provokes its instinct to punish, or triggers other mainsprings of human action.” Id.

Evidence of prior bad acts or misconduct risks exactly this form of unfair prejudice by appealing to the jury to punish for something other than the charged offense. Such evidence is, therefore, inadmissible to prove the defendant's character or to show his general propensity for misconduct. On the other hand, such evidence "may . . . be admissible for

other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." ER 404(b); State v. Grant, 83 Wn.App. 98, 105, 920 P.2d 609 (1996).

To admit evidence of a person's prior misconduct,

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 charged, and (4) weigh the probative value against the prejudicial effect.

State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). The third and fourth elements ensure that the evidence does not run afoul of ER 402 or ER 403, respectively. The party seeking to introduce evidence has the burden of establishing the first, second, and third elements. DeVincentis, 150 Wn.2d at 17; Lough, 125 Wn.2d at 853. It is because of this burden that evidence of prior misconduct is presumptively inadmissible. DeVincentis, 150 Wn.2d at 17.

Ultimately, the trial court's admission of ER 404(b) evidence is vested in the court's sound discretion. Thang, 145 Wn.2d at 642. That discretion is abused, however, when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

c. The inappropriate evidence was minimally relevant and unduly prejudicial.

I.V. testified that she was eleven when Mr. Nave first touched her inappropriately. “We were in the entertainment center room, and I fell asleep on the couch, and I woke up to him touching me.” RP 50. They had been watching a movie when I.V. fell asleep and woke up to “him touching under my shorts on my upper thigh.” RP 51.⁴ He was “just massaging my legs” RP 51. I.V. testified that after she woke up, she did not say anything, but got up and went to bed. RP 51. I.V. did not tell her mother “because [she] didn’t think it was a big deal.” RP 52.

As to the second incident,

I was about 13 maybe, and we had gotten a different couch, and, again, I’d fallen asleep watching a movie on the complete opposite side of the couch from where he was laying, and I woke up to him touching me in the same, similar spot.

RP 52. This time, however, she described that “spot” as “my vagina.” RP 52.⁵ Again, I.V. did not tell her mother. RP 53. I.V. testified that she told the responding officers that she did not really remember anything about that second incident. RP 73.

Then “sometime last year, it was in my room. It was late at night,

⁴ I.V. confirmed on cross-examination that the first incident on the couch, that the touching was on the thigh for a matter of seconds, not on the underwear and “not onto your business.” RP 71-72.

⁵ On cross-examination, I.V. confirmed that the second contact “was above my underwear.” RP 73.

and I woke up to him touching me again.” RP 53-54. After this incident, “the same thing happened...maybe three or four times a week,” for several months before speaking to her mother in May. RP 56-58.

To the extent the prosecution sought to admit these allegations of various uncharged acts, it implicates prohibitions of ER 404(b). “ER 404(b) is a categorical bar to admission of evidence [of a prior bad act] for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). These prior bad acts are admissible only when the evidence is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the witness’s propensity to commit certain acts, and (3) substantial probative value outweighs its prejudicial effect. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); ER 404(b). Doubtful cases should be resolved in favor of the defendant to ensure a fair trial. Smith, 106 Wn.2d at 776. The burden of demonstrating a proper purpose is on the proponent of the evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Here the trial judge admitted the evidence to prove “lack of accident, mistake or intent, [and] an aggravating, as an ongoing pattern of sexual abuse....” RP 10. The judge’s decision was based on untenable grounds or untenable reasons, however, because the testimony failed to

prove “an ongoing pattern of sexual abuse,” where the conduct failed to amount to sexual abuse. The contact was over the clothes or did not involve sexual contact, it was untenable to conclude it was admissible for that purpose.

Furthermore, as to the question of “accident, mistake or intent,” the alleged misconduct was years earlier, occurred in a different location, under different circumstances and fails to address a contested fact where Mr. Nave testifies categorically that he never touched I.V. with his fingers on her vagina and never touched her inappropriately at all. RP 16. As such, there is no issue of contact for which the criminal intent is in dispute or to which the defendant claims accident or mistake. In applying the balancing test, therefore, the “relevance of the evidence to prove an element of the crime,” is negligible. Fisher, 165 Wn.2d at 745.

**d. Admission of irrelevant and prejudicial evidence
compromised the defendant’s right to a fair trial**

Where the evidence was admitted for untenable reasons, or on untenable grounds, then the question of prejudice becomes central. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). In Mr. Nave’s case, when this miniscule element of potential probative value here is weighed against the prejudicial effect, the result is tipped toward undue prejudice. Notwithstanding the effort to minimize the adverse impact on

re-direct, the irrelevant evidence was admitted and the burden on the right to a fair trial and the exercise of Mr. Nave's Sixth Amendment rights was substantial. Mr. Nave timely moved to exclude this testimony because it was irrelevant and was a burden on the exercise of his Sixth Amendment right to counsel. Instead the evidence distracted the fact-finder from its thoughtful evaluation of the evidence and improperly colored the jury's weighing of the evidence. The result is a lack of confidence in the result reach below and reversal is required.

4. The trial court abused its discretion and compromised Mr. Nave's constitutional right to present his defense by excluding evidence that I.V.'s cousin, with whom she was very close, made similar disclosures of sexual abuse in the same time frame.

a. The defense objected to exclusion of evidence of similar disclosures which may have influenced I.V.'s reporting

The State moved, in limine, to exclude evidence I.V.'s cousin disclosed to her that she had been sexually abuse by a family member. RP 20. The prosecutor argued evidence of these allegations did not make any fact in the current case more or less probable, so it was irrelevant and prejudicial citing ER 403. RP 20-21.

Mr. Nave argued the evidence was relevant because the disclosure of these allegations occurred contemporaneously with the disclosure in this case where they were described as very close if not inseparable. RP

21. Defense counsel explained, "A jury one of the questions they'll have is why would this ever have come into the child's mind if this hadn't occurred, and they're entitled I think under that scenario to know that one of her best friends or best cousin had disclosed to her similar allegations." RP 21. "I think it's relevant that the complaining victim in this case was aware of her cousin doing the same sort of thing and making a disclosure and what ensued after that." RP 21-22.

The trial judge expressed concern that the evidence would be hearsay and excluded it as "highly prejudicial." RP 22-23.

b. The accused has a constitutional guarantee of the right to present evidence was relevant and necessary to the defense.

Both the federal and state constitution's guarantee criminal defendants the right to confront witnesses and present evidence in their own defense. U.S. Const, amend. VI; Wash. Const, art. I § 22; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "The primary and most important component" of the confrontation clause "is the right to conduct a meaningful cross-examination of adverse witnesses." Darden, 145 Wn.2d at 620. "[G]reat latitude must be allowed in cross-examining an essential prosecution witness to show motive for his testimony." State v. Knapp, 14 Wn.App. 101, 107, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975).

Certainly, the constitutional right to present a defense is not absolute and does not extend to irrelevant or inadmissible evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

The trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (citing Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

Whether a Sixth Amendment right has been abridged presents a legal question that is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). State v. Clark, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017) (abuse of discretion review of evidentiary rulings and de novo review of whether such rulings violated the defendant's right to present a defense).

The defendant's right [to present a defense] is subject to reasonable restrictions and must yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

State v. Donald, 178 Wn.App. 250, 263-64, 316 P.3d 1081 (2013) (quoting State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)).

c. Exclusion of a contemporaneous disclosure by a close friend or relative was constitutional error.

As Mr. Nave explained, the evidence of I.V.'s cousin's contemporaneous disclosure of sexual abuse at the hands of a relative was relevant to explain "why would this ever have come into the child's mind if this hadn't occurred, and they're entitled I think under that scenario to know that one of her best friends or best cousin had disclosed to her similar allegations." RP 21. The evidence was relevant because it established a potential motive for making the charge and explained that the complaining victim in this case was aware of her cousin doing the same sort of thing and making a disclosure and what ensued after that." RP 21-22.

Evidence such as this is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. More to the point, evidence providing a reason for a child-victim's knowledge and descriptions of sexual activity may be admissible "to rebut the inference [the child] would not know about such sexual acts unless [he or she] had experienced them with defendant." State v. Kilgore, 107 Wn.App. 160, 179-80, 26 P.3d 308 (2001), *aff'd*, 147

Wn.2d 288 (2002) (alteration in original) (quoting State v. Carver, 37 Wn.App. 122, 124, 678 P.2d 842 (1984)).

Contrary to the trial court's concern, evidence offered to show a child's precocious knowledge of explicit sexual matters is not hearsay. In re Dependency of Penelope B., 104 Wn.2d 643, 654-55, 709 P.2d 1185 (1985). "[B]y definition, an utterance, writing or nonverbal conduct that is not assertive is not hearsay." Penelope B., 104 Wn.2d at 652. Furthermore, evidence offered to show that a child has precocious knowledge of explicit sexual matters is not offered for the truth of any assertion that it conveys—that, for instance, a specific episode of sexual abuse actually occurred. Penelope B., 104 Wn.2d at 654-55.

The evidence Mr. Nave sought to elicit was offered as circumstantial evidence that I.V.'s explicit sexual knowledge was not incongruent with her age or maturity because of the experience shared by her cousin. In a matter involving child sexual abuse, evidence of a child's precocious knowledge of explicit sexual matters tends to create an inference that the child had gained such knowledge through prior episodes of sexual abuse. State v. Swan, 114 Wn.2d 613, 648-49, 790 P.2d 610 (1990). Consequently, this evidence was relevant and any potential for prejudice under ER 403 was minimal. See State v. Stevens, 58 Wn.App.

478, 490-91 n.5, 794 P.2d 38 (1990); accord Penelope B., 104 Wn.2d at 652-53.

Where the trial court erroneously excludes relevant and material evidence that is necessary to the defense, the error establishes a constitutional violation. State v. Cayetano-Jaimes, 190 Wn.App. 286, 300, 359 P.3d 919 (2015) (trial court erred because by depriving defendant "relevant, material evidence vital to his defense."); Jones, 168 Wn.2d at 721.

In Jones the defendant sought to testify that his sexual contact with his niece was consensual and took place during an all-night sex party in which both he and his niece participated. 168 Wn.2d at 717. The trial court excluded the defendant's testimony under the rape shield statute. Jones, 168 Wn.2d at 717-18. The Washington State Supreme Court ultimately concluded that the rape shield statute did not apply, that the sex party evidence was the defendant's "entire defense," and that "even if the rape shield statute did apply, the sex party testimony is of extremely high probative value and cannot be barred without violating the Sixth Amendment." Jones, 168 Wn.2d at 724; Chambers v. Mississippi, 410 U.S. 284, 292-94, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (the defendant was deprived of due process when prohibited from cross-examining a witness who had confessed to the crime charged but who later repudiated

his confession); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

As the United States Supreme Court itself later observed, both Chambers and Washington involved the exclusion of evidence that "significantly undermined fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 315, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). Similarly, here, establishing the origins of I.V.'s knowledge and potential motivations for her allegations was crucial to the defense.

d. Where constitutional error was not harmless, remand for a new trial is required

Error of this constitutional magnitude requires reversal unless the State establishes it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). Error is harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

In Mr. Nave's case, it was critical that the jury be made aware of the potential source of I.V.'s allegations of sexual misconduct, particularly

in light of her testimony that she was always facing away and never saw her alleged assailant. A reasonable jury that heard of these contemporaneous disclosures of sexual abuse by a close confidant of I.V.'S may have been inclined to see the allegations in a far different light. The jury would have heard a completely different theory about the events surrounding I.V.'s disclosure and it is possible that a reasonable jury may have thereafter reached a different result. The trial court's error prevented Mr. Nave from presenting this viable scenario to explain the source of the allegations. The constitutional error was not harmless, so reversal and remand for a new trial is required.

5. The trial court abused its discretion in permitting cross-examination of Mr. Nave which went far beyond the limited scope of the direct examination.

a. The defendant objected to the scope of the cross examination.

Mr. Nave testified in his own defense and denied any inappropriate sexual contact with I.V. RP 136. He explained that he first learned of the charges when he was served with a warrant in Idaho Falls where he was staying with his cousin. RP 136. He readily identified himself to marshals, posted a bond and traveled to Spokane to appear in court. RP 137-38.

On cross-examination, the prosecutor sought to go far beyond the scope of the limited scope of his direct examination and inquire into

topics as varied as Mr. Nave's relationship with I.V. to the sleeping arrangements in their Spokane home. RP 139-40. Mr. Nave noted his objection to the scope of the examination, but the judge allowed the prosecutor considerable latitude. RP 142.

Mr. Nave also renewed his objection to questioning regarding leaving his employment and traveling to New York. RP 143. The trial court overruled the objection and Mr. Nave testified he traveled to New York the following day. RP 146.

b. Cross examination is generally limited by the scope of the direct examination.

It has long been the general rule in both civil and criminal cases that the cross-examination of a witness is limited to the scope of the direct examination. State v. Jeane, 35 Wn.2d 423, 431, 213 P.2d 633, 638 (1950). ER 611 specifically provides that "Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. ER 611(b).

Within its discretion, however, the trial court can grant considerable latitude in cross-examination. State v. Robideau, 70 Wn.2d 994, 997, 425 P.2d 880 (1967). The Evidence Rules further provide that "The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." ER 611(b).

In practice, when a defendant in a criminal case takes the stand, he is subject to all the rules relating to the cross-examination of other witnesses. Jeane, 35 Wn.2d at 431. Furthermore, when "a general subject is unfolded [in direct examination], the cross-examination may develop and explore the various phases *of that subject*." Wilson v. Miller Flour Mills, 144 Wash. 60, 66, 256 P. 777, 779 (1927) (emphasis added); 5 Meisenholder, Wash.Prac. § 264 (1965). Mr. Nave contends that the scope of his examination far exceeded that contemplated by the rules and caselaw so as to constitute an abuse of the discretion granted the trial court.

c. Admission of the extraneous evidence was error.

Although the scope of the cross-examination is a matter entrusted to the discretion of the trial court, its decision will be overturned where there is an abuse of that discretion. See State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970); State v. Solomon, 5 Wn.App. 412, 421, 487 P.2d 643 (1971). This discretion is not limitless.

In State v. Coe, for example, the Washington Supreme Court found the trial court abused its discretion by allowing the prosecuting attorney to question the defendant Coe about the details of his writings in an effort to show a lustful disposition. But the evidence had no bearing on any

element of the charges against Coe and would have been inadmissible had it been offered on direct examination. State v. Coe, 101 Wn.2d 772, 780, 684 P.2d 668 (1984). See also e.g. State v. Golladay, 78 Wn.2d 121, 143, 470 P.2d 191 (1970) (trial court abused its discretion by allowing cross examination of rape defendant as to prior visit to house where prostitute lived); State v. Whyde, 30 Wn.App. 162, 168, 632 P.2d 913 (1981).

Mr. Nave's case is distinguishable from cases where trial courts have been found to have reasonably exercised their discretion such as State v. Anderson, 46 Wn.2d 864, 285 P.2d 879 (1955). There a defense of alibi was asserted. A police officer was asked if he had inquired of the defendant as to his whereabouts on the night of the robbery. He replied that he had, and defendant could not tell him where he was on that night. While Anderson argued on appeal that this was a purely collateral matter, the Court stated:

We do not agree. The subject-matter of these rebuttal questions was in no sense collateral. It pertained to appellant's defense of alibi. The objections to these questions were properly overruled.

46 Wn.2d at 869. Mr. Nave asserted no such defense and, therefore, cross examination into extraneous and collateral areas was improper and an abuse of the trial court's discretion.

Similarly, in State v. Robideau, the Court concluded that a defendant may be cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify. State v. Robideau, 70 Wn.2d 994, 425 P.2d 880 (1967). This may include any fact which diminishes the personal trustworthiness of the witness, but only if it is material and germane to the issue. Id. Because the prosecutor's inquiries below did not bear upon the questions presented by the direct examination or the credibility of the Mr. Nave, the trial court's ruling was untenable and an abuse of this discretion granted by ER 611.

d. Defendant was prejudiced.

Evidence regarding Mr. Nave's relationship with his step-daughter did not relate to the topics covered in the direct examination, nor go to inform the jury as to Mr. Nave's credibility. RP 139. Further inquiry regarding family finances and sleeping habits were similarly beyond the scope of the direct examination and not germane to evaluating Mr. Nave's trustworthiness. See e.g. RP 140, 146-47. Instead, the testimony was inflammatory because it sought to paint Mr. Nave as abandoning his family and thereby distracted the jury from its task of evaluating the relevant evidence and determining if the elements of the alleged offenses were proven beyond a reasonable doubt.

6. Cumulative error in the admission of irrelevant and prejudicial evidence and the improper exclusion of evidence denied appellant a fair trial.

The “cumulative effect of repetitive prejudicial error” may deprive a person of a fair trial. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple error and the resulting prejudice on an accused person. United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

During Mr. Nave’s trial, several critical errors occurred in the admission of minimally relevant, but highly prejudicial, evidence which unfairly prejudiced the jury against him and their cumulative impact affected the outcome of the case. Furthermore, the exclusion of defense evidence of the similar allegations of a close relative further hobbled Mr. Nave’s ability to present a defense in the form of an indication where I.V.’s imagination grasped the allegations. This tipped the scales against Mr. Nave and his right to a fair trial. Based on the cumulative effect of these errors, a new trial is required.

F. CONCLUSION

Mr. Nave's conviction should be reversed based on the insufficiency of the evidence of identification, numerous evidentiary errors and cumulative impact on this right to a fair trial.

DATED this 28th day of December, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Donnan", written over a horizontal line.

DAVID L. DONNAN (WSBA 19271)
MERYHEW LAW GROUP
Attorneys for Appellant

MERYHEW LAW GROUP

December 27, 2019 - 9:25 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36488-7
Appellate Court Case Title: State of Washington v. Nathan Brick Nave
Superior Court Case Number: 17-1-02101-7

The following documents have been uploaded:

- 364887_Briefs_20191227091713D3791823_3668.pdf
This File Contains:
Briefs - Other
The Original File Name was Additional Brief of Appellants Associated Counsel.pdf

A copy of the uploaded files will be sent to:

- gaschlaw@msn.com
- gverhoef@spokanecounty.org
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Additional Brief of Appellant's Associated Counsel

Sender Name: David Donnan - Email: david@meryhewlaw.com

Address:

200 BROADWAY, SUITE 301

SEATTLE, WA, 98122

Phone: 206-264-1590

Note: The Filing Id is 20191227091713D3791823