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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NATHAN BRICK NAVE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brett Pearce
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. Where I.V. identified Mr. Nave as her abuser, Mr. Nave confessed to his crimes, and other circumstantial evidence pointed to Mr. Nave's guilt, did the State provide sufficient evidence to prove the identity of I.V.'s abuser?
2. Assuming Mr. Nave adequately briefed and assigned error to his corpus delicti issue, did independent evidence corroborate his confession and is he asking this Court to reweigh I.V.'s credibility?
3. Did the trial court abuse its discretion by admitting evidence of Mr. Nave's immediate flight to New York City after I.V. and her mother accused him of serious sexual crimes?

4. Did the trial court abuse its discretion by admitting prior act evidence that Mr. Nave had molested I.V. years before the charging period, when the State charged the pattern of sexual abuse aggravator and Mr. Nave vehemently contested identity?
5. Did the trial court abuse its discretion by excluding nebulous and substantially prejudicial evidence that I.V.'s cousin had made an unspecified allegation that a different family member had abused her, when Mr. Nave could not provide a substantive offer of proof?
6. Did the trial court's decision to exclude I.V.'s cousin's allegation of abuse infringe Mr. Nave's right to present a defense, when he adequately contested the identity of the perpetrator and I.V.'s credibility?
7. Did the trial court abuse its discretion in determining the State's cross-examination of Mr. Nave properly concerned subjects he had broached during direct examination?
8. Does the cumulative error doctrine apply when Mr. Nave has not established an error?

III. STATEMENT OF THE CASE

Nathan Nave appeals from his convictions for second degree rape, third degree rape of a child, and third degree child molestation, with each charge containing the pattern of abuse aggravator. CP 95-100.

I.V. was born on June 2, 2002. RP 46. She lived with her two sisters and her mother. RP 47-48. Her mother began dating Mr. Nave when I.V. was five, and her mother eventually married Mr. Nave. RP 47-48. The family lived in a two-level house in Spokane County. RP 48. All of the bedrooms were upstairs except for I.V.'s; she slept downstairs in her

basement-level bedroom, which was located next to a basement-level “entertainment center” living room and a toy room. RP 48.

In approximately 2015, Mr. Nave started sleeping downstairs in the basement-level entertainment center living room rather than on the first floor with I.V.’s mother. RP 50, 89. When I.V. was approximately eleven-years-old, Mr. Nave began abusing her. RP 50. The first time, the two were in the basement living room watching a movie when I.V. fell asleep. RP 50. She woke up to Mr. Nave touching her under her shorts, on her upper thigh. RP 50-51. At the time, I.V. thought he was just massaging her legs but was alarmed because the touching was “pretty far up” on her leg. RP 51.

The next incident occurred when I.V. was age 13. RP 52. I.V. fell asleep in the entertainment room on the opposite side of a couch from Mr. Nave, but awoke to him touching her vagina. RP 52. I.V. tried to go to her room, but Mr. Nave pulled her back and told her to fall asleep there. RP 52-53. Mr. Nave insisted she stay, and pulled on her arm, but she pulled her arm away and went back to the safety of her bedroom. RP 53. I.V. was scared but did not yet report the abuse to her mother. RP 53. She stopped watching movies with Mr. Nave to minimize her chances of being abused again. RP 53.

The next incident occurred in 2017. RP 54. I.V. was sleeping in her room but awakened once more to Mr. Nave touching her. RP 54. He

massaged her legs, rubbed her back, and again touched her vagina. RP 54. I.V. typically wore jeans or leggings to bed, and she usually slept facing the bedroom wall. RP 54. The abuse occurred for 15 to 20 minutes, and I.V. was terrified. RP 54-55. I.V. felt Mr. Nave penetrate her with his fingers. RP 56. I.V. again did not disclose the abuse to her mother. RP 56-57.

Emboldened, Mr. Nave began to abuse I.V. “three or four times a week.” RP 56. The abuse occurred for several months. RP 57. Mr. Nave would abuse I.V. at random times during the night, and he also molested her in other ways. RP 57-58. I.V. was scared of Mr. Nave, and employed tactics such as intentionally making him mad in order to prevent him from entering her room. RP 58, 61.

One morning, Mr. Nave took I.V. to a local coffee shop while driving her to her school. RP 63. Mr. Nave stopped at a stop sign, and acknowledged his crimes, by stating “about last night, one of three things could happen. One, you don’t tell anyone and I keep doing it; two, you don’t tell anyone and I stop; three, you feel like you have to tell someone.” RP 63. I.V. told him she would not tell anyone if he stopped. RP 63. Mr. Nave did not say anything. RP 63. Mr. Nave did not stop abusing I.V. RP 63. Mr. Nave eventually informed I.V. that if she did tell on him, the family would lose the home and she would be separated from her mother and sisters. RP 63-64.

On May 12, 2017, I.V. found the courage to tell her mother. RP 60.

I.V. testified:

I was organizing something, and my mom told me to go clean my room, and I said something that like it wasn't even that dirty anyways, and she told me not to talk back, and he came upstairs and he started yelling at me and told me to go clean my room. So I went downstairs and cleaned my room a little bit, and I was crying because when people yell at me, I cry, and when I cry, I think about what he did to me and it just doesn't stop, and he was asking me why are you sobbing? I said I don't want to talk about it, and he kept asking me why are you sobbing? Why are you sobbing, and I said I don't want to talk about it, and each time he would get louder and more frustrated with me until I said you know what you did, and my mom called me upstairs, and I told her Nathan raped me.

RP 66. Her mother confronted Mr. Nave, and told him to leave the home and go to his mother's house while the family "figure[d] all this out."

RP 91.

Mr. Nave immediately stopped going to his job. RP 95, 147. He also sold his car to a used car dealership. RP 95-96, 107, 147. The day after I.V. disclosed the abuse, Mr. Nave travelled to New York City, a location where he did not have any family members. RP 96, 107, 146.

The State charged Mr. Nave with second degree rape, third degree rape of a child, and third degree child molestation. CP 1-2. The State also alleged an aggravating circumstance for each count: that the offense was part of an ongoing pattern of sexual abuse of the same victim under the age

of 18 years manifested by multiple incidents over a prolonged period of time, as provided by RCW 9.94A.535(3)(g). CP 1-2.

The State moved the court in limine to admit evidence of Mr. Nave's prior sexual contact in order to prove the pattern of sexual abuse aggravator. CP 27-29. The State argued that the evidence was necessary to prove the aggravator, and also provided authority that courts routinely admit this type of evidence. RP 6-7; CP 26-28. After Mr. Nave argued that the prior incidents did not rise to the level of prior bad acts, the State also opined that, if the trial court accepted Mr. Nave's argument, only general relevancy would limit admission. RP 7-9. The court ruled the State could use the evidence to prove the aggravator, but also reasoned that it could be used for other ER 404(b) purposes such as lack of accident, mistake, or state of mind of the victim. RP 10.

The State also moved the court pursuant to ER 401-403 to exclude evidence that I.V.'s cousin, who lived in a different state, reported that she had been abused by a different family member, a month prior to I.V.'s disclosure. CP 31. The State argued that the high prejudice from such evidence would substantially outweigh any minimal relevance it may have. CP 31; RP 20-23. The State also pointed out that Mr. Nave did not make

an offer of proof concerning the nature of the allegation, and that it was entirely based on hearsay. CP 31; RP 22-23. Mr. Nave responded:

Judge, I probably would along the theories that the defense should be given some latitude in putting on a defense.

The allegations by the cousin, the disclosure of the allegations occurred about contemporaneously with the disclosures here. It was a cousin that she was very close with. In fact, her mom indicated that when they were together, they were inseparable. The mother knows Isabella knew of the allegations. The mother was somewhat equivocal the timing, but fully admitted that it could have been as earlier as a month before [I.V.] made her disclosures.

A jury one of the questions they'll have is why would this ever have come into this 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.

That case was prosecuted, and I think it was an uncle, and my understanding there was a prison term imposed, but 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 court agreed with the State, reasoning that "the prejudicial value totally outweighs any relevance," and that the allegation was "too nebulous." RP 23. The court did, however, permit Mr. Nave the opportunity to readdress the allegation outside the presence of the jury.

RP 23. Mr. Nave did not do so.

Mr. Nave moved the court to exclude evidence that he immediately fled Spokane County to New York City after accused by I.V. and her mother, although he did not cite to an evidentiary rule or provide a basis for his request. RP 25. He also sought to exclude the details of his hospital stay, which included an allegation that he may have attempted to commit suicide and needed a safety plan. RP 25-26. The State argued in response that it did not seek to admit evidence Mr. Nave was in a hospital after a possible suicide attempt; however, the State argued his immediate flight from the county was relevant to establish consciousness of guilt. RP 26-28. The court reserved ruling on the admissibility of the flight evidence to review case law but excluded the details of the hospital visit. RP 29-30. The court later admitted the flight evidence. RP 96.

Mr. Nave testified in his own defense. RP 135. Mr. Nave concisely and generally denied ever touching I.V. inappropriately. RP 136. He stated he first learned the State had charged him with these crimes when he was in Idaho Falls at a cousin's house. RP 136. During cross-examination, the State asked Mr. Nave if he had known I.V. since she was five-years-old. RP 139. Mr. Nave objected under the basis the question beyond the scope of direct examination, but the trial court overruled him. RP 139. Mr. Nave

objected several more times, and the court excused the jury. RP 139-40.

The court heard argument:

MR. PHELPS: Judge, my direct examination was concise and narrow in that it doesn't leave open for the State to go into all these other issues that were not part of his direct testimony. It's not the proper subject of a cross examination.

THE COURT: Counsel.

MS. FRY: Thank you, Your Honor. I do have some case law on this issue if the Court and counsel would like to review it.

In *State vs. Solomon*, the cite is 5 Wn. App. 412 from 1971, this is essentially the same issue arose that the defendant took the stand and briefly denied. In that case, it was a burglary. He briefly denied entering the garage or stealing the vehicle involved, and afterwards, the State, over the defense objection, conducted an extensive cross examination concerning the defendant's whereabouts that night.

The Court found that that was proper. That when in direct examination a general subject is unfolded, the cross examination may develop and explore the various phases of the subject. Additionally noted that the scope of cross examination is a matter entrusted to the discretion of the trial court and will not be overturned except for abuse of discretion. This case, Your Honor, the direct examination of Mr. Nave in this case falls directly into the analysis that this Court looked at. Mr. Nave through direct examination brought up in issue of never having touched [I.V.] The State based on the fact that that topic was brought up is not limited to just the questions asked on direct and should have the ability to explore the surrounding circumstances of that statement.

THE COURT: Mr. Phelps.

MR. PHELPS: Judge, I'm aware of that proposition, but it doesn't give unfettered license to re-examine the entire case based on that limited direct examination.

THE COURT: The case law does say that if he's going to a general denial, one of the questions you asked him if he ever sexually touched her, whether or not he inappropriately touched her, all of those then would be subject to cross examination. So she can ask her about any of the incidents involving [I.V.] since it's an all out denial on that. You asked where he was living at the time or where he's living now. You, also, asked him about when he learned about the charges or how he found out and how he came to come to court. So all those are fair game.

RP 141-42.

The jury found Mr. Nave guilty of all three counts and returned affirmative special verdicts for the pattern of abuse aggravator charged on each count. CP 95-100. The court sentenced Mr. Nave to 194 months to life confinement. CP 154. The court imposed \$800 in legal financial obligations. CP 157. Mr. Nave timely appeals. CP 169.

IV. ARGUMENT

A. THE EVIDENCE IS SUFFICIENT

Mr. Nave first asserts that the evidence is insufficient to establish that he was the person who abused I.V. This assertion requires the court to disregard I.V.'s testimony and ignore Mr. Nave's confession made to I.V. while the two were in his vehicle. Additional circumstantial evidence supports the State's case. Consequently, the challenge fails.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). A claim of insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). All reasonable inferences must be interpreted most strongly in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Reviewing courts must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). This Court does not reweigh the evidence or substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). "Credibility determinations are peculiarly matters for the trier of fact and

may not be second-guessed by an appellate court.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 464, 232 P.3d 591 (2010). “The identity of a criminal defendant and his presence at the scene of the crime charged must be proven beyond a reasonable doubt.” *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), *aff’d*, 123 Wn.2d 877 (1994).

Under this standard of review, sufficient evidence identifies Mr. Nave as the perpetrator of the crimes. First, I.V. repeatedly identified Mr. Nave as her abuser at trial, and the jury found her credible. I.V. had lived with Mr. Nave since she was five-years-old, and—even if she did not testify that she directly observed him—she was presumably familiar with his mannerisms, body parts, scent, or even breathing patterns. The jury heard testimony that Mr. Nave denied his crimes and heard argument from him that I.V. admitted to not seeing the face of her abuser. The jury found I.V. more credible. I.V.’s testimony was not inconsistent on this point.

There is also the matter of Mr. Nave’s own admissions to the crimes. Those admissions occurred the time that Mr. Nave purchased coffee with I.V. and asked her if she wished for him to stop abusing her, or if she would report him. Mr. Nave acknowledged that he had been abusing her. Mr. Nave was understandably concerned with I.V. reporting the abuse. Under the standard of review, when a defendant challenges the sufficiency of the evidence, the defendant admits the truth of the State’s evidence.

Taken as true, Mr. Nave's confession provides the most irrefutable proof that Mr. Nave is the person who molested and raped I.V. in her bedroom.

The State also presented evidence that Mr. Nave fled his life and home to New York City when confronted by I.V. and her mother. "It is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence." *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). "The rationale of the principle is that flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution." *Id.* Here, the jury could properly infer that Mr. Nave fled when confronted, as an impulsive reaction to the realization that his actions would in fact lead to consequences. This evidence supports the conclusion that Mr. Nave was I.V.'s abuser.

Circumstantially, at some point prior to the abuse, Mr. Nave began to sleep in the basement. Mr. Nave would know who was or was not downstairs at night. Only I.V.'s bedroom was located on that floor. For several months, several times per week, *someone* entered I.V.'s bedroom at night to abuse her. The jury could properly infer that only someone who lived in the home would have such frequent nighttime access to I.V.'s bedroom. The jury could further infer that Mr. Nave, who was the other

person to sleep downstairs, had the greatest undetected access to I.V.'s bedroom several times per week to commit the abuse.

Finally, the evidence that Mr. Nave had engaged in a pattern of abusing I.V.—starting several years prior to the charged crimes—established his identity. I.V. testified that Mr. Nave had abused her twice on the couch. During both of those prior incidents, I.V. explained that she had fallen asleep on the couch while Mr. Nave was present. In both of these incidents, I.V. awoke to discover *Mr. Nave* touching her in areas that she found highly inappropriate and offensive. The prior acts that occurred on the couch in the entertainment room were strikingly similar to the acts that occurred in I.V.'s bedroom. Those prior incidents demonstrate that Mr. Nave was also the person who abused I.V. in her bedroom several times per week.

This Court must view the evidence in the light most favorable to the State. The record provides a basis for a reasonable jury to conclude that Mr. Nave was the person who had abused I.V. in her bedroom.

B. INDEPENDENT EVIDENCE SUPPORTS MR. NAVE’S CONFESSION

Mr. Nave argues that independent evidence does not support his confession¹ to I.V., which he made to her after getting coffee with her one morning. Because I.V. provided evidence that corroborated Mr. Nave’s confession, this claim fails.

1. Mr. Nave did not assign error to the admission of his confession.

The State agrees with Mr. Nave that he may bring a corpus delicti claim for the first time on appeal. *State v. Cardenas-Flores*, 189 Wn.2d 243, 263, 401 P.3d 19 (2017). However, that does not obviate the need for an assignment of error or argument. RAP 10.3(g); *CalPortland Co. v. LevelOne Concrete LLC*, 180 Wn. App. 379, 392, 321 P.3d 1261 (2014). Mr. Nave did not assign error to the trial court admitting his confession as substantive evidence, nor did he assign error alleging independent evidence did not support the introduction of his confession. He does not analyze this issue pursuant to the appropriate legal test, beyond

¹ Although not a traditional confession, some authority suggests Mr. Nave’s admissions to I.V. fall within the ambit of the corpus delicti rule. *See State v. Aten*, 79 Wn. App. 79, 89, 900 P.2d 579 (1995) (“we hold that the corpus delicti rule requires corroboration of any statement ... whether confession, admission, or even neutral description”), *aff’d by State v. Aten*, 130 Wn.2d 640, 657, 927 P.2d 210 (1996) (approving of reasoning, in dicta).

simply asserting that his confession was false. This Court should decline review.

2. *The State presented independent evidence.*

A confession is an expression of guilt as to a past act. *State v. Dyson*, 91 Wn. App. 761, 763, 959 P.2d 1138 (1998). “A defendant’s incriminating statement alone is not sufficient to establish that a crime took place.” *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007). The State must present independent evidence to corroborate that the crime described in the defendant’s incriminating statement occurred. *Id.* at 328. The corpus delicti rule “tests the sufficiency or adequacy of evidence” to corroborate a defendant’s incriminating statement independently of that statement. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). The corpus delicti can be proved by either direct or circumstantial evidence. *State v. Hummel*, 165 Wn. App. 749, 758-59, 266 P.3d 269 (2012). To establish the corpus delicti of a crime, the State must present prima facie evidence of two elements: (1) an injury or loss and (2) a criminal act causing such injury or loss. *Cardenas-Flores*, 189 Wn.2d at 252.

The independent evidence need not satisfy the beyond a reasonable doubt or preponderance of the evidence standards, but instead simply provide prima facie corroboration of the crime described in a defendant’s incriminating statement. *Brockob*, 159 Wn.2d at 328. “Prima facie

corroboration of a defendant's incriminating statement exists if the independent evidence supports a logical and reasonable inference of the facts sought to be proved." *Id.* at 328 (internal quotations omitted). In assessing whether there is sufficient evidence of the corpus delicti, this Court views all reasonable inferences in the light most favorable to the State and assumes the truth of the State's evidence. *State v. Aten*, 130 Wn.2d 640, 658, 927 P.2d 210 (1996).

The first step is to identify the "independent evidence." *Id.* at 657. Here, the independent evidence consists of I.V.'s testimony that Mr. Nave repeatedly abused her for months. This includes the times that she was in her bedroom, as well as the times she was asleep on the entertainment room couch and awoke to him touching her. There is also evidence that I.V. disclosed the abuse to her mother. Her mother confronted Mr. Nave. Mr. Nave's demeanor and behavior bolster the reliability and trustworthiness of his confession to I.V. Within one day, Mr. Nave sold his vehicle, quit his job, and fled across the county to New York City, providing circumstantial evidence of guilt. Additionally, there is circumstantial evidence that Mr. Nave, the only male in the household, began sleeping downstairs in a room next to I.V. rather than in his bedroom with his wife.

As Mr. Nave points out, the corpus delicti rule is a corroboration rule that "prevent[s] defendants from being unjustly convicted based on

confessions alone.” *Dow*, 168 Wn.2d at 249. But, as argued above, the State did not try this case with only Mr. Nave’s confession. The above identified independent evidence corroborates Mr. Nave’s confession. I.V. testified that Mr. Nave had raped her and abused her over the course of years. Mr. Nave began sleeping downstairs, and no other males lived in the home, suggesting circumstantially that no one else had access to I.V.’s bedroom three or four times a week for several months. This is not a case where the only proof of Mr. Nave’s crimes was his incriminating acknowledgement to I.V. that he had raped her.

On a more basic level, Mr. Nave’s claim does not fit within the corpus delicti rule. *Cardenas-Flores* suggests the analysis of a corpus delicti claim brought for the first time on appeal is a sufficiency challenge under which the reviewing court takes a two-step process: (1) determine whether independent evidence supports a confession and, (2) if so, determine whether the evidence including the confession supports the conviction. 189 Wn.2d at 263-67. Presumably, if the rule is not satisfied, this Court would consider the evidence absent the confession. *See id.* at 263-67 (“Here, because the State satisfied corpus delicti, Cardenas-Flores’s statements to the police were properly considered by the jury”). Under these facts, the standard of review for a sufficiency challenge requires Mr. Nave to admit the truth of I.V.’s testimony, which should render him unable to

challenge the corpus of his confession. The argument Mr. Nave implicitly makes is that I.V.'s recounting of his confession should not be trusted; this is a matter of credibility.²

I.V. testified that Mr. Nave confessed to her, by asking her whether she wanted him to stop sexually assaulting her. I.V.'s testimony provided the majority of the independent evidence that corroborates his confession. In order for this court to determine no independent evidence supported Mr. Nave's confession, it would have to assume that I.V. was not credible when she testified about Mr. Nave's criminal acts. "Credibility determinations are peculiarly matters for the trier of fact and may not be second-guessed by an appellate court." *Minehart*, 156 Wn. App. at 464. Mr. Nave testified that he did not commit any of the crimes, and the jury rejected this claim when it chose to believe I.V. Because Mr. Nave is asking this Court to reweigh credibility and because independent evidence supports the confession, this Court should reject this claim.

² This becomes apparent when reading that Mr. Nave labels his confession as an "alleged" conversation. Appellant's Supp. Br. at 14.

C. THE COURT PROPERLY ADMITTED EVIDENCE THAT MR. NAVE FLED THE STATE AFTER HIS FAMILY CONFRONTED HIM WITH THE ACCUSATIONS THAT HE HAD RAPED I.V.

Mr. Nave contends that the trial court abused its discretion in admitting evidence that he fled to New York City the day after I.V. exposed his abuse. He cites to ER 401, 402, 403, and general due process concerns. The trial court did not abuse its discretion.

ER 403 permits a trial court to exclude evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” A danger of unfair prejudice exists when evidence is more likely to provoke an emotional response than a rational decision. *State v. Taylor*, 193 Wn.2d 691, 696-97, 444 P.3d 1194 (2019). This Court reviews a trial court’s decision pursuant to ER 403 for an abuse of discretion. *Id.* A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Id.*

Evidence of flight is admissible, and the jury may properly consider it when determining guilt or innocence. *Bruton*, 66 Wn.2d at 112. “The evidence must be sufficient so as to create a reasonable and substantive inference that defendant’s departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.” *State v. Price*, 126 Wn. App. 617, 645,

109 P.3d 27 (2005), *abrogated on other grounds by State v. Hampton*, 184 Wn.2d 656, 361 P.3d 734 (2015).

Mr. Nave acknowledges that the trier of fact may take evidence of flight into consideration along with other facts and circumstances of the case. *See* Appellant's Supp. Br. at 20 (citing *State v. Pettit*, 74 Wash. 510, 133 P. 1014 (1913)). Mr. Nave also recites case law supporting the admissibility of flight evidence and probative value that courts have consistently determined it holds—for at least 100 years pursuant to his own citations. Appellant's Supp. Br. at 20-21 (citing *Pettit*, 74 Wash. 510; *State v. Stentz*, 33 Wash. 444, 74 P. 588 (1903); *State v. Jefferson*, 11 Wn. App. 566, 524 P.2d 248 (1974) (flight includes departure from the place of the crime by one conscious of guilt even before suspected of the crime)).

Nonetheless, Mr. Nave asserts that evidence he went to New York was highly prejudicial and the trial court abused its discretion by admitting it. He argues that the evidence only demonstrated that he left the home because I.V.'s mother ordered him to leave. This is not the entire story. Mr. Nave continued his behavior after he confessed to I.V., possibly deciding that she was not going to disclose the abuse. When she confronted him downstairs and then told her mother, her mother also *immediately* confronted Mr. Nave with the accusation. As Mr. Nave cited, 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 prosecution is strong. *United States v. Myers*, 550 F.2d 1036, 1049-51 (5th Cir. 1977). I.V.'s mother told him to go to his mother's home. However, Mr. Nave chose instead to quit his job, sell his car, and travel to the opposite side of the country. Mr. Nave's own mother is the person who filed a missing person report. Mr. Nave did not have any family in New York City. Mr. Nave discovered the State had filed criminal charges many months later, when he was staying with a cousin in Idaho. This is not the situation that Mr. Nave attempts to paint: that he had simply inadvertently, coincidentally abandoned his job, assets, and family the day after he was accused of serious sex crimes.

Evidence that Mr. Nave left Washington was not likely to provoke an emotional, rather than rational, response. The jury could rationally and properly infer that Mr. Nave felt pressure and the need to flee when confronted by his family, particularly when coupled with evidence that he quit his job and sold his car. Unfavorable evidence is not unfairly prejudicial evidence.³

³ “Nearly all evidence will prejudice one side or the other,” and “[e]vidence is not rendered inadmissible under ER 403 just because it may be prejudicial.” *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994).

Mr. Nave also does not demonstrate the trial court abused its discretion. The court agreed that evidence of flight was generally admissible, and reviewed case law prior to making a final ruling. RP 29. The trial court made clear that its ruling was narrow, excluding statements about Mr. Nave's possible suicide attempt that had the danger to inflame the jury, as Mr. Nave had pointed out. RP 29-30. The court reasoned that this was a flight because I.V. and her mother had confronted Mr. Nave about his crimes, even if law enforcement had not yet been involved. The court gave tenable reasons for its decision, and it addressed Mr. Nave's concerns about the scope of his activities on the east coast. There was nothing manifestly unreasonable about the court's decision.

D. THE COURT PROPERLY ADMITTED EVIDENCE THAT MR. NAVE ABUSED I.V. FOR YEARS, PURSUANT TO THE STATE'S CHARGING OF THE PATTERN OF ABUSE AGGRAVATOR

Mr. Nave next contends the trial court should not have admitted prior act evidence that he had touched I.V. inappropriately twice prior to the charging period. But the trial court properly admitted the evidence because it was highly probative of the pattern of abuse aggravator, identity of the perpetrator, and several other ER 404(b) purposes.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Prior acts are admissible if they are logically relevant to a material issue before the jury. *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), *overruled on other grounds by State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). A trial court’s ruling on the admission of evidence is reviewed for a manifest abuse of discretion. *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987). The trial court is in the best position to evaluate the dynamics of a jury trial and the prejudicial effect of a piece of evidence. *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962). Courts have “consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant’s lustful disposition directed toward” the victim. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Such evidence is admissible even if it is not corroborated by other evidence. *Id.*

Here, the State charged the aggravating circumstance that Mr. Nave committed these offenses as part of a pattern of abuse, so the acts were highly probative to the State’s case. This is the main reason the trial court identified when ruling on the motion in limine. RP 10. The State cited *Price*, 126 Wn. App. 617, to the trial court. CP 26-28. That case succinctly states that ER 404(b) evidence is properly admitted when it is used to prove

the pattern of abuse aggravator. 126 Wn. App. at 636.⁴ In that case, the evidence at issue was evidence the defendant had entered an *Alford*⁵ plea to a prior domestic violence charge with the same victim, when the defendant had been charged in the present case with the pattern of domestic violence aggravator. *Id.*

Here, the probative evidence was prior allegations of child molestation, when Mr. Nave had been charged with the ongoing pattern of sexual abuse aggravator. RCW 9.94A.535(3)(g). Mr. Nave claims this was innocuous massaging, but I.V. was alarmed by the first act, and specifically described the second act as Mr. Nave touching her vagina. RP 52. The trial court did not abuse its discretion when admitting evidence of prior acts that established the statutory aggravator in light of the case law the State provided.

The trial court also identified that the evidence established “lack of accident, mistake, misunderstanding and the state of mind of the victim at the time.” RP 10. These are additional tenable reasons for the admission

⁴ To forestall any argument in reply that *Price* included a limiting instruction, trial courts are not required to sua sponte give a limiting instruction regarding ER 404(b) evidence admitted against a defendant. *State v. Russell*, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011). Mr. Nave did not request a limiting instruction.

⁵ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

of Mr. Nave's prior acts. He claims the court abused its discretion in determining the evidence was relevant because he testified that he never touched I.V. inappropriately. Appellant's Supp. Br. at 30. However, in these prior incidents, I.V. testified that Mr. Nave touched her "pretty far up" on her legs near her underwear, and on her vagina. RP 51. Even if Mr. Nave disputed the prior acts, that would again be a challenge to I.V.'s credibility, not to whether the evidence was probative or admissible for permissible ER 404(b) purposes.

Additionally, the issue of identity was before the jury, and central to Mr. Nave's theory of defense. I.V. testified on direct that Mr. Nave abused her while she was sleeping, and that she did not turn around to face him. Mr. Nave pursued this issue during cross-examination. RP 76. Mr. Nave elicited testimony that I.V. questioned whether or not she had dreamt the abuse. RP 72-74. Mr. Nave explicitly argued in closing that the State had not proven identity to the jury: "what is technically missing in this case altogether? An identification of the perpetrator." RP 178. ER 404(b) explicitly enumerates that proving identity is a permissible purpose for prior act evidence. Evidence that I.V. had been subjected to Mr. Nave performing substantially similar abuse while she was with him on the couch tends to establish his identity as the person who abused her in her bedroom. The trial court did not abuse its discretion.

E. THE COURT PROPERLY EXCLUDED SPECULATIVE EVIDENCE CONCERNING I.V.'S COUSIN WHEN MR. NAVE COULD NOT PROVIDE AN OFFER OF PROOF, AND THIS RULING DID NOT VIOLATE THE RIGHT TO PRESENT A DEFENSE

The State moved in limine pursuant to ER 403 to exclude evidence that I.V.'s cousin, who lived in another state, had reported another family member for sexual abuse, which had resulted in the family member being convicted. The trial court excluded the evidence over Mr. Nave's objection, finding the claim was nebulous. Mr. Nave claims the trial court's ruling violated his right to present a defense. This Court should affirm.

Under both the Sixth Amendment to the United States Constitution and article I, section 22, of the Washington Constitution, a defendant is entitled to present evidence in support of his defense. *State v. Strizheus*, 163 Wn. App. 820, 829-830, 262 P.3d 100 (2011). That right, however, does not include a right to present irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). As the proponent of the evidence, the defendant bears the burden of establishing relevance and materiality. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). When a defendant claims a trial court's evidentiary rulings violate their right to present a defense, this Court undertakes a two-step review process: (1) review the individual evidentiary rulings for an abuse of discretion, and

(2) consider de novo the constitutional question of whether the rulings infringed the right. *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017).

1. *The court did not abuse its discretion.*

The trial court offered two reasons for its decision to exclude this evidence:

At this point unless you can get me some case law on it or some kind of allegation, just throwing that out I think would be highly prejudicial at this point. If prior to cross of the victim if you want to address it outside the presence of the jury based on her testimony, but unless there's some link for it, at this point I think the prejudicial value totally outweighs any relevance at all unless you can make a connection to base on that.

So the mom saying that oh, it was about the same time and the same type of allegations, at this point, I think it's too nebulous. The Court would keep it out at this time subject to if you want to address it after she testifies and the Court might address it or we can address it outside the presence of the jury with the victim.

RP 23. This ruling implicates two evidentiary concerns: ER 403 and whether Mr. Nave made an inadequate offer of proof that failed to establish the evidence's relevance.

ER 403 permits a trial court to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." A danger of unfair prejudice exists when evidence is more likely to provoke an emotional response than a rational decision. *Taylor*, 193 Wn.2d at 696-

97. This Court reviews a trial court's decision pursuant to ER 403 for an abuse of discretion. *Id.* A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Id.*

Here, the State pointed out to the trial court that I.V.'s cousin lived elsewhere, neither I.V. nor Mr. Nave was involved in the allegations, and there was no indication whatsoever about the type of abuse that had occurred. CP 31. Any unfair prejudice would outweigh the virtually nonexistent probative value such evidence held. The trial court agreed with the State that the evidence was "highly prejudicial" and did not assign much probative value. RP 23. The court properly excluded this evidence. The cousin's allegation had no articulable relation to the facts of this case. The evidence could only serve as an emotional appeal to the jury, by inviting the jury to conclude that I.V. made up the allegation in order to get Mr. Nave in trouble simply because her cousin had disclosed unspecified abuse. Mr. Nave cannot demonstrate the trial court abused its discretion.

As to whether the allegation was too speculative, the court made a reasonable decision. The purpose of an offer of proof is to: (1) inform the court of the legal theory under which offered evidence is admissible; (2) inform the trial judge of the specific nature of admissibility; and (3) create a record for review. *Walker v. Bangs*, 92 Wn.2d 854, 860, 601 P.2d 1279 (1979).

State v. Burnam, 4 Wn. App. 2d 368, 421 P.3d 977 (2018), *review denied*, 192 Wn.2d 1003 (2018), is on-point. In that case, the State charged the defendant with first degree murder, and he asserted self-defense. *Id.* at 372-73. Prior to trial, the defendant moved the court to admit evidence that the victim “had been involved in a prior homicide.” *Id.* at 373. The defendant’s offer of proof was “repeatedly vague” on the nature of the offered evidence, and he simply insisted that the jury should consider that the victim had been involved with or capable of being involved with a homicide. *Id.* at 377-78. The limited record indicated that the victim may have disposed of a firearm for an alleged murder suspect, at some unknown point after the homicide. *Id.* at 373. This Court pointed out that the offer of proof “never said what acts” the victim allegedly committed, or the foundation of how the defendant knew this information. *Id.* at 378. This Court determined that the defendant’s offer of proof failed to establish the relevance of the evidence, and that the trial court did not abuse its discretion in excluding it. *Id.* at 378.

A similar result should follow here. As the State pointed out below, Mr. Nave did not provide any offer of proof concerning the underlying facts of the cousin’s disclosure, the date that the disclosure was made, or whether I.V. even knew the nature of the allegations. RP 22. Mr. Nave provided “nothing to indicate that those circumstances were similar.” RP 22. There

is no indication in the record that the same type of abuse even occurred. The trial court stated the evidence was too nebulous to be admissible. And the trial court took the reasonable step of permitting Mr. Nave to readdress the purported allegation outside the presence of the jury. He never did so, arguably waiving his challenge now. The court's ruling was based on tenable reasoning.

2. *Mr. Nave's right to present a defense was not infringed.*

As to the second step of this analysis, the court's ruling did not unreasonably restrict Mr. Nave's right to present a defense. Most importantly there is no right to present inadmissible evidence and, as discussed, the trial court properly ruled the evidence was both too speculative and highly prejudicial.

Second, the evidence was not highly probative towards the thrust of Mr. Nave's defense. The theory of Mr. Nave's defense was mainly that the State did not establish the identity of I.V.'s assailant, and secondarily that I.V. was not credible because some of the statements she had made to law enforcement were inconsistent with her trial testimony. Evidence that I.V.'s cousin, who did not live nearby and made unspecified allegations of sexual abuse, would not implicate whether or not *Mr. Nave* was the person who abused I.V. The record reveals that Mr. Nave did not assert an "other

suspect” theory of defense, and he did not argue he was offering this evidence to identify any other suspect. *See* RP 21-22.

As to credibility, had Mr. Nave introduced this evidence he likely would have asked the jury to further infer I.V. was not credible and that the cousin’s story could provide a source for some of the details of I.V.’s abuse. But, Mr. Nave adequately attacked I.V.’s credibility with her inconsistent statements to law enforcement. He also elicited statements from law enforcement about I.V.’s emotional state during interviews that cast doubt on her credibility, and his thorough cross-examination of I.V. revealed she did not turn around to see who was attacking her. The Supreme Court has concluded that the Sixth Amendment was not violated when “the defendant remained able to offer evidence to support his defense theories.” *State v. Arndt*, 194 Wn.2d 784, 453 P.3d 696 (2019). The Sixth Amendment is more properly implicated when evidentiary rulings “eliminate[] the defendant’s entire defense.” *Id.* (citing *Jones*, 168 Wn.2d at 724) (emphasis in original). Here, Mr. Nave produced other evidence that supported his theory.

The trial court’s evidentiary rulings did not constitute an abuse of discretion. Mr. Nave adequately argued his theory of the case that the State did not prove identity. He also employed several attacks toward I.V.’s credibility. The trial court did not violate his right to present a defense when

excluding irrelevant evidence that I.V.'s cousin had made an allegation of sexual abuse.

F. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED THE STATE TO CROSS-EXAMINE MR. NAVE CONCERNING ISSUES HE HAD RAISED DURING DIRECT EXAMINATION

Mr. Nave next contends the trial court abused its discretion when it overruled his objections to the State's line of questioning while cross-examining him. The trial court reasonably applied the relevant case law in determining the State's cross-examination did not exceed the scope of direct examination.

"The scope of cross examination lies in the discretion of the trial court and will not be disturbed unless there is a manifest abuse of discretion." *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984); *see also State v. Carol M.D.*, 89 Wn. App. 77, 94, 948 P.2d 837 (1997), *review granted, cause remanded on other grounds sub nom. State v. Doggett*, 136 Wn.2d 1019, 967 P.2d 548 (1998). When a defendant opens up a subject matter in his own defense, the cross examination may probe into the various phases of the subjects developed on direct. *State v. Hayes*, 73 Wn.2d 568, 571, 439 P.2d 978 (1968); *State v. Solomon*, 5 Wn. App. 412, 420, 487 P.2d 643 (1971). The rule does not confine cross examination to the questions asked but permits inquiry into the subjects

discussed on direct. *State v. Riconosciuto*, 12 Wn. App. 350, 354, 529 P.2d 1134 (1974); *State v. Rushworth*, No. 36077-6-III, slip op. at *8 (published in part) (Feb. 20, 2020) .

The State cited to *Soloman* below, and the circumstances of that case are essentially the same but for the charged crimes. 5 Wn. App. 412. When the defendant in that case testified, he “briefly denied entering the police garage or stealing the car.” *Id.* at 420. Over objection, the State conducted an extensive cross-examination “concerning the defendant’s whereabouts that night.” *Id.* The reviewing court determined the trial court did not abuse its discretion when determining those matters were within the scope of direct because when “a general subject is unfolded, the cross-examination may develop and explore the various phases of that subject.” *Id.* (citations omitted).

The trial court in Mr. Nave’s case concurred, recognizing that the State could ask about incidents involving I.V. because Mr. Nave had offered a general denial, including whether Mr. Nave had ever touched I.V. inappropriately. The court also noted Mr. Nave testified on direct about where he was living when he learned the State was prosecuting him, and when he was first confronted with the allegations. Nothing in the record demonstrates an abuse of discretion. The trial court applied *Soloman* and offered tenable reasoning for its determination that the questions related to

issues that Mr. Nave broached during direct examination. The record also demonstrates that the State's cross-examination was not unduly lengthy, continuing for only a few moments after the trial court's ruling.⁶ See RP 145-47. The court did not err.

G. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY

The cumulative error doctrine permits reversal where the cumulative effect of repetitive errors compromises a person's right to a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Here, Mr. Nave does not prevail on any alleged error. There is no basis for this Court to apply the cumulative error doctrine. See *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

V. CONCLUSION

Mr. Nave's claims do not succeed. The implicit thrust of his argument is that I.V. was not credible. Appellate courts do not reweigh credibility. Mr. Nave also does not demonstrate the trial court abused its

⁶ Mr. Nave continued to deny his crimes. He also clarified he went to New York before Idaho, consistent with other witnesses' testimony. Any error would be harmless.

discretion in its evidentiary rulings. Those rulings did not violate his right to present a defense. This Court should affirm.

Dated this 24 day of February, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brett Pearce, WSBA #51819
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN NAVE,

Appellant,

NO. 36488-7-III

CERTIFICATE OF MAILING

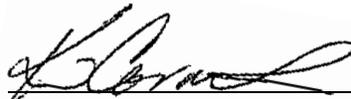
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gaschlaw@msn.com

David Donnan
David@meryhewlaw.com

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