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NO. 37079-8-III

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

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STATE OF WASHINGTON,

Respondent,

v.

PATRICK CROSSGUNS,  
Appellant.

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

Spokane County Cause No. 16-1-03681-4 (32)

The Honorable Julie McKay, Judge

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BRIEF OF APPELLANT

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court erred by entering Conclusion of Law 1. CP 119.
2. The trial court erred by entering Conclusion of Law 2. CP 119.
3. The trial court erred by entering Conclusion of Law 3. CP 119.
4. The trial court erred by entering Conclusion of Law 4. CP 119-20.
5. The trial court erred by entering Conclusion of Law 5. CP 120.
6. The trial court erred by admitting evidence of uncharged allegations of abuse by Mr. Crossguns.
7. The evidence of uncharged allegations of abuse was inadmissible under ER 404(b).
8. The evidence of uncharged allegations of abuse was not admissible as *res gestae* evidence.
9. The evidence of uncharged allegations of abuse was not admissible to explain the alleged victim's late disclosure.
10. The evidence of uncharged allegations of abuse was not admissible to demonstrate a "common scheme or plan."
11. The evidence of uncharged allegations of abuse was not admissible to prove motive.
12. The evidence of uncharged allegations of abuse was not admissible to prove intent.
13. The evidence of uncharged allegations of abuse was not admissible to show opportunity.
14. The evidence of uncharged allegations of abuse was not admissible to show absence of mistake or accident.
15. Washington courts should abandon the "lustful disposition" doctrine because it is incompatible with ER 404(b).

**ISSUE 1:** Evidence of uncharged bad acts is not admissible to demonstrate an accused person's character in order to prove propensity to commit the charged crime(s). Did the trial court err by admitting extensive evidence of uncharged abuse allegations by Mr. Crossguns under a laundry list of exceptions to ER 404(b) when none of those exceptions actually applied to the facts of his case?

16. Prosecutorial misconduct deprived Mr. Crossguns of his Sixth and Fourteenth Amendment right to a fair trial.
17. Prosecutorial misconduct deprived Mr. Crossguns of his Wash. Const. art. I, § 22 right to a fair trial.
18. The prosecutor committed misconduct by making an argument mischaracterizing the state's burden of proof.
19. The prosecutor committed misconduct by making an argument undermining the presumption of innocence.
20. The prosecutor's misconduct was flagrant and ill-intentioned.
21. Mr. Crossguns was prejudiced by the prosecutor's misconduct.

**ISSUE 2:** A prosecutor commits misconduct by incorrectly presenting the jury with a false choice between finding that the alleged victim is lying or acquitting the accused of the charges. Did the prosecutor commit misconduct by telling the jury that it was its "job" and that it was "going to have to" decide whether the alleged victim was lying or whether Mr. Crossguns and his defense witness were lying on the stand?

22. The prosecutor committed misconduct by misstating the law regarding the missing witness doctrine to the jury.

**ISSUE 3:** A prosecutor commits misconduct by misstating the law to the jury. Did the prosecutor commit misconduct at Mr. Crossguns's trial by mischaracterizing the law regarding the missing witness doctrine in a manner that improperly undermined a key component of his defense theory?

23. The cumulative effect of the errors at Mr. Crossguns's trial deprived him of his Sixth and Fourteenth Amendment right to a fair trial.
24. The cumulative effect of the errors at trial requires reversal of Mr. Crossguns's convictions.

**ISSUE 4:** The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Mr. Crossguns's convictions when those errors worked together to undermine the presumption of Mr.

Crossguns's innocence and to sway the jury away from properly considering his arguments in his defense?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Patrick Crossguns got into a fight with his adult stepson, which was so bad the stepson broke Mr. Crossguns's jaw. RP 706.<sup>1</sup> After that punch had been thrown, the stepson accused Mr. Crossguns of improper sexual conduct with his teenage daughter, R.M. RP 707. Mr. Crossguns was shocked to be accused of molesting his daughter. RP 707.

At that time, Mr. Crossguns's wife threatened him against reporting to the police that her son had broken his jaw. RP 408.

A few months later, Mr. Crossguns and R.M. were watching TV on the living room couch when his son came in and told him to turn the volume down. RP 719. Mr. Crossguns reached past R.M. to grab the remote control and his cup of coffee. RP 720. He touched R.M.'s leg as he reached past. RP 720.

But the son claimed that he had seen Mr. Crossguns touch R.M.'s vaginal area. RP 449. He told his mother (Mr. Crossguns's wife) about the allegation and she confronted Mr. Crossguns. RP 451. Mr. Crossguns called R.M. into the room and she confirmed to both parents that Mr. Crossguns had never touched her inappropriately. RP 721.

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<sup>1</sup> All citations to the Verbatim Report of Proceedings refer to the chronologically paginated volumes spanning 7/15/19 through 9/13/19.

Mr. Crossguns relationship with the whole family deteriorated after that allegation was made. RP 722. He moved back to Montana (from which the family had moved about a year prior), leaving the family behind. RP 715.

After Mr. Crossguns had left, R.M.'s stepmother (who later adopted her) asked her directly whether Mr. Crossguns had ever touched her in a sexual manner and she said no. RP 618. When her stepmother asked her again later, she claimed that he had done so, but she said that it had only happened a couple of times. RP 618-19.

At first, R.M. only claimed that Mr. Crossguns had touched her outside of her clothing. RP 648. Then she claimed that the touching was inside her clothing but over her underwear. RP 648. Then she later claimed that he had penetrated her vagina with his fingers. RP 648.

Mr. Crossguns was in Montana when he learned that he was being charged with second-degree rape of a child and second-degree child molestation. RP 722-23; CP 80-81. The state also alleged that the abuse was part of an ongoing pattern and that Mr. Crossguns had abused a position of trust. CP 80-81.

Mr. Crossguns's niece, S.R., was a year younger than R.M. RP 661. They went to the same school during the year after Mr. Crossguns left the family. RP 661. A few months after Mr. Crossguns was charged,

R.M. told her cousin that she had lied about the allegations against her father, at the direction of her stepmother. RP 662. S.R. later told her grandmother about that conversation and memorialized it in writing. RP 663; Ex. D 101.

The child molestation charge against Mr. Crossguns was based on the allegation that he had touched R.M.'s vaginal area while sitting on the couch, before his son came and told him to turn down the TV volume. *See* RP 829-31. The son testified at trial that he had seen Mr. Crossguns's hand inside R.M.'s pants. RP 449. that was true even though he had only told the police that he had seen Mr. Crossguns's hand "near her groin." RP 543.

During the first day of her testimony, R.M. claimed only that Mr. Crossguns had touched her inner thigh. RP 614, 617. After the trial recessed for the weekend, however, R.M. came back and said that Mr. Crossguns's hand had been about 1 ½ inches from her vagina, in the area usually covered by her underwear. RP 637-38.

The rape of a child charge was based on an alleged incident taking place in a bedroom in the basement of the family home. *See* RP 826. R.M. claimed that Mr. Crossguns put his fingers in her vagina during that incident. RP 607.

R.M.'s stepmother, younger brother, and two older stepbrothers all testified for the state. RP 339-538. But there were some inconsistencies in the family members' versions of events.

For example, R.M.'s stepmother said that Mr. Crossguns had treated R.M. like a pariah until the time that the abuse allegedly started. RP 351-52. But R.M.'s stepbrothers both said that Mr. Crossguns treated her the same as all of the other children in the house. RP 475, 506. R.M.'s brother, on the other hand, testified that R.M. had always been treated better than the other siblings by Mr. Crossguns. RP 428.

At trial, the state sought to admit testimony regarding numerous alleged incidents of sexual abuse by Mr. Crossguns against R.M., none of which were the basis for the charges. CP 42-47. The state argued that the evidence was relevant to the aggravating factors, which been added to the Information right before trial. CP 42-47. The state also argued that the evidence was admissible under ER 404(b). CP 42-47.

Mr. Crossguns strenuously objected. RP 60-64, 216-19; CP 70-74. He argued that the testimony would constitute pure propensity evidence. CP 72. In the alternative, he moved for the trial on the "ongoing pattern of sexual abuse" aggravator to be bifurcated from the issue of guilt so the jury would only hear the evidence if he had already been convicted of the charges. RP 62, 217, 222; CP 60.

The trial court granted the state's motion, finding the evidence admissible to show intent, plan, motive, opportunity, absence of mistake or accident, lustful disposition, res gestae, and as evidence of R.M.'s state of mind for her delayed disclosure of the allegations. CP 119. The court also denied Mr. Crossguns's motion to bifurcate, since the evidence had already been ruled admissible in the state's case-in-chief. CP 119-20.

Pursuant to this ruling, R.M. testified at length about her allegations regarding how the abuse started in the car on a road trip with Mr. Crossguns on the way to Montana, continued while they were in Montana, and resumed when they got back to Spokane. RP 582-90. She claimed that Mr. Crossguns first touched her vaginal area while he was driving, she was in the front seat of the car, and her brother was in the back seat. RP 582-83. Her brother only saw Mr. Crossguns put his hand on R.M.'s leg. RP 440. R.M. described those alleged incidents to the jury at length. RP 582-90.

R.M. also alleged that Mr. Crossguns would sneak into her room at night to touch her. RP 594-97. She described those alleged incidents and their effect on her to the jury. RP 594-600. R.M. shared a bedroom with her sister. RP 576. The sisters' beds were only a few feet apart. RP 577. But the state did not call R.M.'s sister as a witness at trial. *See RP generally.*

Mr. Crossguns called his niece – R.M.’s cousin – as a witness for the defense. RP 660-81. S.R. testified that R.M. had told her during school that she lied about the allegations against her father. RP 661-62. She memorialized that conversation in a letter, at her grandmother’s urging. RP 663; Ex. D 101.

Mr. Crossguns also testified. RP 683-766. He denied ever having touched his daughter in a sexual manner. RP 684-724.

During closing argument, the prosecutor informed the jury that it was their “job” to decide whether S.R. was lying or whether R.M. was lying:

[S.R.] told you about an alleged conversation that she had with [R.M.] in which [R.M.] said she was lying, none of this happened. You heard from [R.M.] earlier, that that conversation never happened. Somebody's lying. It's your job to determine who's lying. Is [R.M.] lying or is [S.R.] lying?  
RP 815.

The prosecutor provided the same two options for the jury regarding Mr. Crossguns’s testimony, arguing that the jury was “going to have to” decide that either R.M. was lying or that Mr. Crossguns was:

But, again, you have the testimony of [R.M.], on one hand, and [Mr. Crossguns’s] testimony on the other hand. Somebody's not telling the truth, and, again, you're going to have to make that decision. Who is lying and who is telling the truth.  
RP 817

During his closing, Mr. Crossguns argued that the jury could infer that R.M.'s sister, with whom she shared a bedroom, had not seen or heard any of the alleged late-night abuse in that room because she had not been called as a witness. RP 842.

In response, the prosecutor told the jury during rebuttal that they were not permitted to make any inferences based on the failure of R.M.'s sister to testify. RP 850. The prosecutor said that anything regarding what the sister had seen was "not in evidence," and was, accordingly, outside the bounds of what could properly be considered during deliberations. RP 850.

The jury convicted Mr. Crossguns of both of the charges and answered yes to each of the special verdicts on the aggravating factors. CP 109-12. This timely appeal follows. CP 192.

### **ARGUMENT**

**I. THE TRIAL COURT ERRED BY ADMITTING EXTENSIVE, HIGHLY PREJUDICIAL EVIDENCE OF UNCHARGED ALLEGATIONS OF ABUSE BY MR. CROSSGUNS AGAINST R.M., WHICH WERE INADMISSIBLE UNDER ER 404(B) AND STRONGLY ENCOURAGED THE JURY TO CONVICT BASED ON AN IMPROPER PROPENSITY INFERENCE.**

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.” ER 404(b).<sup>2</sup> This rule must be read in conjunction with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Before admitting evidence of prior bad acts by the accused, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2015).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *Slocum*, 183 Wn. App. at 448. Doubtful cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

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<sup>2</sup> Interpretation of an evidentiary rule is a question of law, reviewed *de novo*. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Trial court evidentiary rulings are generally reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion by failing to abide by the requirements of the rules of evidence. *Id.*

ER 404(b) reflects a long-standing policy against character evidence because “it is said to weigh too much with the jury and to so overpersuade them....” that the accused must be guilty of a particular offense if he has been shown to have a propensity toward that type of misconduct. *Slocum*, 183 Wn. App. at 456 (quoting *Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948)).

The protection against propensity evidence must be given particularly careful consideration in sex cases because, “the prejudice potential of prior acts is at its highest” in such cases. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Specifically:

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

*Id.* (quoting Slough and Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325, 333–34 (1956)).

The prohibition on propensity evidence under ER 404(b) “does not discriminate between the good and the bad in its safeguards.” *State v. Arredondo*, 188 Wn.2d 244, 272, 394 P.3d 348 (2017) (Gonzalez, J., dissenting). This is because:

‘The protection of the law is due alike to the righteous and the unrighteous. The sun of justice shines alike ‘for the evil and the good, the just and the unjust.’ Crime must be proved, not presumed.’ For this reason, we have adopted rules prohibiting the

introduction of character evidence because it incites the “deep tendency of human nature to punish” a defendant simply because he or she is a bad person, a “criminal-type” deserving of conviction.

*Id.* at 272-73 (quoting *People v. White*, 24 Wend. 570, 574 (N.Y. 1840));

1A John Henry Wigmore, *Evidence in Trials at Common Law* § 57, at 1185 (Tillers rev. 1983); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

Nonetheless, evidence of uncharged crimes or misconduct may be admissible to prove, *inter alia*, “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

When applying these exceptions, however, the Supreme Court has admonished against using them as “magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names,” without conducting meaningful analysis into whether each exception truly applies to the facts of any given case.

*Saltarelli*, 98 Wn.2d at 364 (quoting *United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir.1974)).

Evidence of uncharged misconduct is not admissible, for example, to prove motive, intent, etc. when those factors are not actually in dispute at trial. *See e.g. State v. Powell*, 126 Wn.2d 244, 262, 893 P.2d 615 (1995).

Courts must also give “careful consideration” in sex cases of whether evidence, even if relevant, requires exclusion because its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). This is because the danger of an improper propensity inference by the jury is “at its highest” in such cases. *Id.*

In Mr. Crossguns’ case, the court found that the lengthy evidence regarding the uncharged abuse allegations were admissible under ER 404(b) to show “the defendant’s intent, plan, motive, opportunity, absence of mistake or accident, lustful disposition toward [R.M.], and as *res gestae* in the case to show [R.M.’s] state of mind for her delayed disclosure.” CP 119.

The court also explicitly instructed the jury that the evidence could be considered for each of those purposes. CP 93.

As outlined below, however, none of those exceptions to the bar on evidence of uncharged misconduct applied to the facts of Mr. Crossguns’ case. Additionally, Washington court should abandon the “lustful disposition” doctrine because it is incompatible with ER 404(b) and with Supreme Court precedent.

A. The extensive evidence of the uncharged allegations against Mr. Crossguns was not admissible as *res gestae* of the charges.

*Res gestae* or “same transaction” evidence can be admissible to “complete the story of the crime.” *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989); *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004). Such evidence must constitute “a link in the chain of an unbroken sequence of events surrounding the charged offense ... in order that a complete picture be depicted for the jury.” *Id.* (quoting *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)).

*Res gestae* evidence involving other crimes or bad acts must also still relevant to a material issue at trial and meet the other requirements of ER 404(b). *Id.* The evidence remains inadmissible to show that the accused has acted in conformity with his/her allegedly bad character. *Id.*

The evidence regarding the uncharged accusations against Mr. Crossguns were not part of an “unbroken sequence of events.” Nor was the evidence necessary to “complete the story” of the allegations supporting the charges. *Id.* A recitation only of the allegations for which Mr. Crossguns was charged would not have made the case confusing or incomplete for the jury. It would only have encouraged the jury to convict or acquit based only on the evidence supporting those actual allegations.

The admission of the extensive evidence of uncharged misconduct in Mr. Crossguns case was not necessary as *res gestae* of the charges. *Id.* That exception to ER 404(b) did not apply to the facts of this case. *Id.*

B. The extensive evidence of the uncharged allegations against Mr. Crossguns was not admissible to explain R.M.'s late disclosure of the abuse allegations.

Evidence of uncharged misconduct can be admissible under ER 404(b) to explain an alleged victim's delayed reporting of the charged offenses *if* defense counsel chooses to "ma[k]e an issue" of the delay in reporting. *See Fisher*, 165 Wn.2d at 746. This is because any uncharged misconduct does not become relevant to the determination of whether the charged offenses occurred unless the accused attempts to rely on the delayed reporting to attack the credibility of the alleged victim. *Id.*

By presumptively introducing the evidence, when the defense has not yet had the opportunity to decide whether to "make an issue" of the delay in reporting, the prosecutor does not actually use the evidence for the purported purpose of explaining that delay. *Id.* at 747-48. Instead, the evidence is used to encourage an improper propensity inference. *Id.*

That is exactly what happened in Mr. Crossguns's case. Rather than waiting to see if Mr. Crossguns would "make an issue" of R.M.'s delayed reporting during his defense case, the state introduced extensive evidence of uncharged accusations in its case-in-chief. RP 582-90, 594-

600. The evidence was not offered to explain a delay in reporting but to encourage a propensity inference. *Id.*

The trial court erred at Mr. Crossguns's trial by ruling – and specifically instructing the jury – that the extensive evidence of uncharged alleged abuse could be considered to “show [R.M.’s] state of mind for her delayed disclosure.” CP 93, 119.

C. The extensive evidence of the uncharged allegations against Mr. Crossguns was not admissible as evidence of a “common scheme or plan.”

The trial court also ruled – and told the jury – that the extensive evidence of uncharged abuse allegation was admissible to show “plan.” RP 119, 939.

Usually referred to as the “common scheme or plan” exception, ER 404(b) permits evidence of uncharged misconduct *if* the state can first demonstrate “such occurrence of common features that the various acts are naturally to be explained as caused by a general plan.” *Gresham*, 173 Wn.2d at 422. Mere “similarity in results” is insufficient to meet the requirements of the exception. *Id.* Rather, “the prior act and the charged crime must be markedly and substantially similar.” *Id.*

In this case, the charges against Mr. Crossguns addressed one alleged incident on the living room couch (at the Spokane house) during

the day and one alleged incident in a spare downstairs bedroom (at the Spokane house), also during the day. RP 826, 829-31.

But the evidence regarding the uncharged allegations described incidents allegedly occurring in the car, in Montana, or in R.M.'s bedroom at night. RP 582-90, 594-600. The uncharged alleged incidents did not have any "common features" with those underlying the charges other than the parties involved. *Gresham*, 173 Wn.2d at 422.

The ER 404(b) exception for "common scheme or plan" does not apply to the facts of Mr. Crossguns's case. *Id.* That rule cannot be used to justify the admission of the evidence in this case.

D. The extensive evidence of the uncharged allegations against Mr. Crossguns was not admissible to prove motive.

The term "motive" is defined as "cause or reason that moves the will." *Arredondo*, 188 Wn.2d at 262 n. 7 (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)). In other words, motive looks to "what prompted the defendant to take criminal action." *Id.*; *See also Saltarelli*, 98 Wn.2d at 365 (defining motive as "an inducement, or that which leads or tempts the mind to indulge a criminal act").

It is not at all clear how one alleged incident of (uncharged) abuse by Mr. Crossguns against R.M. could provide a motive for him to engage in other (charged) incidents. *See Saltarelli*, 98 Wn.2d at 365. The ER

404(b) evidence was not relevant in his case to demonstrated “what prompted the defendant to take criminal action.” *Id.*; *Arredondo*, 188 Wn.2d at 262 n. 7.

The introduction of vast evidence of uncharged allegations against Mr. Crossguns at trial cannot be justified based on the ER 404(b) exception for evidence proving motive. *Id.*

E. The extensive evidence of the uncharged allegations against Mr. Crossguns was not admissible to prove intent.

“Intent” refers to the “state of mind with which an act is done” or “what the defendant hopes to accomplish when motivated to take the action.” *Arredondo*, 188 Wn.2d at 262 n. 7 (*quoting Powell*, 126 Wn.2d at 261).

Evidence of uncharged misconduct is only admissible to prove intent when “proof of the doing of the charged act does not itself conclusively establish intent.” *Powell*, 126 Wn.2d at 262. In sex cases, for example, in which proof of the alleged act is sufficient to prove the required intent, evidence of other uncharged sex offenses is not admissible to prove intent because intent is not at issue. *Id.*; *See also Saltarelli*, 98 Wn.2d at 365–66; *State v. Bowen*, 48 Wn. App. 187, 194–95, 738 P.2d 316 (1987), *abrogated on other grounds by State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

Rather, to constitute valid evidence of intent, “there must be a logical theory other than propensity that demonstrates how the prior act connects to the intent required to commit the charged offense.” *Arredondo*, 188 Wn.2d at 276 (Gonzalez, J., dissenting) (*citing* Wigmore § 192 at 1857).

In this case, Mr. Crossguns’s testified at trial and categorically denied ever having touched R.M.’s intimate areas. RP 684-724. It was not in dispute that, if he had done the alleged acts, then it would have been for the purpose of sexual gratification.

The introduction of lengthy evidence of uncharged allegations against Mr. Crossguns at trial cannot be justified based on the ER 404(b) exception for evidence proving intent. *Id.*

F. The extensive evidence of the uncharged allegations against Mr. Crossguns was not admissible to show opportunity.

Evidence is relevant to show opportunity when it “demonstrates the ability of the defendant to do a wrong because of a favorable combination of circumstances, time, and place.” *Powell*, 126 Wn.2d at 262-63. Evidence of uncharged misconduct is not admissible to prove opportunity, however, when it is undisputed that the accused had the opportunity to commit the charged offense(s). *Id.* at 262.

Mr. Crossguns readily admitted that he was R.M.'s father, that they lived together, rode in the car alone together, and were sometimes alone in rooms with closed doors. *See* RP 684-724. Accordingly, it was undisputed that he had the opportunity to commit the charged offenses and the evidence of the additional, uncharged allegations was not relevant to prove opportunity. *Id.*

The introduction of the evidence regarding uncharged misconduct cannot be justified under the ER 404(b) exception for evidence proving opportunity. *Id.*

G. The extensive evidence of the uncharged allegations against Mr. Crossguns was not admissible to show absence of mistake or accident.

Evidence of uncharged misconduct is not admissible to prove absence of mistake or accident in a sex case when the accused completely denies touching an alleged victim's intimate areas, even accidentally. *Bowen*, 48 Wn. App. at 193-94. Unless the accused admits to improper touching, but, claims that it occurred by accident or mistake, the state may not preemptively introduce evidence of uncharged misconduct in order to prove that the touching happened on purpose. *Id.*

In this case, Mr. Crossguns flatly denied ever having touched R.M.'s intimate areas in any way. RP 684-724. Accordingly, the issue of whether he had done so by accident or mistake was not at issue. *Id.*

The introduction of evidence of extensive uncharged abuse allegations at Mr. Crossguns's trial cannot be justified by the exception to ER 404(b) for evidence proving absence of mistake or accident.

H. Washington courts should abandon the "lustful disposition" exception to the general ban on propensity evidence because it cannot be harmonized with ER 404(b) or with Supreme Court precedent.

Finally, the trial court admitted the extensive evidence of uncharged alleged abuse by Mr. Crossguns against R.M. to demonstrate his "lustful disposition" toward her. CP 93-119.

As outlined at length below, the "lustful disposition" doctrine is simply a vehicle through which courts have long permitted propensity evidence in sex cases. As such, the doctrine directly contradicts the mandate of ER 404(b). Washington courts should abandon the doctrine as inconsistent with the prohibition on propensity evidence in criminal cases.

1. The history of the "lustful disposition" doctrine demonstrates that it represents the continuation of an antiquated rule permitting propensity evidence in sex cases, in direct contradiction to the prohibition of ER 404(b).

The lustful disposition doctrine has its roots in English ecclesiastical law. Zachary Stirparo, *Reconsidering Pennsylvania's Lustful Disposition Exception: Why the Commonwealth Should Follow Its Neighbor in Getz v. Delaware*, 23 Widener L. Rev. 65, 68 (2017) (citing Michael Smith, *Prior Sexual Misconduct Evidence in State Courts:*

*Constitutional and Common Law Challenges*, 52 Am. Crim. L. Rev. 321, 338-39 (2015)).

In England, most sex crimes were under the jurisdiction of church courts, not secular criminal courts. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J. Crim. L. 127, 164 (1993) (citing Morris Ploscowe, *Sex and the Law* 1-3 (1951); 1 Richard Burn, *Ecclesiastical Law* 662-65 (London, H. Woodfall & Strahan 1763)). In church courts – unlike in English common law -- there was no prohibition on propensity evidence because such courts were concerned only with “morality of duty.” Stirparo, 23 *Widener L. Rev.* at 68. Church courts also followed other evidentiary rules in sex cases, which have long been abandoned, such as allowing evidence that a victim had a history of consenting to sexual encounters with other men as a defense to a rape charge. *Id.*

America has never had ecclesiastical, church courts. Reed, 21 Am. J. Crim. L. at 166. But the colonies, nonetheless, imported some of the English ecclesiastical rules for sex cases, including the lustful disposition doctrine. *Id.* Originally, the doctrine was used in adultery cases to permit evidence of uncharged sexual activity between two consenting adults to show that they had a “lustful disposition” toward one another and were, thus, more likely to have engaged in the charged adultery offense. *Id.*

“Statutory rape” offenses were the first codified sex crimes against children in the U.S. *Id.* at 168. Courts expanded the lustful disposition doctrine to permit the admission of character evidence against people accused of statutory rape as well. *Id.* (citing Charles T. McCormick, McCormick on Evidence §§ 186, 187, 188, 190 (John W. Strong ed., 4th ed. 1992)).

The lustful disposition doctrine explicitly permitted the conclusion that the accused had a propensity to commit sex offenses based on his/her character. *Id.*; Stirparo, 23 Widener L. Rev. at 69 (citing *Disposition*, Black's Law Dictionary 539 (9th ed. 2009); L.S. Tellier, Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses*, 167 A.L.R. 559, 565 (1947)); Michael L. Smith, 52 Am. Crim. L. Rev. at 338.<sup>3</sup>

Washington Courts adopted the lustful disposition doctrine for the specific purpose of establishing the character of the accused in order to demonstrate that s/he had acted in conformity therewith. *See e.g. State v. Wood*, 33 Wash. 290, 292, 74 P. 380 (1903) (“It is more probable that incestuous intercourse will take place between persons who have

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<sup>3</sup> See also Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 Am. J. Crim. L. 327, 336–37 (2012) (citing *Burris v. State*, 420 S.E.2d 582, 584 (Ga. Ct. App. 1992); Edward W. Cleary, *McCormick On Evidence*, 190, 560-61 (3d ed. 1984); Wigmore, *Evidence In Trials At Common Law* § 58.2, at 398-402; *State v. DeJesus*, 953 A.2d 45, 49 (Conn. 2008)).

conducted themselves with indecent familiarity than between those whose behavior has been modest and decorous”).

More recently, however, numerous jurisdictions have abandoned the lustful disposition doctrine (also referred to as the “depraved sexual instinct” or “lewd disposition” rule), holding that the rule does nothing more than permit improper propensity evidence, in violation of ER 404(b). *See e.g. State v. Grist*, 147 Idaho 49, 54, 205 P.3d 1185 (2009); *People v. Sabin*, 463 Mich. 43, 68, 614 N.W.2d 888 (2000); *State v. Nelson*, 331 S.C. 1, 6, 501 S.E.2d 716 (1998); *State v. Osier*, 569 N.W.2d 441 (N.D. 1997); *State v. Winter*, 162 Vt. 388, 392, 648 A.2d 624 (1994); *Lannan v. State*, 600 N.E.2d 1334, 1335 (Ind. 1992); *Mitchell v. State*, 539 So.2d 1366, 1372 (Miss.1989); *Getz v. State*, 538 A.2d 726, 733–34 (Del.1988).

At least two states have also found that the lustful disposition doctrine violates their state constitutional guarantees of due process. *See State v. Cox*, 781 N.W.2d 757 (Iowa 2010); *State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2007).

No published Washington appellate case, however, has considered whether the lustful disposition doctrine can stand in light of the adoption of 404(b) and the Supreme Court’s repeated admonition that the risk of an unfair and improper propensity inference is “at its highest” in cases charging sex offenses.

2. Washington courts should abandon the lustful disposition doctrine because it permits the consideration of

In the 1990's, the federal legislature and numerous other jurisdictions took steps to codify the lustful disposition doctrine into statute or court rule. The Washington legislature followed suit in 2008, passing former RCW 10.58.090.

But the Washington Supreme Court struck that statute down, holding that it had been passed in violation of the separation of powers doctrine because it was irreconcilable with ER 404(b). *See Gresham*, 173 Wn.2d at 429.

If the codification of the lustful disposition doctrine is irreconcilable with ER 404(b), then so is the doctrine itself. Washington courts should abandon the lustful disposition doctrine because it violates the categorical bar on propensity evidence.

In 1994, Congress adopted federal rules of evidence (as part of a broader crime bill) explicitly permitting admission of evidence that the accused had committed uncharged acts, similar to the one(s) charged, in criminal and civil cases. *See Fed. R. Evid Rules 413-415*. Federal rules 413-15 were adopted as specific exceptions for sex cases to the ER 404(b) prohibition on propensity evidence and explicitly codified the lustful disposition doctrine. *See e.g. United States v. Mound*, 149 F.3d 799, 801

(8th Cir. 1998); Lisa M. Segal, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 Suffolk U.L. Rev. 515, 517 (1995).

These federal rules were based on understandings regarding sex offender recidivism, which have been largely disproven by research. Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. Cin. L. Rev. 795, 807–08 (2013).<sup>45</sup>

Several states followed congress’s lead, enacting statutes or court rules like Federal Evidence Rules 413-415. *See* Michael L. Smith, 52 Am. Crim. L. Rev. at 323–24; Former RCW 10.58.090.

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<sup>4</sup> For example, sex offenders are less likely than almost any other type of criminal offender to be re-arrested for a similar crime within three years of release from prison. Lave, 81 U Cin. L. Rev. at 817. In fact, they are less likely than non-sex offenders to be re-arrested for any offense at all. *Id.* at 818. Sex offenders found guilty of offenses against children in their own families have the lowest recidivism rates of all. *Id.* at 825.

<sup>5</sup> Federal rules 413-15 were also based on arguments that prior uncharged sexual misconduct evidence was necessary to corroborate the testimony of the alleged victim, to protect the defendant from a conviction based solely on that testimony, and to prevent the trial from becoming a swearing match between the victim and defendant. *See* Segal, 29 Suffolk U.L. Rev. at 535 (*citing* President’s Message to Congress Transmitting Proposed Legislation, Entitled the “Comprehensive Violent Crime Control Act of 1991”, H.R. Doc. No. 102-58, 102d Cong., 1st Sess. 100 (1991)).

Notably, admission of evidence of uncharged misconduct does nothing to achieve these purposes in cases, such as Mr. Crossguns’s, in which all of the evidence of uncharged allegations comes from the testimony of the alleged victim.

The Washington legislature also followed suit, passing former RCW 10.58.090, which explicitly permitted evidence of prior sex offenses, “notwithstanding Evidence Rule 404(b).” Former RCW 10.58.090.

RCW 10.58.090 (like the federal rules) provided that evidence of the commission by the accused any other sex offense was admissible in sex cases “notwithstanding Evidence Rule 404(b).” Former 10.58.090.

In *Gresham*, however, the Supreme Court held that that statute “cannot be harmonized with ER 404(b)” because ER 404(b) “is a categorical bar to the introduction of evidence of prior misconduct for the purpose of showing the defendant’s character and action in conformity with that character.” *Gresham*, 173 Wn.2d at 429. The *Gresham* court emphasized that “there are no exceptions to this rule.” *Id.*

If the codification of the lustful disposition doctrine cannot be harmonized with ER 404(b), then logic dictates that the doctrine, itself, cannot be harmonized with the rule, either.

This is particularly true given the Supreme Court’s repeated warning that the potential for unfair prejudice from propensity evidence is “at its highest” in sex cases. *See State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014); *Gresham*, 173 Wn.2d at 433; *Smith*, 106 Wn.2d at 776.

The Supreme Court has, similarly, cautioned that lower courts to be on guard against the tendency toward lenient application of the rules of evidence in cases involving sex offenses:

When deciding the issue of guilt or innocence in sex cases, where prejudice has reached its loftiest peak, our courts have been most liberal in announcing and fostering a nebulous exception, offering scant attention to inherent possibilities of prejudice. Just when protection is most needed, the rules collapse.

*Saltarelli*, 98 Wn.2d at 364–65 (quoting *Slough*, 41 Iowa L.Rev. 325).

The lustful disposition doctrine is irreconcilable with ER 404(b). *Gresham*, 173 Wn.2d at 429. It is also incompatible with the Supreme Court’s repeated admonishment that lower courts remain on guard against the very high risk of unfair prejudice resulting from the admission of propensity evidence in sex cases. *See e.g. Saltarelli*, 98 Wn.2d at 364–65. Washington courts must abandon the lustful disposition doctrine.

The lustful disposition doctrine cannot be used to justify the admission of extensive evidence of uncharged misconduct in Mr. Crossguns’s case.

I. The improper admission of lengthy and repeated propensity evidence against Mr. Crossguns requires reversal of his convictions.

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *Gunderson*, 181 Wn.2d at 926. Improperly admitted evidence is only harmless if it is

“of little significance in light of the evidence as a whole.” *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002)).

The analysis does not turn on whether there was sufficient evidence to convict. *Gower*, 179 Wn.2d at 857. Rather, “the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence.” *Id.*

The improper admission of evidence results in unfair prejudice to the accused when it encourages the jury to convict based on an improper propensity inference. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012).

Additionally, as noted above, the risk of prejudice as “at its highest” in cases alleging sex offenses. *Slocum*, 183 Wn. App. at 457; *Gower*, 179 Wn.2d at 857; *Saltarelli*, 98 Wn.2d at 363. As the *Saltarelli* court noted:

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

*Saltarelli*, 98 Wn.2d at 363 (quoting *Slough*, 41 Iowa L. Rev. at 333-34).

Evidence that bolsters the testimony of the alleged victim and detracts from that of the accused also carries a high risk of prejudice.

*Slocum*, 183 Wn. App. at 457. This is particularly true when credibility is the main issue in the case. *Gower*, 179 Wn.2d at 858.

Mr. Crossguns was prejudiced by the improper admission of extensive evidence of uncharged alleged sexual abuse against R.M. The evidence was, by no means, “of little significance in light of the evidence as a whole.” *Fuller*, 169 Wn. App. at 831. Instead, it constituted a significant portion of R.M.’s lengthy testimony. RP 582-600.

Moreover, Mr. Crossguns testified at trial and denied all of the allegations against him. RP 683-766. He also called R.M.’s cousin as a witness, who testified that R.M. had confessed to fabricating the allegations against Mr. Crossguns. RP 660-81. This defense evidence (in addition to the prosecutor’s arguments, described in section II(A) below) painted the case as a pure credibility contest between R.M. and the defense witnesses.

The 404(b) evidence, which encouraged the jury to convict based on some perceived “biological inclination” on the part of Mr. Crossguns, was particularly prejudicial given the nature of this case. *Saltarelli*, 98 Wn.2d at 363.

The trial court also explicitly instructed the jury that the evidence of the uncharged misconduct could be considered for the purposes of determining “the defendant’s intent, plan, motive, opportunity, absence of

mistake or accident, lustful disposition toward [R.M.], [R.M.'s] state of mind for her delayed disclosure of the alleged abuse..." CP 93.

Accordingly, there is no valid concern that the jury could have only considered the evidence to determine whether the aggravating factors had been proved.<sup>6</sup>

In Mr. Crossguns's case, there is "a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence." *Gower*, 179 Wn.2d at 857. The improper admission of extensive evidence of uncharged abuse allegations, in violation of ER 404(b), requires reversal of Mr. Crossguns's convictions. *Id.*

## **II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. CROSSGUNS OF A FAIR TRIAL.**

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and

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<sup>6</sup> Despite the state's claims to the contrary at trial, bifurcation would have been available in Mr. Crossguns's case to permit the jury to hear the evidence and consider the "ongoing pattern of sexual abuse" aggravator only if they had already found Mr. Crossguns guilty of the underlying offenses. *See* RCW 9.94A.537(4) (permitting bifurcation when that aggravating circumstance is alleged).

Mr. Crossguns moved to bifurcate at trial, but the court ruled that bifurcation was unnecessary because the evidence had already been ruled admissible under ER 404(b). CP 119-20. The errors in this case under ER 404(b) cannot be deemed harmless because the improperly admitted evidence was relevant to the "ongoing pattern" aggravator.

cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected.

*Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during closing argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Even absent an objection below, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Id.* at 707.

The prosecutor committed misconduct during closing argument at Mr. Crossguns's trial by making an argument undermining the presumption of innocence and by misstating the law to the jury in a

manner that required them to disregard a critical piece of the defense theory.

- A. The prosecutor committed misconduct at Mr. Crossguns's trial by arguing that the jury had to find that R.M. was lying in order to acquit. This argument mischaracterized the state's burden of proof and undermined the presumption of Mr. Crossguns's innocence.

In regard to the evidence that R.M. had admitted to lying about the allegations against Mr. Crossguns, the prosecutor told the jury that it was its "job" to decide whether Mr. Crossguns's niece was lying or whether R.M. was lying:

[R.M.'s cousin] told you about an alleged conversation that she had with [R.M.] in which [R.M.] said she was lying, none of this happened. You heard from [R.M.] earlier, that that conversation never happened. Somebody's lying. It's your job to determine who's lying. Is [R.M.] lying or is [her cousin] lying?  
RP 815.

A short time later, the prosecutor set up the same two options for the jury regarding Mr. Crossguns's testimony, informing the jury that it was "going to have to" determine that either he or [R.M.] had lied on the stand:

But, again, you have the testimony of [R.M.], on one hand, and [Mr. Crossguns's] testimony on the other hand. Somebody's not telling the truth, and, again, you're going to have to make that decision. Who is lying and who is telling the truth.  
RP 817

These arguments were improper because they undermined the presumption of Mr. Crossguns's innocence and mischaracterized the

state's burden of proof. The jury did not need to determine that R.M. was lying in order to acquit Mr. Crossguns. Rather, the jury could have found that her cousin's letter presented a reasonable doubt – which would have required acquittal – even without determining that R.M. had lied on the stand. This prosecutor's argument constituted misconduct because it improperly set up a "false choice" for the jury between convicting Mr. Crossguns on the one hand or finding that R.M. was lying on the other hand.

A jury is not required to find that the state's witnesses are lying or mistaken in order to acquit an accused person of criminal charges. *State v. Miles*, 139 Wn. App. 879, 889–90, 162 P.3d 1169 (2007). Rather, the jury is *required* to acquit *unless* it finds that the state has proved each element beyond a reasonable doubt. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) ("if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit").

A prosecutor commits misconduct and impermissibly mischaracterizes the state's burden of proof by obfuscating this concept during closing argument – presenting the jury with a false choice between

finding that the state's witnesses are lying vs. convicting the defendant.

*Miles*, 139 Wn. App. at 889–90; *Fleming*, 83 Wn. App. at 213.

That is exactly what the prosecutor did at Mr. Crossguns's trial. *See* RP 815, 817. Indeed, the prosecutor went beyond presenting the jury with a choice to improperly informing them that they had a duty to decide "who is lying." RP 817. The prosecutor argued that it was the jury's "job to determine who's lying" and that they were "going to *have to*" decide whether R.M. was lying or whether Mr. Crossguns was, during their deliberations. RP 815, 817 (emphasis added).

But the proper inquiry for the jury was not whether R.M. was telling the truth or lying; it was whether the state had proved each element of each charges beyond a reasonable doubt. *Id.* The jury would have been required to acquit Mr. Crossguns, for example, if they believed that his niece's testimony and letter had raised a reasonable doubt, regardless of whether they affirmatively found that R.M. had lied on the stand. The jury would also have been required to acquit if they believed that R.M. had embellished her story in a manner that raised a reasonable doubt as to any element, without concluding that she had lied. The prosecutor committed misconduct by presenting the jury with a false choice between acquittal and the conclusion that R.M. was lying. *Id.* That false choice was

improper and directly undermined the state's burden of proof and presumption of Mr. Crossguns's innocence.

There is a substantial likelihood that the prosecutor's misconduct affected the outcome of Mr. Crossguns's trial. *Glasmann*, 175 Wn.2d at 704. First, the "prestige associated with the prosecutor's office" caused a significant risk that the jury would lend "special weight" to the state's explanation of the jury's duty and role. Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706). Second, the argument worked to encourage the jury to ignore any reasonable doubt they may hold unless they were willing to conclude that R.M. had lied. Finally, the prosecutor presented the jury with the false choice on two separate occasions, regarding each of the two witnesses who testified for the defense. This was not a brief oversight by the prosecutor, but a key theme of the state's closing argument. Mr. Crossguns was prejudiced by the prosecutor's improper arguments.

Prosecutorial misconduct is flagrant and ill-intentioned if it violates case law and professional standards that were available to the prosecutor at the time of the improper conduct. *Id.* at 707. Here, the prosecutor had access to longstanding caselaw prohibiting the type of false-choice argument made at Mr. Crossguns's trial. *See Fleming*, 83 Wn. App. at 213 (noting that the Courts of Appeals had "repeatedly"

admonished against that type of argument as of 1996). This error requires reversal even though defense counsel did not object at trial. *Glassman*, 175 Wn.2d at 707.

The prosecutor committed misconduct at Mr. Crossguns's trial by presenting the jury with a "false choice" argument that mischaracterized the state's burden of proof and undermined the presumption of innocence.

*Id.* Mr. Crossguns's convictions must be reversed.

B. The prosecutor committed misconduct by misstating the law regarding the missing witness doctrine to the jury in a manner that nullified a key component of Mr. Crossguns's defense.

R.M. testified that a large percentage of the acts of abuse by Mr. Crossguns had occurred in her bedroom late at night. RP 594-97. R.M. shared that bedroom with her sister. RP 576. The sisters slept in beds a few feet away from each other. RP 577.

During closing, Mr. Crossguns pointed out that the state had not called R.M.'s sister to testify, despite having called three of her other siblings as witnesses. RP 842. Mr. Crossguns argued that the jury could infer from the sister's failure to testify that there was no evidence that she had seen or heard any of the incidents that were alleged to have taken place in that room. RP 842.

In response, the prosecutor told the jury during rebuttal that they were not permitted to make any inferences based on the failure of R.M.'s

sister to testify. RP 850. The prosecutor said that anything regarding what the sister had seen was “not in evidence” and that the jury was not permitted to make any “assumptions about what happens outside of this courtroom.” RP 850.

But the prosecutor was incorrect. Under the missing witness doctrine, the jury *was* permitted to draw a negative inference against the state based on the prosecutor’s failure to call R.M.’s sister to testify. The prosecutor committed misconduct by misstating the law to the jury on an issue that was important to the defense theory.

A prosecutor commits misconduct by misstating the law to the jury during argument. *State v. Allen*, 182 Wn.2d 364, 373–74, 341 P.3d 268 (2015) (*citing State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008)).

The missing witness doctrine is a “well-established rule.” *State v. Sundberg*, 185 Wn.2d 147, 153, 370 P.3d 1 (2016). Under the doctrine, the jury may infer that testimony would be unfavorable to a party if that party fails to produce a witness whose testimony “would properly be part of a case is within the control of the party whose interest it would naturally be to produce it.” *Sundberg*, 185 Wn.2d at 153 (*citing State v. Blair*, 117 Wn.2d 479, 485–86, 816 P.2d 718 (1991); *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)).

The missing witness inference arises whenever the testimony concerns a “matter of importance” and the witness is “peculiarly available to the party” who has failed to call him/her. *State v. Cheatam*, 150 Wn.2d 626, 652–53, 81 P.3d 830 (2003). A witness is “peculiarly available” to a party when they share a “community of interest” and the party has “so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.” *Id.* at 653-54 (*quoting Blair*, 117 Wn.2d at 490).

In Mr. Crossgun’s case, R.M.’s sister was “peculiarly available” to the state. *Id.* She lived with R.M. and her adoptive mother – both of whom were called as witnesses for the prosecution. The state also demonstrated its ability to obtain testimony from R.M.’s siblings by calling three of them as witnesses at trial.

The missing witness doctrine permitted the jury to infer that the state would have called R.M.’s sister to testify but for the fact that her testimony would have been damaging to the prosecution’s case. *Cheatam*,

150 Wn.2d at 653-54. Mr. Crossguns properly informed the jury of that inference during closing. *Id.*; *Sundberg*, 185 Wn.2d at 153.<sup>7</sup>

The prosecutor misstated the law and committed misconduct by telling the jury that it could not rely upon missing witness inference in Mr. Crossguns's case. *Id.*; *Allen*, 182 Wn.2d at 373–74.

Mr. Crossguns was prejudice by the prosecutor's improper argument. As noted above, the "prestige associated with the prosecutor's office" lent "special weight" to the prosecutor's argument and increased the risk that the jury would rely on the prosecutor's statement of the law over that of Mr. Crossguns. Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706). The argument also effectively nullified a key part of Mr. Crossguns's defense theory by urging the jury – incorrectly -- that the missing witness inference would have been improper. There is a substantial likelihood that the prosecutor's improper misstatement of the law affected the outcome of Mr. Crossguns's trial. *Glasmann*, 175 Wn.2d at 704.

The prosecutor's misconduct requires reversal even though defense counsel did not object below. The missing witness doctrine is "a well-

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<sup>7</sup> The missing witness doctrine permits a party to argue the permitted inference to the jury during closing argument, regardless of whether a jury instruction on the doctrine has been requested. *See Sundberg*, 185 Wn.2d at 154; *Cheatam*, 150 Wn.2d at 652.

established rule,” which had been available to the prosecutor for decades. *Sundberg*, 185 Wn.2d at 153. As is the caselaw regarding a prosecutor’s duty to correctly characterize the law for the jury during closing. The improper arguments were flagrant and ill-intentioned because they directly violated case law and professional standards that were available to the prosecutor at the time of the improper conduct. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed misconduct at Mr. Crossguns’s trial by misstating the law regarding the missing witness doctrine to the jury during closing. *Sundberg*, 185 Wn.2d at 153; *Allen*, 182 Wn.2d at 373–74. Mr. Crossguns’s convictions must be reversed. *Id.*

**III. THE CUMULATIVE EFFECT OF THE ERRORS AT MR. CROSSGUNS’S TRIAL DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

Under the doctrine of cumulative error, an appellate court may reverse a conviction when “the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless.” *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. Amends. VI, XIV.

In Mr. Crossguns’s case, the cumulative effect of the errors at trial requires reversal of his convictions. Taken together, the errors exposed the jury to extensive, highly-prejudicial evidence regarding uncharged

misconduct. This evidence strongly encouraged the jury to find guilt based on an improper propensity inference, which is disallowed because it directly contradicts the presumption of innocence. At the same time, the prosecutor's improper arguments also undermined the presumption of Mr. Crossguns's innocence and also incorrectly informed the jury that a primary component of his defense theory could not be properly considered. Taken together, these errors deprived Mr. Crossguns of a fair trial by seriously undercutting his opportunity to hold the state to its burden of proof and to have the jury consider his arguments in his defense.

Even if this court determines that each error, standing alone, does not require reversal, the cumulative effect of the errors at Mr. Crossguns's trial deprived him of a fair trial and requires reversal. *Id.*

### **CONCLUSION**

The trial court erred by admitting extensive propensity evidence, which was inadmissible under ER 404(b). The prosecutor committed misconduct during closing argument by making an argument undermining the presumption of innocence and by misstating the law to the jury. Whether considered individually or cumulatively, these errors require reversal of Mr. Crossguns's convictions.

Respectfully submitted on March 12, 2020,



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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Patrick Crossguns/DOC#417995  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney  
SCPAappeals@spokanecounty.org

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on March 12, 2020



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

**LAW OFFICE OF SKYLAR BRETT**

**March 11, 2020 - 6:15 PM**

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