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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PATRICK CROSSGUNS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Where the defendant conceded a proper ER 404(b) purpose for the admission of “other act” evidence below, and concentrated his argument on the prejudicial nature of the “other act” evidence, is his current ER 404(b) challenge to that evidence preserved, where he now argues the trial court erred in finding the evidence was admitted for a proper ER 404(b) basis?
2. Did the trial court correctly determine that the “other act” evidence was admissible to prove the aggravating circumstance, to show a common scheme or plan, to explain the delay in reporting, as res gestae of the charged offenses, and as evidence of other proper non-propensity purposes?
3. Is the defendant’s challenge to “lustful disposition” evidence preserved where no argument was made below as to the continued efficacy of this evidence in light of other evidence rules and precedent, and may this Court overturn established Supreme Court precedent?
4. Did the prosecutor misstate the burden of proof or undermine the presumption of innocence when he properly argued the credibility of the witnesses, based on the evidence elicited at trial?
5. If the prosecutor’s argument on the credibility of the witnesses was misconduct, was it so flagrant and ill-intentioned that an objection and curative instruction could not have remedied any resulting prejudice?
6. Did the prosecutor misstate the missing witness doctrine by asking the jury to make no inference as to a child witness’ whereabouts, where there was no evidence that the witness was particularly available to the State, where the trial court made no ruling and gave no instruction on the use of the inference, and the defendant invited the jury to improperly speculate as to the witness’ whereabouts?
7. If the prosecutor misstated the missing witness doctrine, was the error so flagrant and ill-intentioned that an objection and curative instruction could not have remedied any resulting prejudice?

8. Is the cumulative error doctrine applicable here where no errors occurred?

II. STATEMENT OF THE CASE

On July 18, 2019, the State charged¹ Patrick Crossguns Sr. with one count of second degree rape of a child committed between April 1, 2016, and May 31, 2016, and one count of second degree child molestation committed between August 1, 2016, and August 6, 2016. CP 80. In both counts, the victim was identified as R.G.C., also known as R.G.M.,² Mr. Crossguns' biological daughter. CP 80. Both counts included aggravating circumstances that (1) the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offenses, and (2) the current offenses were part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple instances over a prolonged period of time. CP 80-81. A jury found the defendant guilty as charged. CP 109-12.

Factual background.

R.G.M. was born on September 11, 2002. RP 348, 567. In March 2006, Child Protective Services (CPS) removed R.G.M. from her biological

¹ This was an amended information.

² The information alleges the crimes were committed against victim R.G.C. CP 80. In 2018, after the abuse had ended, R.G.C. legally changed her name. RP 352-53. At the time of trial, her name was R.G.M. *Id.*

mother's care, and shortly thereafter, R.G.M. began to live with her father, Patrick Crossguns Sr., and her stepmother, Marsha Matte. RP 348-49, 568, 569. R.G.M. was three and one-half years old. RP 349, 568.

In 2015, Mr. Crossguns and Ms. Matte moved, along with their children, from Two Medicine, Montana, to Spokane. RP 355. R.G.M. was 12 years old. RP 356. A short time later, however, Mr. Crossguns returned to Montana to complete his final two weeks of work, taking R.G.M. and his younger son, P.M., with him. RP 357, 423, 581.

During the car trip to Montana, Mr. Crossguns touched R.G.M. inappropriately for the first time. RP 582. Mr. Crossguns drove the car and R.G.M. sat in the front seat. RP 438. P.M. sat in the back seat and played video games. RP 438, 583. The family stopped at a store and Mr. Crossguns purchased beer. RP 584. He placed the beer on the floorboard between R.G.M.'s legs. RP 584. After they were underway, Mr. Crossguns asked R.G.M. to pour beer into his coffee mug and pressured her to drink as well. RP 584. Mr. Crossguns then placed his hand on R.G.M.'s thigh and began stroking it, telling her she was beautiful. RP 585. As he touched R.G.M., Mr. Crossguns told her that he was doing to her what his mother had done to him. RP 585. He placed his hand in her pants, near her vagina. RP 585. Although R.G.M. tried to push his hand away, he laughed at her, telling her to "just come on." RP 586. The touching continued for approximately 30

minutes. RP 586. During the incident, the window was rolled down and the music volume was up. RP 586. P.M., who was still in the backseat playing his game, only observed Mr. Crossguns touch R.G.M. on the shoulder and “sometimes on the leg.” RP 440. However, P.M. noticed that R.G.M. “went quiet” and Mr. Crossguns stared at P.M. in the rearview mirror. RP 439.

While in Montana, R.G.M., P.M., and Mr. Crossguns slept on the same mattress. RP 587. On the night after their arrival, R.G.M. awoke to find Mr. Crossguns again touching her vagina, under both her shorts and underwear. RP 588. Disgusted, R.G.M. told him to stop, and left to sleep on a couch. RP 588. Mr. Crossguns followed and attempted to show R.G.M. pornography. RP 588. R.G.M. did not want to watch, but Mr. Crossguns grabbed her leg, told her to watch with him and began to stroke her leg while he watched. RP 589. Ultimately, he moved his hand to her vagina, where he placed a finger into her vagina. RP 589. R.G.M. told him to stop, and put her face into the couch. RP 590.

Mr. Crossguns told R.G.M. that he was glad he was her first orgasm. RP 592. R.G.M. became afraid of Mr. Crossguns even though he told her it would not happen again. RP 590. She also felt angry, disgusted and ashamed. RP 591. R.G.M. did not want to tell anyone what happened because she was ashamed and afraid to be judged and was also afraid Mr. Crossguns would hurt her. RP 591.

Mr. Crossguns, R.G.M. and P.M. stayed in Montana for nearly two weeks before returning to Spokane. RP 357-58, 437. On the ride home, Mr. Crossguns attempted to put his beard trimmer between R.G.M.'s legs, asking her if it felt good. RP 593.

After R.G.M., her father, and brother returned to live in Spokane, Ms. Matte worked; Mr. Crossguns had various jobs but also was frequently at home with the children. RP 365. Ms. Matte noticed that Mr. Crossguns began to pay more attention to R.G.M. than he had before; he also increased his trips with R.G.M. outside of the home. RP 366. Ms. Matte also observed that Mr. Crossguns would go downstairs to R.G.M.'s bedroom more frequently, potentially every other day, and would be in R.G.M.'s room with her with the door closed. RP 367.

Mr. Crossguns would also enter R.G.M.'s bedroom at night when everyone else was asleep. RP 594. On the first nighttime visit, Mr. Crossguns was friendly, smiled, and did nothing to scare R.G.M.; however, the next time he visited her, he resumed the sexual abuse. RP 595. Although R.G.M. tried to keep him from touching her, she was not strong enough to do so, and he would push his hand into her pants. RP 596. This became a "routine," happening nearly every other night, and R.G.M. dreaded hearing Mr. Crossguns walking down the stairs. RP 596, 598. R.G.M.'s younger sister, C.M., who slept in the same room, was a heavy

sleeper and R.G.M. believed she never awoke during the abuse. RP 597. R.G.M.'s greatest fears were that Mr. Crossguns would touch C.M.³ too, or that C.M. would see Mr. Crossguns touching R.G.M. and not tell anyone. RP 596.

Ms. Matte's eldest son, Brian SiJohn, moved to Spokane in early 2016. RP 510. He slept in the basement bedroom nearest the stairs. RP 515. Mr. SiJohn was able to identify his family members' footsteps on the stairs; for example, T.M.'s footsteps were the heaviest, and the youngest daughter, C.M., "was practically a ninja." RP 516-17. During the middle of the night, Mr. SiJohn sometimes heard Mr. Crossguns' footsteps; on one occasion, Mr. SiJohn observed Mr. Crossguns emerging from R.G.M.'s bedroom sometime between 11:00 p.m. and 2:00 a.m. RP 519.

The other siblings noticed that Mr. Crossguns touched R.G.M. differently than he did the other children. T.M. noticed Mr. Crossguns would hug R.G.M. differently, with his arms around her waist, or his hands on her lower back. RP 480. Mr. SiJohn observed that Mr. Crossguns was "ridiculously close" to R.G.M., who had become pale and reclusive by early 2016 when Mr. SiJohn moved to Spokane. RP 511. Other residents in the home noticed that Mr. Crossguns took R.G.M. on errands in the car more

³ Once Mr. Crossguns told R.G.M. that he would not touch C.M. because "she was a mama's girl" and that she would tell her mother immediately. RP 597.

frequently. RP 366, 521. According to R.G.M., during those car rides Mr. Crossguns would also touch her, but he would not “go under her underwear.” RP 601. Ms. Matte also noticed that R.G.M.’s demeanor changed – she wanted to be alone, began talking back and acted meanly toward the other children. RP 368. R.G.M. had trouble sleeping, had nightmares and Ms. Matte observed she would be very tired when it was time for her to go to school in the morning. RP 369.

Concerned about R.G.M., Mr. SiJohn asked her whether anything was “going on.” RP 522. R.G.M. “got super quiet and [it] took her forever to answer”; however, she denied anything was wrong. RP 522. Mr. SiJohn asked her again, telling her that he “could stop it.” RP 522. R.G.M. would not look at him, and said, “I know.” RP 522.

Mr. SiJohn later had a verbal and physical fight with Mr. Crossguns. RP 523-25. During the fight, Mr. SiJohn accused Mr. Crossguns of touching R.G.M., asking him why he kept “going down to [R.G.M.’s] bedroom” in the middle of the night. RP 408, 484, 524. Mr. Crossguns denied any wrongdoing, and “at some point” “threw the first punch,” hitting Mr. SiJohn. RP 524. In response, Mr. SiJohn broke Mr. Crossguns’ jaw. RP 408.

One of the charged offenses occurred in April or May 2016; on that date, R.G.M., P.M., and C.M. were sitting on the couch in the living room

watching television, when Mr. Crossguns began yelling for R.G.M. from the basement. RP 442, 601. Ms. Matte was at work. RP 602. R.G.M. did not respond to Mr. Crossguns right away because she was afraid he would touch her, but eventually she answered him. RP 443, 603. Mr. Crossguns was in a basement bedroom working on his resume. RP 603. He told her to sit on the bed and help him with his resume. RP 603. He patted the spot next to him and became angry when R.G.M. did not sit near him. RP 604. Afraid, R.G.M. complied. RP 604. Mr. Crossguns put his hand on her thigh and then began working on his computer again. RP 604. Again, Mr. Crossguns put his hands in R.G.M.'s pants, and, although she tried to get away, Mr. Crossguns grabbed onto her legs to prevent her escape. RP 604-05. When R.G.M. tried to smack him away, Mr. Crossguns laughed at her. RP 605. Mr. Crossguns promised that if she did not struggle, he would not touch her for a month. RP 605. She continued to struggle and he offered not to touch her for two months if she complied. RP 606. After he pushed a finger into her vagina, he promised her he would leave her alone for three months if she stopped struggling. RP 606. Eventually, R.G.M. was fatigued and agreed to his demands. RP 606. Even though she told him it hurt, he digitally penetrated her vagina. RP 607. When he was finished, he licked his fingers and he congratulated her, saying she was a woman. RP 607.

Although Mr. Crossguns did not touch her again for three months,⁴ he would count down the days, telling R.G.M. how many days remained. RP 610. After three months had passed, Mr. Crossguns resumed the abuse.

The second charged incident occurred on August 2, 2016. During that evening, Ms. Matte, Mr. Crossguns, R.G.M., and P.M. were watching television in the living room. RP 373, 446, 611. Because the room was hot, Ms. Matte and P.M. went to the porch to cool off. RP 377, 446, 612. Ms. Matte and P.M. could not see the living room couch from the porch. RP 377. While outside, Ms. Matte noticed that the television's volume increased – such that she was unable to hear P.M. talking. RP 378. Ms. Matte told P.M. to go inside to tell Mr. Crossguns to turn down the volume. RP 378. Ms. Matte “heard him holler ‘dad’ real loud, then he paused for a while, and then [she] heard him say, you’re supposed to turn that TV down.” RP 378. When P.M. returned to the porch, he did not make eye contact with his mother and appeared upset. RP 379.

When P.M. went into the living room, he observed R.G.M. leaning on the corner of the couch with her legs spread; the defendant was leaning toward her. RP 449. Mr. Crossguns’ hands were in R.G.M.’s pants, and R.G.M. was covering her eyes. RP 449-50. R.G.M. felt Mr. Crossguns’

⁴ Mr. Crossguns attempted to touch her during the three months, but R.G.M. reminded him of his promise, and he would stop. RP 610.

hand touch approximately one and one-half inches away from her vagina – in an area covered by her underwear. RP 638.

Later that evening, P.M. asked to speak with Ms. Matte privately and disclosed he had seen his father's hand between R.G.M.'s legs. RP 382-383. Ms. Matte asked R.G.M. whether Mr. Crossguns had touched her in that way. RP 383. R.G.M. denied it. RP 383. Ms. Matte then confronted the defendant, who, after turning pale, denied touching R.G.M. RP 385. Mr. Crossguns then "hollered at [R.G.M.]" and said, "[R.G.M.], I'm not touching you, am I[?]" RP 387. At trial, R.G.M. stated that she was afraid Mr. Crossguns would hurt her, so she lied, saying he had not touched her. RP 616.

Four days later, Mr. Crossguns returned to Montana "to sell [his] horses," saying he would return in a few weeks. RP 384, 389. However, Mr. Crossguns never returned, and would not answer his cell phone for his family. RP 390-391, 452. After his departure, R.G.M. disclosed to Ms. Matte that Mr. Crossguns had been abusing her. RP 392.

R.G.M. met with Detective Anthony Lamanna twice, disclosing more abuse during the second meeting than she had at the first meeting. RP 556-557. Detective Lamanna contacted Mr. Crossguns by telephone, who claimed to be unaware of any allegations against him. RP 559.

Mr. Crossguns' niece and R.G.M.'s cousin, S.R.,⁵ testified on Mr. Crossguns' behalf that in January 2017, at school, she asked R.G.M. why she claimed that her father had touched her. RP 661-62. According to S.R., R.G.M. revealed that her mother had directed her to lie. RP 661. R.G.M. denied ever answering S.R.'s question. RP 646-47.

Mr. Crossguns denied ever inappropriately touching R.G.M. RP at *passim*.

Procedural history.

Prior to trial, the State sought admission of other uncharged sexual acts perpetrated upon R.G.M. by Mr. Crossguns. CP 42-47. The State argued that the full history of the defendant's sexual abuse of R.G.M. was probative not only of the charged aggravating circumstance – that the defendant engaged in a pattern of sexual abuse of the same victim – but also for other independent reasons, including (1) the defendant's lustful disposition for R.G.M., (2) the defendant's motive, plan, intent, opportunity, absence of mistake and grooming of R.G.M. and (3) the res gestae of the case. CP 42. The defendant objected to this evidence generally as unduly prejudicial, requesting bifurcation, but did not make any cogent argument under ER 404(b) that the evidence did not serve a legitimate non-

⁵ At the time of trial, S.R. was 15 years old. RP 660.

propensity purpose or claim that the long-accepted “lustful predisposition” purpose for admitting prior “bad act” should be abandoned. RP at *passim*, CP at 70-73.

After hearing argument from the parties, the court admitted the evidence. CP 117-20. The court found, by a preponderance of the evidence, that the uncharged acts of abuse beginning in the year 2015 and continuing until August 2016, occurred and were committed by the defendant. CP 119. The court ruled that the evidence was admissible under ER 404(b) for those purposes cited by the State in support of the evidence’s admission. CP 119. The court balanced the probative value against the prejudicial effect of the evidence, concluding the evidence was extremely probative and outweighed any risk of unfair prejudice to the defendant. CP 119. The court also ruled that evidence of the aggravating factors would be put to the jury during the trial, rather than in a separate proceeding. RP 228. However, the court ultimately instructed the jury that:

Certain evidence has been admitted in this case only for limited purposes. This evidence consisted of evidence the defendant allegedly engaged in sexual abuse of [R.G.M.] not charged in the information and *may be considered by you only for the purpose(s) of determining the defendant’s intent, plan, motive, opportunity, absence of mistake or accident, lustful disposition toward [R.G.M.], [R.G.M.]’s state of mind for her delayed disclosure of the alleged abuse and/or whether the charged conduct was part of an ongoing pattern of sexual abuse and/or involved an abuse of trust or confidence.* You may not consider it for any other purpose. Any

discussion of the evidence during your deliberations must be consistent with this limitation.

CP 93 (Instruction 7) (emphasis added). During closing argument, the prosecutor reminded the jury it could not use evidence of other uncharged acts as propensity evidence, confining the State's arguments to those grounds upon which the court found the evidence admissible. RP 821-23.

During its closing, the State argued S.R.'s testimony was not credible:

Now, let's talk very briefly about what the defense case showed. You heard from [S.R.] this morning. She told you about an alleged conversation that she had with [R.G.M.] in which [R.G.M.] said she was lying, none of this happened. You heard from [R.G.M.] earlier, that that conversation never happened. Somebody's lying. It's your job to determine who's lying. Is [R.G.M.] lying or is [S.R.] lying?

And that's your job entirely, but here's some things that I think you should bear in mind when you discuss that. Think about what [S.R.'s] demeanor was on the stand this morning when she testified. ... She was smiling and laughing, and she was not treating this with the importance that is necessary in testifying under oath in court and her story doesn't make sense.

She tried to tell you that in January 2017, she overheard her grandmother crying because she had had a conversation with the defendant about these allegations. And so she took it upon herself, remember [S.R.] is maybe 11 years old at this time, 12 years old, something like that, she took it upon herself, a young girl, to go out and be the sleuth, the detective, to ask [R.G.M.] what was going on.

So she goes out and asks [R.G.M.], and apparently [R.G.M.] says, yeah, I was lying. So she stops there. [S.R.] never brings that to anybody's attention apparently until October of that year...

Now, who is [S.R.'s] grandmother ...? It's the defendant's mother. The defendant's mother was there when she writes this down, she was there to tell her what to write. And who else was living on that property at that time? The defendant.

...

And, finally, don't forget that when she was testifying to you, [S.R.] admitted that she had lied previously. She had lied to a CPS worker in order to get placed into a different family after she was taken away from her mother. And what did she lie about? She lied about allegations of abuse to that social worker. So I submit, you shouldn't believe what [S.R.] has to say. She's an admitted liar, her story doesn't make sense, and she clearly didn't have the demeanor today with the seriousness that it needs to be treated with.

RP 815-817.

The prosecutor also argued that the defendant's testimony was not credible:

You also heard from the defendant Patrick Crossguns today. He denied any allegations of sexual abuse with his daughter, adamant, never happened. I wouldn't touch my daughter. But, again, you have the testimony of [R.G.M.] on one hand, and his 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. I submit to you that you can't believe what the defendant was saying, and here is why:

Again, think about what his demeanor was like on the stand. Think about how he tried to evade questions. He didn't want to answer even the simplest of questions that I posed to him. He was combative, and when you saw -- you saw when he got frustrated with questions, that's when the veil begins to slip and you begin to get glimpses of what Patrick Crossguns is really like. Remember when he was testifying on direct and he said that in my culture, when you stare at somebody, it's a threat.

Well, when he started to get frustrated, did you see how he looked at me? That's for you to decide what that look meant, but in his culture, constantly staring at somebody is a threat. And I submit to you that the defendant was threatening when I asked him about hard questions about what he did with his daughter because he knew he couldn't answer those questions.

And what else happened on the stand with Mr. Crossguns? Well, he admitted to you that he had lied to his family about moving to Montana. He told his family he was going to Montana for a week or so when he never intended to come back. And when I pressed him on that point, eventually he said, well, if you put it like that, I lied to them. This is a man who deceives his own family. This is a man who deceived them about him going back to Montana and deceived them about what he was doing with [R.G.M.].

...

And what else happened today? Well, the defendant lied about where he was living between January and October 2017. He tried to tell you, the jury, initially that he was living on some Creak Divide, A Road, but that's not true. When I confronted him with the fact that he told the Court he was going to go live at his mother's place, he had to backtrack. He had to step that lie back and say, actually, no, I was living at Lot 5 in Starr School in Montana.

Now, why did he try to convince you that he wasn't living there? [S.R.]. He didn't want you to know that he was at the same property as [S.R.], because then you would question, why is [S.R.] saying what she's saying. He wanted to distance himself from her, so he lied to you. So I submit that you shouldn't give any credit to what the defendant had to say to you in denying the allegations. Look instead at what [R.G.M.] testified about and how that is corroborated by not just [R.G.M.'s] statements, but by what her family members told you about what they noticed about her and what [P.M.] saw.

RP 817-820.

During the defense closing argument, counsel argued, without objection:

Now, it's very obvious that the youngest daughter [C.M.] did not testify. But you can be assured that if she saw anything or heard anything, she would have been called as a witness. So you can assume, I think very fairly and correctly, that there was no evidence that she saw it and she was in that room.

RP 842.

In response, the prosecutor argued, also without objection:

You don't need [sic] reason and common sense at the door of the courtroom. You bring it in here with you, and you will have it with you when you go back and you deliberate. There's a couple of things in particular I want to respond to. One, you were asked to assume what [C.M.] may or may not have seen, said, heard, or done. None of that is before you. You should not speculate about where [C.M.] is now, about what she may or may not have seen, about what she may or may not have done. None of that is evidence.

RP 850.

The jury found the defendant guilty as charged, including the aggravating circumstances. CP 109-12. On the child rape, the court sentenced the defendant to an exceptional sentence above the standard range – a minimum term of 182 months to life; the court imposed 48 months for the child molestation to be served concurrently. CP 177. The defendant appealed.

III. ARGUMENT

A. THE DEFENDANT'S ER 404(B) CLAIMS ARE NOT PRESERVED; THE COURT PROPERLY ADMITTED ADDITIONAL ACTS OF SEXUAL ASSAULT FOR NON-PROPENSITY PURPOSES.

Mr. Crossguns asserts the trial court should not have admitted prior act evidence that he had touched R.G.M. inappropriately on occasions not charged in the information. His assignments of error 8 through 15 contend that the trial court erred in finding evidence of other misconduct was admissible for a proper non-propensity purpose.

Specifically, the State charged two criminal acts – the rape that occurred in the bedroom when Mr. Crossguns asked R.G.M. to help him with his resume, occurring on or about April to May 2016, and the molestation that occurred after the movie in the living room, occurring on or about August 1 to August 6, 2016. The defendant apparently takes issue with the admission of all of the other evidence of sexual contact and attempted contact between Mr. Crossguns and R.G.M. – ostensibly including Mr. Crossguns' first attempt to inappropriately touch R.G.M. in the car during the trip to Montana, the incident in which R.G.M. woke to find Mr. Crossguns' fingers in her pants while in Montana, Mr. Crossguns' act of touching R.G.M. with his beard trimmer, the repeated "almost daily" incidents where Mr. Crossguns snuck into R.G.M.'s bedroom at night or

would isolate her in the car when running errands, and the attempted sexual touching occurring between the date of the alleged rape and the date of the alleged molestation.

The defendant's claim fails. First, his assignments of error to the court's admission of the ER 404(b) evidence were not properly preserved as he did not contest that the evidence was admissible for a proper purpose below – he simply sought to have the case bifurcated so as to avoid undue prejudice from the evidence. Second, the trial court properly admitted the evidence because it was highly probative of the pattern of abuse aggravator, and several other non-propensity purposes.

Standard of review.

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). A trial court abuses its discretion if the evidentiary ruling is based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

1. The interplay between ER 404(b) and ER 403.

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).

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). The appeals court may affirm the trial court on any correct ground. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012); *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995) (a court may uphold trial court’s evidentiary ruling on the grounds the trial court used or on other proper grounds supported by the record).

Our Supreme Court discussed the relationship between ER 404(b) and ER 403 in *Gresham*:

Washington courts have developed a thorough analytical structure for the admission of evidence of a person’s prior crimes, wrongs, or acts. To admit evidence of a person’s prior misconduct, “the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Vy Thang*, 145 W[n.]2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Lough*, 125 W[n.]2d 847, 853, 889 P.2d 487 (1995)). The third and fourth elements ensure that the evidence does not run afoul of ER 402 or ER 403, respectively. The party seeking to introduce evidence has the burden of establishing the first, second, and third elements. [*State v.*] *DeVincentis*, 150 Wn.2d [11,] 17, 74 P.3d 119 [(2003)]; *Lough*, 125 Wn.2d at 853, 889 P.2d 487. It is because of

this burden that evidence of prior misconduct is presumptively inadmissible. *DeVincentis*, 150 Wn.2d at 17, 74 P.3d 119.

173 Wn.2d at 421.

Contrary to the defendant's current claims, the defendant's history of sexual abuse of R.G.M. was not offered at trial to demonstrate his propensity to sexually abuse his child or that he acted in conformity with that propensity on the two occasions specifically charged in the information. Rather, as explained below, that evidence was elicited for a number of other legitimate purposes, consistent with ER 404(b).

2. This evidentiary issue is insufficiently preserved because the defendant did not object based upon the same grounds advanced on appeal.

On appeal, the defendant takes issue with the second criterion listed in *Gresham, supra*, claiming that none of the reasons cited by the trial court supporting the admission of the ER 404(b) evidence are justified in this case. Br. at 15-25. At trial, however, the defendant objected to the use of the evidence on a different ground – the fourth ER 404(b) consideration – the required ER 403 analysis. This Court should refuse to hear these new arguments, raised for the first time on appeal.

“[An] appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). “A party may assign

evidentiary error on appeal only on a specific ground made at trial.”⁶ *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *accord* ER 103(a)(1); *see also*, *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (“Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review”). RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013).

In its motion in limine, the State sought to admit all the evidence of the sexual abuse of R.G.M. occurring between the Montana road trip and the final date of abuse in August 2016. CP 42. The defendant’s written response in the trial court objected to the use of “allegations of sexual misconduct not alleged in the charging document.” RP 70. However, the defendant did not advance any specific argument that the evidence was not admissible for a proper ER 404(b) purpose other than to state:

As to the State’s *res gestae* argument, there was no thought expressed prior to the May 2019 interviews of admitting uncharged criminal conduct despite the 2 charges having been filed almost 3 years earlier.

The other grounds argued for admissibility under 404(b) are cumulative, contrived and clearly designed to give propensity

⁶ Under RAP 2.5(a), a defendant may also raise a manifest constitutional error for the first time on appeal. Here, the defendant does not allege a constitutional violation, but rather, an evidentiary error, and so this exception does not apply.

information to the jury during the 1st phase of trial under the cloak of legitimate exceptions to exclusion.

CP 72.

In fact, the defendant agreed that the “other act” evidence *was* admissible for a proper purpose – to prove the aggravating circumstance.⁷

Instead, the defendant argued the ER 404(b) evidence should be heard by the jury in a bifurcated hearing⁸ so as not to unduly prejudice⁹ the defendant.

⁷ RP 71: “To make the defense position clear; there is no objection to the aggravating factors to be testified to and argued. The only dispute is over our legitimate position that the issue not be adjudicated prior to judgment on the 2 filed charges.”

RP 72-73: “Again, the defense is not objecting to the admission of other alleged acts during any sentencing phase if the defendant is convicted of one or both filed charges.”

⁸ The defendant does not assign error to the court’s ruling denying his motion to bifurcate the proceedings.

⁹ *See also* RP 216: “I think the bifurcation motion kind of primed the response under 404(b) to a greater extent, and one of the reasons, the main reason for the bifurcation motion is to prevent, in my view, of undue prejudice to the defendant.”

RP 216-217: “What I’m trying to avoid is extreme prejudice to my client... I think it’s very clear that additional, uncharged counts of a similar nature are extremely prejudicial. It comes down to whether the prejudice is outweighed by probative value, but it’s our position that very clearly that – that the prejudicial value is so great that there’s no way to mitigate it. That’s why I’ve asked for bifurcation to allow the state to still make their motion and still seek an exceptional sentence, but not at the expense of an unfair trial to my client.”

RP 218: “It’s our position that he cannot -- Mr. Crossguns cannot have a fair trial if all this other information is coming in, and it’s not necessary for the state to have that in order to make their case, and I don’t want to take that away from them. I just believe it should be presented at a more appropriate time, and the way to do that is to bifurcate it, is to have the trial on the charges themselves, and then open up the door so-to-speak on whatever evidence the state thinks is relevant on the issue of aggravating factors.”

CP 72-73. Thus, the defendant's objection at trial actually was predicated upon ER 403,¹⁰ under the fourth criterion required in an ER 404(b) analysis.

In ruling on the admissibility of the ER 404(b) evidence, the trial court clearly believed that the proffered evidence was relevant and offered for valid non-propensity purposes, and identified that the defendant's objection to the evidence was predicated upon its prejudicial nature, not on its intended use:

And then the biggest issue here I think for the defense and argued most by the defense is whether the probative value of the evidence outweighs any unfair prejudice which it may have on the fact finder.

RP 227.

Upon a thorough review of the record, it appears that the defendant's only arguably preserved ER 404(b) argument is his claim that the evidence could not be admitted as evidence of *res gestae*. CP 72. Even the defendant's *res gestae* argument below lacked specificity or cogency: "As to the State's *res gestae* argument, there was no thought expressed prior to the May 2019 interviews of admitting uncharged criminal conduct despite the 2 charges

RP 219: "So we're asking for the Court's help in not trying to present to the jury a situation that's different than it really is, but just a measured response to avoid extreme prejudice that Mr. Crossroads [sic] will suffer if those additional instances, un-filed, untested, if they are admitted into court."

¹⁰ ER 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

having been filed almost 3 years earlier.” CP 72. This argument is not reiterated on appeal.

On appeal, however, instead of challenging the trial court’s ruling on the same basis argued below, ER 403, the defendant assigns error to the court’s findings that the defendant’s other acts of sexual misconduct against R.G.M. were admissible under ER 404(b) for several non-propensity purposes. Similarly, he did not argue to the trial court that the “lustful disposition” ER 404(b) purpose should be abandoned, as he does now on appeal. Because the claims of error asserted on appeal are not the same as those advanced in the trial court, this Court should decline to consider any of the defendant’s new ER 404(b) arguments as they were unpreserved.

3. The additional acts of sexual abuse were properly admitted as proof of an aggravating circumstance.

A trial court may impose an exceptional sentence outside the standard range only if it finds that there are substantial and compelling reasons to do so. RCW 9.94A.535. RCW 9.94A.535(3) sets forth “Aggravating Circumstances—Considered by a Jury—Imposed by the Court.” That provision includes “an exclusive list of factors that can support a sentence above the standard range,” and includes the aggravators at issue here. RCW 9.94A.535(d)(iv) and (g).

RCW 9.94A.537(4) provides:

Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t).¹¹ If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the *res gestae* of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

Under this statute, the enhancements charged by the State were to be proved to the jury during the trial for the underlying criminal acts. The SRA requires that facts supporting aggravating circumstances should be found “by procedures specified in RCW 9.94A.537.” RCW 9.94A.535(3).

¹¹ RCW 9.94A.535(3)(e)(iv): “The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy”; RCW 9.94A.535(3)(h): “The current offense involved domestic violence ... or stalking ... and ... (i) the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time”; RCW 9.94A.535(3)(o): “The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment”; RCW 9.94A.535(3)(t): “The defendant committed the current offense shortly after being released from incarceration.”

The enhancements charged in this case were: RCW 9.94A.535(d)(iv) “The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense”; and RCW 9.94A.535(g) “The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.”

The trial court properly determined that the evidence establishing the existence of the aggravating factors was not propensity evidence under ER 404(b). In *State v. Price*, 126 Wn. App. 617, 636, 109 P.3d 27 (2005), this Court stated:

Under ER 404(b), evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show action in conformity therewith; however, this evidence is admissible for other purposes. Here, the State clearly offered Price's *Alford* statement on plea of guilty for "[an]other purpose[]" - it was offered as evidence of the aggravating circumstance of a pattern or practice of domestic violence incidents perpetrated by Price against Ms. Sheaffer. ER 404(b). Moreover, the court provided a limiting instruction to the jury that it was to consider this evidence only "as it may relate to your consideration of whether the State has proven the aggravating circumstance beyond a reasonable doubt." CP at 71. Thus, not only was the statement properly admitted, its use was properly limited.

Here, the evidence of the defendant's repeated instances of sexual misconduct with R.G.M. were offered and admitted for a proper purpose – for the jury to determine whether the offenses were part of an ongoing pattern of sexual abuse of the same victim. As in *Price*, where similar evidence was admissible to prove the pattern of domestic violence abuse aggravator, Mr. Crossguns' jury was provided an instruction limiting the use of this evidence; the jury is presumed to have followed that instruction. *Lough*, 125 Wn.2d at 864.

Further, as indicated above, the defendant conceded below that the other act evidence was admissible to prove the aggravating circumstance,

seeking bifurcation of the issues to avoid undue prejudice. The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). A defendant invites an error if he or she affirmatively assented to the error, materially contributed to it, or benefitted from it. *Id.* at 154. If the defendant's concession that the ER 404(b) evidence was admissible to prove the aggravating circumstance was in error, then any error in admitting the evidence for that purpose was invited by the defendant. This Court should decline review of this alleged error because it is both unpreserved and invited.

4. Other ER 404(b) non-propensity purposes.

Because the defendant did not contest that his alleged prior acts of sexual abuse served a valid ER 404(b) purpose, the trial court did not make a specific record as to the non-propensity purpose(s) for each prior act. The admission of each of the other acts may have had different non-propensity purposes, but, unfortunately, this was not analyzed at trial because the defendant did not contest that the evidence served a valid ER 404(b) purpose.

Briefly, other acts of a defendant may be admitted at trial to establish, among other things, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). Such evidence is also admissible when it establishes the res gestae of the crime(s), i.e., the State may be allowed to complete the story of the crime on trial by proving its immediate context. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)). The rationale for res gestae evidence is to ensure that the jury knows the whole story. *State v. Lillard*, 122 Wn. App. 422, 431-32, 93 P.3d 969 (2004). Additionally, such evidence may be admissible to explain a delay in reporting sexual abuse and to rebut the implication that the molestation did not occur. *See e.g., State v. Wilson*, 60 Wn. App. 887, 891, 808 P.2d 754 (1991).

ER 404(b) evidence may also be admitted to establish a common scheme or plan. In a child sexual abuse case, evidence of “the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior” is relevant to whether the crime occurred. *DeVincentis*, 150 Wn.2d at 17-18. “[A]dmission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue.” *Id.* at 21. Sufficient similarity is reached only when the trial court determines that the “various acts are naturally to be explained as caused by a general plan.” *Id.* (quoting *Lough*, 125 Wn.2d at 860). There is no

uniqueness requirement; the similarities need not “be atypical or unique to the way the crime is usually committed.” *DeVincentis*, 150 Wn.2d at 13.

R.G.M.’s description of waking in Montana to find Mr. Crossguns’ hand in her pants while in the same bed as P.M. was admissible as evidence of common scheme or plan. So, too, was R.G.M.’s description of Mr. Crossguns’ almost daily visits to her bedroom in Spokane. Each of these instances had sufficient similarity to demonstrate the defendant’s general plan to rape and molest his daughter. The defendant would intentionally isolate his daughter from others in the home to molest her. The defendant routinely abused R.G.M. in the basement of the home, to include the bedroom. The abuse occurred even when another child, like C.M. or P.M., was present – in situations where Mr. Crossguns would not likely be discovered – C.M. was asleep, P.M. was playing video games, or, as with the final instance of molestation, P.M. and his mother had recently stepped outside. Mr. Crossguns would only digitally penetrate or molest R.G.M. – there was no evidence of other penetration, or that he required R.G.M. to perform sexual acts upon him. These other acts were sufficiently similar to the charged acts to be admitted as a common scheme or plan.

Additionally, at least some of the other allegations of sexual abuse or attempted sexual abuse were clearly admissible as the *res gestae* of the charged offenses. For instance, the conduct occurring between the charged

rape and the charged molestation, including any of the “attempted touching” and the defendant’s reminders of how much time remained until he would resume the abuse, would have been admissible as *res gestae* to explain the gap in the abuse, why it resumed three months later, and why R.G.M. did not report the charged instance of rape – because she may have believed the abuse would stop.

The initial two instances of abuse – specifically the first time Mr. Crossguns touched R.G.M. during the car ride to Montana, and when he later molested her while she slept in Montana were also admissible to provide an explanation why R.G.M. did not report the abuse after the charged rape offense. R.G.M. became afraid of Mr. Crossguns after the first two incidents. RP 590. She also felt angry, disgusted and ashamed. RP 591. R.G.M. did not want to tell anyone what happened because she was ashamed and afraid to be judged and was also afraid Mr. Crossguns would hurt her. RP 591. Those initial acts of abuse explain why R.G.M. did not report the April/May rape – she had been abused for the preceding months, was ashamed and afraid of the defendant, and at that time, the defendant promised not to touch her for an extended period of time – three months.

Additionally, the defendant introduced the idea, early in trial (before the introduction of any ER 404(b) evidence), that the allegations against Mr. Crossguns were fabricated by R.G.M. and the rest of the of the family

concurrently with or after the fight with Mr. SiJohn. Mr. Crossguns elicited testimony that after the fight, Ms. Matte said to Mr. Crossguns, “my son Brian better not go to jail over this.” RP 408. The defendant continued to develop this theory, calling S.R. to testify that R.G.M. admitted to fabricating the allegations at her mother’s command. RP 662. During closing, defense counsel noted that Mr. Crossguns had no obligation “to explain why [R.G.M. was] making the allegations.” RP 842.

On appeal, the defendant claims that it was error to admit his other acts of abuse as evidence of the reason(s) for R.G.M.’s late disclosure, because he did not raise the issue of her late disclosure first. Br. at 16. This contention is belied by the record, although his theory was, perhaps, subtly developed and argued. Therefore, the evidence of the defendant’s other acts of sexual abuse was admissible to rebut the inference that the allegations were belatedly reported or fabricated – perhaps after, or in retaliation for, Mr. Crossguns’ fight with Mr. SiJohn. *See Lough*, 125 Wn.2d at 862. That the abuse began well-before Mr. SiJohn’s fight with Mr. Crossguns was admissible to demonstrate that the allegations were not related to that fight. The allegations were belatedly reported, not because they were fabricated by R.G.M., but rather, because R.G.M. feared Mr. Crossguns, was ashamed of the abuse, and Mr. Crossguns promised her a three-month respite from

his ongoing sexual abuse if she permitted him to digitally rape her during the April/May incident.

As above, this Court may affirm the trial court on any basis supported by the record. The record clearly supports the admission of the prior act evidence to prove the aggravator, as a common scheme or plan, to explain the delay in reporting, as *res gestae*, and, potentially, other acceptable ER 404(b) purposes.

5. Lustful disposition.

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.* Our Supreme Court has 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 offended female. *Id.*; *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983); *see also State v. Medcalf*, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990) (misconduct directly connected to the offended female, which does not just reveal defendant’s general sexual proclivities, is admissible).

As discussed above, the defendant made no challenge to the utility of this ER 404(b) purpose below. His current challenge is, therefore, unpreserved. Further, this Court remains bound by the decisions of the Washington Supreme Court, *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984), which still permits “lustful disposition” evidence where otherwise admissible. The court below did not err in following Supreme Court precedent – especially where the defendant failed to object. The defendant’s other acts of rape and molestation were probative to show the defendant’s sexual attraction to R.G.M. The evidence demonstrated that Mr. Crossguns told his daughter she was “beautiful” as he molested her. He was happy to have “given her her first orgasm” and that he “made her a woman.” He touched her differently than he did the other children – putting his hands on her waist or lower back.

The “other act” evidence was properly admitted as evidence of his lustful disposition toward R.G.M. The defendant’s challenge to the viability of this ER 404(b) exception is unpreserved and should not be considered for the first time on appeal.

6. The trial court properly instructed the jury to consider the defendant’s other acts only for limited purposes.

In analyzing the erroneous admission of evidence in violation of ER 404(b), this Court applies the nonconstitutional harmless error standard.

State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014) (citing *Gresham*, 173 Wn.2d at 433). That standard requires this Court to determine whether ““within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”” *Id.*

Here, the trial court instructed the jury that it could only consider the evidence of the defendant’s other acts for non-propensity purposes. The jury is presumed to have followed that instruction. Additionally, the State confined its closing remarks to discussing how the defendant’s other sexual conduct with R.G.M. was probative of proper ER 404(b) purposes, also cautioning the jury against its use as propensity evidence. RP 821-23. Any error, assuming one occurred and was preserved, was harmless.

B. THE STATE DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT; ANY CONCEIVABLE MISCONDUCT WAS NOT SO FLAGRANT AND ILL-INTENTIONED THAT A CURATIVE INSTRUCTION WOULD NOT HAVE REMEDIED ANY POTENTIAL PREJUDICE.

The defendant alleges that the State committed prosecutorial misconduct during closing by telling the jury that in order to acquit Mr. Crossguns it would have to find that R.G.M. was lying. Additionally, the defendant claims that the State mischaracterized the missing witness doctrine, also amounting to reversible misconduct. At trial, the defendant failed to object to any of these alleged instances of misconduct. On appeal,

he has failed to demonstrate misconduct, let alone misconduct that could not have been cured by a timely objection. Therefore, his claims fail.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

Where a defendant does not object during trial to the alleged misconduct, the claim is considered waived unless the misconduct is "so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction." *Matter of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). In *Phelps*, our high court observed it has found prosecutorial misconduct that was flagrant and ill-intentioned only "in a narrow set of cases where we were concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner." *Id.* at 170.

1. The prosecutor did not undermine the presumption of innocence or misstate the burden of proof.

In closing argument, the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). “The prejudicial effect of a prosecutor’s improper comments is not determined by looking at the comments in isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

The defendant’s allegation that the State undermined the presumption of innocence or misstated the burden of proof is based on a flawed reading of the record. The defendant contends that the prosecutor told the jury that it would “need to determine that R.M. was lying in order to acquit Mr. Crossguns.” Br. at 34-35. Similarly, the defendant contends that the “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.” Br. at 35.

The prosecutor's argument did neither; instead, the prosecutor's argument was focused on the jury's duty to decide the credibility of the witnesses, a proper subject for closing argument, and a proper statement of the law. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (the trier of fact has sole authority to assess witness credibility); *see also State v. Jackson*, 150 Wn. App. 877, 884, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009) (prosecutor's statements that police testified accurately were not improper vouching because the prosecutor outlined the evidence that could support the jury's conclusion that the officers were credible after reminding the jury that it was the sole judge of credibility). A prosecutor is permitted to make arguments regarding the credibility of the witnesses that are based on the evidence or reasonable inferences taken from the evidence. *See Thorgerson*, 172 Wn.2d at 448.

Contrary to the defendant's assertions, nowhere in the State's closing argument did the prosecutor argue or even hint that the jury must find R.G.M. lied in order to acquit Mr. Crossguns. Rather, the State's arguments, reproduced in full above, focused on the differences between R.G.M.'s testimony, that of her cousin S.R., and that of Mr. Crossguns. The prosecutor outlined reasons, based on the testimony presented at trial, the jury could believe or disbelieve those witnesses.

The prosecutor told the jury at least twice that it was the sole judge of the credibility of the witnesses.¹² The prosecutor's statements were consistent with the instructions given to the jury – that it was the judge of the credibility of the witnesses and the weight to be given to the evidence and testimony. CP 86. The argument of the prosecutor contained numerous reasons that the jury should or should not believe the witnesses, and was intended to aid the jury in its credibility determinations. The prosecutor's argument was also consistent with the instructions. CP 86-87 (“In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the

¹² RP 815:

It's your job to determine who's lying. Is [R.G.M.] lying or is [S.R.] lying?...And that's your job entirely, but here's some things that I think you should bear in mind when you discuss that.

RP 817:

But, again, you have the testimony of [R.G.M.], on one hand, and his 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. I submit to you that you can't believe what the defendant was saying, and here is why...

reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony"). The State's closing argument did not improperly shift the burden of proof or undermine the presumption of innocence. It was a proper credibility argument based on the evidence elicited at trial.

Additionally, the defendant has failed to establish that if there had been some impropriety in this argument, it could not have been cured by a timely objection and curative instruction. As above, the focus of a prosecutorial misconduct analysis where no objection was made is upon whether any prejudice could be cured. Here, had a timely objection been made, the court could have cured any potential prejudice by again reminding the jury that it was the sole judge of the credibility of the witnesses and that the State bears the burden to prove all elements of the charged offenses beyond a reasonable doubt. Therefore, the defendant's argument fails.

2. The prosecutor did not misstate the law regarding missing witnesses; any such misstatement could have been cured by timely objection and curative instruction.
 - a. *The prosecutor did not misstate the law or otherwise commit misconduct.*

The defendant claims that the prosecutor committed misconduct by misstating the law pertaining to missing witnesses, and that this misconduct

warrants reversal. Because this issue was not litigated below, no record was made as to the reasons that the youngest daughter, C.M., did not testify at trial. The defendant's argument fails because C.M. was not particularly available to the State. Additionally, the defendant has not shown he was prejudiced, nor has he shown that any prejudice could not have been remedied by a curative instruction.

Under the "missing witness" or "empty chair" doctrine,

[I]t has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, ... he fails to do so - the jury may draw an inference that it would be unfavorable to him.

State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991).

[O]ne must establish such circumstances which would indicate, as a matter of reasonable probability, that the prosecution [the party against whom the missing witness rule was sought to be applied in the case] would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. In other words, "the inference is based, not on the bare fact that a particular witness is not produced as a witness, but on his non-production *when it would be natural for him to produce the witness if the facts known by him had been favorable.*"

Id. at 488 (alteration in original). A second limitation on the rule is that the inference is not permitted when the witness is unimportant, or the testimony would be cumulative. *Id.* at 489; *see also State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). If a witness's absence can be satisfactorily explained, no inference is permitted. *Blair*, 117 Wn.2d at 489.

If a witness is not competent to testify, or some privilege applies so that the witness's testimony is protected, then the inference is not proper. *Id.* The doctrine does not apply if the uncalled witness is equally available to the parties.

For a witness to be "available" to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have 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 490. "[A]s one court has put it ... the party seeking benefit of the inference must show the "absent witness was peculiarly within the other party's power to produce." *Id.* at 491.

During the defense closing argument, defense counsel argued:

Now, it's very obvious that the youngest daughter [C.M.] did not testify. But you can be assured that if she saw anything or heard anything, she would have been called as a witness. So you can assume, I think very fairly and correctly, that there was no evidence that she saw it and she was in that room.

RP 842.

In response, the prosecutor argued:

You don't need [sic] reason and common sense at the door of the courtroom. You bring it in here with you, and you will have it with you when you go back and you deliberate. There's a couple of things in particular I want to respond to. One, you were asked to assume what [C.M.] may or may not have seen, said, heard, or done. None of that is before you. You should not speculate about where [C.M.]

is now, about what she may or may not have seen, about what she may or may not have done. None of that is evidence.

RP 850.

No “missing witness instruction” was given by the court, nor did either party request it.¹³ CP 82-84. The first time that the missing witness issue was raised was during the defense closing. RP 842. There was no earlier litigation to establish why C.M. was not called to testify by either party. Thus, the record is not developed as to whether there was a competency issue or some other satisfactory explanation for C.M.’s absence from court. In that regard, the defendant failed to develop a record that would support his current contention that the prosecutor improperly explained the missing witness doctrine to the jury, or a record that C.M. was “peculiarly within the [State’s] power to produce.”¹⁴ *Blair*, 117 Wn.2d at 491.

¹³ Arguably, any error was invited by the defendant in raising the argument that C.M. was a missing witness and asking the jury to assume that C.M. saw nothing while sharing a bedroom with R.G.M.; the defendant made this argument without first asking the court to rule on whether the doctrine may be fairly applied against the State. Under the invited error doctrine, a party cannot set up an error at trial and then complain of the same error on appeal. *State v. Ellison*, 172 Wn. App. 710, 715, 291 P.3d 921 (2013), *review denied*, 180 Wn.2d 1014 (2014).

¹⁴ It is the party against whom the rule would operate who is entitled to explain the witness’s absence and avoid operation of the inference. *Blair*, 117 Wn.2d at 489 (citing 2 J. Wigmore § 290, at 216). However, because this issue was not raised until the defendant’s closing argument, the State had no motive to earlier establish “a satisfactory reason” C.M. had not been called to testify. Any attempt to explain

Additionally, a prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel. *See e.g., State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). As above, any claimed misconduct is reviewed in light of all the arguments, issues, evidence, and jury instructions. *State v. Davis*, 141 Wn.2d 798, 872, 10 P.3d 977 (2000). Here, the defendant interjected the “missing witness” issue into his closing argument, without first addressing the applicability of the doctrine with the court or requesting an instruction be given to the jury by the court. The State was entitled to make a fair response to the defendant’s closing argument. Notably, in responding to the defense argument, the State did not encourage the jury to utilize the missing witness doctrine *against* the defendant for *his* failure to call C.M. to testify on his behalf; rather, the State’s argument was limited to the reason that the application of the doctrine against the State was inappropriate. This was a proper response.

Additionally, and most importantly, the defendant has not demonstrated how C.M. was particularly available to the State, and, therefore, how the defense could properly use the missing witness inference against the State. C.M. was R.G.M.’s sister, but she was also

C.M.’s whereabouts during closing argument would have required a reliance on facts not in evidence.

Mr. Crossguns' daughter. Presumably, Mr. Crossguns knew how to locate C.M. to subpoena her if she had favorable testimony to give on his behalf, which would include any testimony that she never saw or heard the defendant in her bedroom with R.G.M. at night. Therefore, the missing witness inference, first raised by the defendant, was not a proper inference or statement of the law. The State was entitled to correct the misstatement.

b. The defendant cannot demonstrate incurable prejudice.

As with any prosecutorial misconduct claim raised for the first time on appeal, the defendant must demonstrate the misconduct was flagrant and ill-intentioned such that no curative instruction could remedy the resulting prejudice. The defendant is unable to demonstrate prejudice, let alone incurable prejudice.

First, the State's argument that the jury should not consider "what [C.M.] may or may not have seen, said, heard, or done" could benefit the defendant and the State equally. Based on the defense closing argument, the jury could easily have inferred that the *defendant* did not call C.M. to testify because her testimony would have been unfavorable to *him*. The State's response to the defendant's missing witness argument made clear that the jury should not speculate why C.M. was not at trial; in other words, no inference should be made against *either* the defendant or the State as to the reason C.M. did not testify.

Second, assuming the prosecutor's argument was improper, the defendant cannot demonstrate that any resulting prejudice could not be cured by a timely objection and curative instruction. WPIC 5.20 is the pattern instruction on the missing witness inference. It provides:

If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:

- (1) The witness is within the control of, or peculiarly available to, that party;
- (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
- (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
- (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
- (5) The inference is reasonable in light of all the circumstances.

Had the defendant timely objected to the State's rebuttal argument, the trial court could have made a determination, perhaps based on evidence outside the current appellate record, that the defense was entitled to the missing witness instruction, and could have provided WPIC 5.20 to the jury. Any potential prejudice resulting from the State's response could easily have been cured by an instruction on the missing witness inference, if the inference were permissible in this case.

The defendant has failed to demonstrate that the prosecutor's argument was improper, and that the argument, if improper, resulted in incurable prejudice. This claim fails.

C. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.

The cumulative error doctrine applies when a trial is affected by “several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). To determine whether cumulative error requires reversal of a defendant's conviction, the court considers whether the totality of circumstances substantially prejudiced the defendant. *In re Cross*, 180 Wn.2d 664, 690-91, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). The cumulative error doctrine does not apply when there are no errors or where the errors are few and have little or no effect on the trial's outcome. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Because the defendant's arguments above fail, the cumulative error doctrine is inapplicable.

IV. CONCLUSION

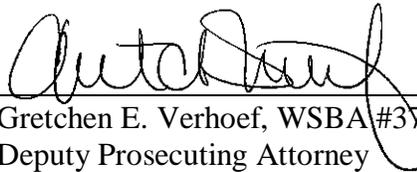
This Court should not consider the defendant's belated ER 404(b) claim as it was not raised or fully litigated below. In any event, the trial court did not err in determining that the defendant's other acts of sexual

assault against R.G.M. were admissible under ER 404(b) for a number of proper, non-propensity purposes.

The defendant also failed to object to the prosecutor's closing argument. The State's argument did not undermine the presumption of innocence or misstate the burden of proof. It was a proper argument regarding the credibility of the witnesses. Additionally, the prosecutor did not misstate the law regarding missing witnesses and was entitled to a fair response to the defendant's argument. In either instance of alleged misconduct, the defendant has failed to demonstrate that if misconduct occurred, it could not have been cured by a timely objection and instruction by the trial court to the jury. Because no error occurred, the cumulative error doctrine is inapplicable. The State respectfully requests this Court affirm the defendant's conviction.

Dated this 8 day of May, 2020.

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Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK CROSSGUNS,

Appellant.

NO. 370789-8-III

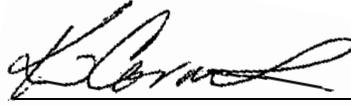
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 8, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Skylar Brett
Skylarbrettlawoffice@gmail.com

5/8/2020
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

May 08, 2020 - 2:29 PM

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