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NO. 242536-III

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

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY SCOTT FISHER,

Appellant.

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

The Honorable Vic L. VanderSchoor, Judge

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OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in admitting evidence of prior bad acts.
2. The trial court erred in admitting hearsay allegations of prior bad acts.
3. The trial court erred in permitting the state to cross examine Mr. Fisher and a rebuttal witness about irrelevant and unfairly prejudicial matters.
4. The prosecutor committed misconduct during trial and in closing argument by arguing that the prior bad acts evidence established that Mr. Fisher was acting consistently with his character in committing the charged crimes.
5. The prosecutor committed misconduct in arguing to the jury that the question for them to decide was whether the state witnesses were telling the truth or whether Mr. Fisher was telling the truth, implying that to acquit Mr. Fisher the jury would have to disbelieve the state's witnesses.
6. The trial court erred in permitting the prosecutor to call the defense investigator as a witness and eliciting testimony from her that was work product.
7. The prosecutor committed misconduct by impugning the integrity of Mr. Fisher's attorney through examination of the defense investigator and at other times during the trial.
8. The trial court erred in permitting the prosecutor to elicit prior consistent statements which were not made before any alleged motive to fabricate arose.

9. The trial court erred in permitting the state to call the counselor of the complaining witness and her siblings as a witness; the counselor's testimony constituted an impermissible comment as to guilt and invaded the province of the jury.

10. The trial court erred in denying Mr. Fisher the right to cross examine a witness against him to establish motive and bias.

11. The trial court erred in denying Mr. Fisher the right to call witnesses in his own behalf to establish the motive and bias of the witnesses against him.

12. The prosecutor committed misconduct by eliciting testimony from Mr. Fisher about the sentencing consequences of conviction.

13. The court's jury instructions denied Mr. Fisher his right to a unanimous jury verdict (instruction number 5). CP 116.

14. The court's jury instructions denied Mr. Fisher his right to proof beyond a reasonable doubt on every element of each crime charged (instruction number 5 combined with instruction number 7). CP 118.

15. Cumulative error denied Mr. Fisher a fair trial.

16. Mr. Fisher assigns error to the trial court's findings of fact numbers 4, 7, 8, 10, 12, 13, 14, 15, 16, 17 of the Findings of Fact Conclusions of Law denying a new trial.<sup>1</sup> CP 18-19.

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These findings and conclusions are attached as an appendix to this brief and incorporated herein by reference.

17. Mr. Fisher assigns error to the trial court's conclusions 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the written Findings of Fact Conclusions of Law denying a new trial. CP 18-19.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in admitting evidence of alleged prior bad acts of physical abuse where the evidence did not explain the delay in reporting sexual abuse and where the prosecutor used the evidence during trial and in closing argument to argue the inference forbidden by ER 404(b), that Mr. Fisher committed the charged crimes because it was in his character to do so?

2. Did the trial court err in failing to give a limiting instruction for the prior bad acts evidence?

3. Did the trial court err in allowing the state to introduce evidence of prior bad acts through hearsay for which there was no exception to justify admission?

4. Did the trial court err in permitting the prosecutor to examine Mr. Fisher and a rebuttal witness about irrelevant, unfairly prejudicial and demeaning matters?

5. Did the prosecutor deny Mr. Fisher his state and federal constitutional rights to a fair trial and the assistance of counsel by: impugning the integrity of defense counsel; eliciting testimony about the sentencing consequences of conviction; arguing that prior bad acts established Mr. Fisher's guilt; and misstating the burden of proof?

6. Did the trial court err in allowing the state to call the defense investigator as a witness where the justification for calling her -- to elicit

testimony about prior consistent statements -- was improper, given that the prior consistent statements were not made before a motive to fabricate arose, and where the state was further permitted to elicit work product information, in violation of Mr. Fisher's state and federal constitutional rights to the effective assistance of counsel?

7. Did the testimony of a counselor who saw the complaining witness and her siblings professionally constitute impermissible opinion testimony as to guilt and invade the province of the jury, in violation of Mr. Fisher's state and federal constitutional rights to a jury trial?

8. Did the trial court err in denying Mr. Fisher the right to cross examine witnesses to establish motive and bias in violation of his state and federal rights to confront the witnesses against him and in denying him the right to call witnesses to establish the motive for the accusations against him, in violation of his state and federal constitutional rights to compulsory process and to defend at trial?

9. Did the trial court's instructions to the jury deny Mr. Fisher his state and federal constitutional rights to a unanimous jury verdict and proof beyond a reasonable doubt on every element of each crime charged?

10. Did cumulative error deny Mr. Fisher a fair trial?

11. Did the trial court err in denying the motions of new trial?

## **C. STATEMENT OF THE CASE**

### **1. Procedural history**

On June 26, 2003, the Benton County Prosecutor's Office charged Timothy Fisher with one count of second degree child molestation against

Melanie Lincoln, alleged to have occurred six years earlier in 1997. CP 126-128, 139-140. The information was amended on June 28, 2004, to four counts of second degree child molestation. CP 139-40.

The jury convicted Mr. Fisher, as charged, after trial before the Honorable Vic L. VanderSchoor. CP 104-107.

After trial, Judge VanderSchoor denied defense motions for a new trial and imposed a sentence within the standard range. CP 21-31. Mr. Fisher subsequently filed a timely Notice of Appeal. CP 5-16.

## **2. Pretrial ER 404(b) ruling**

Prior to trial and after an evidentiary hearing, the court ruled that the state would be permitted to introduce evidence of prior acts of physical abuse allegedly committed by Mr. Fisher against the complaining witness, Melanie Lincoln, and her siblings Brett Lincoln and Brittany Doyea. The court ruled that the evidence was admissible to explain Ms. Lincoln's delay in reporting the allegations of sexual abuse. RP 2-3.<sup>2</sup>

## **3. Relevant trial testimony**

Melanie Lincoln, who was 19 years old at the time of trial, testified that Mr. Fisher married her mother Judy Ward when Melanie was in the fifth grade. RP 33, 35-36. Although Ms. Lincoln was living with her father at the time, she soon moved into the house on McKinley Court which her mother and Mr. Fisher had purchased together. RP 38. Ms. Lincoln shared a room

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The trial transcripts are in consecutively-numbered volumes designated RP. Other hearings are designated by date, e.g., RP(7/13/04).

The ER 404(b) hearing took place on January 8, 2004.

with her younger sister Brittany. RP 42. Her brother Brett shared a room with Mr. Fisher's son Tyler when Tyler and his sister Whitney visited every other weekend. RP 44, 238.

Ms. Lincoln testified that when she was in the seventh grade Mr. Fisher began taking her upstairs to her room to discipline her because she was, at twelve, too old to be spanked in front of the other children. RP 58-59. According to Ms. Lincoln, after a week or two, Mr. Fisher had her take off her pants and lift her shirt while she was lying on her bed. RP 61-62. Mr. Fisher then, according to Ms. Lincoln, opened and closed the outer portion of her vagina, sometimes plucked her pubic hairs, and sometimes he twisted her breasts. RP 61-62. Ms. Lincoln lay quietly while these things took place, which she said was virtually daily. RP 65, 68-69. According to Ms. Lincoln, Mr. Fisher did not remove any of his own clothing or fondle himself during these times. RP 150. In an earlier written statement, Ms. Lincoln said Mr. Fisher had her remove all of her clothing when they went upstairs. RP 144.

Ms. Lincoln said she did not tell anyone about what happened at the time because Mr. Fisher threatened to harm her if she did. RP 54. She told her boyfriend when she was 18, before she left to join the Air Force, and, at his urging, told her mother and current stepfather who called the police. RP 74-777.

Brett Lincoln, who was 17 at the time of trial, testified that he witnessed Mr. Fisher and his sister go past his room together either toward Ms. Lincoln's room or his parents' bedroom. RP 237. On one occasion, Brett testified at trial, he heard a scream from the room. RP 239. Brett, however,

had adamantly insisted at the pretrial evidentiary hearing a short time before trial that he heard screaming and then heard spanking -- "like someone down the street was chasing someone and they were screaming for their life" -- each and every time his sister and Mr. Fisher were together. RP(1/8/04) 156, 165-67, RP 627-29. At trial, Brett completely denied that he ever said this in the previous hearing and that it was not true. RP 246, 253-54, 627-29. Brett had also testified pretrial that the screaming came from the parents' room. RP(1/8/04) 172.

Mr. Fisher's ex-wife, Ms. Judy Ward, confirmed that Ms. Lincoln reported her allegations shortly after Ms. Lincoln's eighteenth birthday. RP 308. Ms. Ward called the police because she wanted to press charges. RP 309.

When Mr. Fisher was arrested, he denied any sexual misconduct with Ms. Lincoln. RP 438. He testified on his own behalf at trial and consistently denied the allegations. RP 522, 524, 540-41.

Brittany, Tyler and Whitney testified that they never saw Mr. Fisher and Ms. Lincoln go upstairs together. RP 275, 402. Brittany further testified that she never heard any screaming. RP 275.

The entire remainder of the trial was devoted to testimony about Mr. Fisher's alleged physical abuse of Ms. Lincoln, Brett, Brittany and his own two children Tyler and Whitney. The state was even permitted, over defense hearsay objection, to introduce evidence that the stepmother of the two children of Mr. Fisher's wife Peggy had filed a complaint alleging physical abuse against them. RP 617-22.

The prosecutor used the prior bad acts evidence in closing argument to ask the jury to convict Mr. Fisher because of his "distinctive pattern" of abuse, and because to acquit him the jurors would have to disbelieve the testimony of all of the witnesses who described the physical abuse. RP 661, 709. The prosecutor argued that: there was no doubt Mr. Fisher was abusive; that he dealt with children in an abusive manner all of his life, as shown in the thirteen separate instances of abuse the prosecutor had written on a board for the jurors; and that this spilled over into sexual abuse. RP 711-12.

#### **4. Testimony about physical abuse**

Ms. Lincoln testified extensively about physical abuse. She testified (a) that Mr. Fisher was mean about everything; (b) that once when she and Brett were not pulling weeds as they were supposed to, he smashed their heads together and gave her a bloody nose; (c) that one time Mr. Fisher kicked Brett over and over again; (d) that Mr. Fisher pushed her head into the wall when he thought she had eaten his donut; (e) that he randomly punched all of the children in the shoulder; and (f) that he once punched Brett so hard, while they were in the car, that Brett passed out. RP 48, 55-55. Ms. Lincoln was asked about a time in 1999, after Mr. Fisher was no longer living with them, when Officer Lance Manthey came to the house to talk about whether Mr. Fisher had hit Brett. RP 71-72. Although she talked about the physical abuse, Ms. Lincoln did not report any sexual abuse to Officer Manthey. RP 71-72.

Ms. Lincoln was also asked about her diary which covered the same period of time as the alleged abuse, in which she primarily discussed her feelings about boys. RP 78-88, 127-29. She never mentioned Mr. Fisher

leaving in the diary although she did report some concern about another of her mother's boyfriends leaving. RP 131-32.

The prosecutor asked Ms. Lincoln and she confirmed that Mr. Fisher did not owe her any money or property, that she never owed him anything and that she had not filed a civil lawsuit against Mr. Fisher. RP 98. She testified as well that neither Brett nor Brittany had anything to gain from their testimony. RP 99.

Brett Lincoln testified generally that he was physically abused and threatened by Mr. Fisher that it would be worse for him if he told. RP 234-36.

Brittany Doyca testified that Mr. Fisher hit or spanked them for no reason, and that she saw him hit and push Melanie and Brett. RP 268-69. She further testified that Mr. Fisher slapped Melanie and hit her on the butt and hit Brett with a belt. RP 274, 277. She could not recall if she was ever hit with the belt. RP 277.

Judy Ward testified that she was unaware of any abuse, but that the children changed: Ms. Lincoln was still "the mother," Brittany stayed in her room and Brett was quiet. RP 305. She recalled one incident when she came home and Brittany was on her bed crying and said that Mr. Fisher had hit her with a belt; Brittany had marks on her legs. RP 305-06.

Ms. Ward was also permitted to testify that after Melanie's disclosure, the three children were in counseling and that Brett had seen a counselor at an earlier time because he was having "issues" with the abuse. RP 310-12.

On cross examination, Ms. Ward confirmed that she might have told Officer Manthey that she was in the middle of a long, bitter divorce when he

came to the house to talk to the children in 1999.<sup>3</sup> RP 314. She admitted that she had ill-will against Mr. Fisher. RP 3114. On redirect she was asked by the prosecutor if the fact that Mr. Fisher physically and sexually abused her children figured into her feelings about him. RP 318.

**(i) Denial of right to cross examine**

The trial court excluded from opening argument and trial, testimony the defense sought to introduce about the divorce that might have given rise to Ms. Ward's motive and bias in testifying against Mr. Fisher. RP 23-26, 298. The defenses offer of proof, pretrial, was that Mr. Fisher married Ms. Ward because she was more attractive than he was and she married him because she wanted his insurance. RP 23. She was never happy with him. RP 23. The long drawn-out divorce was bitter. RP 23. Because of this, Ms. Ward told her friend and colleague, Patti Orsborne, that she would "get" Mr. Fisher. RP 23-24. Her children were likely influenced by her. RP 24. Ms. Ward and Mr. Fisher fought over money and she was vindictive because he ultimately prevailed in the divorce proceedings. RP 25. Defense counsel also argued that this evidence was appropriate to respond to the state's arguments and allegations. RP 25. During trial the defense made a further offer of proof that the divorce began in 1999 when Ms. Ward kicked Mr. Fisher out of the house. RP 297. Mr. Fisher initially won a judgment requiring that the house be sold and the equity in it split. RP 297. Ms. Ward refused to sell the house, and after delays and contempt proceedings, she was permitted to keep the house and pay a money judgment. RP 297. However, Mr. Fisher was not able

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Officer Manthey confirmed that she said this. RP 483.

to get the money until 2002, after he finally won a three-year battle during which Ms. Ward attempted to file bankruptcy to avoid paying Mr. Fisher what he was owed. RP 297-98. Mr. Fisher was also denied the right to call Patti Orsborne to testify about Ms. Ward's threat to get Mr. Fisher any way she could.<sup>4</sup> RP 330. Defense counsel asked for a standing objection to the failure to allow Mr. Fisher to call Ms. Orsborne as a witness. RP 409-11.

**(ii) Calling defense witnesses by state**

The state called the majority of the defense witnesses preemptively as state witnesses to impeach them with their failure to recall alleged prior incidents of abuse.

Tyler Fisher testified that he was 15 years old and lived with his father, his stepmother and two stepsisters Ashlyn and Shelby. RP 377-78. He recalled the time when Mr. Fisher lived with Judy Ward. RP 379. He testified, in response to questioning by the prosecutor, that he lived with his father and did not want to see him get into trouble. RP 390-91. On cross examination by defense counsel, Tyler testified that he recalled swimming in the pool at the house on McKinley Court and had no other strong recollections. RP 392-93. On redirect, the prosecutor asked Tyler if he recalled his father kicking, punching and hitting him in the face or when a Pasco police officer came to see him. RP 374.

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The prosecutor argued that Melanie Lincoln was the person making the allegations; defense counsel responded that his client disagreed. RP 30-331.

Whitney Fisher, who was 16 at the time of trial, testified that there were no problems during the time she visited the house at McKinley Court and no concern with regard to physical punishment. RP 396-401. She testified that she never heard screaming or saw Mr. Fisher and Ms. Lincoln go upstairs together. RP 402. Whitney did not recall that Ms. Ward's children ever acted frightened around Mr. Fisher. RP 403.

Kathy Valenzuela babysat the children during the summers of 1996 and 1997. RP 348. She testified that the children acted fine. RP 350. Sometimes Mr. Fisher came home while she was sitting and was there for a few hours while she was there. RP 351. Ms. Valenzuela recalled that Mr. Fisher helped the children and that everyone seemed fine and happy. RP 361. She could not recall that they acted afraid of Mr. Fisher or that their demeanor changed when he arrived. RP 362, 364.

**(iii) Other allegations of abuse**

Through the testimony of the arresting officer, Detective Murstig, the state elicited evidence of an incident in 1993 when the City of Pasco filed a fourth degree assault charge against Mr. Fisher for allegedly slapping his son. RP 446-54. The state then cross examined Mr. Fisher about this incident and over defense objection, the court allowed the state to introduce the criminal complaint as a trial exhibit. RP 554-55. The state also asked Mr. Fisher if the reason for his divorce from his first wife was his continued abuse of Tyler. RP 563.

The state called Jennifer Dick, Mr. Fisher's first wife, as a witness to testify about the slapping incident, in which Mr. Fisher had slapped Tyler for

saying a bad word. RP 459-60. After he had done this, Mr. Fisher had taken Tyler to Ms. Dick at work to tell her what he had done. RP 460. Ms. Dicks' aunt had called the police. RP 460.

The prosecutor also asked Ms. Dick if Mr. Fisher had kicked Tyler when Tyler was four or five years old and asked her why she had concerns about leaving her children with Mr. Fisher. RP 461.

When Peggy Fisher testified as a defense witness that she was aware of the allegations and was comfortable with living with Mr. Fisher, the prosecutor was permitted to cross examine her about her awareness of the incident involving Tyler and another incident involving Tyler and a Child Protective Services (CPS) referral. RP 472-73, 475.

**5. Forcing the defense investigator to testify as a state witness**

Over defense objection, the state was permitted to call the defense investigator, Marlene Goodman, as a state witness and ask her to confirm that Ms. Lincoln, Brett and Brittany gave statements during defense interviews that were consistent with their trial testimony. RP 174, 178, 184-85, 187, 196, 201, 205, 209-11. Defense counsel objected on hearsay grounds and on the grounds that the state was eliciting work product. RP 187-96. Counsel argued that evidence of prior consistent statements was not admissible unless the prior statements were made before the motive to fabricate arose, which they were not in this case. RP 187-200. Counsel asked for a standing objection. RP 196.

Defense counsel initially objected that the prosecutor was invading the attorney-client privilege by asking about how the investigation was conducted

and how many hours Ms. Goodman had spent on the case. RP 180. The prosecutor stated in front of the jury that "the fact is that she is getting paid by the defendant, so this investigation may clearly be a bias [sic]." RP 180. The state then asked Ms. Goodman about whom the defense had interviewed and whether defense counsel conducted the interviews. RP 182-83. The prosecutor asked whether defense counsel asked Ms. Lincoln about the sexual abuse and tried to elicit her opinion that such questions should have been asked. RP 206-07. The trial court sustained an objection to the question seeking her opinion about trial counsel's interviewing techniques. RP 207.

Ms. Goodman was able to impeach some of Ms. Lincoln's testimony. Ms. Lincoln had testified at trial that several months after Mr. Fisher left the house, she had seen him on one occasion by the school where she was picking up Brittany. RP 72, 150. Ms. Goodman testified in the defense interview that Ms. Lincoln had said that she had seen Mr. Fisher for two or three months in a row near Brittany's school. RP 214-15. Ms. Goodman further testified that when asked if she told Officer Manthey about the sexual abuse, she said no, she lied to him. RP 204.

#### **6. The counselor as a state witness**

The state was permitted to call Bonnie Kendall, a private counselor, as a witness. RP 333. She testified that she had seen Ms. Lincoln three times, Brett four times and Brittany two times in clinical settings. RP 336, 341, 342. Over defense hearsay objection, Ms. Kendall was permitted to testify that she believed Ms. Lincoln was remarkable for her lack of concern for herself and her worry and distress over the well-being of her family. RP 338-39. Ms.

Kendall testified that Brett was excessively concerned about the family and the family's safety and had tremendous feelings of guilt and remorse, specifically when he was able to apologize to his sister for not protecting her enough. RP 341-42.

**7. Improper impeachment of Mr. Fisher**

Over defense objection, the state was permitted to cross examine Mr. Fisher about the reasons for his gastric bypass surgery and about his ability to engage in sex due to his weight. RP 590-94, 597-98. The state recalled Judy Ward in its rebuttal case to testify that Mr. Fisher became "too fat for sex." RP 636, 638.

The prosecutor was permitted to cross examine Mr. Fisher about hearsay allegations of abuse in CPS documents. RP 617-22.

The prosecutor questioned Mr. Fisher at some length about whether he had talked to his attorney and the defense investigator and whether they had told him how to testify, accusing Mr. Fisher in front of the jury of having rehearsed his testimony. RP 584-85. When defense counsel objected, the prosecutor responded, also in front of the jury, that Mr. Fisher was giving pat answers and "we need to get to the bottom of why." The court sustained the objection and asked the prosecutor to "move on." RP 587. In spite of the fact that the court sustained the objection, the prosecutor continued, "You've been coached well." RP 588.

The prosecutor asked Mr. Fisher, "All of these accusations, all of these acts, what is the one common denominator?" Defense counsel objected under ER 404(b). After a sidebar conference, the court said this could be argued in

closing and allowed the prosecutor to ask Mr. Fisher if he was the person accused in each instance. RP 609.

The prosecutor was also permitted to ask Mr. Fisher if he was aware of having to register as a sex offender if convicted and that he would not be able to have contact with children if convicted. RP 611.

### **8. Closing argument**

The prosecutor's theme in closing argument was that there were two Timothy Fishers, the Timothy Fisher who would not physically or sexually abuse children, and the "Timothy Fisher that engaged in repeated abuse of children, culminating in the sexual abuse of Melanie Lincoln." RP 654.

The state argued, "[W]hat do you have to do? You have to evaluate the credibility of Melanie Lincoln against the credibility of the defendant. . . . And when you balance that [her testimony] against what you saw with the defendant, the balance tips heavily -- heavily towards the irrefutable truth that Melanie Lincoln is telling you the truth." RP 654-55.

Remember the law in the State of Washington is that we could have stopped at Melanie. We could have called Melanie and had no other evidence. . . . But you got more. You got a whole host of witnesses. You got more evidence.

. . . .

I told you that I would give you evidence, and evidence you got. And we're going to talk about more of these folks in detail. But this is the cast of characters. These are the people you heard from.

Miss Dick, the defendant's ex-wife. Whitney Fisher, his daughter. And Tyler Fisher, his son. Peggy Fisher, his current wife. Melanie was sexually abused by the defendant. Her brother, Brett. Sister, Brittany. Her mom, Judy Ward. We heard from Kathy Valenzuela and Bonnie Kendall. Officer Manthey. Detective Murstig. And even the defendant

investigator Marleen Goodman. Those were the witnesses in this case.

Well, what did they bring to the case? What did they have to add? What evidence to help show that Melanie was, in fact, sexually abused by the defendant did they bring to the table. Let's start.

RP 655-58. The prosecutor then argued that Ms. Dick told the jurors that Mr. Fisher smacked and had been abusive to Tyler and as a result had been charged with assault. RP 658. The state referred to the charging document, state's exhibit 6. RP 658.

The prosecutor argued that Mr. Fisher had abused his kids and "What's that consistent with?" RP 661. The prosecutor argued that this was consistent with the abuse in Judy Ward's house and "it followed that distinct pattern that the defendant started with his own son." RP 661.

The state argued that another pattern was the "system-wide failure" to hold Mr. Fisher accountable. RP 663-64. "And the failure of this system, the horrible failure of this system stops with the defendant's conviction of molesting Melanie. But it starts here with Tyler." RP 664.

The prosecutor argued that Peggy Fisher's own children are the subject of further CPS complaints about Mr. Fisher being abusive. RP 664-65.

The prosecutor continued for page after page discussing the physical abuse allegations. RP 663-71. The prosecutor argued that the children sought counseling "because of what the defendant did to them." RP 671. The state argued that Detective Murstig's testimony was important because he related "the defendant's admissions to being physically violent with Tyler." RP 673. The prosecutor argued that Mr. Fisher molested Ms. Lincoln because he was

morbidly obese and was not having sexual relations with Ms. Ward. RP 675-76. The prosecutor argued that neither Ms. Lincoln nor Ms. Ward had a motive to be untruthful about Mr. Fisher. RP 677-78.

The prosecutor concluded:

The truth of this case is that the system has failed. The system failed Tyler. The system has failed Melanie. The system has failed Brett. The system has failed Brittany. And the system has failed Ashland [sic] and Shelby. It's failed all of them sitting out there. And there is only one way that we can make sure that the system stops failing and that's to do the job that you all have been charged with and that I know you'll do.

RP 679-80.

In rebuttal argument, the prosecutor referred to the defense theory as "worse than the O.J. Simpson trial." RP 708.

The prosecutor argued again that there "can be no doubt that the defendant is abusive. It shows in the way the defendant deals with and has dealt with children all his life . . . It's not once, it's thirteen separate instances, ladies and gentlemen. Thirteen separate instances, including Melanie and including the sexual abuse." RP 711.

The prosecutor returned to the theme, "And yes it really does come down in the end to whose credibility you believe. Do you believe Melanie's? Or, do you believe the defendant's?" RP 718.

#### **9. The motions for new trial**

After the verdict, defense counsel moved for a new trial based on prosecutorial misconduct, -- the prosecutor's gestures and expressions in front of the jury, the prosecutor's expressions of his personal opinion as to guilt and credibility, the prosecutor's intrusion into work product and privileged information in calling the defense investigator as a witness, and the

prosecutor's impugning the integrity of defense counsel -- the improper admission and use of ER 404(b) evidence and the limitation on cross-examination to establish bias and motive. RP(12/21/04) 2-6, 22-25, 27-30, 33-34, 40-42, 42-44, 46-49; CP 82-103; CP 56-72. Defense counsel filed a number of affidavits in support of its motion, attesting to the fact that the prosecutor made gestures -- wincing, rolling his eyes and shaking his head in a negative manner -- during direct examination of Mr. Fisher and during defense counsel's closing argument. CP 77-81. Defense investigator Marleen Goodman testified at the hearing on the motion for new trial that she personally observed these expressions and gestures during trial when Melanie Lincoln was testifying and during defense counsel's opening statement and closing argument; Ms. Goodman testified that the jurors could see these gestures and expressions and she felt they were obviously intentional. RP(12/21/04) 2-6. The trial court denied the motion, ruling that the court would let the record speak for itself with regard to the evidentiary rulings. RP(12/21/04) 55-56. The court acknowledged that there were words and actions by the prosecutor which "were not entirely appropriate" and "some gestures and so on....but not that would undermine the jury's impartiality." RP(12/21/04) 57-58.

The trial court denied a subsequent motion for new trial based on using only one "to-convict" instruction for multiple counts, the instruction telling the jury that they need agree on only one act having been proven, the failure to give a Petrich instruction, the failure to give an ER 404(b) limiting instruction, and the jury's note expressing confusion about why four counts

had been charged. RP(6/8/05) 27, 12-13; CP 32-40, 41-50. Two affidavits by a defense investigator were filed in support of the addendum to the motion, indicating that some jurors were confused about the number of counts, found Ms. Lincoln to be vague when talking about when an act of abuse occurred, and could not place a specific count with a specific act; the affidavits indicated that the jurors were influenced by the alleged bad acts of child abuse. CP 38-40.

The trial court entered Findings of Fact Conclusions of Law denying a new trial. CP 17-20.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MR. FISHER'S ALLEGED PRIOR BAD ACTS, IN FAILING TO GIVE A LIMITING INSTRUCTION AND IN ADMITTING THE EVIDENCE IN THE FORM OF HEARSAY STATEMENTS.**

The trial court erred in admitting evidence of prior physical abuse allegedly committed by Mr. Fisher against Ms. Lincoln, her siblings Brett and Brittany, Mr. Fisher's son Tyler and even the children of Mr. Fisher's current wife; this evidence was overwhelmingly and unfairly prejudicial and denied Mr. Fisher a fair trial. Although the court admitted evidence of prior bad acts of physical abuse against Ms. Lincoln and her siblings to explain why she delayed reporting sexual abuse, the evidence snowballed during trial to instances about which Ms. Lincoln could not possibly have known. RP 2-3. The allegations of prior abuse became the main focus of the trial and overshadowed every other aspect of it. By closing arguments any pretense that the ER 404(b) evidence was introduced for a purpose other than to prove

that Mr. Fisher was the type of person to have committed the crime had disappeared.

The erroneous introduction of alleged prior bad acts should require reversal of Mr. Fisher's convictions. The evidence was not admissible for a purpose other than propensity and its prejudicial impact was substantially outweighed by any probative value. Most importantly, the prosecutor used the evidence to argue that it was Mr. Fisher's character to commit the charged crimes, an inference forbidden by ER 404(b). The trial court failed to give an appropriate limiting instruction and admitted hearsay evidence about the alleged physical evidence for which there was no basis for admission. This should require reversal of Mr. Fisher's convictions.

**a. The improper admission of ER 404(b) evidence**

Ms. Lincoln testified that she delayed reporting because Mr. Fisher threatened her. RP 54. This explained the delay better than any evidence of alleged acts of physical abuse, which *were* reported to the police, four years before Ms. Lincoln made her allegations of sexual abuse and without any apparent consequences to her or her siblings. RP 71-76, 308. It seems logical that Ms. Lincoln could just as well have been motivated to report any sexual or physical abuse to protect her siblings rather than *not* reporting it to protect them; the inference the state claimed was ambiguous at best. In any event, the state was not limited in any way to introducing the prior bad acts evidence of physical abuse to the purpose for which the court admitted it. In the final analysis, the prosecutor's argument was the argument prohibited by ER 404(b)

-- that Mr. Fisher committed the charged crime because it was in his character to commit such a crime.

Evidence of other uncharged, alleged misconduct by a defendant in a criminal case is *never* admissible to show that a defendant is a "criminal type" who is therefore more likely to have committed the crime charged, nor is it admissible to prove that the defendant acted in conformity with the prior bad acts during the alleged crime, or that he or she had the propensity to commit the crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487, 489 (1995); ER 404(b).

ER 404(b) provides:

**(b) Other Crimes, Wrongs, or Acts.** Evidence 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.

In deciding the admissibility of evidence under ER 404(b), the trial court must first determine whether the alleged misconduct has been proven by a preponderance of the evidence. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). If there is sufficient proof, then the court must follow a three-part analysis. First, the court must identify the purpose for which the evidence will be admitted. State v. Salterelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). Second, the evidence must be materially relevant, under ER 401 and ER 402, and necessary to prove an essential ingredient of the crime charged. Id. at 361-

62. For this second condition to be satisfied, the purpose for admitting the evidence must be of consequence to the action and make the existence of the identified fact more probable. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Third, pursuant to ER 403, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the finder of fact. Salterelli, 98 Wn.2d at 362-66.

"Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value." Lough, 125 Wn.2d at 863. Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, though no evidence of the alleged abuse of Ms. Lincoln and her siblings was considered at the pretrial hearing, the court found that the prior bad acts had been established by a preponderance of the evidence. The court found that the purpose for the evidence was to show why there was a delay in reporting. Yet, Ms. Lincoln explained that she had not wanted to report the sexual abuse because it embarrassed her and because Mr. Fisher threatened her. RP 54, 103-04. Further, the court did not determine why that issue was material, of consequence to the action, or more probable because of the ER 404(b) evidence. Thus, the alleged physical abuse did not clearly make a delay in reporting more understandable, especially because the physical abuse was reported to the police long before the allegations of sexual abuse surfaced. RP 71-72.

Most importantly, the evidence of physical abuse was so overwhelmingly prejudicial that even if the evidence had some slight probative value, that probative value was substantially outweighed by the prejudice. The evidence was admitted wholesale, with no attempt to moderate or limit the prejudice or to limit the evidence to its purported purpose. During trial and in closing argument, the prosecutor abandoned any pretense that the ER 404(b) evidence was admitted for any purpose other than to prove propensity: "Timothy Fisher . . . engaged in repeated abuse of children, culminating in the sexual abuse of Melanie Lincoln." RP 654. The prosecutor argued that what the other witnesses "brought to the table" was "to help show that Melanie was, in fact, sexually abused by the defendant." RP 658. He argued that the abuse was part of a "distinct pattern that the defendant started with his own son." RP 661. The prosecutor was permitted, over defense objection, to ask Mr. Fisher, "All of these accusations, all of these acts, what is the one common denominator?" RP 609. As the above citations to the record demonstrate, the prosecutor clearly violated the court's pre-trial ruling that prior bad acts were admissible only to establish why Ms. Lincoln did not report what happened earlier.<sup>5</sup>

**b. The failure to give a limiting instruction**

When evidence is admitted under ER 404(b), the jury should be instructed to use the evidence only for the purpose for which the court found it admissible. State v. Myers, 82 Wn. App. 435, 439, 918 P.2d 183 (1996),

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The trial court found, in its ruling denying defense motions for new trial, that the prosecutor did not violate pretrial rulings. CP 18.

aff'd, 133 Wn.2d 26, 941 P.2d 1102 (1997). Since the court must identify the purpose prior to admitting the evidence, the jury's consideration of the evidence must be limited to this purpose. It is overwhelmingly likely that the jury misused the evidence and considered it for improper purposes and not for any ER 404(b) permissible purpose. Under the circumstances of this case, the failure to give a limiting instruction should be grounds for reversal.

Although the defense did not propose a limiting instruction, prior counsel's assertions in the Motion for New Trial ("The defense concedes that no limiting instruction was proposed. However, the defense was maintaining an objection to the admission of the evidence and believes it was the duty of the court to make the necessary findings and to properly limit the use of prior bad act evidence") establish that defense counsel had no strategic reason for failing to propose a limiting instruction. See State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Therefore, the failure to give the ER 404(b) limiting instruction was reversible error because of the court's failure to give a limiting instruction or counsel's ineffective assistance of counsel in failing to request one. In either case Mr. Fisher should be given a new trial.

**c. The improper admission of hearsay**

Over defense hearsay objection, the state was permitted to introduce evidence that the stepmother of the two children of Mr. Fisher's wife Peggy had filed a complaint alleging physical abuse against them. RP 617-22. This evidence was introduced during cross examination of Mr. Fisher in the form of hearsay accusation in CPS records. RP 617-22. The trial court apparently

believed that CPS reports are automatically admissible. RP 619. This is erroneous.

Even if CPS records can be admitted under RCW 5.45.020 as business records, they must be authenticated by the custodian of the records or "other qualified witness" who could identify the record and its mode of preparation and testify that it was made in the regular course of business. RCW 5.45.020; State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979) (before a business record may be admitted, a foundation must be laid as to identity and mode of preparation); State v. Weeks, 70 Wn.2d 951, 425 P.2d 885 (1967).

Neither the court nor the prosecutor could supply the required foundation as plainly, they were not qualified witnesses.

Even if the CPS records could have been properly admitted, the underlying accusations in the report are hearsay within hearsay. ER 805 (each level of hearsay must fit within an exception to be admissible). There was no hearsay exception to admit the underlying hearsay. In State v. Mason, 31 Wn. App. 680, 644 P.2d 710 (1982), for example, the court considered Tacoma-Pierce County Health Department venereal disease contact referral forms containing the patient's statement as to where, when, and from whom he thought he got the venereal disease. The Mason court held that the "forms may be admitted despite being outside the business records exception . . . if an independent basis for admissibility exists, such as another exception to the hearsay rule." Mason, 31 Wn. App. at 688. Here, there was no exception to authorize admission of the accusations contained in the CPS report. The evidence was not relevant, there was no proper foundation laid for its

admission and there was no hearsay exception to allow the admission of the underlying accusations.

The error in admitting the CPS reports was not only evidentiary error, it was constitutional error. The admission of accusations by a person who did not testify at trial and who was not shown to be unavailable denied Mr. Fisher his right to confront the witnesses against him under the Sixth Amendment. The prosecutor not only introduced the evidence at trial, he returned to it during closing argument. RP 644-65.

The accusations were testimonial hearsay. They were made with the expectation that they would lead to an investigation and possibly criminal charges. Admitting the statements was constitutional error under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

**d. Erroneous finding that the door was opened**

In the court's written Findings of Fact Conclusions of Law in support of the denial of a motion for new trial, the court found that the defense inquired about good character with children during the examination of Mr. Fisher and his wife Peggy and this opened the door to impeachment of Mr. Fisher with prior instances of abuse. CP 19-20. These findings and conclusions are factually and legally in error.

Peggy Fisher was asked to describe Mr. Fisher's methods of disciplining her children and was asked if she was comfortable living with Mr. Fisher, hardly putting his good character with children in issue. RP 469-72. Mr. Fisher was similarly asked about his methods of disciplining the children when he was married to Judy Ward. RP 521-22. He was asked to describe

his interaction with the children. RP 520-31. This was not putting his character for being good with children at issue; it was merely controverting the testimony of the state's witnesses.

Under State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984), when a defendant offers a pertinent trait of character, "it may be rebutted by cross examination of character witnesses or contrary proof of reputation in the community, not by evidence of specific instances of misconduct. ER 405(a)." Kelly, 102 Wn.2d at 194. Cross examination of character witnesses "is to impeach the testimony of the character witness, not to discredit the person on trial." Id. Here, even if Mr. Fisher had offered a pertinent trait of character, which he clearly did not, it could not be properly rebutted by specific instances of misconduct. The trial court erred in ruling that prior bad acts evidence was admissible because the defense opened the door to such evidence.

**e. Summary**

The error in admitting the improper character evidence, in failing to give a limiting instruction and in admitting hearsay evidence of prior bad acts in this case was not harmless because, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The improper character or propensity evidence overwhelmed the trial and overwhelmed the jurors as well. This requires reversal of Mr. Fisher's convictions.

**2. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CROSS EXAMINE MR. FISHER AND A REBUTTAL WITNESS ABOUT IRRELEVANT AND UNFAIRLY PREJUDICIAL MATTERS.**

The state was improperly permitted to cross examine Mr. Fisher about the reasons for his gastric bypass surgery and his inability to engage in sex due to his weight. RP 590-94, 597-98. The state was also permitted to recall Judy Ward in its rebuttal case to testify that Mr. Fisher became "too fat for sex." RP 636, 638. This was error.

Questions about Mr. Fisher's medical decisions and conditions were totally irrelevant, highly improper and denigrating to him. ER 402; ER 403. The prosecutor did not provide any basis to support what must have been the personal belief that Mr. Fisher's weight or the success of his sex life with his wife made it more likely that he would have sexual contact with Ms. Lincoln. The trial court abused its discretion in admitting the evidence.

**3. THE PROSECUTOR'S MISCONDUCT DENIED MR. FISHER A FAIR TRIAL.**

The prosecution deprived Mr. Fisher of a fair trial under the due process clauses of the Fifth and Fourteenth Amendments by engaging in the following prosecutorial misconduct during closing argument: (1) impugning the integrity of defense counsel; (2) eliciting testimony about the sentencing consequences of conviction;(3) arguing that Mr. Fisher committed the crime because it was in his character to have committed it;(4) arguing that in order to acquit Mr. Fisher, the jurors would have to believe that the state's witnesses were untruthful; and (5) making inappropriate gestures during examination of Mr. Fisher and during defense counsel's opening statement and closing argument.

**a. Impugning defense counsel**

Over defense objection, the prosecutor was permitted to call the defense investigator as a witness to ask her about defense counsel's decision not to ask about sexual abuse during the defense interview of Ms. Lincoln, and about whether in the investigator's opinion, such questions should have been asked. RP 207.

Then, during the cross examination of Mr. Fisher, the prosecutor asked him at length if he had talked to his attorney and the defense investigator about how to testify; the prosecutor accused Mr. Fisher in front of the jury of having rehearsed his testimony. RP 584-85. When defense counsel objected, the prosecutor responded, also in front of the jury, that Mr. Fisher was giving pat answers and "we need to get to the bottom of why." RP 587-88. The court sustained the objection and told the prosecutor to "move on," but the prosecutor continued anyway, saying, "You've been well coached." Id.

This impugning of the defense counsel in front of the jury was misconduct.<sup>6</sup>

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The trial court found that "[t]he state did not ridicule the defense attorney at any time during the trial," and concluded that the state "did not ridicule or disparage the defense attorney" and the state "did not imply that defense counsel had committed any illegal acts." CP 18-20. The record, as cited in this brief, speaks for itself. Moreover, ridicule and accusations of illegal conduct are not the only means of disparaging defense counsel and impugning counsel's motives. The court's finding that the defendant asked the court "to order the State to ask the 'pat answers' question," is rather absurd. Clearly this is not a correct interpretation of the exchange in court. Defense counsel objected to the prosecutor's inquiry about the purpose of practicing his testimony: "Objection. He is asking what he talked about with his lawyer." RP 588. When the prosecutor responded, "I'm asking about rehearsed testimony," defense counsel objected that the prosecutor was not asking questions but making statements. RP 588. The prosecutor continued and stated, in front of the jury, "You've been coached well." RP 588.

A prosecutor may not launch unfounded attacks impugning the character of defense counsel and implying that the defense case is a sham. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983).

In Bruno v. Rushen, the appellate court affirmed the reversal of the defendant's conviction where the prosecutor had improperly suggested that a witness's consultation with defense counsel caused the witness to repudiate earlier pro-prosecution statements she had made to governmental investigators. Bruno, 721 F.2d at 1194.

In United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996), the Ninth Circuit reversed a conviction because of cumulative error that included improper prosecutorial attacks on defense counsel during closing argument. The Ninth Circuit found that the prosecutor's "compliment[ing]" defense counsel on "confusing" the witness was improper because it "would seem to imply that [defense counsel's] methods were somewhat underhanded and designed to prevent the truth from coming out." Frederick, 78 F.3d at 1380. The Court found that many of the prosecutor's remarks during closing implied that "the government and the court are allied in opposition to the defendant and his lawyer". Id.

In United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999), the Ninth Circuit found that it was error for a prosecutor to argue that "the defense in this case read the records and then told a story to match the records. And, ladies and gentlemen, I'm going to ask you not to credit that scam that has been perpetrated on you here." Sanchez, 176 F.3d at 1224. The Ninth Circuit found

that these remarks "denigrated the defense as a sham," which was prosecutorial misconduct. Id.

An unfounded attempt to undermine the defendant's case by denigrating defense counsel insidiously undermines counsel's constitutional duty to provide effective assistance of counsel, investigate and interview witnesses. State v. Jury, 19 Wn. App. 256, 263-66, 576 P.2d 1302, review denied 90 Wn.2d 1006 (1978). The attempt to undermine the defense in this case denied Mr. Fisher his state and federal constitutional rights to the effective assistance of counsel and of his state and federal due process rights to appear and defend at trial.

Similarly, the prosecutor's making gestures during defense counsel's opening statement and closing argument, as well as during Mr. Fisher's testimony, was another means of denigrating defense counsel and expressing a personal opinion about Mr. Fisher which was improper and which alone should result in the reversal of Mr. Fisher's conviction. See e.g., State v. Swan, 114 Wn.2d 613, 664, 769 P.2d 610 (1990) (misconduct for prosecutor to express his personal opinion about the credibility of witnesses or the defense case).

**b. Eliciting sentencing consequences**

The prosecutor improperly elicited from Mr. Fisher the consequences of conviction -- that he would have to register as a sex offender and would not be permitted to have contact with children. RP 611. These are sentencing consequences about which the jury was properly instructed, in the Court's Instruction Number 1, that "[the jury had] nothing whatsoever to do with [the

sentencing consequences]," and that "[t]he fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful." CP 111.

It is misconduct to elicit testimony which the jury, by specific jury instruction, may not consider. Such evidence is not relevant. It was elicited to discredit Mr. Fisher and burdened his state and federal constitutional rights to testify in his own behalf. The misconduct in eliciting the testimony should require reversal of Mr. Fisher's convictions.

**c. Arguing propensity**

The prosecutor represented to the court that the state was seeking admission of prior bad acts to establish Ms. Lincoln's reasons for delaying her accusations. RP 2-3, 15. That was the only purpose for which the evidence was admitted. RP 203. In violation of the court's ruling, and over repeated defense objection, the prosecutor argued that the evidence was relevant to show that Mr. Fisher committed the crime because it was in his nature to do so. This was misconduct and requires reversal of Mr. Fisher's conviction. See, State v. Clemons, 56 Wn. App. 57, 62, 782 P.2d 219 (1989), review denied, 114 Wn.2d 1005 (1990) (the state's violation of a motion in limine can justify a mistrial).

**d. Misstatement of the burden of proof**

In closing argument the state told the jury that their job was to weigh the credibility of Ms. Lincoln against the credibility of Mr. Fisher, and to conclude that the "balance tips heavily" towards Ms. Lincoln. RP 655. Towards the end of his argument, the prosecutor returned to this theme of it

"comes down in the end to whose credibility you believe. Do you believe Melanie's or do you believe the defendant's?" RP 718. This improperly implied that the burden of proof was whether Ms. Lincoln was more credible and that to acquit Mr. Fisher, the jury must find that Mr. Fisher was truthful and Ms. Lincoln was not. This is well-established misconduct and the prosecutor's continued engagement in it was flagrant and ill-intentioned.

A prosecutor commits misconduct by arguing to the jury that in order to convict the defendant, the jury must find that the state's witnesses were lying. State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); State v. Riley, 69 Wn. App. 353, 359 n.5, 848 P.2d 1288 (1993); State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996). A prosecutor who continues to engage in misconduct which has been repeatedly held to be improper by appellate courts does so flagrantly and with ill-intention. Trial counsel's failure to object should not preclude appellate review.

In Fleming, the court reversed the defendant's conviction due to the prosecutor's misconduct for this reason:

We note that this improper argument [that to acquit the defendant the jurors would have to believe the state's witnesses were lying] was made over two years after the opinion in Casteneda-Perez, supra. We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.

Fleming, 83 Wn. App. at 214.

The jury was required to find Mr. Fisher not guilty unless it was convinced beyond a reasonable doubt that every element of the crimes charged

against him was established. The jury was not permitted to merely weigh his credibility against the credibility of other witnesses.

This misconduct should result in reversal of Mr. Fisher's conviction.

**e. Reversible error**

Mr. Fisher objected to the questions impugning his integrity and to the admission of the prior bad acts evidence. His failure to object to other misconduct should not preclude review of the issue on appeal or reversal of his conviction. The misconduct was flagrant and ill-intentioned and there is a substantial likelihood that the misconduct affected the verdict.

Where there is a "substantial likelihood" that the prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where defense counsel does not object to the misconduct, appellate review is not precluded (1) if the cumulative effect of the misconduct rises to the level of manifest constitutional error that is not harmless beyond a reasonable doubt, State v. Fleming, 83 Wn. App. at 216; or (2) "if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice" of the misconduct. Belgarde, 110 Wn.2d at 507.

The prosecutor was well aware of his own argument for the admissibility of the ER 404(b) evidence and well aware that he was using the evidence to argue propensity and character. The prosecutor should certainly have been aware of the decisions holding that it is misconduct to argue that to acquit a defendant the jury must disbelieve the state's witnesses. The prosecutor should

certainly be aware of the standard jury instructions given in every criminal case. Ignoring these duties and these legal requirements was flagrant and ill-intentioned and should result in reversal of Mr. Fisher's convictions.

**4. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE DEFENSE INVESTIGATOR AS A WITNESS AND ELICIT TESTIMONY DEALING WITH WORK PRODUCT.**

Over defense objection on grounds that the state was seeking to elicit hearsay and attorney work product, the state was permitted to call the defense investigator as a witness. The state's purpose in calling her as a witness was to have her confirm that Ms. Lincoln, Brett and Brittany made statements consistent with their trial testimony during defense interviews. This was error.

Prior consistent statements, as defense counsel pointed out, are not admissible to rebut a claim of recent fabrication or improper motive unless the prior statement was made before the motive for fabrication arose. ER 801(d)(1)(ii); Tome v. United States, 513 U.S. 150, 115 S. Ct. 696, 700, 139 L. Ed. 2d 574 (1995) ("the prior consistent statement has no relevance to refute the charge [of fabrication] unless the consistent statement was made before the source of the bias, interest, influence, or incapacity originated").

Thus, the state had no possible legitimate justification for calling the investigator.

Further, the state improperly asked questions about information covered by the work product doctrine. The prosecutor asked about the number of hours the investigator spent on the case and whom the defense had interviewed. RP 180, 182-83. The prosecutor tried to elicit the investigator's

view of the appropriateness of defense counsel's interview techniques. RP 207.

These questions violated the work product doctrine.

The work product doctrine protects material prepared by agents for the attorney and agents who are acting at the direction of counsel, as well as reports generated by experts retained to investigate aspects of the case. United States v. Nobles, 422 U.S. 255, 238-39, 95 S. Ct. 2160, 45 L. Ed. 146 (1975); United States v. McPartline, 595 F.2d 1321, 1332 (7th Cir. 1979); State v. Ybarra, 161 Ariz. 188, 777 P.2d 686 (1989); State v. Yates, 111 Wn.2d 793, 796, 765 P.2d 291 (1988). Because the prosecutor was attempting to elicit information about the defense strategy and investigation, the prosecutor elicited and tried to elicit inadmissible evidence covered by the work product doctrine. The trial court erred in allowing the prosecutor to pursue these lines of inquiry and erred in allowing the state to bolster the credibility of Ms. Lincoln, Brett and Brittany by eliciting inadmissible hearsay from the investigator. Because credibility was central to the state's arguments and to the jury's determination, the error was unfairly prejudicial. The error violated Mr. Fisher's fundamental state and federal constitutional right to effective representation of counsel. The error requires the reversal of Mr. Fisher's conviction.

5. **THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CALL THE COUNSELOR OF THE COMPLAINING WITNESS AND HER SIBLINGS AS A WITNESS; THE COUNSELOR'S TESTIMONY CONSTITUTED AN IMPERMISSIBLE OPINION AS TO GUILT AND INVADED THE PROVINCE OF THE JURY.**

The trial court erred in allowing the prosecutor to call a counselor who saw Ms. Lincoln, Brett and Brittany as clients. RP 333, 335, 341-42. The counselor had no relevant evidence to provide and her testimony constituted an extended and impermissible opinion as to guilt. The assumption underlying her entire testimony was that they had been abused; her description of them was her opinion of their behavior which was a result of having been abused. RP 338-39, 341-42. In particular she gave her opinion as to guilt when describing Brett's remorse or guilt over not having been able to protect Ms. Lincoln. RP 341-42. This was error and constitutional error.

"No witness, *lay or expert*, may testify to his opinion as to the guilt of a defendant, whether *by direct statement or inference*." (emphasis added) State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This rule is a limitation on ER 704, which otherwise permits opinions which embrace the ultimate issue to be decided by a trier of fact. See, e.g., State v. Sanders, 66 Wn. App. 380, 386, 832 P.2d 1326 (1992) (noting that, in spite of ER 704, no witness may give an opinion as to the guilt of a criminal defendant).

In State v. Jones, the court held that the CPS worker's comment to the child, "I believe you," was not a sufficiently clear comment on the defendant's guilt because the CPS worker appeared to be reassuring the child, not making an explicit statement of belief in the victim's story. 71 Wn. App. 798, 812-13, 863 P.2d 85 (1993). In contrast, the CPS worker's further testimony that she felt that the child had been sexually molested by the defendant at a particular point in the child's story, was considered to be a comment on the defendant's

guilt, an invasion of the province of the jury, and thus, constitutional error Id.

In State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994), the court held that evidence that the child suffered from posttraumatic stress syndrome was not an impermissible comment on the defendant's guilt so long as the witness did not indicate, directly or indirectly, that her behavior patterns demonstrated sexual abuse. However, the court held that constitutional error did occur when the witness gave her opinion that the posttraumatic stress was secondary to sexual abuse because the witness's testimony invaded the province of the jury. Id.

Such a direct opinion as to guilt can be raised for the first time on appeal because it is a manifest constitutional error that has "practical and identifiable consequences in the trial of the case." Id. at 73-74 (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Here, the inference was clear that the counselor believed the abuse had occurred and was describing their behavior as being a result of the abuse. This denied Mr. Fisher his state and federal constitutional rights to a jury trial and a verdict based solely on evidence introduced at trial. It was constitutional error and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The error should require reversal of Mr. Fisher's convictions.

**6. THE TRIAL COURT ERRED IN DENYING MR. FISHER THE RIGHT TO ESTABLISH THE MOTIVE AND BIAS OF A WITNESS BY (1) CROSS EXAMINING THE WITNESS AND (2) CALLING WITNESSES ON**

**HIS OWN BEHALF TO ESTABLISH THE MOTIVE  
AND BIAS OF THE WITNESS.**

The prosecutor went out of his way to ask Ms. Lincoln if Mr. Fisher owed her any money or property or if she ever owed him anything or had filed a civil lawsuit against him. RP 98. The prosecutor asked Ms. Lincoln to confirm that neither Brett nor Brittany had anything to gain from their testimony. RP 99. The trial court, at the same time, denied Mr. Fisher the right to introduce any evidence about their mother Judy Ward's motive and bias in testifying against Mr. Fisher. RP 23-26, 298. Thus, the jurors heard only one side of the issue. This denied Mr. Fisher his right to present evidence on an issue raised by the state and denied him his fundamental right to present a defense and fully confront the witnesses against him.

Mr. Fisher's defense was that Ms. Ward had animosity and a bias against him over their long, bitter divorce and that her children were likely influenced by her. RP 23-24. The defense was prepared to cross examine Ms. Ward to establish her motive and bias and to present testimony that Ms. Ward had, in fact, told a colleague that she would "get" Mr. Fisher if necessary. RP 23-24. Clearly there was both money and property at issue. Ms. Ward had refused to comply with a judgment awarding Mr. Fisher half of the equity in the house and it took Mr. Fisher three years to obtain the money owed to him. RP 297-98. Defense counsel asserted in his offer of proof that Ms. Ward had been held in contempt and had even tried to file for bankruptcy to avoid paying Mr. Fisher what he was owed. RP 297-98. The trial court excluded any cross

examination about the divorce and excluded testimony from Ms. Ward's colleague that she said she would "get" Mr. Fisher any way she could. RP 330.

The exclusion was constitutional error as it denied Mr. Fisher his state and federal constitutional rights to confront the witnesses against him.

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 guarantee to a criminal defendant the right to present testimony in his own defense and the right to confront and cross-examine the witnesses against him. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Generally, the right to confront and cross-examine witnesses cannot be restricted absent a demonstration by the prosecution that there is a compelling state interest more important to the truth-finding process than the curtailment of the defendant's confrontation rights. Id. at 16; State v. Boast, 87 Wn.2d 447, 453, 553 P.2d 1322 (1976).

In particular, exclusion of cross-examination to establish a witness's bias, credibility, prejudice, or hostility may violate a defendant's Sixth Amendment rights.<sup>7</sup> "Cross examination to show bias, prejudice or interest is a matter of right." State v. Buss, 76 Wn. App. 780, 787, 887 P.2d 920 (1995).

The confrontation clause may be violated if the defense is not permitted to place specific facts before the jury from which bias or prejudice can be inferred. In State v. Brooks, 25 Wn. App. 550, 552, 611 P.2d 1274 (1980),

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A witness may be examined as to particular facts tending to show the nature and extent of the hostility. State v. Robbins, 35 Wn.2d 389, 395-96, 213 P.2d 310 (1950); State v. Brooks, 25 Wn. App. 550, 552, 611 P.2d 1274 (1980); State v. Jones, 25 Wn. App. 746, 610 P.2d 934 (1980).

for example, the court reversed the defendant's conviction where the trial court allowed cross-examination on the terms of the witness's plea agreement with the state -- including the agreement to dismiss a deadly weapon charge -- but improperly denied the defendant the right to elicit the specific fact that by having the state dismiss the deadly weapon charge, the witness avoided a 5-year mandatory minimum sentence. The court held that the defendant was entitled to present the specific reasons why the witness might be biased in the particular case. Id. at 552.

[T]he court may violate the confrontation clause if it prevents the defense from placing facts before the jury from which . . . bias or prejudice may be inferred. Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974). In Davis, the defense sought to question a key witness concerning the fact that he was on probation as a juvenile offender and thus could be under pressure from the police. The trial court disallowed the cross-examination to protect the secrecy of the juvenile record. The Supreme Court reversed, holding that defendant's Sixth Amendment right was violated as he was unable to establish the factual record to argue his bias theory.

State v. Pickens, 27 Wn. App. 97, 100, 615 P.2d 537 (1980) (confrontation rights denied where the defendant was not allowed to cross-examine his brother, a state's witness, on the subject of whether the brother might also be subject to prosecution for incestuous relations with his sisters). See also, State v. Robbins, 35 Wn.2d 389, 395-96, 213 P.2d 310 (1950); State v. Jones, 25 Wn. App. 746, 610 P.2d 934 (1980) (reversible error to exclude the testimony of two defense witnesses that the state's officer witness threatened to "fry" the defendant).

Davis v. Alaska, stands for the proposition that motive and bias may arise from situations where there is inherent bias and no formal promises or

agreements have been made. Similarly, in State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980), the court reversed the defendant's conviction where the trial court excluded evidence that one of the young girls who testified as a state's witness had been physically disciplined for failing to keep an appointment with the prosecutor. The Roberts court held that the evidence was relevant to possible pressure on the witness from her parents to cooperate with the state and exclusion of the evidence denied the defendant his right to confrontation. Id. at 836. As in Davis, no formal agreement existed between the state and the witness in Roberts.

Clearly, Judy Ward had a strong motive arising from her divorce and her having to pay money to Mr. Fisher which she did not want to pay, in testifying against him. Mr. Fisher had a constitutional right to cross examine her about her motive and bias. The state, in fact, raised the issue with Ms. Lincoln and was permitted to give any entirely false picture of the family's relationship with Mr. Fisher.<sup>8</sup>

The error in excluding the evidence was constitutional error and should require reversal of Mr. Fisher's convictions.

**7. THE COURT'S INSTRUCTIONS TO THE JURY DENIED MR. FISHER HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A UNANIMOUS**

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The trial court concluded in denying a new trial that there was insufficient evidence of a financial motive, and even if she did have a motive, "it was too remote in time to be relevant." CP 20. This conclusion is not supported by the record. Defense counsel's offer of proof was rebutted and never challenged as inaccurate. Further, the motive arose before the disclosures. The court's conclusion is not supported by the record.

**JURY VERDICT AND TO PROOF BEYOND A REASONABLE DOUBT ON EVERY ELEMENT OF EACH CRIME CHARGED.**

The Court's Instructions to the Jury did not include separate "to convict" instructions for each of the four counts of child molestation in the second degree charged by the state.<sup>9</sup> RP 651. Instead, in Instruction No. 7, the jury was instructed:

To convict the defendant of the crime of child molestation in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on four separate days between January 1, 1997 and December 30, 1997, the defendant had sexual contact with Melanie Lincoln:

.....

CP 118.

The state did not elect which acts or even which days it was relying on for each count in closing argument. Instead, the court's instructions included what purported to be a "Petrich" or unanimity instruction. RP 650. In Instruction No. 5, however, the jury was told only that:

There are allegations that the defendant committed acts of child molestation on multiple occasions. To convict the defendant, *one or more* particular acts must be proven beyond a reasonable doubt and you must unanimously agree as to which *act or acts* have been proven beyond a reasonable doubt. *You need not*

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Defense counsel did not take exception to the instructions proposed by the stat and given by the court; counsel did not propose any instructions and noted that if he had done so he would have worded them differently. RP 639.

*unanimously agree that all the acts have been proven  
beyond a reasonable doubt.*

(emphasis added). The jury was never informed that each count constituted a separate crime and that its verdict on one count should not control its verdict on any other count. CP 116.

During the course of deliberations, the jurors sent out a note asking "Why are there 4 counts? Why not 3 or 6? What was basis for 4 counts?" CP 108. The court responded, "You must rely on the instructions already given to you by this Court." CP 108. The instructions already given were of no help.

Where a jury hears evidence of multiple acts which might be considered as a basis for conviction, there must be some means of making sure that the jurors unanimously agree which act it is relying on for conviction. It is unconstitutional to obtain a conviction where some jurors find one act to have been committed and other jurors find a different act for conviction. It is also fundamental that jurors must find all of the elements of each charged count beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Here the court's instructions did not require either unanimity or proof beyond a reasonable doubt for each conviction. First, the instructions failed to set out each count charged in a separate "to convict" instruction. The one "to convict" instruction, Instruction No. 7, did not require unanimity. Instruction No. 7 only required that jurors agree that on any four days -- rather

than the same four days -- during the charging period, Mr. Fisher engaged in sexual contact.

Second, and most importantly, Instruction No. 5 made the problem worse rather than curing the problem. Instead of requiring unanimity, Instruction No. 5 actually informed the jurors that they need only unanimously agree that one specific act was committed for conviction. Instruction No. 5 makes no reference to separate counts or the need to unanimously agree on the same act for each count. Instruction No. 5 tells the jury that "to convict the defendant" -- apparently all of the counts that have been lumped together in one "to convict" instruction-- "*one or more particular acts* must be proven beyond a reasonable doubt and you must unanimously agree as to which *act or acts* have been proven beyond a reasonable doubt." To compound the problem, the juror were then expressly told that that they "need not unanimously agree that all the acts have been proven beyond a reasonable doubt." The jury was clearly confused and asked what was the basis for four counts and why not either fewer or more counts. CP 108.

The clear and unambiguous import of Instruction No. 5 is to tell the jurors that they could convict if they agreed that one specific act had been proven. This was constitutional error that requires reversal of Mr. Fisher's convictions.

Mr. Fisher had a state and federal constitutional right, for each count charged, to have the jury determine unanimously that he committed the criminal act with which he was charged in that count. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); State v. Petrich, 101 Wn.2d 566, 572,

683 P.2d 173 (1984) modified by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Const., art. 1, § 22 (amend. 10); U.S. Const., amend. 6. To assure this right, where evidence of multiple acts is presented, the state must elect the particular criminal act on which it will rely for conviction, or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572.

Where the prosecutor does not elect which of several acts the state will rely on for conviction, the failure to give the required unanimity instruction is constitutional error. State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993); State v. Loehner, 42 Wn. App. 408, 409, 711 P.2d 377 (1985), review denied, 105 Wn.2d 1011 (1986). As such, it may be raised for the first time on appeal. State v. Gitchel, 41 Wn. App. 820, 821, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985); see also State v. Camarillo, 115 Wn.2d 60, 63 n. 4, 794 P.2d 850 (1984).

Reversal is required unless the failure to properly instruct the jury was harmless beyond a reasonable doubt. Kitchen, 110 Wn.2d at 409; Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). The error is presumed to be prejudicial and "will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." Kitchen, 110 Wn.2d at 405-06.

The error was constitutional and not harmless beyond a reasonable doubt. The jurors may well have concluded that they need only believe that

one act had to be proven and that the state had no burden to establish all of the elements of each charge. The jurors clearly did not understand their duty to agree on specific acts forming the basis of each charged crime; their note indicated that they did not understand the reason for there being four counts or why there were not fewer or more counts. CP 108. Certainly the jury was not required by the instructions given to agree in any way on which act it was relying for conviction in each count. Mr. Fisher's convictions should be reversed for the inadequacy and unconstitutionality of the jury instructions given in his case.

**8. CUMULATIVE ERROR DENIED MR. FISHER A FAIR TRIAL.**

It is well settled that the combined effects of error may require a new trial, even when those errors individually may not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993) (recognizing that cumulative error can deny a defendant due process even where the individual errors are harmless). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

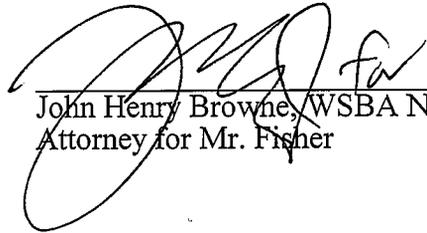
In this case, the many trial errors, either individually or cumulatively, denied Mr. Fisher a fair trial. Indeed, the trial was infected with error from beginning to end and Mr. Fisher should be entitled to a new, fair trial.

**E. CONCLUSION**

Appellant respectfully submits that his convictions should be reversed and remanded for retrial.

DATED this 21 day of December, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "JH Browne", is written over a horizontal line.

John Henry Browne, WSBA No. 4677  
Attorney for Mr. Fisher

Rita J. Griffith, WSBA No. 14360  
Co-counsel

E. KAY STAPLES  
BENTON COUNTY CLERK

RECEIVED

JUN - 8 2005  
FILED *[Signature]*

JAN 03 2006

In the Office of the Clerk of Court  
Washington Court of Appeals, Division Three  
By \_\_\_\_\_

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,  
  
Plaintiff,  
  
vs.  
  
TIMOTHY FISHER,  
  
Defendant.

03-1-00547-2  
NO. ~~03-1-00785-8~~

FINDINGS OF FACT  
CONCLUSIONS OF LAW

Based on the court record and the arguments of counsel, the Court makes the following Findings of Fact:

1. In the context of the entire closing argument, the State used the term "we know" to refer to evidence in the trial;
2. The State did not use "we know" in closing as an assertion of the credibility of his office or to imply that there was extra-judicial information which he had;
2. While the court can not recall any specific times that the State reacted to testimony or argument in the courtroom, the court believes that the State did react;

FINDINGS OF FACT

SCANNED

101  
0-0017

3. The court saw the State gesture at times;
4. None of the gestures that the court saw were of a nature to undermine the jury's impartiality or seriously prejudice either side;
5. The court instructed the jury to disregard comments or actions by either counsel or the judge as they are not evidence;
6. The State never said "we know the defendants guilty;"
7. The State never suggested that defense attorney was suborning perjury or otherwise breaking the law;
8. The State cross-examined witness Katherine Valenzuela about inconsistencies in her testimony;
9. The State did question the defendant on using "pat answers;"
10. The defense did not object and in-fact, asked the court to order the State to ask the "pat answer" question;
11. Lawyers for both the State and the defendant zealously advocated for their clients;
12. The State did not ridicule the defense attorney at any time during the trial;
13. The State did not violate any pre-trial rulings <sup>VLS</sup> by the court;
14. In the testimony of Peggy Fisher, the defense inquired about the defendant's good character with children;
15. In the defense direct of the defendant, the defendant testified about his good character with children;
16. Only after the defense directed two witnesses on the issue of

the defendant's good character with children did the State impeach the defendant with evidence of his prior abuse of children;

17. The defense offer of proof on the alleged financial motivation of Judy Ward to lie about the defendant was speculative and remote in time from the alleged abuse in the case;

18. The court instructed the jury that "Your verdict in one count does not control, your verdict on any other count;"

19. The defense did not object to the instruction questioned in the second motion for new trial;

Based on the court record and the arguments of counsel, the Court makes the following Conclusions of Law:

1. The use of the term "we know" by the State in closing argument were not improper. The comment, when viewed in the context of the argument, was a comment on the evidence not personal vouching of the State;

2. Based on the strength of the evidence in the case, even if the use of "we know" was improper, there was not a likelihood that the comments effected the jury's verdict;

3. The instructions<sup>WJS</sup> given required the jury to find the defendant committed four separate acts of molestation on four separate days;

4. The instructions given required the jury to not allow their verdict on one count to control their verdict on any other count;

5. The court allowed the defendant to be impeached with prior

instances of abuse after the defense opened the door to that issue;

6. There was insufficient evidence of Judy Ward having a financial motive to lie about the defendant's abuse;

7. Even if there were credible evidence of Judy ward having a financial incentive to lie about the defendant's abuse, it was too remote in time to be relevant;

8. The State did not ridicule or disparage the defense attorney;

9. Any gestures or comments the State made, when viewed in light of the entire trial were not capable of undermining the jury's impartiality or seriously prejudicing any party's case;

10. The State did not comment or gesture in a manner that was flagrant or ill intentioned, thus a curative instruction was not needed;

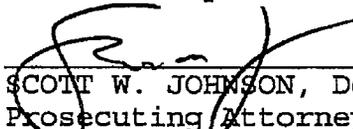
11. The State did not state or imply that defense counsel had committed any illegal act;

12. The trial, while not perfect, was fair to both sides.

Signed this 8 day of ~~March~~<sup>JUNE</sup>, 2005.

  
JUDGE VIC VANDERSCHOOR

Presented by:

  
SCOTT W. JOHNSON, Deputy  
Prosecuting Attorney  
Office ID #91004

Approved by:

\_\_\_\_\_  
Attorney For Defendant

FINDINGS OF FACT