

FILED

JUN 16 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

84003-2

NO. 269965

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

STATE OF WASHINGTON, Respondent,

v.

ALBERTO PEREZ VALDEZ, Appellant.

BRIEF OF RESPONDENT

James L. Nagle WSBA#9637
Prosecuting Attorney &
Attorney for Respondent

240 West Alder, Suite 201
Walla Walla WA 99362-2807

509/524-5445

TABLE OF CONTENTS

	Page
A. COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
B. COUNTER STATEMENT OF CASE.....	1
C. COUNTER ARGUMENT.....	1
1. The trial court did not err in excluding evidence that the girls burned down a foster parent’s home after being removed from the Perez-Valdez home	5
2. The trial court did not err in granting the State’s motion to strike evidence of Mr. Perez-Valdez’s moral character and prohibiting defense counsel from mentioning the evidence in closing argument	7
3. The trial court did not err in denying Mr. Perez-Valdez’s motion for a mistrial based on the argument that the CPS investigator opined that the victims told the truth, and later denying his motion for a new trial on the same basis.....	10
D. CONCLUSION.....	14

TABLE OF AUTHORITIES

Table of Cases

	Page
<i>Crippen v. Pulliam</i> , 61 Wn.2d 725, 734-5, 380 P.2d 475 (1963).....	14 n.2
<i>Humbert/Birch Creek Const. v. Walla Walla County</i> , 145 Wn.App. 185, 192, 185 P.3d 660, 663 (2008).....	13-14
<i>In re Pers. Restraint of Tortorelli</i> , 149 Wn.2d 82, 94, 66 P.3d 606 (2003).....	13
<i>Nguyen v. Sacred Heart Medical Center</i> , 97 Wn.App. 728, 735, 987 P.2d 634, 638 (1999).....	10
<i>Snyder v. Tompkins</i> , 20 Wn.App. 167, 173, 579 P.2d 994 (1978).....	10
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	4
<i>State v. Alexander</i> , 64 Wn.App. 147, 154, 822 P.2d 1250 (1992).....	12-13
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).....	14
<i>State v. Demery</i> , 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).....	13
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	8
<i>State v. Drummer</i> , 54 Wn.App. 751, 775 P.2d 981 (1989).....	2-3
<i>State v. Griswold</i> , 98 Wn.App. 817, 829, 991 P.2d 657 (2000).....	7,8
<i>State v. Jones</i> , 71 Wn.App. 798, 812, 863 P.2d 85 (1993).....	12,13

<i>State v. Korum</i> , 157 Wn.2d 614, 646, ¶ 54, 141 P.3d 13, 30 - 31 (2006).....	13,14
<i>State v. Land</i> , 121 Wn.2d 494, 500, 851 P.2d 678 (1993).....	9
<i>State v. Lewis</i> , 15 Wn.App. 172, 177, 548 P.2d 587 (1976).....	14
<i>State v. Madison</i> , 53 Wn.App. 754, 770 P.2d 662 (1989).....	3,13
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	13
<i>State v. Pam</i> , 101 Wn.2d 507, 511, 680 P.2d 762 (1984).....	13
<i>State v. Ranicke</i> , 3 Wn.App. 892, 896, 479 P.2d 135, 138 (1970).....	4
<i>State v. Rehak</i> , 67 Wash.App. 157, 162, 834 P.2d 651 (1992).....	8
<i>State v. Stein</i> , 140 Wn.App. 43, 65 ¶ 53, 165 P.3d 16, 28 (2007).....	4
<i>State v. Studd</i> , 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999).....	13
<i>State v. Tharp</i> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981).....	14
<i>State v. Thomas</i> , 123 Wn.App. 771, 98 P.3d 1258 (2004).....	3
<i>State v. Thompson</i> , 47 Wn.App. 1, 10-12, 733 P.2d 584, 590 - 591 (1987).....	4
<i>State v. Wade</i> , 138 Wn.2d 460, 464, 979 P.2d 850 (1999).....	4
<i>State v. Warren</i> , 134 Wn.App. 44, 53, ¶ 13, 138 P.3d 1081, 1085 (2006).....	12

Court Rules

CrR 4.7(b)(1).....	7 n.1
ER 402.....	2
ER 403.....	4
ER 404(a).....	8,9
ER 404(b).....	3
ER 405.....	8,9
ER 611.....	14 n.2

Treatises

Tegland, Vol. 5D Wash. Prac., <i>Handbook on Wash. Evid.</i>	2
--	---

A. COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The trial court did not err in excluding evidence that the girls burned down a foster parent's home after being removed from the Perez-Valdez home.
2. The trial court did not err in granting the State's motion to strike evidence of Mr. Perez-Valdez's moral character and prohibiting defense counsel from mentioning the evidence in closing argument.
3. The trial court did not err in denying Mr. Perez-Valdez's motion for a mistrial based on the argument that the CPS investigator opined that the victims told the truth, and later denying his motion for a new trial on the same basis.

B. COUNTER STATEMENT OF CASE

Appellant's statement of the facts is sufficient for argument of this appeal.

C. COUNTER ARGUMENT

- 1. The trial court did not err in excluding evidence that the girls burned down a foster parent's home after being removed from the Perez-Valdez home.**

As outlined in the appellant's brief, the appellant attempted to attack the credibility of the victims, herein S.V. and A.V., by seeking the admission of evidence of an incident that occurred after the sexual assaults by the appellant wherein the girls caused a fire to a foster parent's home.

Tegland, Vol. 5D Wash. Prac., Handbook on Wash. Evid. ER 607 (2008-09 ed.) p. 309 (the paperback “Courtroom Handbook on Washington Evidence”) states in broad outline, that there are five methods for impeaching the credibility of a witness:

- (a) The witness may be shown to be biased;
- (b) The witness may be challenged on the basis of mental or sensory deficiencies;
- (c) Evidence may be introduced to contradict facts to which the witness has testified;
- (d) The character of the witness may be attacked by evidence of poor reputation, specific instances of misconduct, or prior convictions; and
- (e) The witness may be shown to have made a prior inconsistent statement.

No matter what the goal of the defense is in impeaching a state’s witness, the proffered evidence must still meet the test of relevancy.

Evidence Rule 402 must still be satisfied:

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

Washington's appellate courts have never held that a defendant has a right to present exculpatory evidence despite the fact that the evidence was clearly barred by the rules of evidence. This argument was rejected in *State v. Drummer*, 54 Wn.App. 751, 775 P.2d 981 (1989), in which the

court stated that a criminal defendant “does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” In *State v. Madison*, 53 Wn.App. 754, 770 P.2d 662 (1989), the court stated, “There is nothing ... to suggest that defendants in general are exempted from the normal rules of evidence in presenting their case.”

For example, in *State v. Thomas*, 123 Wn.App. 771, 98 P.3d 1258 (2004), the trial court properly excluded testimony of a defense expert on diminished capacity, where the expert's testimony was inadmissible under the normal rules of evidence. The appellate court rejected the defendant's argument that he had a constitutional right to present a valid defense, saying a criminal defendant has no right, constitutional or otherwise, “to introduce evidence that is irrelevant or otherwise inadmissible.”

Given this background, it is clear that the trial court did not err in refusing the admission of prior misconduct of the victims to attack their credibility. Evidence Rule 404(b) lays out the parameters of admissibility:

Rule 404(b) Other Crimes, Wrongs, Acts

(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.

Evidence of other bad acts is not admissible when the trial court is convinced that its effect would be to generate heat instead of diffusing light. “In other words, is its probative effect outweighed by its highly prejudicial effect?” *State v. Ranicke*, 3 Wn.App. 892, 896, 479 P.2d 135, 138 (1970). If the trial court determines that the testimony was relevant, the trial court is required to balance the prejudicial effect with probative value. The trial court must exclude even relevant evidence when the danger of unfair prejudice substantially outweighs its probative value. Evidence Rule 403. This balancing is a discretionary ruling. *State v. Stein*, 140 Wn.App. 43, 65 ¶ 53, 165 P.3d 16, 28 (2007); *State v. Thompson*, 47 Wn.App. 1, 10-12, 733 P.2d 584, 590 - 591 (1987). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court’s reasoning was not an abuse of discretion:

9 THE COURT: Mr. McCool, I have been thinking about
10 this ever since last week. We are not going into the
11 burning of the house. Number one, you haven't really
12 shown that she just hated this house. Was she unhappy?

13 She is unhappy as half the teenaged kids in any house
14 are. Everybody is unhappy with the parents. They don't
15 like the rules, they don't like this or that, but we
16 don't put in evidence of burning a house down. The link
17 just isn't there. And it is just so prejudicial. And
18 it's prejudicial to the fact-finding process, not just
19 to her. You put in there that she is an arsonist.
20 That's, it's just unfair. And you can certainly, you
21 are going to be able to make that argument and you will
22 make it until you are blue in the face, that she did
23 this to get out of the house. But you don't have to say
24 she burned down a house to make that argument.

RP 108. The trial court's reasoning continued:

17 THE COURT: Mr. McCool I understand, she burned a
18 house down and she had pretty dumb reasons for doing
19 that, but to parlay that into what motivates this crime
20 is simply a stretch. So we're not going to go there.
21 You can make the argument that that's why she did it to
22 get out of the house. You've already implied it with
23 your questions. They know where you are headed. I know
24 where you are headed. But to tie in the whole other
25 arson crime, is really doesn't add much to the equation
1 and they can figure that out. If she wanted to get out
2 of house she could make up a lie. That doesn't take a
3 genius to figure that out. You can make the argument,
4 but we're not going into the arson, and I'm not taking
5 anymore argument on it.

RP 110-111. The trial court reiterated that it was a collateral matter when
defense counsel attempted to introduce it during cross-examination of the
foster parent:

2 THE COURT: If that were a material fact I would do
3 that in a heartbeat, but this is a collateral matter. I
4 have been thinking about this. My ruling is that's a
5 collateral issue. Maybe she is wrong. Maybe starting a

6 fire is a serious thing. Maybe her interpretation, her
7 opinion is bad judgment. But so what? This case isn't
8 about whether starting a fire is serious or not. It has
9 nothing to do with it. It's a collateral issue.

10 I will let you do this: I will let you make
11 inquiry did something severe enough happen that the
12 children were removed and leave it at that. So that
13 they at least know something did happen that they were
14 removed, and so something happened.

RP 194.

The appellant's offer of proof did not make any logical connection between A.V.'s setting her foster parent's house on fire so she and S.V. could leave it and a claimed motive to fabricate allegations of sexual abuse by the appellant. RP 109-110. The reason for the fire was not even established to be the reason to leave the foster parent's home. Nor was there any logical connection between making a false allegation of sexual abuse against the appellant and later setting fire to a foster parent's home in order to get her sister to "clean the car for me", which was the explanation for the fire. RP 109, line 17-18. The trial court's decision to exclude the evidence was not manifestly unreasonable or exercised on untenable grounds or for untenable reasons.

2. The trial court did not err in granting the State's motion to strike evidence of Mr. Perez-Valdez's moral character and prohibiting defense counsel from mentioning the evidence in closing argument.

Mr. Perez-Valdez presented a number of witnesses who testified without objection they had known Mr. Perez-Valdez for a considerable period of time at the farm labor camp where he lived, that his general moral character and reputation was very good, and they had never witnessed anything inappropriate in his relationship with S.V. and A.V. RP 203-04, 207-08, 262-67. Mr. Perez-Valdez's trial attorney provided the State with a witness list containing the names of those witnesses, but did not provide the State with advance indication of what those witnesses were going to testify to as required by CrR 4.7(b)(1).¹ RP 329-30, 331. The State asked that their testimony be stricken and disregarded. RP 333, line 13-14. The trial court ruled that testimony as to Mr. Perez-Valdez's general moral character should not have been admitted under *State v. Griswold*, 98 Wn.App. 817, 829, 991 P.2d 657 (2000). The trial court was going to give an instruction to the jury to disregard the testimony. RP336-

¹ **CrR 4.7(b) Defendant's Obligations.** (1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, *together with any written or recorded statements and the substance of any oral statements of such witness.* (Emphasis added)

7. The parties agreed not to give the instruction, and Mr. Perez-Valdez's trial counsel was not permitted to mention the testimony in closing.

A defendant has a constitutional right to present a defense consisting of relevant and admissible evidence. *State v. Rehak*, 67 Wash.App. 157, 162, 834 P.2d 651 (1992), *cert. denied*, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993). However, a proper foundation is necessary. *Id.* (evidence regarding a third party perpetrator). Evidence Rule 404(a) provides:

Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: 1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

Evidence of one's reputation in the community for sexual morality may be relevant and admissible as character evidence of the accused, if a proper foundation is laid. *State v. Griswold*, 98 Wn.App. 817, 829, 991 P.2d 657 (2000), abrogated on other grounds by *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Such evidence, where relevant, must be based on reputation in the community. Evidence Rule 405. A witness's personal opinion is not sufficient to lay a foundation for the admission of such testimony. The community from which the opinion is sought must be both neutral and general. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

The record illustrates Mr. Perez-Valdez sought to have witnesses testify as to (1) their opinion as to his general moral character, and (2) their personal observations regarding his interaction with S.V. and A.V. The former testimony was not about his reputation in the community for sexual morality. The latter was not reputation evidence, but personal opinion evidence and was not admissible under ER 404(a). Thus, the evidence was not admissible under ER 404 or ER 405 and there is no indication that the trial court abused its discretion in further excluding any mention of it in the presence of the jury. The jury had heard the evidence, however. In lieu of giving an instruction to the jury, the parties agreed that Mr. Perez-Valdez's counsel would not mention the testimony in closing arguments:

10 MR. GOLDEN: Why don't we do this? Don't give the
11 instruction, and obviously, Mr. McCool would be
12 precluded from giving anything about moral character. I
13 can live with that. We can get on with it. I said I
14 don't think, I don't believe I am entitled to the good
15 character instruction.

16 THE COURT: That's what I'm going to do. I'm going
17 to take that instruction out. I will not give it. But
18 I'm not going to let you argue about it either,
19 Mr. McCool.

20 MR. McCOOL: Well, if you looked at my reasonable
21 doubts you wouldn't even see it up there.

RP 367.

An agreement arrived at on the record is binding on the parties and will not be reviewed on appeal unless the party contesting it can show that the concession was a product of fraud or that the attorney overreached his authority. *Nguyen v. Sacred Heart Medical Center*, 97 Wn.App. 728, 735, 987 P.2d 634, 638 (1999); *Snyder v. Tompkins*, 20 Wn.App. 167, 173, 579 P.2d 994, *review denied*, 91 Wn.2d 1001 (1978). There is no suggestion in the record that Mr. Perez-Valdez's counsel's concession was improper, especially considering the fact that he had put inadmissible evidence before the jury. He cannot now appeal that tactical decision.

3. The trial court did not err in denying Mr. Perez-Valdez's motion for a mistrial based on the argument that the CPS investigator opined that the victims told the truth, and later denying his motion for a new trial on the same.

Mr. Valdez-Perez's trial counsel elicited the following from Karen Patton, the Child Protective Services investigator during cross-examination:

- 18 Q. Are you telling me only children sexually abused would
19 know what their mother and father's room looked like if
20 they had been in there five, six, seven or eight years?
21 A. No, not at all, but each family has rules, and some
22 families don't allow the children in the parents'
23 bedroom. That's a private space. So I'm saying these
24 children knew what the parents' bedroom looked like, and
25 in addition, they were in there several times being
1 sexually abused by their father.
2 Q. Assuming they are telling you the truth?
3 A. They are telling me the truth.

4 MR. McCOOL: Objection. Move to strike. Move for
5 mistrial.

6 THE COURT: I'm going to sustain your objection.
7 I'm going to ask that the jury disregard her comment,
8 but I'm not going to grant your motion. I'm going to
9 deny your motion for a mistrial.

RP 301-02. The appellant renewed his motion for a mistrial, to which the
trial court responded:

11 THE COURT: Well, Mr. McCool, it seems to me you've
12 got some complicity on this. You are the one that asked
13 her. She went on to say I interviewed these kids and
14 they told me this, and told me that, and she had already
15 gone through her direct. She never said anything about
16 what she believed or didn't believe. But on
17 cross-examination, you said, "Assuming they're telling
18 you the truth."

19 MR. McCOOL: Right.

20 THE COURT: She said, yeah, they are telling me the
21 truth. You asked the question and she responds. She
22 responds, and now you want a new trial.

RP 442. The trial court continued the analysis by looking at the totality of
the trial in denying the motion for a new trial:

10 THE COURT: Okay. I understand that. But I'm
11 going to deny the motion. The Court of Appeals is going
12 to have to make that call. You know, I sat through this
13 trial. And when I look at the circumstances of this
14 case, the factors that you've cited, the type of
15 witness, nature of the testimony, nature of the charges
16 and the type of offense, this was one of many witnesses.
17 There were numerous experts that testified. There was

18 one question and one answer; assuming you believe her.
19 I do believe her. That was it. Out of a several day
20 trial. And there is no way, in my opinion, that that
21 tainted this whole trial. And I told them to disregard
22 it. And they're presumed to do what I tell them to do.

23 You know, I was struck, there was a quote in one of
24 our most recent advance sheets, Justice Sweeney of our
25 Court of Appeals said this, I forget what the issue was,
1 some question about what had happened. He said this:
2 "Certainly, the perfect case was not tried here. But
3 the perfect case has not been and never will be tried.
4 The parties here are not entitled to a perfect trial.
5 They're entitled to a fair trial."

6 That's exactly what they got. They got a fair
7 trial here. He had his day in court. One comment by
8 one person, one fleeting reference, that I think was at
9 least partially invited, certainly didn't turn this
10 thing around. So at a minimum, it would have been a
11 harmless error, beyond a reasonable doubt.

12 So I'm going to deny the motion. You can argue
13 that with the Court of Appeals.

RP 445-46.

A trial court should not grant a mistrial based on improper opinion
evidence elicited by the defense in cross-examination of a State's witness.

The trial court did not in this case.

No witness may state an opinion about a victim's credibility
because such testimony "invades the province of the jury to weigh the
evidence and decide the credibility of the witness." *State v. Warren*, 134
Wn.App. 44, 53, ¶ 13, 138 P.3d 1081, 1085 (2006); *State v. Jones*, 71
Wn.App. 798, 812, 863 P.2d 85 (1993) (citing *State v. Alexander*, 64

Wn.App. 147, 154, 822 P.2d 1250 (1992)); *State v. Madison*, 53 Wn.App. 754, 760, 770 P.2d 662 (1989). Such testimony can be constitutional error because it invades the province of the jury, thus infringing on a defendant's constitutional right to trial by jury. *Jones*, 71 Wn.App. at 813; see also *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

However, under the doctrine of invited error, a party who sets up a constitutional error at trial may not later complain of it on appeal. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds, *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). Where the testimony later challenged is specifically elicited by defense counsel, it amounts to invited error and is not reviewable on appeal. *State v. Korum*, 157 Wn.2d 614, 646, ¶ 54, 141 P.3d 13, 30 - 31 (2006); see also *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (the invited error doctrine is a “strict rule” intended to apply in every situation where the defendant's actions at least in part caused the error). As this court so aptly explained in *Humbert/Birch Creek Const. v. Walla Walla County*, 145 Wn.App. 185, 192, 185 P.3d 660, 663 (2008):

¶ 13 “The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal.” *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, *cert. denied*, 540 U.S. 875, 124 S.Ct. 223, 157 L.Ed.2d 137 (2003). As was explained once in a criminal case, the invited error doctrine is constitutional because “He is not denied due process *by the state* when such denial results from his

own act, nor may the state be required to protect him from himself.” *State v. Lewis*, 15 Wn.App. 172, 177, 548 P.2d 587 (emphasis in original), review denied, 87 Wn.2d 1005 (1976).

Mr. Perez-Valdez’s trial counsel asked the caseworker, on cross examination, if she assumed the victims were telling the truth.² He “opened the door” and invited the witness to drive a truck filled with opinion evidence through it. Fortunately for the appellant, the trial court immediately struck the testimony and instructed the jury to disregard it.

Even if the eliciting of opinion evidence of the victim’s credibility was error, it does not constitute reversible error. Reversal is not required “ ‘unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’ ” *State v. Korum*, 157 Wn.2d 614, 646-647, 141 P.3d 13, 30 - 31 (2006); *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Here, the outcome of the trial was not materially affected by the opinion of the caseworker. The trial court immediately instructed the jury to disregard the testimony. The defense presented substantial evidence to counteract any effect the testimony would have had on the jury. Among

² The question was argumentative; *i.e.*, because it sought no facts but instead sought agreement with defense counsel’s inference, assumption, or reason. ER 611; *Crippen v. Pulliam*, 61 Wn.2d 725, 734-5, 380 P.2d 475 (1963) (“All right, I take it apparently you weren’t quite careful enough.”)

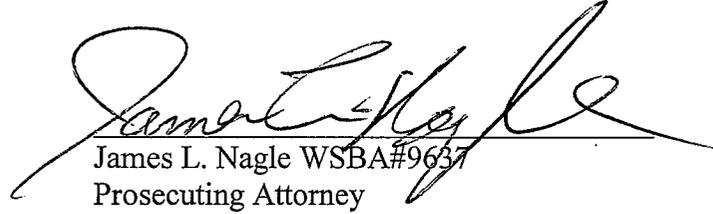
other things, Mr. Perez-Valdez testified to matters that corroborated circumstances surrounding the allegations of the victims, including where they lived. He also admitted to being alone with the children. RP 342-50. Mr. Perez-Valdez witnesses testified as to their opinion of his general moral character and their personal observations regarding his interaction with S.V. and A.V. He elicited testimony from witnesses that indicated that A.V. had a poor reputation in the community for truth and veracity. RP 341-342. Thus, the opinion evidence elicited by the defense was not reversible error.

D. CONCLUSION

Burning down a foster parent's home was never established as relevant to the victims' alleged motive for reporting sexual abuse by Mr. Perez-Valdez, and therefore characterizing the victims as arsonists was properly excluded. Mr. Perez-Valdez's trial counsel improperly introduced moral character and opinion evidence, but then agreed not to mention the improper evidence in closing argument, eliminating any claim of error that can be used on appeal. His counsel also asked the caseworker if she assumed the victims were telling the truth. He "opened the door" and invited error to which he cannot now complain of. Nothing the state

did denied Mr. Perez-Valdez a fair trial. Therefore, Mr. Perez-Valdez's conviction should be affirmed.

Respectfully submitted this 15th day of June, 2009.



James L. Nagle WSBA#9637
Prosecuting Attorney

240 West Alder, Suite 201
Walla Walla WA 99362-2807
(509)524-5445