

64141-7

64141-7

No. 64141-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

IGNACIO ARIAS,

Appellant.

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

The Honorable Bruce Heller

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
DIVISION ONE
KING COUNTY

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A. ASSIGNMENTS OF ERROR

1. In Ignacio Arias' trial on charges of child molestation and rape of a child, the evidence was insufficient to convict the defendant of the offenses charged in counts two and three, with regard to complainant F.M.L.

2. The trial court abused its discretion by admitting evidence of the complainant F.M.L.'s statements to Ms. Loya, her mother, under the "hue and cry" rule.

3. The trial court erred in denying the defendant's ER 608(b) motion to impeach Ms. Loya.

4. Cumulative error denied the defendant a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the evidence was insufficient to convict the defendant of the offenses charged in counts two and three, where there was no evidence to support a jury finding beyond a reasonable doubt that the defendant and the complainant F.M.L. were not married.

2. Whether the trial court abused its discretion by admitting evidence of the complainant F.M.L.'s statements to her mother, under the "hue and cry" rule, where the rule requires that the

complainant made a “timely” complaint of sexual abuse, and where the complaints in the present case occurred a year after the alleged incidents.

3. Whether the trial court erred in denying the defendant’s ER 608(b) motion to impeach a State’s witness, the complainants’ mother, with reference to her use of a false social security number to secure government benefits, where the evidence was probative of credibility and the witness’ testimony was critical to the State’s case.

4. Whether cumulative error by the trial court denied the defendant a fair trial.

C. STATEMENT OF THE CASE

1. Procedural history. Ignacio Arias was charged with four counts based on allegations by the children of Mr. Arias’ girlfriend, Silvia Loya. CP 1-5. The counts charged were child molestation in the third degree pursuant to RCW 9A.44.089 as to Ms. Loya’s daughter A.M.L. (count one); rape of a child in the second degree pursuant to RCW 9A.44.076 as to Ms. Loya’s daughter F.M.L. (count two); child molestation in the second degree pursuant to RCW 9A.44.086 as to F.M.L. (count three); and communication

with a minor as to J.M.G., a family friend, pursuant to RCW 9.68A.090 (count four). CP 1-2.

The children's mother was the source of the original allegations, made first to local police and then to the King County Sheriff's Office. 7/9/09RP at 17-24. According to the State's claims with regard to F.M.L., Mr. Arias had engaged in digital-vaginal intercourse with the child while the family was living in SeaTac, Washington, in the summer of 2007, and engaged in sexual contact with her multiple times thereafter. Supp. CP ____, Sub # 60 (State's trial memorandum, at pp. 4-5). F.M.L., and also her sister A.M.L., along with J.M.G., claimed that sexual abuse or communications by Mr. Arias had happened to them during this time, and they made claims to their mother about the alleged conduct in the summer of 2008. Supp. CP ____, Sub # 60 (State's trial memorandum, at p. 5).

The children's mother and the children in question testified at trial, which was held in July of 2009. Following the jury trial, Mr. Arias was found guilty of the two counts involving F.M.L. and the count of communication with a minor, but the jury found him not guilty as to the count involving A.M.L. CP 80-84.

On the felony convictions, Mr. Arias was sentenced to 35 months on the child molestation count as to F.M.L. (count three), and an indeterminate sentence under RCW 9.94A.507 of 110 months to life on the rape of a child count as to F.M.L. (count three) CP 100-10.

Mr. Arias timely appealed. CP 87.

2. Relevant facts. Ignacio Arias met Silvia Loya in December, 2005, and they started dating. Silvia had three daughters from a previous marriage -- A.M.L. (DOB 11/9/91), F.M.L. (DOB 1/27/94) and M.M.L. (DOB 7/27/97). All three of Silvia's daughters were living with her at that time. The defendant, Ms. Loya, and the girls moved into a house in Auburn, Washington together in early 2006. 7/9/09/RP at 44-47.

In November 2006, A.M.L. moved out of the house in Auburn, and went to live with her father in Federal Way. F.M.L., her mother, and her youngest sister were still living with the defendant in the Auburn house. 7/9/09/RP at 56. In the spring of 2007, Ms. Loya and the defendant bought a small trailer in SeaTac; thereafter, the children moved in with their father, but they regularly stayed with their mother and the defendant at that SeatTac

location. 7/9/09/RP at 54-57.

F.M.L. claimed at trial that an incident happened during the summer of 2007, while at the SeaTac trailer, during a time when the defendant, Silvia Loya, F.M.L. and M.M.L. had been watching movies in the living room. 7/9/09/RP at 105-08. They all fell asleep on the floor in the living room. In the early morning, F.M.L. stated, she woke up to the defendant allegedly putting his hand down her pants, and then putting his finger inside her vagina, while F.M.L. was still pretending she was asleep. When she moved, the defendant stopped, got up and left the room. 7/9/09/RP at 109-13.

F.M.L. claimed that some other time that summer when she was again visiting her mother, she was sleeping on the couch by herself when the defendant came into the room in the early morning. 7/9/09/RP at 117-19. He allegedly stood over her, and put his hand down her shorts. F.M.L. moved, and the defendant ran into the kitchen, but then came back after a few minutes. 7/9/09/RP at 121. The defendant allegedly again put his hand down F.M.L.'s shorts and touched the outside of her vagina. 7/9/09/RP at 125. F.M.L. claimed that this kind of touching occurred multiple times in subsequent visits. 7/9/09/RP at 134-36,

140-42.

A.M.L. also claimed she had been touched around this same time. She stated that Mr. Arias came into the room where she was half-sleeping, walked closer, and then reached along her thighs and touched her vagina. 7/9/13/RP at 22-29. This was under her shorts and her underwear. 7/13/09RP at 33.

The allegations by F.M.L. and her sister A.M.L. arose at a time when both children were extremely angry with both their mother and the defendant, and "hated" the defendant, because of the changes they said that Mr. Arias had caused in Ms. Loya's behavior. 7/9/09RP at 168-75; 7/13/09RP at 77-79.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT ALL THE ESSENTIAL ELEMENTS OF THE OFFENSES OF RAPE OR MOLESTATION AGAINST F.M.L.

(a) Sufficient evidence must be presented to support each and every element of the crimes charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62,

768 P.2d 470, 775 P.2d 448 (1989); U.S. Const. amend. 14. On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the charged crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

(b) Insufficient evidence was presented to find that Mr. Arias was not married to the complainant F.M.L. Mr. Arias was not the complainant's biological father, or blood relation in any way. 7/8/09RP at 39-47. However, the prosecutor failed to elicit evidence that, further and specifically, he was not married to the complainant. To obtain a conviction for child molestation in the second degree, the State must prove beyond a reasonable doubt that the victim was not married to the perpetrator. See RCW

9A.44.086(1).¹ The same is true for rape of a child in the second degree. RCW 9A.44.076(1).² The jury instructions correctly reflected these essential elements of the offenses charged with regard to the complainants, including F.M.L. CP 64-69.

Thus in this prosecution for child molestation and rape, the nonmarriage of the defendant and the complainant F.M.L., like the other elements of the charged crimes, was required to be proved beyond a reasonable doubt. See State v. Rhoads, 101 Wn.2d 529, 532, 681 P.2d 841 (1984).

It is true that the non-marriage of the defendant and the complainants may be proved by circumstantial evidence. Rhoads, 101 Wn.2d at 532; State v. May, 59 Wash. 414, 415, 109 P. 1026 (1910). In the instant case, however, no circumstantial evidence allowed the jury to conclude beyond a reasonable doubt that the defendant could not have been married to the complainant. There

¹A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.086(1).

²A person is guilty of rape of a child in the second degree when the person has sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.076(1).

was no circumstantial evidence excluding the possibility of marriage of the complainants to Mr. Arias, such as the fact of marriage between Ms. Loya and Mr. Arias. Ms. Loya testified that she was still married to her first husband, Alfredo Macias, the children's biological father. 7/9/09RP at 40. She was not married to the defendant. 7/8/09RP at 44-47.

Notably, in closing argument, the State told the jury that certain elements of the crimes, including the fact of non-marriage, were plainly not at issue, but then only mentioned the fact of the differences in age of the defendant and the complainant as having been plainly shown. 7/14/09RP at 59-60. The State likely realized its failure to produce evidence on this essential element. Given a definitive familial relation between the defendant and the complainant or other circumstantial evidence that would somehow prove non-marriage between the defendant and the complainant, the State's evidence was indeed insufficient to prove their non-marriage, beyond a reasonable doubt.

(c) Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Arias committed each and

every element of the offenses charged as to F.M.L., the judgments of guilty may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). Because the State's evidence was insufficient to prove the non-marriage of the defendant and the complainant F.M.L., Mr. Arias' convictions on counts two and three must be reversed. U.S. Const. amend. 14.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING F.M.L.'S STATEMENTS CLAIMING SEXUAL ASSAULT UNDER THE "HUE AND CRY" RULE WHERE THEY WERE NOT TIMELY MADE.

(a) The trial court erroneously admitted statements by the children, including F.M.L., claiming sexual abuse. Hearsay is inadmissible. ER 801, ER 802; State v. Hancock, 46 Wn. App. 672, 677-78, 731 P.2d 1133 (1987), affirmed, 109 Wn.2d 760, 748 P.2d 611 (1988). In addition, the "hue and cry" rule, even where out of court statements are admitted to enhance credibility and not expressly as admissible hearsay, has its own requirements for admission. State v. Bray, 23 Wn. App. 117, 121, 594 P.2d 1363 (1979).

In the present case, following a pre-trial hearing, the trial

court ruled that F.M.L.'s hearsay statements claiming sexual abuse were admissible under the "hue and cry" or "fact of complaint" rule. 7/1/09RP at 4-5, 7/8/09RP at 3-5, 7/9/09RP at 13-14. This was despite the fact that the statements by F.M.L., the complainant in counts two and three, were made to her mother a full one calendar year after the alleged incidents. 7/8/09RP at 3.

Ms. Loya's hearsay testimony repeating F.M.L.'s claims was thereafter introduced at trial pursuant to the court's hearsay ruling. Ms. Loya testified that F.M.L. came to her and complained that she had been "sexually assaulted." 7/9/09RP at 69-70.

In addition, the court specifically employed "hue and cry" reasoning in ruling that F.M.L. herself could testify to having made a complaint under this rule, and this witness testified at trial that she told her mother that she had been abused, around the time of a shopping trip in approximately July of 2008. 7/9/09RP at 13, 165.

The court's hearsay and "hue and cry" ruling was a clear abuse of discretion. The "hue and cry" or "fact of complaint" exception to the hearsay bar does allow the prosecution in a sex case to present evidence in its case in chief that the complaining witness made a timely complaint to someone after the alleged

incident. State v. Alexander, 64 Wn. App. 147, 151, 822 P.3d 1250 (1992). This exception to the hearsay rule is narrow and allows only evidence establishing that a complaint was timely made. Id. Here, the trial court erred in reasoning that F.M.L.'s statements were admissible despite the extremely untimely nature of her complaints of the alleged sexual incidents.

In making its ruling the court correctly noted that the State misrelied on State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988), which did not stand for the proposition that the complaint need not be timely. 7/8/09RP at 3-4. However, the court stated that Ciskie had pointed out why the victim of a sex crime might be reluctant to come forward quickly, particularly when the alleged perpetrator is a "family" member. See Ciskie, at 272-77 (discussing admissibility of expert testimony on battered woman's syndrome). The court also stated that there were unpublished cases which supported the proposition that timeliness is not a requirement of the hue and cry rule, and reasoned that older Washington cases had labored under misconceptions regarding the impact of sex crimes on victims. 7/8/09RP at 4. The trial court then speculated that, overall,

when appellate courts do address this issue in light of current knowledge and understanding of how sex crimes affect victims that it is likely that they will not require that the complaint be made promptly.

7/8/09RP at 4-5.

However, timeliness is central to this hearsay exception, and the court's assessment of what courts might do in light of new awareness of the impact of sex crimes on victims was not an accurate reflection of the state of the law. The "hue and cry" exception to the hearsay bar is based "on the ground that a [person] naturally complains promptly of offensive sex liberties upon [his] person." (Emphasis added.) State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1950).

One year is simply beyond the bounds of a court's discretion to admit evidence under this rule. The logic of the "fact of the complaint" rule, similar to the related "excited utterance" exception contained in ER 803(a)(2), is that given the temporal circumstances surrounding the statement, the victim will not have the opportunity to reflect and consciously fabricate, and a timely statement after a rape is thereby made more reliable than ordinary hearsay. See Tegland, 5B Washington Practice, Evidence, §§ 803.6, 803.7 (4th

ed. 1999).

Thus, for example, in State v. Griffin, 43 Wash. 591, 86 P. 951 (1906), a complaint made six months after the alleged incident was not “seasonably made” under this hearsay exception. The Griffin case, though old, has been cited repeatedly as a touchstone for this hearsay exception. State v. Bray, 23 Wn. App. at 122; State v. Fiddler, 57 Wn.2d 815, 818, 360 P.2d 155 (1961).

Because the complaints by F.M.L. in this case were not “timely,” the fact-of-complaint exception was inapplicable. The child’s statements did not come soon enough after the alleged touching to qualify for admission under the “hue and cry” rule, as an exception to the hearsay rule. See also State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983) (hue and cry or “fact of complaint” rule in any event allows only evidence of the fact that a complaint was timely made).

(b) The trial court’s hearsay ruling cannot be upheld on any alternative basis. Although a reviewing court may uphold the admission of evidence on a basis not employed by the trial court, the hearsay evidence in this case could not have been admitted under any other rule-based hearsay exception. See State v. Norlin,

134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

Certainly, the child's statements to her mother were also not excited utterances, a rule which requires even more immediate statements. See State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986) (delay of 5 hours between sexual contact and 8-year-old victim's declaration to her mother was adequate time for the child to reflect on the event, thus the declaration did not qualify as an excited utterance). These allegations came far too long after the alleged incidents to be admitted under the excited utterance exception to the hearsay rule. See ER 803(a)(2).

The child F.M.L.'s statement to her mother were also not admissible on the ground they were made for the purpose of medical diagnosis under ER 803(a)(4). See State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999) (medical diagnosis exception to the hearsay rule requires that the declarant spoke for purpose of receiving medical treatment). Finally, the statements were also inadmissible under the child hearsay statute, RCW 9A.44.120. The statute requires a showing that the children were under age ten, in addition to requiring that the statements manifest reliability, an analysis that the trial court in this case did not engage in. RCW

9A.44.120; State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

(c) The erroneous admission of the evidence requires reversal because this testimony provided a significant corroborating aspect of the evidence against Mr. Arias. The error described above requires reversal of the defendant's convictions as to F.M.L. This individual did testify at trial. Where statements in a child sex case by the child claiming abuse are erroneously admitted, such error is reversible if, within reasonable probabilities, the outcome of the trial would have been affected if the error had not occurred. See, e.g., State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

In this case, it was substantially through this testimony that the jury gained any corroboration of the child F.M.L.'s claims. There was no physical evidence, and no indirect evidence of abuse, such as any precocious knowledge of sexual activity. See State v. Swan, 114 Wn.2d 613, 623, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). The claim by F.M.L. also came during a confrontation between the children and their mother about her parenting, where Ms. Loya was upset and crying. 7/9/09RP at 164-65. After the "hue and cry" revelation, Ms. Loya, and the

children, were of course even more upset and crying. 7/9/09RP at 165; 7/13/09RP at 55-56. Ms. Loya "broke down" and cried. 7/13/09RP at 55. Despite the planned sterilization of this hue and cry evidence under the rule limiting statements regarding any detail as to what allegedly happened, this testimony would have left a significant impression on the jury.

Because the child's out of court claims admitted under the hue and cry rule were particularly pivotal in this case, the admission of the evidence created reversible prejudice. See Traver v. State, 568 N.E.2d 1009, 1013-14 (Ind.1991) (admission of child statements in absence of required foundation was reversible error because the sum of the hearsay testimony was a significant part of the evidence at trial).

This evidence and its dramatic surrounding testimony tended to corroborate the children's allegations both factually and emotionally, and materially affected the outcome, more likely than not. See State v. Hancock, 46 Wn. App. at 678 (test for reversible error in admitting child statements in sex case is whether "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected"). This Court should

reverse Mr. Arias' convictions, based on the trial court's erroneous evidentiary ruling.

3. THE TRIAL COURT VIOLATED MR. ARIAS' RIGHT TO A FAIR TRIAL BY DENYING INQUIRY INTO A CRUCIAL WITNESS' PRIOR MISCONDUCT, WHICH WAS ADMISSIBLE TO IMPEACH UNDER ER 608(b).

(a) Mr. Arias sought to "inquire" into two specific instances of misconduct bearing on the credibility of the children's mother. A defendant has a constitutional right to cross-examine prosecution witnesses. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); U.S. Const. amend. 6; Const. art 1, § 22. This includes the right to impeach these witnesses, because of their importance to the State's case. State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980) (citing State v. Beaton, 106 Wn. 423, 180 P. 146 (1919)). Mr. Arias argues that exclusion of the impeachment evidence he proffered rose to the level of constitutional error, and is presumed prejudicial, requiring reversal unless no rational jury could have a reasonable doubt that the defendant committed the offenses, even absent the error. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1999).

Here, Mr. Arias was precluded from employing ER 608(b) to cross-examine witness Sylvia Loya, the mother of the children alleging serious sex offenses against him.

The defendant placed an extensive offer of proof before the trial court regarding the areas of impeachment sought to be inquired upon.

First, counsel noted that Ms. Loya had used a false social security number. 7/1/09RP at 12. The offer of proof was supported by evidence which showed the defense inquiries on this matter to be in good faith. With regard to the false social security number, the defense proffered an Accurant Credit Report for Ms. Loya, and also a social security card. 7/7/09RP at 6. Ms. Loya had claimed in an interview that she did not have a social security card at all. 7/7/09RP at 9, 13. The credit report showed that one of the numbers had been issued to a citizen in Texas well before Ms. Loya moved to the United States from Mexico. 7/8/09RP at 6.

Relatedly, the defense sought to inquire into the fact that Ms. Loya had applied for Department of Social and Health Services (DSHS) benefits to which she was not entitled, amounting to undeserved benefits of approximately \$10,000. Ms. Loya had

provided false information, apparently using one of the social security numbers. 7/1/09RP at 15; 7/7/09RP at 9.

The trial court excluded these areas of impeachment concluding that they were not adequately probative of credibility, and that the mother's testimony was not central to the case. 7/8/09RP at 8-11.

(b) The trial court wrongly disallowed the defendant's inquiry into these specific instances of other conduct of the witness, which was probative of untruthfulness, on cross-examination. Washington case law allows cross-examination under Evidence Rule 608(b) regarding specific instances of the conduct of a witness that are relevant to veracity. See State v. Cummings, 44 Wn. App. 146, 152, 721 P.2d 545, review denied, 106 Wn.2d 1017 (1986). The Rule states:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

ER 608(b); see State v. Mendez, 29 Wn. App. 610, 630 P.2d 476 (1981) (explaining operation of rule).

The trial court should allow a party on cross-examination to challenge the veracity of a witness by inquiring about any fact “which goes to the trustworthiness of the witness . . . if it is germane to the issue.” State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980); see, e.g., State v. Wilson, 60 Wn. App. 887, 892, 808 P.2d 754 (prior false statement under oath), review denied, 117 Wn.2d 1010, 816 P.2d 1224 (1991).

Under the rule, the past conduct of the witness, probative of credibility, may be inquired into by questioning during examination of the witness. State v. Simonson, 82 Wn. App. 226, 234, 917 P.2d 599 (1996). The inquiry may be made if the questioner has a good faith basis that the prior incident occurred. State v. Johnson, at 71 (citing 5A Teglend, Washington Practice, Evidence, § 232, at 205 (1999)).

Here, Ms. Loya’s false statements in an application for benefits and use of a false social security number were matters that would certainly be impactful on a jury’s decision to believe a witness. The rule plainly allows inquiry into the past matter if the

requirements of ER 608(b) are satisfied, which they were in the present case. Misstating important facts in a writing is significantly impeaching of any witness' truthfulness. United States v. Reid, 634 F.2d 469, 473 (9th Cir.1980), cert. denied, 454 U.S. 829, 102 S.Ct. 123, 70 L.Ed.2d 105 (1981) (cross-examination of defendant concerning unrelated false statements in a letter was "entirely proper to impeach appellant's general credibility" under Fed. R. Evid. 608(b)). And matters of financial fraud are well within the ambit of conduct that bears on credibility in this manner. See United States v. Bright, 630 F.2d 804, 817 (5th Cir.1980) (no abuse of discretion in permitting cross-examination concerning pending state fraud charge against witness).³ This should, logically, be particularly true in a case where criminal litigation frequently has a beneficial effect on the possibility of financial recovery in subsequent civil proceedings. See Malland v. Department of Retirement Sys., 103 Wn.2d 484, 489, 694 P.2d 16 (1985) (citing Rains v. State, 100 Wn.2d 660, 674 P.2d 165 (1983) (outlining estoppel principles)).

³Federal case law interpreting a federal evidence rule identical to the state rule is probative of the proper construction of the state rule. State v. Fitzgerald, 39 Wn. App. 652, 658 n. 1, 694 P.2d 1117 (1985).

Importantly, a prior Washington case that the present trial court distinguished as inapplicable to the instant case was State v. Wilson, supra. 7/8/09RP at 8. The court below noted correctly that in the Wilson case, the witness had made a false statement in an application for DSHS assistance. 7/8/09RP at 8; State v. Wilson, 60 Wn. App. at 892.

In that case, the victim testified that her sister's then-boyfriend, Joseph Wilson, started molesting her when she moved in with them. Her sister ("Billie") testified for the defendant that Wilson lived with her during the time of the alleged sexual abuse and, therefore, she would have known had such abuse occurred. Wilson, at 889, 891. The opinion states: "However, she admitted that she had previously stated under oath [in the DSHS application] that Wilson did not live with her during the time in question." Wilson, at 889 (approving impeachment).

The trial court below in the present case stated that Wilson did not support admission of the impeachment proffered by the defendant here, because the witness's false statement in Wilson was about where the defendant lived, which was a substantive issue in the case since the witness testified that she would have

known about the abuse since the defendant lived with her.

7/8/09RP at 8-9.

Mr. Arias respectfully points out that this was a misinterpretation of Wilson, and a matter on which the defendant's right to effectively cross-examine a key witness in this case turned (and was denied).

Wilson contended on appeal that the trial court erred under both ER 404(b) and ER 608(b) in allowing the State to impeach Billie by asking her about the prior false statement. Wilson, at 891. But the Court noted that ER 404(b) applies only to prior misconduct offered as substantive evidence, and stated that "Wilson's residency was not at issue." (The Court noted that the victim's cousin and aunt corroborated the victim's testimony about the assaults at the home). Wilson, at 889. Therefore, the Court ruled, admissibility was governed by ER 608(b) because the prior misconduct was offered for the limited purpose of impeachment. Wilson, at 891 (citing 5A Teglund, Washington Practice, Evidence § 114 (3rd ed. 1989)).

The Court's ruling that the impeachment material was admissible was therefore not based on the residency issue, but

was solely premised on the need to impeach the credibility of Billie as a witness. The Wilson case in fact supports the defense argument below regarding the proffered impeachment, both its relevance to credibility, and its importance.

Furthermore, Mr. Arias was entitled to latitude in his efforts to impeach this prosecution witness. In this respect, the court's ruling was also error of a constitutional nature beyond the evidentiary issue. For defendants, under the Sixth Amendment, and Article 1, § 22, confrontation of witnesses is a matter of right. Davis v. Alaska, 415 U.S. at 315-16; State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). The evidence proffered must be relevant, and the right to introduce it is balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Here, Ms. Loya's credibility was important because she claimed her children made complaints about the abuse to her – evidence that was a significant part of the State's proof, as argued previously. Additionally, this impeachment evidence should have been admitted because Mr. Arias did not have substantial other

evidence from which to argue that Ms. Loya may not have been a truthful witness - a fact that should weigh in favor of determining that he needed the impeachment evidence regarding her false statements, for a full and fair assessment of the case by the jury. See, e.g., State v. Barnes, 54 Wn. App. 536, 539, 774 P.2d 547 (1989) (court should consider what other impeachment is available to the defense); see also State v. Jones, 117 Wn. App. 221, 234, 70 P.3d 171 (2003).

It is true that the decision whether to admit ER 608 impeachment rests within the discretion of the court. See Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 76-77, 684 P.2d 692 (1984). But a court abuses its discretion when it acts in a manner that is manifestly unreasonable. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). However, ER 608 is designed to allow the trier of fact to properly evaluate the witnesses' credibility. See 5A Teglund, Washington Practice, Evidence Law and Practice, § 230(1), at 197 (3d ed. 1989). ER 608(b) was satisfied here because the matter was relevant to the credibility of a crucial witness, raising the matter to a constitutional level and requiring greater latitude in admissibility. The court abused its discretion and

reversal is required under either the constitutional or the non-constitutional harmless error standards. State v. Halstien, 122 Wn. 2d 109, 857 P.2d 270 (1993); State v. Johnson, 90 Wn. App. at 69. A fair trial will allow the jury to assess Ms. Loya's credibility with knowledge of all relevant considerations.

(c) The exclusion of the requested inquiry requires reversal of Mr. Arias' convictions. As shown by the State's effort to introduce "hue and cry" evidence that the girls allegedly complained of the alleged incidents to her, Ms. Loya's testimony was in fact very important to the State. This "fact of complaint" testimony by the mother was crucial as the only evidence from an adult witness regarding potentially contemporaneous⁴ claims of abuse by the girls. In sexual abuse prosecutions where children's claims of sexual crime no longer need be corroborated by physical evidence, testimony like Ms. Loya's is crucial to the State's case.

Additionally, Ms. Loya's testimony helped place the children's somewhat vague testimony regarding the location and timing of the alleged events some years earlier, which was critical

⁴But see Part D.2, supra (arguing that the statements were not adequately contemporaneous as required by the hue and cry rule).

to the State's effort to prove that the alleged conduct occurred within the charging period.

Importantly, there was generally a strong concern for fabrication in this case. Of course, A.M.L.'s statements were apparently not believed by the jury at all, as the defendant was acquitted on that count. CP 80. Both girls "hated" the defendant. 7/9/09RP at 175. They believed he had transformed their mother into someone who drank alcohol and did not attend to their needs as she had previously. 7/9/09RP at 161-63, 167-70; see also 7/13/09RP at 22-25 (testimony of A.M.L.). F.M.L. herself initially did not deny that she and her sister were trying to get the defendant out of the house when they made the claims against him. 7/9/09RP at 164.

When the defendant was denied his legitimate opportunity to impeach Ms. Loya, fairly, in front of the jury under the evidence rules and under his right to confront witnesses, the jury was left only with the State's offer of the mother as a witness, who would be assumed to be telling the unvarnished truth. This was unfair to Mr. Arias to a constitutional degree.

The trial court's error in disallowing defense inquiry into the

misconduct was reversible error. For example, in the cases of State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980), and State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997), convictions were reversed because defense cross-examination, inquiring into past incidents going to credibility, was similarly restricted.

In State v. York, the defendant was convicted primarily on the testimony of an undercover investigator. The defense tried to cross-examine the investigator about the fact that he had been fired by a sheriff's department in Montana because of paperwork "irregularities" and "general unsuitability for the job." York, 28 Wn. App. at 34. The trial court sustained the State's objection, but the Court of Appeals reversed, holding that the defendant had a right to cross-examine about the past incident to attempt to show lack of credibility. York, 28 Wn. App. at 36.

Here, it is critical to note that Mr. Arias' counsel had proffered significant details of the false DSHS application and proposed to cross-examine this witness, under ER 608, regarding those details. 7/7/09RP at 6-7. In Wilson, supra, the case involving a girlfriend's false statement on a benefits application, the

Court of Appeals' further opinion on this issue shows that Mr. Arias' proffered impeachment on the matter of Ms. Loya's false DSHS application should have been allowed, and also reflects the Court's view of how significant it was to the important question of a witness' credibility on the stand:

Wilson also argues that even if the testimony was admissible, the court erred in allowing the State to ask its questions in such detail. The State asked [Billie] many questions about the DSHS forms, showing that she filled out the documents under penalty of perjury, that she failed to list Wilson as a member of her household, that she never filled out a "change of circumstances" form, and that she affirmatively misrepresented Wilson as her babysitter. The probative value of these questions outweighs any cumulative or prejudicial effect since they demonstrate the extent to which [Billie] could be untruthful. The trial court did not abuse its discretion in admitting the evidence.

Wilson, at 893-94. Mr. Arias' proffer was of similar importance in the present case. Particularly in these circumstances, the defendant should have been allowed to inquire into Ms. Loya's prior misconduct, in order to counter the prosecutor's creation of an impression of her as an honest truth-teller dismayed at her daughter's revelations.

For further example, in State v. McDaniel, the Court of

Appeals held that the defendant should have been allowed to impeach the victim's credibility by showing that she had committed perjury in a related civil proceeding, and also that she had a motive to lie about her drug use on the day of the alleged assault because she was on probation. The Court found these issues "highly relevant." McDaniel, 83 Wn. App. at 186. In a footnote, the Court noted that even if this type of evidence is arguably inadmissible, the constitutional right to impeach must take precedence. McDaniel, 83 Wn. App. at 188. The same is true here.

(d) The ruling also requires reversal under a constitutional error standard. The trial court abused its discretion, and committed constitutional error, requiring reversal in a case where the credibility of the witness' allegations was critical. Here, exclusion of the inquiry into specific past incidents in which Ms. Loya had demonstrated her lack of truthfulness in a government application was unreasonable because it allowed the State to create a half-truthed impression of the credibility of this witness. 2/7/05 at 4-8; 2/8/05 at 16.

The trial court's abuse of discretion was reversibly prejudicial. Under the non-constitutional error standard, an error in

refusing to admit evidence requires reversal if, within reasonable probabilities, the error materially affected the verdict. State v. Halstien, 122 Wn. 2d at 127.

However, a defendant has a constitutional right to impeach a prosecution witness. Davis v. Alaska, 415 U.S. at 316-18. This right of cross-examination includes the right to impeach the chief prosecution witness using an independent witness. State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980). In excluding the evidence of Ms. Loya's misconduct, the trial court not only abused its discretion in making an evidentiary ruling, but also violated Mr. Arias' right to a fair trial, because impeaching Sylvia Loya's credibility was critical to Mr. Arias' effort to defend against the charges by raising any reasonable doubt.

Constitutional error in excluding impeachment evidence is presumed prejudicial, and reversal is required unless, even absent the error, no rational jury could have a reasonable doubt that the defendant committed the offenses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1999). Such a determination of "harmlessness" cannot be made in the present case.

4. EVEN IF NONE OF THE TRIAL ERRORS DISCUSSED ABOVE ALONE MANDATE REVERSAL, THE CUMULATIVE EFFECT OF THOSE ERRORS MATERIALLY AFFECTED THE OUTCOME IN MR. ARIAS' TRIAL.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produce a trial that was fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, cert. denied, 513 U.S. 849 (1994); State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); U.S. Const. amend. 14. Mr. Arias argues in the alternative that if this Court does not find that any of the errors above individually merit reversal, the cumulative error doctrine applies, because, as here, "several trial errors occurred which, standing alone, may not be sufficient to justify reversal, but when combined together, may deny a defendant a fair trial." State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).

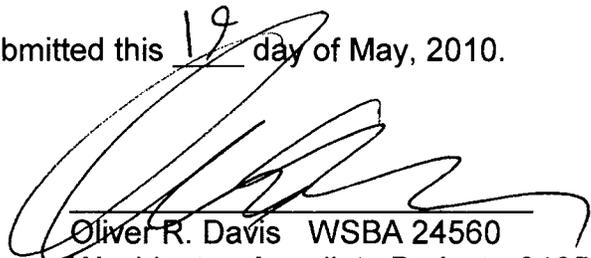
Here, the cumulative errors of admitting improper hue and cry evidence, and denying impeachment of the children's mother, overall deprived Mr. Arias of a fair trial. The trial court erroneously allowed the believability of J.M.L.'s claims of abuse at trial to be bolstered in the jury's eyes by introduction of evidence that she

made claims about the abuse over a year afterward. To add insult to injury, the mother's important testimony went unchallenged on grounds that would have strongly – but fairly – impugned her credibility. The cumulative effect of these errors prejudiced Mr. Arias' right to a fair trial on serious sexual crime accusations. The court's rulings certainly impaired his ability to create reasonable doubt on the charges, and to so gain acquittal. They require reversal of the molestation and rape convictions as to J.M.L. In re Pers. Restraint of Lord, 123 Wn.2d at 332.

E. CONCLUSION

Based on the foregoing, Mr. Arias respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 19 day of May, 2010.



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