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Court of Appeals
Division I
State of Washington

COA No. 73864-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

CELSO ORBE-ABARCA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Jeffrey Ramsdell

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Celso Orbe-Abarca's trial on charges of child rape and child molestation, a prosecution witness violated the trial court's pre-trial rulings barring opinion evidence as to the character and credibility of other witnesses, and as to the guilt of the defendant.

2. The trial court erred in admitting ER 404(b) evidence.

3. Defense counsel was ineffective in violation of Mr. Orbe-Abarca's Sixth Amendment right to effective assistance of counsel. U.S. Const. amend. 6.

4. The trial court erred in admitting opinion testimony of a police detective.

5. Cumulative error requires reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Ms. Maria Hinojosa, the mother of the two complainants, violate the trial court's in limine orders by giving opinion testimony as to the character and credibility of other witnesses, and as to the guilt of the defendant Mr. Orbe-Abarca?

2. Did the trial court abuse its discretion in admitting ER 404(b) evidence to show "lustful disposition," where the incident in question was subsequent to the charged criminal acts?

3. If defense counsel agreed to the admission of the lustful disposition evidence, was counsel ineffective?

4. Did the trial court abuse its discretion in admitting lay opinion testimony of a police detective, who was not qualified as an expert, and whose testimony constituted an opinion on guilt?

5. Did cumulative error prejudice Mr. Orbe-Abarca's Due Process right to a fair trial?

C. STATEMENT OF THE CASE

1. Charging and trial. Mr. Celso Orbe-Abarca was charged with two counts of second and third degree child molestation based on allegations of sexual contact with D.G. (the daughter of his girlfriend Maria Hinojosa), then aged 13 to 15, between the years 2007 and 2010; and three counts of first degree rape of a child of J.C., Ms. Hinojosa's son, then aged 7 to 11 years old, allegedly occurring between 2005 and 2010. CP 1-2.

Ms. Hinojosa's announcement of claims against Mr. Orbe-Abarca came in February, 2015, in reaction to his effort to obtain a court order regarding visitation with X.O.H., his toddler child in common with Ms. Hinojosa. CP 9-10; 7/13/15RP at 869-70. Ms. Hinojosa telephoned the City of Bothell police department and stated that her daughter D.G. had previously made allegations to her, of sexual conduct by Mr. Orbe-

Abarca. By the time she went to the police station to file a report about the matter, Hinojosa was also claiming that her son J.C. was now also making similar allegations. She had asked both D.G. and J.C. to make their assertions to the police, but also decided they would wait until after the older child, D.G.'s, exams at school were completed. CP 9-10; 7/13/15RP at 768-72.

Mr. Orbe-Abarca was charged with the offenses in March, 2015, and he proceeded to trial in July of 2015. CP 1-2; 7/6/15RP at 4.

At trial, Maria Hinojosa related that she and Mr. Orbe-Abarca met in 2004 at a dance club in Seattle and dated until 2011. During this time, Ms. Hinojosa lived in various places, including the Interlaken Apartments in Bothell from 2006 to 2008, and then the Lazy Wheels mobile home park in Woodinville. 7/13/15RP at 693-95. Mr. Orbe-Abarca had a key, and would generally spend four or five nights per week at Ms. Hinojosa's residence, until they broke up. Ms. Hinojosa worked long hours during the day, often leaving D.G. and J.C. in Mr. Orbe-Abarca's care. 7/13/15RP at 718-23.

After Ms. Hinojosa and Mr. Orbe-Abarca broke up, X.O.H., the couple's biological child, had informal visitation with Mr. Orbe-Abarca. CP 3-6; 7/13/15RP at 765-67. Then, in late 2014 and early 2015, Mr. Orbe-Abarca began seeking a court order regarding X.O.H., prompting

Hinojosa's accusations against him. Ms. Hinojosa alleged that D.G. had in fact complained to her in the past that Mr. Orbe-Abarca had been acting improperly. 7/13/15RP at 721-22, 730.

D.G.'s original claims, at least according to the affidavit of probable cause, had been that she was touched by Mr. Orbe-Abarca on her vaginal area on two occasions when she had fallen asleep on the living room couch. The touching was inside her shorts and over her underwear. She pretended to be asleep and shifted her body position, and Mr. Orbe-Abarca went away. On the second occasion Mr. Orbe-Abarca asserted that any contact was a mistake and he had been looking for the TV remote control. CP 3-6; 7/13/15RP at 822-25.

Then, after Ms. Hinojosa and the children moved, D.G. alleged she awoke one night and found the defendant in her bedroom watching her. When he left, D.G. recorded a 1 minute voicenote on her cellular telephone, stating that Mr. Orbe-Abarca came into her room and she did not know why. CP 3-6. Subsequently, when D.G. was asleep in her bedroom at Lazy Wheels, she claimed she awoke to find the defendant half on top of her, and touching her breasts. CP 3-6; 7/13/15RP at 839-44.

At trial, D.G.'s testimony was inconsistent about whether the couch incident was something she was claiming happened one or two different times. 7/13/15RP at 873-74. Her claim that the defendant had

gotten on the bed with her and touched her breasts, supposedly at the Lazy Wheels residence, conflicted with other reports by her that there had been no touching at that time. 7/14/15RP at 58-60. D.G. also testified inconsistently whether the voice recording she said she made after an incident was in regard to her assertion of some improper conduct on the couch, or her own bedroom at the Lazy Wheels residence. 7/13/15RP at 875-77; 7/14/15RP at 20-30; Supp. CP ____, Sub # 56 (Exhibit List, exhibit 2, exhibit 3, exhibit 6).¹

In a further claim, D.G. testified that one time she was taking a shower after a morning jog, when Mr. Orbe-Abarca started trying to take pictures of her with his cell phone over the top of the shower door. 7/13/15RP at 856-60.

When Ms. Hinojosa later decided she would fight court-ordered visitation to occur with Mr. Orbe-Abarca and X.O.H. in 2015, she spoke with her daughter D.G., and asked her to talk to the police about Mr. Orbe-Abarca. D.G. testified that her mother said that this visitation simply had

¹ Detective Chad Davis was able to use a Cellebrite program to extract the voice recording attached to the date and time of a message sent from and/or to D.G.'s inoperable Blackberry phone. The testimony did not conclusively establish a date of when the attached recording was actually made. 7/14/15RP at 176-80; Exhibit 2.

to be prevented.² CP 3-6; 7/13/15RP at 766-70; 7/14/15RP at 8-10, 153-54. This was followed by further accusations, now by J.C. Complainant J.C. stated that Mr. Orbe-Abarca had forced him to engage in oral and anal intercourse multiple times. He stated that this occurred when he was age 7 to age 11. 7/14/15RP at 81-108. J.C. admitted in cross-examination that his mother Ms. Hinojosa told him she was going to use his and D.G.'s claims to prevent Mr. Orbe-Abarca from gaining any visitation with X.O.H. 7/14/15RP at 154-55.

2. Verdicts and sentencing. The jury found Mr. Orbe-Abarca guilty. CP 29-33. He was ordered to serve 318 months to Life on the first degree convictions along with lesser concurrent determinate terms. 8/19/15RP at 13-15; CP 62-74.

The sentencing court deemed Mr. Orbe-Abarca indigent for purposes of appeal. 8/19/15RP at 16-17. The trial court included Legal Financial Obligations in the amount of only \$600, consisting of solely the mandatory \$500 Victim Penalty Assessment (RCW 7.68.035) and the \$100 DNA collection fee (RCW 43.43.7541). CP 64.

Mr. Orbe-Abarca timely appeals. CP 92.

² Ms. Hinojosa appeared to be determined to prevent visitation, because, she stated, X.O.H. had specific important food allergies that she was unsure Mr. Orbe-Abarca was taking seriously. 7/13/15RP at 769.

D. ARGUMENT

MULTIPLE EVIDENTIARY ERRORS, AND THE CUMULATIVE ERROR DOCTRINE, REQUIRE REVERSAL OF MR. ORBE-ABARCA'S CONVICTIONS.

Mr. Orbe-Abarca's trial was replete with evidentiary errors that require reversal of his convictions and a new trial. In general, evidentiary errors require reversal where, within reasonable probabilities, the jury would have reached a different outcome absent the error. State v. Hancock, 46 Wn. App. 672, 678, 731 P.2d 1133 (1987) (test for reversible evidentiary error in child sex case).

In addition, the cumulative prejudice of multiple errors can so harm the defendant's right to a fair trial that Due Process is violated, also requiring reversal. U.S. Const. amend. 14; State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992).

1. Over various objections, Ms. Hinojosa violated *in limine* rulings to refrain from testifying to the good character of the complainants, the bad character of the defendant, and from making comments on credibility and guilt.

(i). The issues were litigated pre-trial.

Prior to trial, the State and defense agreed that elicitation of character evidence as to the witnesses should be excluded. 7/6/15RP at

24-26; Supp. CP ___, Sub # 26 (State's trial memorandum, at pp. 27-29); CP 15 (Defense trial memorandum, at p. 8).

The trial court also granted the defense motions to prohibit all State's witnesses from commenting on the credibility of other persons including the defendant, and from offering opinions as to Mr. Orbe-Abarca's guilt. 7/6/15RP at 45, 50-51; CP 18-20 (Defense trial memorandum, at pp. 11-13).

Finally, the court made clear by an additional in limine ruling that the witnesses were to be carefully instructed on the court's orders regarding admissible and inadmissible testimony. 7/6/15RP at 52; CP 21 (Defendant's trial brief, at p. 14).

(ii). The court's rulings were violated.

During her testimony, Ms. Hinojosa violated the court's rulings regarding character evidence by commenting on the good character of the complainants. 7/13/15RP at 697. Hinojosa referred to both D.G. and J.C., extolling about each and how "proud" she was of them, and what proud young people they were. 7/13/15RP at 697.

Ms. Hinojosa also improperly made comments on character, and the defendant's guilt, when she stated that D.G. and J.C. did not like Mr. Orbe-Abarca. 7/13/15RP at 721. She violated the ruling precluding opinions on guilt, when she offered her assessment that Mr. Orbe-Abarca

would sometimes smile when he was “nervous,” and indeed he did so when confronted by her about the sex abuse allegations. 7/13/15RP at 726.

Finally, the court overruled the defense objection when Ms. Hinojosa testified that Mr. Orbe-Abarca was very good at being pleasant, seeming to suggest that he was good at making excuses or keeping favor. 7/13/15RP at 741.

Although some of the defense objections (on the basis of the pre-trial rulings) were sustained, the jury was exposed to inadmissible evidence that the in limine rulings were designed to forestall. The purpose of a motion prior to trial is to prevent an inadmissible matter from being interjected into the case so counsel will not be forced to object in the presence of the jury, after the fact. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) (quoting State v. Evans, 96 Wn.2d 119, 123–24, 634 P.2d 845 (1981)).

The damage was done and inadmissible evidence went before the jury. A witness may not express an opinion, either directly or indirectly, about another witness’s credibility. See also State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). And a witness may not give an opinion “regarding the guilt or veracity of the defendant.” State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). All of this testimony violated the

pre-trial rulings and the Evidence Rules. It had been agreed pre-trial that evidence of witness's character or credibility would be inadmissible, as would be comments on truthfulness, and the rulings were in accord with evidence law. Supp. CP ____, Sub # 26 (citing State v. Harper, 35 Wn. App. 855, 859-60, 670 P.2d 296 (1983) (evidence of good character presumptively inadmissible); State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) (rape complainant's reputation among family members inadmissible)); CP 19-21 (citing State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995); ER 401; ER 402; ER 403; ER 404; ER 608; ER 701; ER 704. These multiple violations of the court's pre-trial rulings carried material prejudice and require reversal.

2. The trial court erred in violation of ER 404(b) in admitting evidence that Mr. Orbe-Abarca allegedly tried to take a picture of D.G. while showering. Pre-trial, the State indicated it would proffer ER 404(b) bad act evidence that Mr. Orbe-Abarca allegedly tried to take a picture of a female person he believed to be D.G. while she was showering at the family's Woodinville residence. The prosecutor argued this was admissible, despite the ER 404(b) bar, because it was offered to show (a) lustful disposition, (b) was *res gestae*, and (c) showed intent to sexually gratify, for purposes of sexual contact. Supp. CP ____, Sub # 26 (State's

trial memorandum, at pp. 17-18 (citing ER 404(b) and State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991) (in incest trial, evidence of previous sexual conduct towards victim ten years prior was admissible to show lustful disposition)); CP 8-25 (Defendant's trial brief, at pp. 7-8).

(i). This Court can review the error as ineffective assistance of counsel, particularly where the admission of the evidence was legally erroneous.

The defense moved in limine to exclude all ER 404(b) evidence, and briefed the question of "lustful disposition." CP 15-18 (Defendant's trial brief, at pp. 7-11). At the pre-trial hearing, Mr. Orbe-Abarca's counsel did indicate that she believed the 'shower incident' was admissible. 7/6/15RP at 18-19. This Court should nonetheless exercise its discretion to review the trial court's error in admitting the evidence, particularly where the court did rule on the matter, reasoning that the incident indeed showed lustful disposition. 7/6/15RP at 19; see RAP 2.5(a).

Further, Mr. Orbe-Abarca argues that if his counsel waived the error, counsel was deficient, to his prejudice. U.S. Const. amend. 6; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 333-36, and n. 2, n. 4, 899 P.2d 1251 (1995). Importantly, the evidentiary error would be deemed an abuse of discretion by outright legal error, rather than a matter of

judgment. State v. Gunderson, 181 Wn. 2d 916, 922, 337 P.3d 1090 (2014) (discretion is abused by legal misconstruction of the requirements of an evidentiary rule)); see infra.

(ii). As a matter of legal error, the evidence was inadmissible for “lustful disposition” where it occurred after the charged events.

Admission of the evidence was error. In order to admit ER 404(b) evidence, the trial court must conduct a multiple-part test, assessing whether the incident occurred, and whether it is relevant by non-propensity reasoning, and not unduly prejudicial, to prove a material fact of consequence. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

Lustful disposition is an exception to the ER 404(b) proscription against propensity evidence, and may be admissible to show a lustful disposition toward the complaining witness. State v. Carver, 37 Wn. App. 122, 126, 678 P.2d 842 (1984). The rule specifically allows evidence of “collateral sexual misconduct of a defendant which establishes a lustful disposition toward the offended [person].” State v. Carver, 37 Wn. App. at 126 (victim allowed to testify that the defendant had previously engaged in, among other things, anal intercourse with her).

However, the cases involve conduct before the time of the charged offense, such that it shows that the alleged crimes were motivated by

sexual desire for the victim who was aggressed against. See, e.g., State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991) (victim allowed to testify that the defendant, 10 years before the charged incident, had rubbed her breasts and buttocks); State v. Bernson, 40 Wn. App. 729, 737–38, 700 P.2d 758 (1985) (co-worker's testimony that defendant stated, "I'd really like to get her," referring to victim of sexually-motivated murder, properly admitted under ER 404(b) to show lustful disposition); State v. Crowder, 119 Wash. 450, 451-52, 205 P. 850 (1922) (prior acts of sexual intercourse between parties admissible in rape prosecution to show lustful disposition of defendant toward complaining witness).

Here, the State's pre-trial proffer was that the 'shower' event was many months after the charged crimes as to D.G. 7/6/15RP at 15-18; Supp. CP ____, Sub # 26 (State's trial memorandum, at pp. 8-9, 16-21. As to D.G. the defendant had been charged with multiple counts of alleged sexual contact, in the second and third degrees based on D.G.'s increasing age, but with the most recent claimed incident having a charging period ending in October, 2010. CP 1-2. The State recognized that the incident with the shower and D.G. at Lazy Wheels was something occurring after D.G. turned 16 years old. This dating of the incident was the same at trial, with witnesses placing it in 2013 or 2014. 7/13/15RP at 742-43 (Hinojosa testimony); 7/13/15RP at 853-61 (D.G. testimony).

It was error to admit the evidence, which Mr. Orbe-Abarca argues was entirely irrelevant, coming as it did after the charged incidents. The best rule is that the lustful incident must be *prior* to the charged crimes, which is consistent with the requirement that the evidence be probative of the defendant's pre-existing impetus to engage in the sexual conduct. State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010). The evidence was inadmissible and any defense concession as to the evidence was deficient attorney performance.

It is true that the Court of Appeals may affirm admission of evidence on other proper theories where the record supports admission. See, e.g., State v. Butler, 53 Wn. App. 214, 217, 766 P.2d 505 (1989). Here, in addition to lustful disposition, the prosecutor argued that the shower incident was admissible as *res gestae* evidence. Supp. CP ____, Sub # 26 (State's trial memorandum).

The courts have recognized a "*res gestae*" or "same transaction" exception to the other bad acts proscription, in which "evidence of other crimes is admissible to complete the story of the crime on trial "by proving its immediate context of happenings near in time and place." State v. Lane, 125 Wn. 2d 825, 831, 889 P.2d 929, 932 (1995) (citing McCormick's Evidence § 190, at 448 (Edward W. Cleary gen. ed., 2d ed. 1972)). However, the alleged shower incident was not part of the charged

crimes in any manner, including chronologically, but instead occurred after the offense dates and after the charging period.

Finally, "intent" also fails as a prosecution theory of admissibility. Supp. CP ___, Sub # 26 (State's trial memorandum, at pp. 20-21). Proof of the motivation of sexual desire for purposes of sexual contact, an element of molestation, is not properly proved by prior bad acts in a case where, as Mr. Orbe-Abarca was accused of here, the defendant touched the sexual organs of the victim, D.G. State v. Ramirez, 46 Wn. App. 223, 226-27. 730 P.2d 98 (1986) (for purposes of ER 404(b) analysis, prior conduct is not admissible under an intent or sexual gratification rationale, in a molestation case where the touching was of the sexual organs, thus establishing the purpose of sexual gratification) (citing State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982)). The evidence was inadmissible.

3. Detective Rebecca Smith was not qualified as an expert to opine on the typical state of the evidence in sex cases, which in any event was an improper comment on guilt.

(i). The defendant objected.

The State called Detective Rebecca Smith of the Bothell Police, who was in the department's investigative unit. Detective Smith reviewed the report of the original responding officer, and coordinated the taking of statements and collection of other material necessary to the case.

7/14/15RP at 193-97. This testimony, elicited for chain of custody and other purposes, was proper. Then, however, the prosecutor sought the detective's opinion about evidence in sexual abuse cases:

Q: Based on your training and experience in cases involving sexual abuse, is there often evidence to collect in those cases?

MS. LOPEZ DE ARRIAGA: Objection

THE COURT: Grounds.

MS. LOPEZ DE ARRIAGA: She's not qualified.

THE COURT: Overruled.

7/14/15RP at 197. After the trial court overruled the defense objection, Detective Smith then went on to opine that sexual assault cases typically do not have physical evidence -- such as fibers and bodily fluids, or DNA, including where victims do not always report right away. 7/14/15RP at 198-99. This evidence was entirely improper, first, because Detective Smith was not qualified substantively or procedurally as an expert.

(ii). Error occurred in violation of ER 702.

The Court of Appeals reviews the trial court's admission or exclusion of expert testimony for an abuse of discretion. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). The trial court's decision is reviewed for an abuse of discretion. State v. Rafay, 168 Wn. App. 734, 783-84, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013).

Here, the trial court acted unreasonably in allowing Detective Smith to give expert testimony. ER 702 governs the admission of expert testimony and provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

Under this rule, a witness may give opinion testimony under ER 702 if (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact. State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990) (citing State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), cert. denied, 498 U.S. 1046 (1991)).

Below, Mr. Orbe-Abarca properly objected that Detective Smith was not qualified to offer expert testimony on the question of sexual assault cases and the existence of evidence. Detective Smith had recently been placed into the investigative unit of the Bothell police department, and was working on routine criminal cases, and sex cases. 7/14/15RP at 194-95. Detective Smith indicated that she had specialized training in the

interviewing of children, and took a week-long course in the procedures of evidence collection. 7/14/15RP at 195-98.

But there was no foundational testimony that indicated that Detective Smith had any sort of special training and experience that would allow her to testify about the vast panoply of sex offense cases in general and the amount of evidence usually associated with such prosecutions. Furthermore, this sort of improper opinion testimony interfered with the jury's role in determining guilt, and thus violated the other in limine rulings prohibiting opinions on guilt.³ See Part D.1, supra; Part D.4, infra.

5. Reversal is required including for cumulative error, requiring a new trial. Mr. Orbe-Abarca argues that each error described above requires reversal, under a non-constitutional evidentiary error standard. See Assignments of Error 1, 2, 3, 4; see State v. Hancock, 46 Wn. App. at 678 (test for reversible error in admitting evidence in child sex case was is whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected”). Further, under the cumulative error doctrine, this Court can assess whether

³ Of course, this was not lay opinion testimony that might be admissible under ER 701, because it was plainly not in regard to a matter of common, lay knowledge. See State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985); 5D Karl B. Tegland, Washington Practice: Evidence § 702.6, at 315–16 (2014–2015 ed.).

the multiplicity of errors, even if individually inadequate to reverse, rendered the trial unfair.

First, with respect to all of the errors that violated in limine rulings, these errors should be recognized as particularly prejudicial by definition, having been the subject of pre-trial litigation between both parties. See Kelly, supra, 102 Wn.2d at 193 (pre-trial rulings are for the purpose of ensuring that a bell that cannot be unrung never gets rung).

The multiple errors in this case were cumulatively prejudicial. Impermissible opinion testimony regarding witness credibility and the defendant's guilt is particularly harmful and in this case was specifically harmful. See generally, State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (improper opinion testimony is harmful based on the type of case and the remaining evidence). The jury, anxious to understand the family dynamic, and likely eager to hear from an authoritative law enforcement witness, likely gave the improper evidence great weight and probably found guilt based simply on the family knowledge of Ms. Hinojosa, and the authority of Detective Smith.⁴

⁴ Attempting to mitigate the prejudice caused by Detective Smith being wrongly portrayed to the jury as an expert, the defense was careful to ensure that an originally proposed jury instruction on expert testimony was not given to the jury. 7/15/15RP at 907.

Importantly, in closing argument, the prosecutor emphasized the theme that J.C., who his mother improperly described as “proud,” was now, on the stand, not the same weak kid anymore. 7/15/15RP at 913-14. According to the State, J.C. was now strong enough to testify about what happened and the jury should be clear about what occurred, because of how he described events in a way that was “open [and] confident.” 7/15/15RP at 914, 923-25. This drove home the prejudicial effect of Ms. Hinojosa’s disregard of the trial court’s evidentiary rulings.

Also in closing, the prosecutor referred to Mr. Orbe-Abarca’s explanations to Ms. Hinojosa as to the events being inadvertent or accidental as “ridiculously implausible.” 7/15/15RP at 935-36. This argument found support in the improper testimony throughout trial wherein witnesses, both lay and police, impugned Mr. Orbe-Abarca’s credibility and character by implying he was unliked, had seemed nervous with possible guilt, and was good at making excuses.

The foregoing errors combined with the inadmissible lustful disposition evidence and the Detective’s improper testimony deeming the evidence typical in cases of guilt to sex crimes, requires reversal.

Each of these errors affected the result of the trial. Reversal is required. See also State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) (material errors require reversal).

Finally, the cumulative error doctrine allows this Court to reverse for multiple errors that together, because of their combined prejudice, resulted in denial of the Due Process right of a fair trial. This rule protects a principle so important that it applies even in cases where, as here, some of the errors were inadequately preserved. State v. Russell, 125 Wn.2d at 93-94; State v. Alexander, 64 Wn. App. at 150-51; U.S. Const. amend. 14. This Court should reverse the convictions.

E. CONCLUSION

Based on the foregoing, Celso Orbe-Abarca asks that this Court reverse his convictions, in favor of a new trial. Further, in the event that Mr. Orbe-Abarca does not substantially prevail on appeal, he asks this Court, under its discretionary authority, to deny any award of appellate costs. State v. Sinclair, ___ Wn. App. ___, 2016 WL 393719 (Jan. 27, 2016).

Respectfully submitted this 19th day of May, 2016.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73864-0-I
v.)	
)	
CELSO ORBE-ABARCA,)	
)	
Appellant.)	

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