74333-3

NO. 74333-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

OSCAR RAUL LOPEZ,

Respondent.



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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

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# BRIEF OF APPELLANT

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1. The trial court erred by entering an order granting Lopez a new trial.

2. The trial court erred by ruling that trial counsel performed deficiently for the sole reason that he did not present reputation evidence of character pursuant to ER 404(a).

3. The trial court erred as a matter of fact by finding that trial counsel never considered that he might offer reputation evidence on behalf of his client.

4. The trial court erred by ruling that Lopez was prejudiced by the failure to present reputation evidence of character.

5. The trial court erred by finding as fact that "reputation evidence can be particularly impactful."

6. The trial court erred by granting a new trial on the "independent basis" that due process requires a lawyer free from mental illness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in finding that trial counsel's performance was deficient for failure to present reputation evidence of

sexual morality where binding precedent foreclosed such evidence, or where such evidence was, at best, debatable?

2. Did the trial court err in relying on an unsworn statement in an electronic mail message to conclude that trial counsel never considered reputation evidence where there was sworn testimony to the contrary at an evidentiary hearing, where the parties never had an opportunity to lodge objections to the email message, and where the court never reconciled the conflicting assertions?

3. Did the trial court err in finding that trial counsel's performance was deficient where the lawyer ably represented counsel through a full investigation and a long trial, and where the lawyer's only alleged misstep was in failing to present reputation evidence of questionable admissibility?

4. Did the trial court err in finding the defendant was prejudiced by the failure to present reputation evidence of the defendant's alleged "character" for sexual morality where essentially the same evidence was presented through numerous witnesses who testified that they trusted the defendant with their children and were shocked that he was charged with child molestation, where it was obvious that the defendant's family and co-workers trusted him to care for children, and where there is no basis to say that reputation evidence is "impactful."?

5. Did the trial court err in ruling that the Due Process Clause demands a new trial for a defendant who, by all objective measures, was properly represented by counsel, simply because the lawyer suffered from depression during the trial?

## C. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS.

The defendant Oscar Lopez was charged on June 23, 2014, with a single count of child molestation in the first degree for sexual contact with L.M., aged six. CP 1-2. The information was later amended to expand the charging period. CP 77. Beginning on July 11, 2014, Lopez was represented by Mr. Steven Witchley. CP 6-7. Trial began with pretrial hearings on February 11, 2015 and concluded on March 12, 2015. 1RP 4-41; 10RP 1209. The jury returned a verdict of guilty on March 13, 2015. CP 81; 10RP 1212-14.

On April 15, 2015, Mr. George Trejo substituted for Witchley as counsel of record. CP 101-03.[1] Trejo asked for additional time to present his motions for a new trial. CP 106-10. There followed a series of hearings on March 27, May 22, September 15, and October 8, 2015 to

[1] Ms. Aimee Sutton briefly represented Lopez, but Lopez apparently was unhappy that Witchley and Sutton were friends on Facebook. CP 101-02, 265-66. It appears there may also have been a fee disagreement. CP 136.

litigate Lopez's motion for new trial. See 11RP.[2] Lopez ultimately claimed that Witchley was ineffective for failing to offer evidence of Lopez's good character, failing to "conduct any type of investigation," failing to deal with his inability to understand interpreters, and failing to communicate plea offers. CP 113-40.

On October 30, 2015, the trial court denied all of Lopez's claims, except for the claim based on character evidence. 11RP 1317-18. As to that claim, the court ruled that Witchley should have presented evidence of Lopez's good reputation for sexual morality, and that this failing prejudiced Lopez. 11RP 1303-10. As an independent basis for granting a new trial, the court ruled that "as a matter of due process, a defendant is entitled to be represented by somebody who is not suffering from mental illness." 11RP 1311-17. The State timely appealed these rulings.

## 2. FACTS OF THE CRIME.

L.M. lived with her mother and older sister in King County, Washington. Times had been difficult for L.M. and her family. Her father died in 2002 when she was four years old, and her dog died in May, 2014. 7RP 618. She was enrolled in grief counseling to help her deal with her

[2] A hearing was also held on September 18, 2015. Counsel for Appellant did not order a transcript of that hearing because the clerk's minute entry shows there was no testimony taken and no rulings made on that date.

father's death. 7RP 624. Her mother worked long hours as a veterinarian in order to support the family, so several days per week L.M. was in daycare for many hours. 7RP 650-55. L.M. was described as an intelligent child and quite verbal, but she suffered fears of abandonment after her father's death, so she was sometimes emotional and clingy when dropped off at daycare. 7RP 655. L.M. was about a head taller than her peers and she had red hair. 7RP 615. And she was not shy about talking to adults. 7RP 619-20.

L.M. enrolled at Bethel Christian Daycare Center in April, 2013, when she was five years old. 7RP 647. Children at the daycare were taken to and from their schools in shuttle buses. 7RP 656. Oscar Lopez drove one of those buses for Bethel and he was the driver primarily responsible for transporting L.M. 7RP 658. L.M. liked Lopez and she would greet him when she saw him in the parking lot. 7RP 659.

L.M. was generally happy at the daycare but there were a few difficulties. Because she was somewhat distinctive and stood out, she endured some bullying at the school, particularly from one girl. 7RP 620-21. Her mother instructed L.M. to tell her when she was bullied so that her mother could intervene on her behalf. 7RP 705. This strategy seemed to work. 7RP 726.

Sometime in the spring of 2014, L.M. commented to her mother that Lopez had hit or spanked her butt. 7RP 679-80. After questioning L.M., her mother believed this was an accident, so she took no further action except to instruct L.M. to alert her if it happened again. 7RP 680. The trial court ruled pretrial that this incident was not technically child hearsay, so it was not admitted pursuant to the child hearsay statute. 3RP 85-87. However, because the event influenced how L.M.'s mother dealt with L.M.'s later disclosure, the trial court ruled that the hue and cry doctrine permitted L.M.'s mother to testify in very general terms that an incident had occurred that caused her to warn L.M. to report inappropriate behaviors. 6RP 556-61.

On Friday, June 6, 2014, L.M. was excited because she would be attending a camp with her grief counseling group that weekend, so she was in good spirits. 7RP 662-63, 672. When she and her mother arrived at Bethel early in the morning, they saw Lopez in the parking lot. After they parked and as they walked into the school, L.M. stopped and said to her mother, "By the way, Mr. Oscar touched my butt yesterday." 7RP 663. L.M. generally referred to her private areas as her front butt and back butt. 7RP 639-40. L.M. demonstrated to her mom what had occurred by moving her hand in a rubbing motion over her vaginal area. 7RP 664. She said this occurred on the school bus. 7RP 666. She made the

statement spontaneously, not in response to any questioning, and it seemed to be triggered by seeing Lopez in the parking lot. 7RP 665. Her tone was indignant, like how she sounded when kids would tease her or hurt her feelings in a way that was not right. 7RP 664. She was not crying. 7RP 664. She did not say that she never wanted to see Lopez again. 7RP 686. She simply did not want to be alone with him on the bus. 7RP 666.

Although L.M. was indignant when she told her mother, she also seemed relatively unperturbed. Her mother did not believe that L.M. understood the contact to be sexual; she seemed not to understand why someone would want to touch her in that way. 7RP 677. She was not embarrassed or ashamed. 7RP 666. L.M. told her mom that it was her mom's job to take care of it. 7RP 665. This was a reference to earlier conversations between L.M. and her mother in which it was agreed that L.M. would tell her mother if someone bothered her at school, and her mother would talk to school personnel to help solve the problem. 7RP 700-01. She was able to move on with her day if she knew her mother was dealing with it. Id.

A dispute as to the timing of this event ran through the entire trial—whether L.M. was alone with Lopez on the school bus on the morning of June 5th, or some other day. L.M. had reported to her mother on June 6th that the touching had occurred "yesterday." L.M.'s mother

explained that in June of 2014, L.M. – who was six years old at the time – had not yet developed a mature notion of "yesterday." 7RP 628-31. Although L.M. could recite events in chronological order, she would sometimes use "yesterday" to describe events that had occurred in the past, sometimes weeks in the past, just as she would use the term "tomorrow" to mean something that was to occur in the future, not necessarily the next day. 7RP 28-31, 693-98. As to why L.M. may not have disclosed the touching immediately on the evening of June 5th, L.M.'s mother testified that upon picking L.M. up from daycare she had presented L.M. with the ashes of her recently deceased dog, an event L.M. had been greatly anticipating. 7RP 667-69.

There was extensive testimony at trial regarding the bus schedules and routes. The State endeavored to show that in 2014, between January and June, Lopez was often alone with L.M. on the bus, so the touching could have occurred on one of any number of occasions. The State's evidence showed that L.M. and Lopez were alone on the bus 16 times – twice in the morning and 14 times in the evening. 6RP 498-507. Lopez's lawyer, on the other hand, attempted to show through numerous witnesses, that Lopez was not alone with L.M. on the morning of June 5th, and that

other discrepancies in her report called into question whether abuse had really occurred at all.[3]

A great deal of time was devoted at trial to examination of a seven-minute excerpt of a security video recorded on June 5th that showed L.M. and Lopez interacting in a common area at the Bethel daycare. The video showed Lopez sitting at a long table and, as L.M. walked by, he gestured toward her indicating that she should sit at the table with him. 6RP 555. She complied, sat down across the table from him, and they had a conversation for several minutes. At one point, he reached out and either touched or stroked her hair. 6RP 552, 9RP 1126. At another point, he playfully put his glasses on his face and she took the eyeglasses from his face and put them on herself. 6RP 565-68, 9RP 1123-24. Lopez can also be seen touching L.M.'s elbow. 9RP 1127.

On June 6th after L.M. disclosed what Lopez had done, her mother reported the information to the school and asked them to prevent Lopez from being alone with L.M. on the bus. 7RP 671. Her mother then drove to work because she was scheduled to perform surgeries that day but, as L.M.'s statements sunk in, her mother realized that she must do more, so she left work shortly after arriving and contacted police. 7RP 673-74. Officer Wilson came out and took a statement from her. 7RP 674-76.

[3] These attempts are discussed in detail below.

When she picked up L.M. in the afternoon, L.M. was still excited about the prospect of camp and did not seem to have lingering concerns about Lopez. 7RP 677.

Several days later, L.M. was taken to the prosecutor's office where she met child interview specialist Carolyn Webster who video- and audio-recorded an interview with L.M. The video was shown to the jury at trial and a transcript was provided. 5RP 425-38; Ex 18. At the beginning of the interview, L.M. told Webster about going to Trampoline Nation for her friend's birthday party, and she said that she threw up two times "yesterday" because she drank some hand sanitizer. Ex. 18, p. 5. Her mother testified that the trip to Trampoline Nation was actually in April, 2014, not "yesterday." 7RP 621-22.

As to the allegations against Lopez, L.M. reported to Webster on the video that "the bus driver was being ... inappropriate. ... Um. So like I had shorts on and then like he put his hand inside my shorts and then he started itching my butt." Ex. 18, p. 10. She said the driver was Mr. Oscar and that this had occurred while she was sitting on a seat at the back of the bus. Ex. 18, p. 11. L.M. had told him that she was ready to leave, meaning that she had buckled her seatbelt, and he came to the back of the bus, sat down next to her, then he reached under her shorts and "all the way into my butt and then he started like... itching it." Ex. 18, p. 12,

19-20. She also demonstrated how she had been touched, and she clarified that he itched "under my underwear" in the middle between where she went pee and poo. Ex. 18, p. 13. She said it felt like someone was trying to pinch her or like someone was tickling her butt. Id. She told him to stop, he stopped, he said he was sorry, "and then he drived me to school." Ex 18, p. 14. L.M. said she was not sure when it happened, it might be a Thursday, or Friday, or May 29th. Ex. 18, p. 15. She demonstrated how Lopez had tickled her in the past in various places, including over her clothes on her "butt." Ex. 18, p. 17. She said he used to tell her that she was beautiful, that he would like to marry her, and that he liked her better than his wife. Ex 18, p. 22-23.

L.M. had a difficult time testifying at trial. Although she confirmed the basic events described above, she answered many questions by saying she did not remember or she did not know. 7RP 759-63. When pressed for details as to exactly how he put his hand under her pants, she replied, "I don't know." 7RP 763. She testified that this is something she did not like to think or talk about. 7RP 763. The direct examination became increasingly difficult for L.M. as questioning turned to the video showing her interacting with Lopez. She finally asked to take a break. 7RP 776. A little while later she was still "crying and emotional" so the court adjourned early that day. 7RP 780.

The defendant testified at trial and denied any inappropriate touching of L.M. 9RP 1112. When confronted with the video evidence, the defendant said his ability to speak English was so basic that he could not have communicated with L.M.. 10RP 1143-44. He also disputed that he had asked or invited L.M. to sit with him. 9RP 1116-17.

### 3. FACTS REGARDING POST-TRIAL MOTION AND RULING GRANTING NEW TRIAL.

On June 12, 2015, Mr. George Trejo filed a Motion and Memo To Set Aside Verdict And For A New Trial. CP 113-40. He claimed: Witchley had failed to investigate the case, CP 121-25; Witchley had ignored Lopez's statements that he could not understand some of the interpreters, CP 125-28; and Witchley failed to communicate plea offers. CP 133.

As to the failure to investigate claim, Lopez claimed that Witchley failed to contact or interview several witnesses who would have testified to their positive dealings with Lopez and to their opinions that Lopez would not molest children. CP 114-17. Specifically, Lopez wanted to call the following witnesses.

- Ricardo and Cecilia Rivera and their two young daughters who lived with the defendant and his wife. They apparently would have testified that they never saw Lopez behave

inappropriately toward their daughters, and that their daughters adored him.

- Isabella Tolber, 9 years old, who would have testified that Lopez never molested her.

- Joselyn Leon, 13 years old, who occasionally spent the night at the Lopez house to testify that the defendant never acted inappropriately towards her.

- Ms. Helen Smith would have testified that her six-year old daughter and three-year old son both, in her opinion, loved Lopez, and that he had never been inappropriate with them.

- A school representative to testify that there had never been any complaints lodged against Lopez for sexually inappropriate conduct.

- Ms. Ruth Acosta and her nine-year old daughter to testify that Lopez had never molested the daughter.

CP 115-16. Neither Lopez's motion nor the offers of proof suggested that Witchley should have developed evidence of Lopez's *reputation* for sexual morality.

The State requested and was granted permission to discuss these matters with Witchley. CP 141-45. On September 15, 2015, Witchley filed a declaration adopting as true the statements he had made to the deputy prosecutor in a recorded interview on June 25, 2015. CP 222. A transcript of that interview was prepared and filed with the court. CP 223-64. Witchley said in the interview that, although Lopez and his wife very much wanted to present character witnesses, Witchley declined

because such character evidence would not be admissible. CP 227. The discussion about these witnesses occurred on multiple occasions over the course of pretrial preparations. CP 234-35. Witchley explained to Lopez and his wife that "the fact that you don't molest child A is not relevant to prove that you didn't molest child B." CP 227. He said, "It was hard for me to come up with a theory under which they had ... admissible testimony." CP 232. As to witness Ruth Acosta, Witchley noted that everything that Lopez wanted from that witness ultimately came out in her testimony.[4] CP 228-29.

The deputy prosecutor who tried the case filed a declaration on August 14, 2015, saying, "In the course of preparing for trial, Mr. Witchley was present for my interviews of all the defense witnesses. He was also present for the State's interview of Ruth Acosta." CP 147. On September 15, 2015, the prosecutor filed a response to the motion for new trial. CP 149-221. Attached were notes taken by Witchley's investigator, Karen Sanderson, of witness interviews that Witchley attended. CP 165-221. These notes illustrate that Witchley interviewed no fewer than 10 witnesses, including a second interview of L.M. based on new information. CP 157. The interview summaries show the breadth and depth of his investigation. CP 165-212.

[4] This point is illustrated in greater detail below.

An evidentiary hearing was scheduled for October 8, 2015. The day before the hearing, Lopez filed seven new declarations and a memorandum of law. One declaration was from Lopez, himself, and he asserted that Witchley had failed to call six witnesses: Ricardo and Cecilia Rivera, co-worker Ruth Acosta, Paola Deleon, Helen Smith, and an unnamed school district representative. CP 265-72. There are some differences between this list and the list in the original motion for new trial—Deleon is added, while Isabella Tolber (9 years old) and Joselyn Leon (13 years old), are missing. *Compare* CP 277 *with* CP 115-16. Moreover, whereas the original motion asserted that Witchley had refused to call "character" witnesses, this motion alleged that Witchley had refused to call "reputation" witnesses. CP 295-96. The purported testimony of the witnesses listed in the first motion was clearly inadmissible "character" evidence. *See* CP 115-16. The newly listed witnesses and their companion declarations are carefully worded to assert that they would have testified to Lopez's "reputation" in the community. CP 270-84.

Ms. Sanderson also filed a declaration for the first time. She said it was her "strong belief that Mr. Witchley was suffering from severe depression in the months leading up to Mr. Lopez's trial and including trial. I feel strongly that Mr. Witchley's compromised mental state

impacted and restricted his ability to represent Mr. Lopez adequately." CP 286.

The deputy prosecutor noted that she had received these materials only the day before and that, because she was going on maternity leave the next day, she would be unable to adequately address them. 11RP 1233-34. The court continued with an evidentiary hearing, nonetheless.

Lopez testified at the hearing and was cross-examined about facts supporting his motion for new trial, but his testimony focused mostly on the claims that he could not understand the interpreters and that Witchley had failed to inform him of plea offers. 11RP 1241-79.

As the hearing came to a close, the court noted that it felt the need to unseal a declaration Witchley had filed after he was sanctioned. 11RP 1280. The court said, "I've now come to the conclusion that the contents of the declaration are relevant to this proceeding." 11RP 1280. The prosecutor asked to which issue the declaration pertained. 11RP 1281. The court replied,

> I can tell you that the issue that I'm focusing on is the failure of Mr. Witchley to consider calling some of the witnesses for the purposes of giving *reputation* testimony as to Mr. Lopez's sexual morality. And it appears to the court that that is appropriate in this kind of case. I don't believe that the witnesses could come in and say, "They treated my child well and I trusted Mr. Lopez." But it seems to me that an attorney could have perhaps – the question is I don't know whether these witnesses would be able to establish the proper foundation that they're aware of Mr. Lopez's

> *reputation in the community*. So that's one of the uncertainties here. But it's certainly something that I think should have been considered.
>
> And I think that Mr. Witchley's mental state during trial is a relevant consideration for the court because I can tell you, in general terms, that I believe there's a connection between his ability to perform and his mental state. Even though I have to say, quite candidly, though Mr. Witchley, despite his tardiness, for the most part did a good job. But I am concerned about this one area.

11RP 1282-83 (italics added).

In light of these comments from the court, Mr. Trejo then decided to call Ms. Karen Sanderson as a witness. 11RP 1285. The State objected because Ms. Sanderson had been in the courtroom during the proceedings, but the objection was overruled. 11RP 1284. Ms. Sanderson testified that she and Witchley discussed the issue of character witnesses in October, 2014. 11RP 1286. She said they compiled a list of tasks that included the task of interviewing possible witnesses for reputation evidence regarding Lopez. 11RP 1290. Ms. Sanderson said that she and Witchley discussed evidence of "what his reputation in the community was for – I'm stretching a little bit because I'm not a lawyer, but I'm thinking it was along the lines of that he's not a child molester, that he's a good, a good person." 11RP 1293. The prosecutor asked whether Sanderson and Witchley had actually discussed this topic, rather than Sanderson simply inferring it from what she heard earlier in court. Sanderson confirmed that

she discussed reputation evidence with Witchley. 11RP 1293 ("No. We talked about it."). Ms. Sanderson testified that she had on other occasions worked with Witchley on presenting reputation evidence. 11RP 1297. She said, "Yeah, I mean, it's a common thing that I've done with other attorneys in other cases, and I have memories of talking to Mr. Witchley about reputation evidence and the development of it through investigation." 11RP 1297. She clarified that they had sought "reputation testimony concerning his good sexual reputation and/or decency in the community." 11RP 1297.

Ms. Sanderson discussed other aspects of trial preparation. When the prosecutor asked about Ms. Acosta, the trial court interrupted, saying, "And, Ms. Lee, could you remind the court who she was?"[5] 11RP 1291.

The State supplied an additional brief the next day that directed the court's attention to State v. Jackson, 46 Wn. App. 360, 365, 730 P.2d 1361 (1986). CP 335-36. The brief also made the point that Lopez had not been prejudiced by the lack of reputation evidence because witnesses had clearly imparted the notion that people close to the daycare did not believe Lopez to be a child molester, since they left him in charge of children on the school bus. CP 37-38.

[5] The trial had occurred seven months earlier and the court did not have a transcript.

On October 30, 2015, the trial court announced its decision in an oral ruling. 11RP 1303-19. The court first ruled that Witchley was correct to refuse character evidence, since such evidence is plainly not admissible. 11RP 1305. The court distinguished reputation evidence, however, and identified the pertinent trait of character as "sexual morality and decency." 11RP 1306. The court noted that Witchley had earlier said that he could not find a basis to admit character evidence, and the court said, "So this brings us to the heart of the matter: Was Mr. Witchley wrong?" 11RP 1307. The court then discussed four published appellate decisions and concluded that Witchley had been wrong. It seemed to believe that dictum from the supreme court outweighed a holding from this Court. 11RP 1308. It then concluded that the fact that the case law was "somewhat muddy" did not excuse Witchley's failure to offer the evidence. 11RP 1308. The court asserted that the decision to forego reputation evidence was not tactical, citing an unsworn electronic mail message where Witchley said he never considered the issue. CP 347; 11RP 1308-09.[6] The trial court did not address how that unsworn quip in an email could be squared with Ms. Sanderson's repeated statements under oath that they tried to develop "reputation evidence of character." 11RP 1285-86, 1293, 1297. The court then ruled that it would have

[6] It does not appear that the parties had seen this email before the October 30th hearing.

allowed reputation evidence at trial, and that Witchley therefore had made a "serious mistake," and concluded that he had been constitutionally deficient. 11RP 1309.

The court then turned to the issue of prejudice. It ruled as follows:

> And the court believes that reputation evidence can be particularly impactful. When asked during voir dire what kind of evidence they would expect to hear, jurors commonly mention prior pattern of behavior by the defendant. They want to know what kind of person the defendant is before they make a judgment about whether he committed a crime. In a way, they hunger for character evidence, but they rarely get to hear it, and for good reason, because the rules of evidence are structured to force jurors to base their verdict on the evidence that's related to the crime, not on the defendant's disposition to either commit or not commit a crime.
>
> Reputation evidence is an important exception to this rule because it allows jurors to view the defendant in a broader context. Depending on the credibility of the witnesses giving this type of character evidence, it can potentially have a significant impact on the outcome, particularly in close cases. And this was a close case. It could have gone the other way. And for this reason, the court concludes that the failure to put on reputation prejudiced Mr. Lopez.

11RP 1311.

4. FACTS REGARDING DEFENSE COUNSEL'S PERFORMANCE.

This section of the statement of facts will closely examine in context how defense counsel handled Lopez's defense. These facts are imperative to understanding both the deficient performance and prejudice prongs of the ineffective assistance of counsel claim discussed below. In

sum, Witchley presented several themes throughout the trial. To undermine the jury's confidence that the event occurred when L.M. claimed, and to undermine its confidence in her credibility, generally, counsel argued that L.M. was not alone with Lopez when she said the abuse occurred. He tried to portray her as emotional, sensitive, and prone to exaggeration. He tried to show that Lopez had insufficient English-language skills to have communicated with L.M. as she reported. He attacked the worthiness of the video evidence the State relied upon. And, finally, he took advantage of every opportunity to illustrate that Lopez was a family man surrounded by children and other adults, and that nobody believed he would molest a child.

a. Pretrial Investigation And Litigation.

Steven Witchley has been a criminal defense lawyer in Washington since 1990. He was a public defender with The Defender Association (TDA) and then he operated his own practice. He has handled many serious felony cases, including at least three death penalty cases. CP 286 (Decl. of Sanderson). He first appeared in this case on July 11, 2014. CP 6-7. Shortly thereafter, he moved to release Lopez pretrial and arranged for 25 people to show up at the hearing. CP 237. He and his investigator conducted a thorough investigation. CP 89-95, 165-221,

223-35. No fewer than 24 pretrial motions were litigated on February 11, 2015, the first day of trial. 1RP 6-41. There were discovery motions, impeachment issues, character evidence issues, and arguments as to the admissibility of the victim's nightmares, bus logs, penalty evidence, and issue of general relevance. Id. Counsel intelligently defended his client's interests on each topic raised, sometimes contesting the matter while other times conceding part or all of the issue. Counsel indicated that he did not intend to introduce character evidence under ER 404(a). 1RP 17-18; CP 40-41. Counsel persuaded the court to grant a second interview with the victim based on new video evidence. 1RP 35-38.

The admissibility of child hearsay was litigated over the course of several days, and L.M.'s mother and the prosecutor's child interview specialist testified on this issue. CP 41, 48-49. Legal arguments on the issue occurred on February 23rd. 3RP 61-95. Three separate statements were at issue: a disclosure by L.M. to her mother that Lopez had touched or hit or spanked her bottom; a disclosure on June 6th as L.M. was walking into the daycare with her mother; and the forensic child interview on June 18th with interviewer Carolyn Webster. 3RP 62. Witchley appropriately acknowledged that the State had met the requirements of the statute in several respects, but he focused his attention on the "nebulous" statement by L.M. to her mother that Lopez had slapped or hit or spanked her, and

on a select portion of the forensic interview. 3RP 72. It was unclear on what date the "nebulous" disclosure occurred, and it was also unclear when the incident mentioned in the disclosure had occurred. 3RP 72-76. Counsel made cogent arguments that these disclosures were not covered by the child hearsay statute. 3RP 84-85. Counsel also attacked a portion of the forensic interview where L.M. talked about Lopez tickling her; he argued that the interviewer obtained this statement through the use of leading questions. 3RP 76-78.

The trial court ruled in Witchley's favor as to both points and excluded the statements that Witchley wanted to exclude, even though the court found L.M. to be "extremely truthful" in the sense that she was not exaggerating her claims, and even though the court admitted the June 6th disclosure and a great deal of the forensic interview. 3RP 87-89. As for the disclosures that would be excluded, the court ruled (as Witchley had argued) that the "spanking" disclosure did not sufficiently describe sexual abuse to fall under the statute. 3RP 85-86. The court also ruled (as Witchley had argued) that "by continuing to prod" the witness, "the individual questions might have been leading." 3RP 89-90. Witchley then moved to restrict the mother's testimony at trial and the court granted his request. 3RP 93. The court later reconsidered its ruling on the "tickling" matter and allowed the State to admit that evidence. 3RP 95.

Voir dire occurred on February 11, 12, 17, 18 and 19. CP 41-53. Fifty-six jurors were examined individually and many were excused for cause, at least five at the express urging of defense counsel. CP 43-51.

b. Trial.

Both parties gave opening statements. The State outlined the evidence it believed would support conviction. 3RP 98-108. Witchley then gave a focused and pointed opening statement in which he alerted the jury to the key points of his defense, and he implored the jury to carefully scrutinize the evidence. 3RP 109-13. He explained that L.M. had told her mother on June 6th that she had been molested the day before in the morning on the school grounds, but Witchley pointed out that it was unlikely any touching occurred because the bus was parked in a bustling place; he mocked the notion that someone would molest a child under such circumstances. 3RP 110. In addition, he alerted the jury that L.M. might be mistaken as to the timing of the event; she was not alone with Lopez on the morning of June 5th. 3RP 110-11. He asked the jury to pay close attention to L.M.'s description of the event and to whether the touching was physically possible. 3RP 111. He cautioned them to critically evaluate the video showing Lopez and L.M. interacting inside

the daycare. 3RP 111-12. And, he asked them to consider the totality of the evidence against L.M.'s "implausible" claims. 3RP 112.

The State's first witness was Overlake Ili who was working on June 6th and L.M.'s mother reported the abuse to her. 3RP 116-20. Ili testified that the report was shocking. 3RP 132. On cross-examination, Witchley established that Lopez's wife and adult son worked at the daycare, and that Lopez interacted with them over the course of the work day such that they would be in a position to observe his interactions with the children. 3RP 132-33. Witchley also asked Ili: "If you had ever observed any inappropriate conduct taking place between an adult and any of the kids at the daycare, what would you have done?" Ili replied, "Report it." 3RP 134. Witchley then asked, "Did you ever have those concerns with Mr. Lopez?" Ili answered: "No." 3RP 134.

Michael Sadosky testified next. He had been a grounds-keeper, mechanic, and bus driver for Bethel Christian Church since 2006. 3RP 136-40. He testified at length about the bus schedules, logs, and routes, timing, and safety procedures. 3RP 140-70. He testified to the position of the parked buses relative to other church buildings, and whether the buses could be seen from the buildings. 3RP 174-83. He testified that the windows on the buses are tinted and that the bus Lopez drove had darker tinting than the others. 3RP 184-86, 189-90. He testified that Lopez's

English-speaking skills were "pretty good" and that he could communicate with Sadosky and the children. 3RP 191-93.

Witchley cross-examined Sadosky and established that Bethel Community Church was much more than simply a church; it was a community of more than 100 people living in 25-30 houses on the 30-acre property. 3RP 194-95. He established that many of those people had children. 3RP 196. He established that the bus parking area was a "hub of activity" – as Witchley put it – so it was hardly a private place where someone might abuse a child. 3RP 197-200. He clarified the details of the bus schedules and routes, in an effort to show that Lopez would not have been alone with L.M. on the bus. 3RP 201-07. Finally, he adroitly used the transcript of Sadosky's witness interview to show that Lopez's English-speaking skills were rudimentary. 3RP 207-09. On re-cross, although the line of questioning was ultimately terminated, counsel returned to the theme that Lopez had six children and that they were a "close-knit" family. 3RP 217.

Ruth Acosta was the State's next witness. She testified that she worked as a cook, daycare worker, and school bus driver at Bethel for about eight years. 3RP 218-23. She described the school, the ages of children who attended, the basic operational procedures, and some details about bus routes and logs. 3RP 224-36. She acknowledged that she was

good friends with the defendant's wife and with his whole family and that she had written a letter on Lopez's behalf to the court. 4RP 247-48. Although Acosta was called as a witness by the State, the prosecutor more than once had to point out that her answers at trial differed from her answers in an earlier interview. See, e.g., 4RP 242, 263.

Acosta testified that Lopez liked to play with the children and that they loved him. 4RP 260-61. Acosta did not have concerns about his behavior and did not feel the need to keep an eye on him when children were around. 4RP 264. She said that L.M. liked Lopez, that she was talkative, smart, and cried sometimes when she was dropped off for daycare. 4RP 268-72.

Before starting his cross-examination, Witchley asked to excuse the jury. 4RP 276. He indicated that he believed the prosecutor had opened the door to rebuttal evidence when she challenged Acosta regarding the letter Acosta had sent to the court. 4RP 276. He proposed that he be permitted to ask her why she supported Lopez. 4RP 276. By offer of proof, he examined Acosta outside the presence of the jury. 4RP 277-79. The court ruled that Acosta could testify to her reasons for writing the letter. 4RP 283. Acosta re-took the witness stand and testified – in response to Witchley's leading questions – that she considered Lopez and his entire family to be close friends, that he had taken care of her

daughters when she was unable to do so, that she trusts Lopez and other members of his family, and that she wrote her letter of support after she had learned about the accusations from L.M. 4RP 289. Witchley believed Acosta's testimony to be equivalent to positive character evidence regarding Lopez. CP 228-29.

During the cross-examination of Acosta, Witchley reminded the jury that many people worked with Lopez at the daycare, including his wife and son. He developed a theme that Lopez played with all children – boys, girls, younger, older – suggesting that Lopez did not treat L.M. differently from the other children. 4RP 292-93. He confirmed that Acosta would certainly have reported any unusual behavior on his part to the director. 4RP 293. She said she never saw Lopez act sexually towards children. 4RP 293.

Finally, Witchley used this State's witness to attempt to undermine the State's video evidence. It is apparent from the record that Witchley had watched the video very carefully in preparation for trial, and he had shown it to Acosta on February 23rd. 4RP 283-86. After persuading the court to allow him to inquire into the video, Acosta took the stand again. 4RP 299. She described the events and people depicted in the video, she opined that there was nothing unusual about the way Lopez beckoned L.M. to sit near him, she said that L.M. was complaining about an injury

to her elbow that day, and she opined that there was nothing inappropriate about Lopez touching L.M.'s hair, or with him allowing L.M. to take the eyeglasses from his face. 4RP 300-04.

On redirect from the prosecutor, it became clear that Witchley had showed the video to Acosta after her testimony the day before and that neither Witchley nor Acosta had shared that information with the prosecutor. 4RP 307-08. At the end of the court day, Witchley complained about this line of questioning, saying that it might suggest that he had done something wrong, and that it might reflect poorly on Lopez. 4RP 346-47. The court was willing to provide a curative instruction to avoid that possibility but the court ruled that the questions properly explored the witness's bias. 4RP 348-49. The court did read such an instruction to the jury. 5RP 358.

Sabrina Salavea testified next. 4RP 317-45. She had been employed at Bethel Christian Center for about eight years. 4RP 317-20. She was now the director and was responsible for, among other things, managing employees and paperwork. 4RP 320. She supervised twelve people including the bus drivers. 4RP 324. She described the administrative structure at Bethel and the routines of the bus drivers. 4RP 325-35. She described the routine that Lopez, in particular, followed in June, 2014. 4RP 335-46. She drew a diagram of the physical layout at

Bethel, she identified places where there were security cameras, and she used photographs to describe the premises. 5RP 359-70.

Salavea testified that L.M. started at the school in April, 2012, as a five-year old in the first grade. 5RP 370-71. The defendant's stepson, Ivan, was her teacher. 5RP 371. She testified that L.M. was emotional and cried when her mother dropped her off for school, but the frequency of this behavior was at issue. 5RP 373-76, 417-18. L.M. liked Lopez and the other children liked him, too. 5RP 375-76. Salavea could communicate with Lopez using rudimentary English. 5RP 378-80.

When L.M.'s mother filed a written report about Lopez on June 6th, Overlake Ili gave the report to Salavea. 5RP 381. Salavea was shocked and surprised. 5RP 385, 397. She showed the letter to Lopez who denied the allegations. 5RP 386-87. He claimed that L.M. had been upset the day before, June 5th, when her mother did not pick her up at school, but that he had persuaded L.M. to get back on the bus to return to Bethel. 5RP 386-87, 397-98.[7] When Salavea learned that police had been called, she summoned Lopez to return and she knew that police interviewed him. 5RP 390.

[7] Although there should have been documentation of such event, none could be found, L.M.'s mother said there were no plans to pick L.M. up from school that day, and nobody ever spoke to her about that. 7RP 670.

On cross-examination, Witchley first established that all employees knew that there was security video and knew the locations of the cameras, suggesting that Lopez would not touch a child inappropriately in front of a video camera. 5RP 409-10. He then asked a series of questions to make clear that Lopez was not alone with L.M. on the morning of June 5th. 5RP 413-14. He asked Salavea to confirm that L.M. was upset on June 5th. 5RP 412-13. He reiterated (through the witness) that Lopez willingly returned to the school when he knew police were coming, and that Lopez submitted to an interview. 5RP 414-15. He then asked Salavea about Lopez's language skills and Salavea said that she had relied on "pantomime" to communicate effectively with him. 5RP 416-17. He also reiterated that Lopez had reacted with surprise and denial when told that L.M. accused him of touching her private area. 5RP 416.

The next witness to testify was Carolyn Webster, the child interview specialist from the prosecutor's office. 5RP 420. She testified about her training and experience, 5RP 423-25, and then she laid a framework for the jury to watch the video recorded interview of L.M. 5RP 425-38. Webster's testimony ran over the usual stopping time, but Witchley astutely chose to conduct his cross-examination in the short time available rather than wait until after a recess that was to last more than four days. 5RP 445, 451. Witchley's cross-examination was focused. He

clarified that Webster had no special certification, he established that she had been trained how to testify, and he suggested to the jury that she was "polished." 5RP 446-48. He challenged her technique of "asking [L.M.] the same general question three times in a row until she says something other than no." 5RP 449. He ended by asking her to confirm that L.M. was "a pretty smart kid." 5RP 450.

Officer Wilson testified to taking a statement from L.M.'s mother and to taking a statement from Lopez. 6RP 457-89. Again, Witchley's cross-examination was appropriate. 6RP 482-88.

Thomas VanArsdell, the assistant administrator at the school since 1999, testified next. 6RP 490-91. He outlined for the jury the school administration and the process for keeping bus logs. 6RP 491-97. He reviewed detailed logs showing that L.M. had been alone with Lopez on 16 dates between January and June, 2014, sometimes in the morning, sometimes in the afternoon. 6RP 502-08. He also testified that he reviewed the school's video surveillance system for June 5th and June 6th for any information relevant to this case. 6RP 509-20.

After lunch, the parties argued the admissibility of a hue and cry statement by L.M. Witchley outlined a cogent argument. He argued that L.M. had essentially made four separate disclosures and that this particular disclosure, that Lopez had spanked her on some undetermined date in the

past, was neither sexual nor specific enough to constitute a statement admissible pursuant to hue and cry. 6RP 527-31. The prosecutor responded and answered several questions from the judge. 6RP 531-36. The parties also had a preliminary discussion regarding the victim's shorts, and whether her mother should be required to produce those shorts for inspection at Witchley's insistence. 6RP 536. The discussion was tabled in favor of continuing with testimony before the jury.

Mr. VanArsdell then continued with his testimony. He testified that the defendant clocked out from work on June 5th after 4:30 p.m. and he said that there was disagreement at the daycare over whether employees should remain after clocking out. 6RP 537-40. He testified about a map of the property showing all the buildings and roads on the property; Witchley challenged him as to the scale but conceded admissibility after some questioning. 6RP 542. VanArsdell then testified that he had no trouble communicating with Lopez in English and he watched Lopez communicate with children, too. 6RP 543-45. VanArsdell then reviewed multiple frames from the video evidence and identified people and places on the video. 6RP 548-55.

At the afternoon break, the parties litigated the State's request to admit statements under hue and cry. 6RP 556. The Court pointed out that it might be admissible because a course of conduct over time was alleged.

Witchley reminded the court that he had objected to the amended information because he did not expect the evidence to support a course of conduct claim. 6RP 558. He argued that the State was simply trying to admit inadmissible child hearsay through the back door. 6RP 559-61.

VanArsdell then completed his testimony about the video evidence. 6RP 564-68. He testified that still photos taken from the video had been compiled by Lopez's wife and twin daughters. 6RP 569-70.

Witchley then cross examined him on numerous points. 6RP 571. He confirmed that the wife and daughters had not engaged in any "funny business" with the video and that VanArsdell had "no concerns" with the process. 6RP 572-73. He then attacked VanArsdell's testimony about the bus logs, pointing out that in only two of the 16 incidents did L.M. ride alone with Lopez in the mornings. 6RP 575-77. He also noted that VanArsdell could not be sure whether L.M. and Lopez were alone in the afternoons because that would depend on what precise route Lopez followed, and VanArsdell did not know that. 6RP 577. He raised some points about the detective's investigation. 6RP 577-78. And, he clarified that Lopez was not violating any written rule by failing to leave the daycare after he had formally clocked out. 6RP 579. Finally, he pressed VanArsdell over whether he had ever used any other employees to interpret in his communications with Lopez. 6RP 580-83.

After the jury was excused at the end of the day, Witchley persuaded the court to order L.M.'s mother to produce the shorts that L.M. was wearing on June 5th. Witchley had noticed the shorts upon watching the video on the first day of trial, he had obtained a follow-up interview with the victim, and he had asked her precisely how she could have been touched under those shorts. 6RP 588-91. Also, based in part on Witchley's arguments to the court, the court denied the State's request to reconsider one part of child hearsay that had been excluded. 6RP 592-95.

L.M. testified on March 4 and 5, 2015. 7RP 733-76; 8RP 790-816. She was reluctant to testify on direct examination about certain topics, and she answered those questions vaguely, or by saying she could not remember.

Witchley's cross-examination displayed tact, sensitivity, and skill. He started by obtaining permission of the court to wheel his chair around counsel table so that he could sit while questioning, so as not to threaten or appear to threaten the witness. 8RP 789. He asked her whether she recalled coming to an earlier hearing and upon seeing Lopez, "giving him a big smile and waving to him?" 8RP 800. He was able to convince her to talk about the video where she had earlier declined. 8RP 801. He stayed back from her in court to encourage her to keep her voice up. 8RP 802. He got L.M. to agree that instead of Lopez touching her head in the

video, maybe they were just playing a game. 8RP 802. He got her to agree that Lopez played games, goofed around with all the kids, not just her. 8RP 803. She agreed that he would tickle kids when they did not fasten their seatbelts. 8RP 804. As for the "scratching of the butt" issue, he confirmed with her that there was frost on the windows, and then juxtaposed that with her testimony that she was wearing shorts. 8RP 804. When it appeared she was getting reluctant to answer questions, he changed the topic and asked her about the stuffed animal she was holding. 8RP 807. And, he had L.M. describe the event in a way that invited the jury to question whether Lopez could have reached under her shorts while she was in a sitting position. 8RP 809-10.

Witchley also called eight witnesses (including the defendant) in the defense case. In addition to basic facts that would support Lopez's theories of the case, he skillfully elicited testimony from these witnesses to show how the defendant was surrounded by close friends and children, how they were shocked at the charges, and how they remained loyal to him even in the face of molestation charges.

Nelva Jimenez, the defendant's wife, testified at length about their family and their lives. 8RP 864-952. Eighteen-year old twin daughters Karen and Jennifer testified. 8RP 953-67, 968-79. The defendant's stepson, 24-year old Ivan Jimenez Matus, testified that he had lived with

Lopez since he was four or five years old, that he considered Lopez to be his father, that they had lived with his five siblings – including two girls – since he was about four or five years old, and that he is currently a teacher of children ages five to 12 years. 9RP 987-88. He discussed appropriate physical contact between staff and children and said that he had never seen Lopez do anything that was inappropriate. 9RP 995-96. He testified that he was shocked when he heard the allegations. 9RP 1000.

These same themes were echoed in the testimony of Leonardo Ponce, the defendant's 22-year old son. 9RP 1018. He testified that he and five siblings grew up with Lopez, he described the family's routines of the caring for the children, and he said that he was surprised upon hearing the accusation because "that's not something that you would be expecting." 9RP 1030. Siblings Joshua (16 years old) and Joyce (a sixth grader) testified about their morning routines and the family schedule. 9RP 1043-51, 1051-64.

Counsel also attempted to paint a somewhat unflattering picture of the victim. He developed the theme that she was an emotional or fragile child who was something of a "tattletale." *See* RP 921 (Nelva Jimenez), 9RP 997-98 (Ivan Jimenez Matus).

Counsel called Lopez as a witness at trial and led him through a lengthy, detailed and thorough direct examination covering Lopez's

personal history, his family history, his reasons for moving to Washington, his desire to start a church of his own, his military service in Guatemala, his work history, his limited ability to speak English, his commercial driver's license, the routines of work at Bethel, the bus routes and the timing of those routes, and other topics. RP 1067-1170. Counsel defended his client during cross-examination by objecting no fewer than nine times. RP 1014, 1034, 1059, 1116 (twice), 1122, 1126, 1128, 1160.

Finally, Witchley delivered an intelligent, articulate, cogent and methodical closing argument showing a sensitivity to language, legal concepts, and both the subtleties and generalities of the evidence. He fully explored the nuances of the bus routes and schedules, he illustrated conflicts in the evidence, he exploited any weaknesses in the State's evidence, he talked about general themes in child molestation prosecutions, and he cautioned the jury not to convict based on innuendo and insinuation. 10RP 1185-1203.

c. Witchley's Shortcomings.

Witchley failed to appear for court one day before trial officially started and the case had to be returned to the presiding department for reassignment. 11RP 1253. Once the case was assigned for trial, on February 12, 2015, Witchley arrived in court 10 minutes late. CP 43. He

explained that he had underestimated his travel time and that he had to park further away than expected. 2RP 48. The court admonished him. CP 43; 2RP 48. At the end of the day on February 23rd, the court reprimanded Witchley for being about 20 minutes late that morning. 3RP 238.[8] In so doing, the court remarked, "And frankly, I'm a little baffled. We've spoken about this a number of times. *You're obviously a very able trial attorney*, but this continues to be an issue." 3RP 238 (italics added). On March 4, 2015, the court admonished Witchley for being one hour and 20 minutes late to court in the morning. 6RP 521. Witchley explained that he left his trial files at home and had to turn back to get them. 6RP 522. The court asked Witchley why he did not file a brief on a legal issue as directed by the court. 6RP 523. Witchley replied that he was not sure whether the court had simply asked for or ordered a response. He also said that he had been very busy with being in trial. 6RP 524. The court sanctioned Witchley $250 for being late and $250 for failing to file the brief. He directed Witchley to pay immediately. 6RP 525-26. Witchley indicated that he could not afford to pay, and the court asked him to file an affidavit explaining his inability to pay. 6RP 526.

After trial, Witchley acknowledged that his tardiness was a problem. He said, "I had … a lot of stuff going on during the trial that

[8] The court had asked to start at 8:45 a.m. but because Witchley was late, they did not start until 9:10 a.m. *Compare* 3RP 61 to 3RP 238.

was ... personal and health stuff." CP 262. It appears that he was suffering from depression. 11RP 1314. His investigator opined that he struggled to perform tasks she had seen him handle in years past. CP 285-91. A mental health expert who apparently commented on Witchley's condition contrasted between his ability to manage a law practice with his ability to handle tasks more limited in scope. The expert said, "Steve is able to work very productively in focused areas, though has difficulty with managing the various demands of a full-time legal practice." 11RP 1315.

Witchley ultimately agreed to relinquish his license to practice law. He had violated trust account rules and failed to properly serve a number of clients. CP 304-10.

## D. ARGUMENT

Oscar Lopez received an excellent defense from his experienced, albeit troubled, lawyer. Steven Witchley thoroughly investigated this case, litigated pretrial motions, intelligently cross-examined the State's witnesses, astutely attacked the State's most important corroborating evidence, marshalled and professionally presented seven defense witnesses, effectively guided Lopez through his own testimony, and delivered a logical, persuasive closing argument. Such high-quality

representation does not dip below professional norms simply because counsel failed to present evidence that the defendant's co-workers and fellow parishioners believed Lopez had a good reputation in their small community for sexual morality. Evidence of a reputation for sexual morality is inadmissible. At best, it's admissibility is "somewhat muddy." It is not deficient performance to forgo evidence with a muddy provenance. The trial court erred in finding deficient performance.

Moreover, the failure to call reputation witnesses did not prejudice Lopez. Witchley skillfully developed a body of evidence showing that Lopez's co-workers, family, and fellow parishioners believed he was trustworthy with children. They were all shocked by the allegations, and clearly still were allied with Lopez. Most rational jurors would assume Lopez would not be driving a school bus at a daycare if he did not enjoy a good reputation for sexual morality. Express testimony to same point would have been only a marginal improvement over what had already been presented, and would not have changed the result in this case.

Finally, the trial court erred by ruling that there is a due process right to counsel free from mental illness. There is simply no authority for that ruling. Courts have consistently rejected per se rules as to ineffective assistance of counsel. The usual Sixth Amendment standards apply equally to claims that lawyers were mentally compromised.

1. LEGAL STANDARDS FOR EVALUATING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. The defendant has the burden of establishing that counsel was ineffective. Id. at 687. To prevail, the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different. Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed *de novo* on appeal. State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable

considering all the circumstances. Strickland, 466 U.S. at 688. Courts must strongly presume competence. Id. In any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Id. at 689. Counsel is not required to call all possible witnesses. In re Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998). "The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." State v. Sardinia, 42 Wn. App. 533, 540, 713 P.2d 122 (1986) (quoting Strickland, 466 U.S. at 689).

Courts must defer to a trial lawyer's decision not to call certain witnesses when the lawyer has investigated the case and made an informed, reasonable decision against conducting a particular interview or calling a particular witness. Jones, 183 Wn.2d at 340.

> 'Surmounting Strickland's high bar is never an easy task.' Padilla v. Kentucky, 559 U.S. 356, ——, 130 S. Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689–690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.

Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 787 (2011).

As for a claim that counsel was ineffective in failing to call certain expert witnesses, reviewing courts must recognize that there are a multitude of reasonable approaches in any particular case.

> Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach.

Harrington v. Richter, 562 at 106 (quoting Strickland, 466 U.S. at 689). Ultimately, the constitution guarantees a fair trial, not a perfect lawyer.

> A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting Finer, *Ineffective Assistance of Counsel,* 58 Cornell L.Rev. 1077, 1080 (1973)).

The defendant must also affirmatively show prejudice. Strickland, at 693. Prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. Petitioner must establish a reasonable probability that, but for

counsel's errors, the result of the proceeding would have been different. Id. at 694; McFarland, 127 Wn.2d at 335. The difference between Strickland's prejudice standard and a more-probable-than-not standard is "slight." Harrington v. Richter, 562 U.S. at 792. Under the Strickland standard, "the likelihood of a different result must be substantial, not just conceivable." Id.

Moreover, prejudice can be shown only if the decisionmaker *should* have relied on the questioned evidence as part of a rational decisionmaking process.

> A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry.

Strickland v. Washington, 466 U.S. 668.

2. EVIDENCE OF THE DEFENDANT'S REPUTATION FOR SEXUAL MORALITY AND DECENCY WAS INADMISSIBLE CHARACTER EVIDENCE, SO THE FAILURE TO PRESENT SUCH EVIDENCE IS NOT DEFICIENT PERFORMANCE.

ER 404(a)(1) provides:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of

> proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of Accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same....

Thirty years ago in State v. Jackson, this Court held that evidence of sexual morality and decency are not relevant in prosecutions for sexual abuse of a child. 46 Wn. App. 360, 730 P.2d 1361 (1986). Jackson was convicted of first degree statutory rape for sexual intercourse with a very young girl. The trial court refused to permit him to call two character witnesses "concerning his reputation for sexual morality and decency." Jackson, 46 Wn. App. at 364. This Court held that such evidence was properly refused.

> The crimes of indecent liberties and incest concern sexual activity, which is normally an intimate, private affair not known to the community. One's reputation for sexual activity, or lack thereof, may have no correlation to one's actual sexual conduct. Simply put, one's reputation for moral decency is not pertinent to whether one has committed indecent liberties or incest. The trial court properly refused to permit Jackson's witnesses to testify concerning his reputation for sexual morality and decency.

Jackson, at 365. This holding is directly on point and is binding precedent in trial courts. The trial court erred in disregarding it.

Instead of relying on this binding precedent, the trial court relied upon decisions from Divisions II and III of the Court of Appeals which the trial court said "permitted reputation evidence of sexual morality." 11RP

1308 (citing State v. Griswold, 98 Wn. App. 817, 991 P.2d 657 (2000) and State v. Harper, 35 Wn. App. 855, 859-60, 670 P.2d 296 (1983). This Court should reject the trial court's reasoning and the language in Griswold and Harper.

No testimony was offered in Harper that the defendant had a reputation for sexual morality or decency. Rather, the issue in Harper was whether reputation for the defendant's *truthfulness* was admissible in a prosecution for indecent liberties. Harper, 35 Wn. App. at 859-60. In that context, the court said:

> Defendant's character trait for truthfulness is not a trait pertinent to the charge of indecent liberties; rather, the specific trait pertinent to the charge is sexual morality and decency.

Id. Plainly, the language in Harper was dicta and is not binding on this Court.

Subsequent to the decisions in both Harper and Jackson, the Washington Supreme Court considered the case of State v. Thomas, 110 Wn.2d 859, 757 P.2d 512 (1988), and the trial court seems to have concluded that Thomas overruled Jackson. The trial court was mistaken.

Thomas was convicted of rape in the third degree for sexual intercourse with a 14-year old girl who was sleeping over at his house. Thomas, 110 Wn.2d at 861. Three of the defendant's closest friends testified to his reputation for sexual morality. Thomas, at 863-64. The

prosecution appears not to have objected to this testimony, or to closing argument drawing attention to the testimony. Id. The trial court refused, however, to instruct the jury on how to evaluate character evidence.

On appeal, Thomas argued that an instruction was required to guide the jury's deliberations. Id. at 860 ("The sole issue raised is whether the trial court must instruct on character evidence when the defendant has introduced relevant character testimony."). The supreme court held that an instruction was not required. However, because the admissibility of the evidence itself was never challenged, the court did not address the reasoning of Jackson. Thus, Thomas is not authority for the proposition that reputation evidence of sexual morality is admissible in Washington under ER 404(a)(1).

The court in State v. Griswold transformed the dicta in Harper and the inapposite holding in Thomas into a rule of law that conflicts with this Court's holding in Jackson. Griswold was a martial arts instructor convicted of child molestation in the third degree for sexual contact with a 14-year old student. The trial court, relying on Jackson, rejected Griswold's effort to present testimony from several witnesses as to his reputation for good sexual character. Division III held that the trial court had erred, because Thomas and Harper permit such testimony. Griswold, 98 Wn. App. at 828-29. Although the court recognized that language in

Harper regarding character evidence for sexual morality was dicta, the court failed to recognize that such evidence was never challenged in Thomas. Thus, the holding in Griswold is flawed, and is no more authority for the admissibility of such evidence than is either Thomas or Harper standing alone.

The reasoning in Jackson is sound and should be followed. Reputations for character traits like truthfulness or peacefulness are reliable evidence because public conduct reveals those traits, so a person can develop a reputation as to the trait. And truthfulness and peacefulness are truly elements of a person's character. Reputations concerning sexual conduct, however, are more likely to be based on speculation than on observed conduct. It is highly unlikely that a person will display or discuss his or her immoral or indecent sexual conduct. In fact, many offenders deliberately hide such behavior and they often simultaneously cultivate a false reputation for sexual morality and decency. Thus, a person's reputation for sexual conduct is unlikely to reflect his immoral or indecent conduct. For this reason, it is not a character trait "pertinent" to a criminal prosecution, if it is a "character" trait, at all.

Moreover, it is now more apparent than ever that a reputation for sexual morality is well-nigh meaningless as to a crime that occurs in private. As recently as a few decades ago, the average person imagined

sex offenders as an easily recognized deviant. Such presumptions may have made it appear reasonable to admit evidence of a good reputation for sexual morality. But, as prosecutions of sex offenders have increased over the last two decades, and as victims have become more open to discussing the crimes committed against them, and as more and more victims have spoken out and exposed the criminal behaviors of supposedly reputable people, it has become even more apparent than it was in the past that many admired people commit sexual crimes against children. Congressmen, priests, coaches, teachers have all been shown to be abusers of children.[9] Any one of these people could have mustered dozens of witnesses to testify (truthfully) that he or she had a reputation for sexual morality and decency. But such reputation was ultimately immaterial to the question whether they molested a child.

Indeed, even experts who study sex offenders agree that there is no psychological test to determine whether a man is a child molester, and there is no profile of a "typical" child abuser. See John E.B. Myers, *Myers on Evidence in Child, Domestic, and Elder Abuse Cases*, § 6.27 and 6.28 (4th ex. 2011). If science cannot answer the question of whether a person is predisposed to molest children, then reputation evidence certainly cannot.

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[9] *See, e.g.*, http://www.cnn.com/2016/04/27/politics/dennis-hastert-sentencing (last accessed 5/19/16).

For these reasons, the trial court erred in relying on Harper and Griswold instead of Jackson. It follows that Witchley was not ineffective for failing to offer evidence under ER 404(a), because such evidence would have been inadmissible.

### 3. TRIAL COUNSEL WAS NOT DEFICIENT IN PRESENTING EVIDENCE OF QUESTIONABLE ADMISSIBILITY IN LIGHT OF THE EXCELLENT DEFENSE LOPEZ RECEIVED.

Even if this Court determines that evidence of a defendant's reputation for sexual morality may be admitted at trial, it does not follow that Witchley was ineffective for failing to present such evidence in light of the "somewhat muddy" case law in this area. 11RP 1308. The trial court erred in this case when it framed the ineffective assistance of counsel as follows: "So this brings us to the heart of the matter: Was Mr. Witchley wrong [about the admissibility of character evidence]?" 11RP 1307. The issue is not whether Witchley was wrong or right, the issue was whether a reasonable attorney might have passed on the opportunity to present evidence under ER 404(a).

The Washington Supreme Court has held that a lawyer is not ineffective if he follows existing precedent. In re Det. of Coe, 175 Wn.2d 482, 491, 286 P.3d 29 (2012) ("It is difficult to imagine exactly how Coe's

counsel was deficient when then-controlling authority stated an instruction was not necessary."). Courts have also held that counsel's failure to anticipate changes in the law does not amount to deficient representation. State v. Brown, 159 Wn. App. 366, 372, 245 P.3d 776 (2011); State v. Slighte, 157 Wn. App. 618, 238 P.3d 83 (2010) (concluding that trial counsel is not deficient for failing to anticipate changes in relevant case law and adjusting legal trial strategy accordingly); United States v. Fields, 565 F.3d 290, 296 (5th Cir.) (recognizing that a majority of circuits of the United States Courts of Appeal find that counsel's failure to anticipate changes in the law does not amount to ineffective assistance), cert. denied, 558 U.S. 914 (2009).

As argued above, this Court held in Jackson thirty years ago that evidence of a defendant's reputation for sexual morality was not a pertinent trait of character under ER 404(a). This holding undoubtedly shaped counsel's impression that the evidence was not admissible in this trial. Although the supreme court might one day disagree with Jackson, it was binding precedent, and Witchley cannot be faulted for believing that ER 404(a) evidence was inadmissible, or for failing to push for its admission. A reasonable attorney may have refrained from offering such evidence.

Moreover, counsel is deficient only if his performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." Strickland, 466 U.S. at 687-88. Witchley presented an excellent defense for Lopez. He was aggressive in seeking Lopez's release pretrial, he professionally litigated pretrial motions, he skillfully cross-examined the State's witnesses to extract information helpful to Lopez, he attacked the State's video evidence, he presented seven witnesses whose testimony was plainly designed to persuade the jury not to convict Lopez, and he made a compelling closing argument. It is telling that no fewer than three times the trial court complimented Witchley's performance.[10] A single evidentiary shortcoming is not constitutionally deficient performance.

The trial court also erred when it relied on an unsworn statement in an email belatedly received from Witchley in which Witchley said he never considered whether to offer evidence under ER 404(a). 11RP 1309-10. There are several reasons this was error. First, Karen Sanderson testified under oath quite clearly that she and Witchley discussed developing and offering evidence of Lopez's reputation for sexual

[10] 3RP 238 (You're obviously a very able trial attorney, but this [tardiness] continues to be an issue."); 11RP 1283 (Even though I have to say, quite candidly, I thought Mr. Witchley, despite his tardiness, for the most part did a good job. But I am concerned about this one area."); 11RP 1317 ("Mr. Witchley, even despite his shortcomings, was a competent trial attorney for the most part, except for the evidentiary issues.").

morality. 11RP 1287, 1290-91. The trial court never mentioned this testimony in its oral ruling, nor did it explain why it would credit Witchley's unsworn, eleventh-hour email message more than Sanderson's sworn testimony at an evidentiary hearing. And, the State had no opportunity to test this statement through cross-examination. Secondly, even if Witchley's unsworn statement is credited, it doesn't establish deficient performance. Jackson has been the law in Washington since 1986, so it would not be surprising that Witchley would fail to consider offering evidence that is plainly inadmissible. Third, it is unknown how carefully Witchley considered his emailed statement, as it was simply a reply to the court's email regarding whether to unseal details about his mental health. And Witchley plainly desired to help his former client.[11] It certainly seems to assist his client to say that he did not make a tactical decision to fail to pursue evidence under ER 404(a).

4. LOPEZ FAILED TO PROVE PREJUDICE.

The trial court's prejudice ruling was erroneous for two reasons. First, the witnesses implicitly testified that they believed Lopez to have a reputation for sexual morality and decency; express testimony to that

[11] It might be argued that Witchley instructed Karen Sanderson to document his tardiness in order to support Lopez's motion for new trial. 11RP 1289.

effect would not have made an appreciable difference. Second, the trial court's ruling grossly overstated the effectiveness of reputation evidence.

Witchley skillfully coaxed testimony from many witnesses that was functionally equivalent to testimony that Lopez had a reputation for sexual morality and decency. Overlake Ili, Ruth Acosta, Sabrina Salavea, Nelva Jimenez, Ivan Jimenez, and Karen, Jennifer, Josh, and Joyce Lopez all testified that they were shocked by the accusations, and they were clearly supporting the defendant in spite of the criminal charges. Even the prosecutor acknowledged that Lopez was liked and trusted. 3RP 99 ("You're going to hear that the children [at Bethel] liked him, trusted him, and liked to play with him."). These people – and inferentially, others at Bethel Christian – all knew the defendant and they allowed him to keep driving a school bus. Any reasonable juror would conclude that these people believed the defendant to be of good moral character. Express testimony on the topic would have been superfluous. There was at best a marginal difference between what the jury heard and could infer from the existing defense witnesses, and the express reputation testimony that Lopez claims he wanted in his motion for new trial. This slight difference cannot establish a *substantial* likelihood of a different result at trial. Harrington v. Richter, 562 U.S. at 792.

The trial court found prejudice because "reputation evidence can be particularly impactful." 11RP 1310. The court cited nothing but jurors' statements in voir dire to support this assertion. In fact, there is no substantial evidence to support the conclusion that reputation evidence is generally impactful. As described above, even scientists expert in the topic cannot predict who will molest a child; reputation evidence cannot be better. And, to the extent Lopez hoped to gain some emotional traction from that evidence, he is not entitled to a verdict based on irrationality. The trial court was mistaken that reputation evidence was a basis to find prejudice.

### 5. THERE IS NO INDEPENDENT, FREE-STANDING DUE PROCESS RIGHT TO COUNSEL FREE FROM ILLNESS OR DISABILITY.

The trial court ruled that the Due Process Clause guarantees a right to counsel free from mental illness, and that Lopez was entitled to a new trial because Witchley suffered from depression. The court's ruling does not consider counsel's performance or its effect; it essentially says that a new trial is required whenever a defendant can show that counsel suffered from mental illness. There is no authority for this approach. In fact, numerous courts have refused to adopt rules of per se ineffectiveness based on disabilities suffered by counsel.

Courts hold that Strickland sets forth the standards for evaluating counsel's performance. For instance, in a case involving a lawyer with Alzheimer's disease, the Ninth Circuit has held as follows:

> The mere fact that counsel may have suffered from a mental illness at the time of trial ... has never been recognized by the Supreme Court as grounds to automatically presume prejudice. Moreover, in Smith v. Ylst, 826 F.2d 872, 876 (9th Cir.1987), the Ninth Circuit specifically rejected this basis for presuming prejudice. In rejecting defendant's argument that prejudice should be presumed where counsel may have had a mental illness, the Ylst court reasoned that "mental illness is too varied in its symptoms and effects to justify a per se reversal rule without evidence that the attorney's performance fell below the constitutional norm." Id.

Dows v. Wood, 211 F.3d 480, 485 (9th Cir. 2000). Similarly, in Johnson v. Norris, 207 F.3d 515, 518 (8th Cir. 2000), the court held that lawyer with bipolar disorder should not be presumed ineffective because

> "[o]ur Court has previously declined to adopt a rule requiring a per se presumption of prejudice with regard to mental illness....Bipolar disorder, like most mental illnesses, can have varying effects on an individual's ability to function, and the disease can vary widely in the degree of its severity. We are not convinced there is anything about Mr. Smith's bipolar condition that would not lend itself to the normal fact-specific Strickland analysis. ... Any errors Mr. Smith made, even as a result of his mental illness, should be apparent from the face of the trial record, or otherwise susceptible of proof, and thus readily reviewable.

*See also* Bellamy v. Cogdell, 974 F.2d 302, 308 (2d Cir. 1992) (holding that it was the Strickland standard, not a per se rule of ineffectiveness, that should guide the court's analysis where trial counsel admitted mental deficiencies to bar association). Thus, the trial court was simply mistaken

in its assertion that due process requires counsel uninhibited by struggle with mental illness.

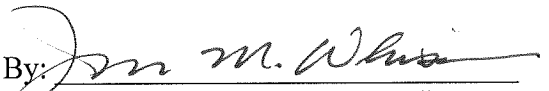
## E. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order granting a new trial and should remand this case for resentencing.

DATED this 24th day of May, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to George Trejo, the attorney for the respondent, at gptrejo@thetrejolawfirm.com, containing a copy of the BRIEF OF APPELLANT, in State v. Oscar Raul Lopez, Cause No. 74333-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 24TH day of May, 2016.

Name:
Done in Seattle, Washington