No. 47835-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Edward Wilkins,

Appellant.

Cowlitz County Superior Court Cause No. 14-1-01082-3

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Edward Wilkins was briefly married to Kyra Wilkins in 2008. RP 364-365. Ms. Wilkins's four children, including her daughter N.H. lived with the couple before and during their marriage. RP 364-365.

N.H. was diagnosed with genital herpes in 2008 when she was three and a half years old. RP 466; Ex. 2. Her doctor suspected that the disease had been caused by sexual abuse. Ex. 2, p. 1. He acknowledged, however, that there could also have been a benign explanation. Ex. 2, p. 1.

N.H. was interviewed by a child forensic interviewer in 2011. RP 406. N.H. did not make any disclosures warranting further action. RP 406-407.

She was interviewed again in 2014. RP 287. At that interview, she alleged that Mr. Wilkins had raped her. RP 301-303. She described a single incident of penile-vaginal penetration occurring when Mr. Wilkins had lived with her family six years earlier. RP 325-326. She did not allege any other inappropriate touching before or after that episode. RP 331-332.

During the interview, N.H. said that Mr. Wilkins did "bad things to kids." RP 302. She said that he had done the same thing to lots of other

children. RP 303. She said he had done it to older children and had probably done it to children younger than her as well. RP 303-304.

Still, N.H. maintained that she had not talked to anyone else about the allegations. RP 333-334.

Following this interview, a detective located Mr. Wilkins and confronted him about the allegation. RP 511-512. The detective had already obtained a search warrant for Mr. Wilkins's medical records, and knew that he had been diagnosed with herpes five years after the alleged incident. RP 511.

Mr. Wilkins told the detective that his positive herpes test was not enough evidence that he had done anything wrong. RP 515.

The state charged Mr. Wilkins with rape of a child in the first degree. CP 9.

The court held a child hearsay hearing on the admissibility of the video of N.H.'s 2014 interview. RP 13-177. The court found that N.H. and her mother did not appear to have been truthful regarding how much they had discussed the allegations before the 2014 interview. CP 6-7. Nonetheless, the court ruled that the entire video was admissible under the child hearsay statute. CP 8.

One the eve of trial, the state amended the charging document to add a charge of child molestation in the first degree. RP 232-235; CP 9.

The prosecutor acknowledged that the child molestation charge was based on the same single incident as the rape charge. RP 232-233. The prosecutor recognized that convictions for both charges would merge for double jeopardy purposes. RP 233.

The state moved pretrial to admit Mr. Wilkins's prior sex offense convictions under ER 404(b). RP 193. Mr. Wilkins objected, and the court denied the state's motion. RP 228. The court ruled that the previous offenses were not substantially similar to the current allegation and that any probative value of the evidence was far outweighed by the risk of unfair prejudice. RP 228-229.

Even so, the court denied Mr. Wilkins's motion to redact N.H.'s interview video to remove her references to Mr. Wilkins having done similar things to other children. RP 267-272. The court reasoned that another judge had ruled the entire video admissible following the child hearsay hearing, so the whole video would be admitted. RP 272.

Mr. Wilkins moved to exclude any evidence that he had been incarcerated before. RP 254-262. The court granted the motion, and excluded evidence that Mr. Wilkins's 2013 herpes test had happened while he was in prison. RP 256. The parties and court spoke at length about how they would sanitize the testimony of the physician's assistant who conducted the test. RP 256-258.

The court also granted Mr. Wilkins's motion to exclude evidence that his police interview had taken place while he was incarcerated. RP 259-262.

Mr. Wilkins's attorney agreed to the admission of the documentary evidence of Mr. Wilkins's herpes test. RP 286; Ex. 3. On the first page, Exhibit 3 indicates that the test was conducted at Monroe Correctional Facility. Ex 3, p. 1. Each of the two remaining pages are on Department of Corrections stationery with the department logo on the bottom. Ex 3, pp. 2-3. Defense counsel did not move to redact any of the information showing that his client had been previously incarcerated. RP 286.

During closing, the prosecutor argued that the jury should infer guilt from Mr. Wilkins's statement that the detective did not have enough evidence of his guilt. RP 558. The prosecutor told jurors that saying "that's not enough evidence" is different than saying "I didn't do it." RP 558.

He continued:

> A detective is talking to you about an investigation and he points this fact out, and your response – his response is 'That's not enough evidence.' That's a pretty incriminating statement.
>
> RP 558-559.

In rebuttal closing, the prosecutor addressed defense arguments about shortcomings in the state's evidence:

> … that's really not a fair fight for a defense attorney to parse out a child's words with such great specificity … she's only in the fifth grade.
> RP 600-601.

The prosecutor went on to argue that asking N.H. more questions would have been cruel:

> "You know, [N.H.] had to get in here and testify, at ten years old, about being raped, in front of the man who did it. How difficult would that be? So Defense complains we didn't ask her about her nightmares she was having about it. I think she was in here for long enough."
> RP 606.

The jury found Mr. Wilkins guilty of both rape of a child and child molestation. CP 30-31. The court entered convictions for both offenses and sentenced Mr. Wilkins for both. CP 44, 50.

This timely appeal follows. CP 61.

ARGUMENT

I. MR. WILKINS'S CONVICTIONS FOR BOTH RAPE OF A CHILD AND CHILD MOLESTATION VIOLATE DOUBLE JEOPARDY BECAUSE BOTH WERE BASED ON A SINGLE ACT OF PENETRATION.

Initially, the prosecutor acknowledged that the child molestation charge would be dismissed if the jury convicted Mr. Wilkins of both child

molestation and rape of a child. RP 233. The state agreed that a single act supported both charges. RP 232-233.

Still, the court entered convictions and sentences against Mr. Wilkins for both charges. CP 44, 50. By doing so, the court violated Mr. Wilkins's right to be free from double jeopardy. *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Both the Washington state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. VI, XIV; art. I, § 9; *Orange*, 152 Wn.2d at 815.[1] The *Blockburger*[2] or "same evidence" test controls the double jeopardy analysis unless there is a clear indication that the legislature intended otherwise. *Womac*, 160 Wn.2d at 652. Under the *Blockburger* test, multiple convictions based on a single act violate double jeopardy if the evidence necessary to support a conviction for one offense would also have been sufficient to support a conviction for the other. *Orange,* 152 Wn.2d at 816.

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[1] Double jeopardy violations are constitutional issues reviewed *de novo*. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Double jeopardy violations constitute manifest error affecting a constitutional right, which can be raised for the first time on appeal. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000); RAP 2.5(a)(3).

[2] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

The legal elements of the offenses are not dispositive of the *Blockburger* test for double jeopardy. *Womac*, 160 Wn.2d at 652[3]. In order to constitute separate offenses, two crimes must each include an element not included in the other *and* must each require proof of a fact that the other does not. *State v. Hughes*, 166 Wn.2d 675, 682, 212 P.3d 558 (2009).

Mr. Wilkins's child molestation and rape convictions constituted the same offense for double jeopardy purposes. The two offenses involved a single act of penetration, and were based on the same evidence. *Orange*, 152 Wn.2d at 816.

To convict Mr. Wilkins for rape of a child, the state was required to prove that he engaged in intercourse with N.H. RCW 9A.44.073. To convict for child molestation, the state was required to prove sexual contact with N.H. RCW 9A.44.083.[4]

Proof that Mr. Wilkins engaged in intercourse with N.H. was sufficient to prove that he engaged in sexual contact. Indeed, that is the only evidence the state presented to prove that Mr. Wilkins engaged in

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[3] *See also Orange*, 152 Wn.2d at 820 (holding that, because the offenses were both based on the single act of firing one shot at another person, attempted murder and assault constituted the same offense despite different legal elements); *State v. Martin*, 149 Wn. App. 689, 699, 205 P.3d 931 (2009) (finding that convictions for assault and attempted rape violated double jeopardy despite different legal elements).

[4] Sexual contact means any touching of the sexual or intimate parts for the purpose of gratifying sexual desire. RCW 9A.44.010(2).

child molestation. As such, the jury incontrovertibly convicted him for both offenses based on the same evidence.

The evidence necessary to convict Mr. Wilkins of rape of a child was also sufficient to convict him of child molestation. His conviction and sentence for both violated his right to be free from double jeopardy. *Orange,* 152 Wn.2d at 816.

Differences in the legal elements legal elements are not dispositive. *Womac*, 160 Wn.2d at 652. Here, the state proved both offenses using exactly the same facts.[5] *Id*; RCW 9A.44.010(2); RCW 9A.44.073; RCW 9A.44.083.

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[5] More than two decades ago, Division I held that differences in the elements of rape of a child and child molestation prevented the two offenses from merging. *State v. Jones*, 71 Wn. App. 798, 824-25; 863 P.2d 85 (1993). But *Jones* was decided before the Supreme Court clarified that any difference in the legal elements is not dispositive when the evidence necessary to prove one offense is sufficient to prove the other. *Orange,* 152 Wn.2d at 816; *Womac*, 160 Wn.2d at 652.

Jones was implicitly overruled by *Orange* and *Womac*.

Division I has also implied in *dicta* that rape by means of penetration is never the same offense as molestation, because"the touching of sexual parts for sexual gratification constitutes molestation up until the point of actual penetration." *State v. Land*, 172 Wn. App. 593, 600, 295 P.3d 782 (2013).

Land should not control here. First, the *Land* court was faced with separate acts of molestation and penetration; the quoted language is *dicta,* with no precedential value. Second, the *Land* court's assumption is also belied by the facts of Mr. Wilkins's case in which there was no evidence of any sexual contact prior to the penetration itself. Third, the *Land dicta* would not resolve the double jeopardy issue in Mr. Wilkins's case, because the court did not instruct jurors to base convictions for the two charges on separate and distinct acts. CP 11-29; *see State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). Accordingly, the jury convicted Mr. Wilkins for both offenses based on the single act of penetration, which was not preceded or followed by any other touching.

Mr. Wilkins's conviction for both rape of a child and child molestation violated the prohibition against double jeopardy. *Womac*, 160 Wn.2d at 652. His conviction for child molestation must be vacated. *Id.*

II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. WILKINS OF A FAIR TRIAL.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial. There is a risk that jurors will lend it special weight "'not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.'" *Glasmann*, 175 Wn.2d at 706 (quoting commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8).

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). The misconduct here was flagrant and ill-intentioned, and could not have been cured.

A. The prosecutor committed misconduct by arguing that jurors could infer guilt from Mr. Wilkins's statements regarding his rights to a jury trial and to due process.

During closing argument, the prosecutor argued that the jury should infer Mr. Wilkins's guilt based on his statement that the police did not have enough evidence to convict him. RP 558. The prosecutor said that saying "that's not enough evidence" is different than saying "I didn't do it." RP 558. He continued:

> A detective is talking to you about an investigation and he points this fact out, and your response – his response is 'That's not enough evidence.' That's a pretty incriminating statement. RP 558-559.

The state and federal constitutions guarantee the right to a jury trial. U.S. Const. Amends. VI; XIV; Wash. Const. art. I, §§ 21, 22; *State v. Williams-Walker*, 167 Wn.2d 889, 895, 225 P.3d 913 (2010).[6] Due process entitles an accused person to require the state to prove each

[6] The state constitutional right "shall remain inviolate" and is more extensive than the federal right. Art. I, §§ 21, 22; *Williams-Walker*, 167 Wn.2d at 895.

element of each charge against him/her. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const Amend. XIV; Wash. Const. art. I, § 3.

A prosecutor commits misconduct by arguing that an accused person's exercise of his/her constitutional rights constitutes evidence of guilt. *State v. Pinson,* 183 Wn. App. 411, 417, 333 P.3d 528 (2014). An accused person's exercise of his/her constitutional rights is not evidence of guilt. *State v. Silva*, 119 Wn. App. 422, 428-429, 81 P.3d 889 (2003). Due process prohibits the state from inviting the jury to infer that the accused is more likely guilty because of the exercise of his/her constitutional rights. *Id.*

Here, the prosecutor improperly argued that the jury should infer Mr. Wilkins's guilt based on his expression of his intent to hold the state to its constitutional burden. RP 558-559. The prosecutor's argument that Mr. Wilkins's assertion of that right was evidence of his guilt constituted misconduct. *Id.*; *Pinson,* 183 Wn. App. at 417.

An inference of guilt resting on exercise of a constitutional right "always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial."[7] *Silva*, 119 Wn. App. at 429.

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[7] Once such an improper comment has been made, "the bell is hard to unring." *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004). The situation puts defense counsel in

The evidence of Mr. Wilkins's guilt was not overwhelming. During her first forensic interview, N.H. did not claim that Mr. Wilkins had harmed her. RP 406-407. The court expressed doubts about her veracity and that of her mother. CP 6-7.

In this context, the prosecutor chose to take Mr. Wilkins's innocuous (and constitutionally protected) words and argue that they were affirmative evidence of his guilt. RP 558-559. The prosecutor pointed out that Mr. Wilkins had not declared his innocence. RP 558. Instead, he had called attention to the fact that he did not think the state could prove its case against him. RP 558-559.

Mr. Wilkins's statement on the exercise of his rights was not evidence of guilt. There is a substantial likelihood that the prosecutor's argument that it was a "pretty incriminating statement" affected the outcome of the trial. *Silva*, 119 Wn. App. at 429.

A prosecutor's explicit argument that an accused person's exercise of his/her constitutional rights constitutes evidence guilt cannot be remedied by a curative instruction. *Pinson*, 183 Wn. App. at 419. The prosecutor's improper argument in Mr. Wilkins's case constitutes flagrant and ill-intentioned misconduct. *Id.*

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the difficult position of gambling on whether to ask for a curative instruction "—a course of action which frequently does more harm than good" – or ignoring the comment. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by arguing that Mr. Wilkins's exercise of his constitutional rights to a jury trial and to due process constituted evidence of his guilt. *Silva*, 119 Wn. App. at 429; *Pinson*, 183 Wn. App. at 419. His convictions must be reversed and his case remanded for a new trial. *Id.*

B. The prosecutor improperly appealed to passion and prejudice by encouraging jurors to disregard weaknesses in the state's case because it had been difficult for N.H. to testify and it "wasn't a fair fight."

Mr. Wilkins's closing argument focused on the weaknesses in the state's evidence. RP 565-598. He pointed out, among other things, inconsistencies in N.H.'s story between her interview and her in-court testimony. RP 571-574. He also noted that the state had failed to elicit testimony from N.H. that would have corroborated what her mother said. RP 580.

In response the prosecutor told the jury that:

> … that's really not a fair fight for a defense attorney to parse out a child's words with such great specificity … she's only in the fifth grade.
> RP 600-601.

Later, the prosecutor argued that:

> You know, [N.H.] had to get in here and testify, at ten years old, about being raped, in front of the man who did it. How difficult would that be? So Defense complains we didn't ask her about her nightmares she was having about it. I think she was in here for long enough.

RP 606.

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is misconduct for a prosecutor to make arguments designed to inflame the passions or prejudices of the jury. *Id.*

Here, the prosecutor did not respond to Mr. Wilkins's closing by arguing that the defense theory was unsupported by the evidence. Nor did he point out evidence supporting conviction. Instead, the prosecutor implied that Mr. Wilkins was being 'unfair' to N.H. by pointing out the deficiencies in the state's case because she is "only in the fifth grade." RP 600-601.

The prosecutor implied that Mr. Wilkins was being callous toward N.H. by bringing up shortcomings in the state's evidence. RP 606. The prosecutor set the case up as a "fight" between Mr. Wilkins and N.H, and then argued that the fight was "not fair" because N.H. was a child. RP 600-601, 606.

The prosecutor encouraged the jury to overlook holes in the state's evidence by appealing to passion and prejudice. The argument was improper. *Glasmann*, 175 Wn.2d at 704, 706-07.

Mr. Wilkins was prejudiced by the prosecutor's misconduct. *Glasmann*, 175 Wn.2d at 704. As outlined above, the evidence against

Mr. Wilkins was not overwhelming. The prosecutor's improper arguments urged the jury to convict Mr. Wilkins despite the evidentiary problems in order to be 'fair' to N.H. There is a substantial likelihood that the prosecutor's improper arguments affected the outcome of Mr. Tyler's trial. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to standards and prior decisions prohibiting him from appealing to passion and prejudice. *See e.g. State v. Armstrong*, 37 Wash. 51, 79 P. 490 (1905); *State v. Stith*, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993); *American Bar Association Standards for Criminal Justice* std 3-5.8 (1993). The arguments were also inflammatory, and, accordingly, not curable by an instruction. *Pierce*, 169 Wn. App. at 552.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by appealing to the jury's passion and prejudice. *Glasmann*, 175 Wn.2d at 704, 706-07. Mr. Wilkins's convictions must be reversed. *Id.*

C. The cumulative effect of the prosecutor's misconduct deprived Mr. Wilkins of a fair trial

The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded,* 175 Wn.2d 1022, 295 P.3d 728 (2012).

The prosecutor here improperly argued that the jury should convict based on Mr. Wilkins's statements regarding his exercise of his constitutional rights. The prosecutor also improperly appealed to the jury's passion and prejudice. Whether considered individually or in the aggregate, the prosecutor's improper arguments require reversal of Mr. Wilkins's convictions. *Walker*, 164 Wn. App. at 737.

III. THE COURT SHOULD HAVE REDACTED N.H'S VIDEO STATEMENTS TO COMPORT WITH ITS ER 404(B) RULING EXCLUDING PRIOR ALLEGATIONS OF UNRELATED MISCONDUCT.

The court denied the state's motion *in limine* to admit evidence that Mr. Wilkins had been previously convicted of an unrelated sex offense. RP 221-228. The court recognized that the evidence would have impermissibly "shift[ed] the jury's attention to [Mr. Wilkins]'s general propensity for criminality." RP 222. The court also found that any

probative value of the prior conviction evidence was outweighed by the danger of unfair prejudice. RP 229.

As a result of the ER 404(b) ruling, the court and attorneys went to great lengths to sanitize evidence that a medical witness had examined Mr. Wilkins while he was in prison. RP 254-258. The court also excluded evidence that Mr. Wilkins was incarcerated at the time of his interview with the police. RP 254-262.

Still, the court denied Mr. Wilkins's motion to redact portions of N.H.'s interview, in which she claimed that he had done similar "bad things" to numerous other children. RP 262. The jury heard this evidence, including N.H.'s discussion of Mr. Wilkins having done bad things specifically to an older child (who was the alleged victim of his excluded prior conviction). RP 303-304.

The court abused its discretion by denying Mr. Wilkins's motion to exclude N.H.'s statements about his prior offenses. The court's decision that the evidence of prior misconduct encouraged a propensity inference and carried a high risk of unfair prejudice should have applied to N.H.'s statements.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith."[8] ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.[9] *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

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[8] Evidentiary rulings are reviewed for abuse of discretion. *State v. Slocum*, 183 Wash. App. 438, 449, 333 P.3d 541, 547 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

[9] ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). If the evidence is admitted, the court must give a limiting instruction to the jury. *Gunderson*, 181 Wn.2d at 923.

The court should have excluded N.H.'s statements about Mr. Wilkins having allegedly harmed other children under ER 404(b) and ER 403. Indeed the court noted that the evidence had little probative value and carried a high risk of unfair prejudice and confusion. RP 228-229. Accordingly, the court properly denied the state's motion to admit evidence of Mr. Wilkins's prior conviction. RP 228-229.

Still, the court failed to conduct the proper inquiry on the record regarding N.H.'s statements, as required under ER 404(b). *Slocum*, 183 Wn. App. at 448; *McCreven*, 170 Wn. App. at 458. Had it done so, the court would have noted (as it did when it denied the state's motion to admit the conviction documents) that the evidence was pure propensity evidence and did not fit into any of the exceptions under ER 404(b).

The court's decision admitting N.H.'s allegations of prior unrelated misconduct was manifestly unreasonable, in light of its finding that the evidence had little probative value and carried a high risk of prejudice and

confusion. RP 228-229. The court abused its discretion by denying Mr. Wilkins's motion to exclude N.H.'s statements about other alleged sex offenses. *Slocum*, 183 Wn. App. at 457.

The potential for prejudice from admission of other bad acts evidence is "at its highest in sex offense cases." *Slocum*, 183 Wn. App. at 442 (quoting *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)).

Such evidence is inadmissible "not because it has no appreciable probative value but because it has too much." *Id.* The evidence presents a danger that the jury will convict not because of the strength of the evidence of the charges but because of the jury's overreliance on evidence of other acts. *Id.*

Mr. Wilkins was prejudiced by the court's denial of his motion to exclude the 404(b) evidence. *Slocum*, 183 Wn. App. at 456. The evidence encouraged the jury to overlook the weaknesses of the state's case and convict Mr. Wilkins based on a vague sense that he was the type of person who commits sex crimes. There is a reasonable probability that the court's error affected the outcome of Mr. Wilkins's trial. *Id.*

The court abused its discretion by denying Mr. Wilkins's motion to exclude evidence of other allegations against him under ER 404(b).

Slocum, 183 Wn. App. at 448; *McCreven*, 170 Wn. App. at 458. His convictions must be reversed and his case remanded for a new trial. *Id.*

IV. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO SEEK REDACTION OF EXHIBIT 3, WHICH ESTABLISHED THAT MR. WILKINS HAD PREVIOUSLY BEEN IN PRISON.

Mr. Wilkins's defense attorney successfully advocated for the exclusion of any evidence of his prior incarceration. RP 254-262. The court and parties discussed the issue at length. They strategized ways to sanitize the testimony to remove any reference to his prior incarceration. RP 254-262.

Still, defense counsel agreed to the admission of Mr. Wilkins's unredacted Department of Corrections (DOC) medical records. RP 286; Ex. 3. The records clearly state that Mr. Wilkins was examined at Monroe Correctional Facility. Ex. 3, p. 1. Two of the exhibits three pages were printed on DOC letterhead. Ex. 3, pp. 2-3.

Mr. Wilkins's attorney provided ineffective assistance of counsel by failing to seek redaction of exhibit 3 to comply with the court's rulings excluding evidence of prior incarceration. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The right to counsel includes the right to the effective assistance of counsel.[10] U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (*citing State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and there is a reasonable probability that the result of the trial would have been different without the inadmissible evidence. *Id.*

Mr. Wilkins's attorney provided ineffective assistance by failing to seek redaction of language clearly indicating that Mr. Wilkins had been

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[10] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

incarcerated. *Saunders*, 91 Wn. App. at 578. No valid strategic reason can explain counsel's failure to object. Indeed, defense counsel recognized that the evidence was inadmissible and successfully argued for its exclusion. RP 254-262.

Mr. Wilkins was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. As the court recognized in granting defense counsel's other motions, evidence of Mr. Wilkins's prior incarceration would have been significantly prejudicial in the mind of the jury. RP 256.

The prejudicial impact of this evidence was exacerbated by the court's improper admission of N.H.'s statements regarding Mr. Wilkins's other offenses, discussed above. The two errors together strongly indicated to the jury that Mr. Wilkins had been previously convicted of a sex offense, and encouraged the jury to convict based on propensity. There is a reasonable probability that defense counsel's deficient performance affected the outcome of Mr. Wilkins's trial. *Id.*

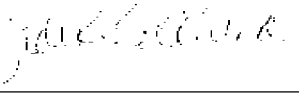
Mr. Wilkins's attorney provided ineffective assistance of counsel by failing to seek redaction of exhibit 3 to comply with the court's ruling excluding evidence of his prior incarceration. *Id.* Mr. Wilkins's convictions must be vacated and his case remanded for a new trial. *Id.*

CONCLUSION

Mr. Wilkins's convictions for both rape of a child and child molestation violate the constitutional prohibition on double jeopardy. The prosecutor committed misconduct by encouraging the jury to convict Mr. Wilkins based on his exercise of his constitutional rights and by appealing to passion and prejudice. The court abused its discretion by admitting N.H.'s statements about Mr. Wilkins's other alleged sex offenses. Mr. Wilkins's attorney provided ineffective assistance of counsel by failing to move to redact an exhibit indicating that he had been previously incarcerated. For all these reasons, Mr. Wilkins's convictions must be reversed.

Respectfully submitted on January 21, 2016,

BACKLUND AND MISTRY



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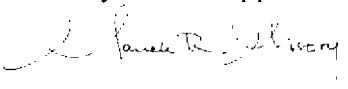

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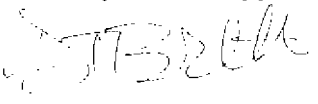

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Edward Wilkins, DOC #856755
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

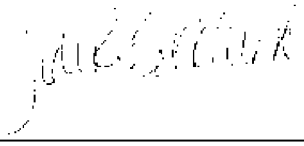
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 21, 2016.



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January 21, 2016 - 4:04 PM

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