Supreme Court No. 98573-1
(COA No. 79309-8-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN OLTMAN,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Brian Oltman, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Oltman seeks review of the Court of Appeals decision dated April 20, 2020, which is attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. The court deprived Mr. Oltman of his right to a fair trial by allowing the prosecution to introduce propensity evidence of a marijuana grow operation to establish Mr. Oltman was guilty of possession of methamphetamines with the intent to deliver or manufacture, in violation of ER 404(b).

2. The prosecutor's incurable misconduct in his closing argument by arguing the marijuana grow operation demonstrated Mr. Oltman's propensity to commit the charged crime requires a new trial.

3. Cumulative error prevented Mr. Oltman from receiving a fair trial, where the prosecution took advantage of the trial court's erroneous ruling on propensity evidence to ensure Mr. Oltman's conviction.

D. STATEMENT OF THE CASE

Brian Oltman's split-level home was shared with his wife and a roommate, known at trial as "Shawn." RP 192, 267-68. Mr. Oltman's bedroom and office were on the upper level. RP 207, 228. The lower level contained space where someone was growing a substantial amount of marijuana. RP 253. The marijuana was never alleged to belong to Mr. Oltman.

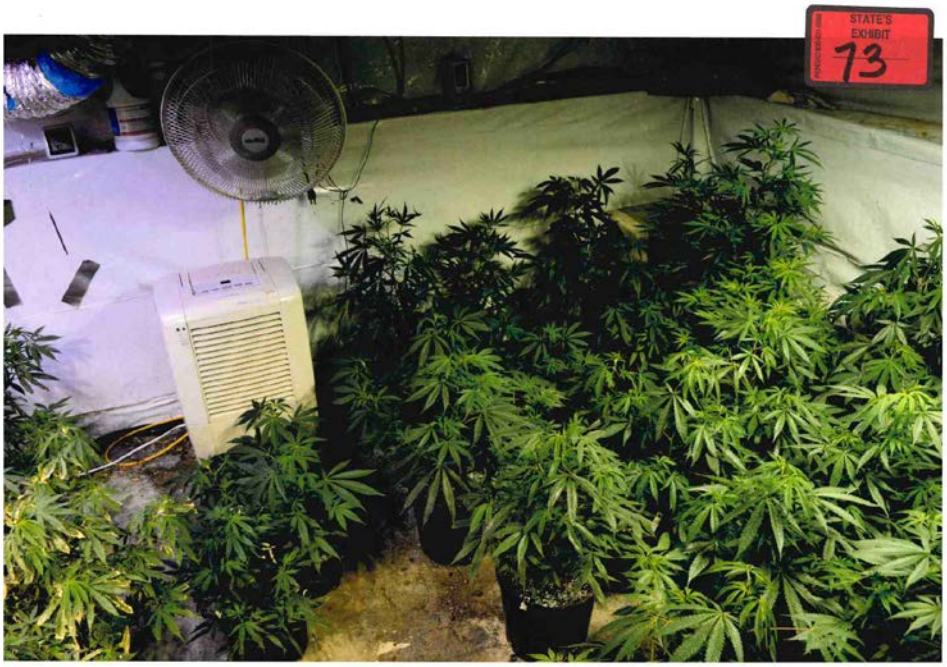
Instead, the government charged Mr. Oltman with possession of methamphetamine with the intent to manufacture or deliver. CP 52. This charge was based entirely on evidence found on the upper floor, where the government found about 16 grams of methamphetamine, along with 20 zip lock bags and a scale. RP 179. Ledgers, large amounts of money, small denomination bills, multiple

cell phones, or other evidence of delivery were not found in the house. RP 210, 213, 205, 239. Glass pipes, suggesting personal use, were also found. RP 220.

The police also found evidence suggesting someone was running a large-scale marijuana grow operation within Mr. Oltman's residence. RP 254. The police discovered a significant number of marijuana plants arranged in a way to suggest they were part of a grow operation. *Id.* None of the marijuana was found where any of the methamphetamine evidence was located. RP 253. No allegations were ever made that the marijuana grow operation was illegal.

Before trial, Mr. Oltman objected to the prosecution's use of the marijuana grow operation as evidence against him. RP 135. The prosecution argued evidence of the grow operation should be admitted to "bolster" the prosecution's case. RP 136. After conducting an ER 404(b) hearing, the court allowed the prosecution to admit evidence of the grow operation, finding there was a "logical tie" between the marijuana and a "larger enterprise" of drug dealing. RP 139.

Over Mr. Oltman's objection, the court also admitted several photographs demonstrating the breadth of the marijuana grow operation. RP 172. The court allowed these photographs to be shown to the jury. *Id.*



See, e.g., Ex. 73.

In closing arguments, the prosecution argued the marijuana grow operation showed Mr. Oltman's propensity to deliver or manufacture drugs. RP 307. In his closing statement, the prosecutor emphasized the marijuana grow

operation, again stating to the jury: "And marijuana. Plenty of marijuana was found in the house." RP 306.

The jury struggled with its verdict. Before finding Mr. Oltman guilty, the jury asked the court whether re-packaging the methamphetamines was sufficient to prove the charged crime. CP 25. After further deliberations, the jury found Mr. Oltman guilty of possession of a controlled substance with the intent to deliver or manufacture. CP 24.

The Court of Appeals held that ER 404(b) did not preclude the government from introducing the marijuana evidence at trial. App. 1. It also held the prosecutor did not commit misconduct by referring to the evidence as propensity that Mr. Oltman committed the charged crimes. App. 2. Mr. Oltman now asks this Court to accept review.

E. ARGUMENT

1. **The jury was improperly prejudiced by the court's error, allowing them to view large amounts of marijuana unrelated to the charged possession of controlled substance offenses.**

Review should be granted of whether Mr. Oltman's right to a fair trial was denied when the trial court allowed

the jury to hear of an uncharged marijuana grow operation to "bolster" evidence Mr. Oltman intended to deliver 16 grams of methamphetamine. Because this erroneous ruling deprived Mr. Oltman of his right to a fair trial, review should be granted. RAP 13.4(b). Further, this ruling conflicts with decisions of this Court, which also justifies review. *Id.*

a. The Court of Appeals decision relies on a decision in conflict with decisions of this Court.

The prosecution asked to introduce the marijuana grow operation evidence to "to show that a drug distribution operation was occurring within the home" because "it goes part and parcel [ ] with the drug distribution operation that the substances found in the home are also found on attendant paraphernalia that are used to distribute those substances" such as the scale. RP 136-37.

Even though Mr. Oltman was not alleged to have been involved in marijuana sales, the trial court reasoned Mr. Oltman's general plan was the "delivery of substances of . . . a chemical nature" and admitted the marijuana grow operation evidence because it allowed an inference Oltman was running

"a larger enterprise" and intended to distribute controlled substances, including methamphetamine. RP 138-39.

In denying Mr. Oltman relief, the Court of Appeals equated this case to *State v. Thomas*, a Court of Appeals case which involved three drug sales witnessed by police officers just before they made their arrest. App. 5 (citing *State v. Thomas*, 68 Wn. App. 268, 273-74, 843 P.2d 540 (1992)). This comparison is misplaced for many reasons, primarily because *Thomas* involves the sale of illegal drugs. *Id.* No allegation was ever made that the marijuana found in the Oltman household was unlawful. Additionally, the drugs involved in *Thomas* were the same and, unlike here, all illegal. *Id.*

The Court of Appeals failed to address this Court's ruling in *State v. Devries*, where this Court held evidence of a juvenile's prior delivery of pills was not admissible to show the juvenile knew the pill given to her friend was a controlled substance. 149 Wn.2d 842, 849, 72 P.3d 748 (2003). Indeed, it would appear that the Court of Appeals' reliance on *Thomas*,

which predates *Devries*, creates a conflict with this Court, again justifying acceptance of review by this Court.

b. Allowing the jury to hear other act evidence to "bolster" its case deprived Mr. Oltman of his right to a fair trial.

Allowing the jury to hear about the marijuana overwhelmed the jury's ability to consider whether the methamphetamine was intended for delivery fairly. This Court has warned of the danger of an unfair conviction when the jury hears propensity evidence. *State v. Everybodytalksabout*, 145 Wn.2d 456, 465-66, 39 P.3d 294 (2002). Review should be granted to correct this error and to reaffirm the dangers of relying on other act evidence to secure a conviction.

This Court understands other act evidence incites the "deep tendency of human nature to punish" a defendant simply because they are a bad person or a "criminal-type" deserving of conviction. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Evidence of prior bad acts is presumptively inadmissible, unless it is allowed by ER 404(b). *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

The marijuana evidence was introduced to show Mr. Oltman's propensity for selling drugs, even though the marijuana was not alleged to have been illegal, nor was it demonstrated Mr. Oltman was involved in its delivery. The impact of the marijuana evidence cannot be understated. This was not a few plants, but an operation taking up an entire floor of the house.

Ex. 71.

Showing the jury the marijuana grow operation was improper. *Devries*, 149 Wn.2d at 849. Bolstering, as argued

by the government, is not a reason for allowing the jury to hear about other act evidence. *Foxhoven*, 161 Wn.2d at 175. Instead, it prevents the jury from fairly hearing the relevant evidence presented at trial, thus depriving Mr. Oltman of his right to a fair trial. *Id.*; see also U.S. Const. amend. VI.

c. Review should be granted to correct the trial court's error in allowing the jury to hear improper propensity evidence.

Rather than convict Mr. Oltman for the crimes he may have committed, the evidence of the marijuana grow operation evoked an emotional response among the jurors, making it likely they convicted Mr. Oltman based on propensity evidence. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). This error was not harmless and deprived Mr. Oltman of his right to a fair trial. Relying on a case in conflict with this Court's jurisprudence, the Court of Appeals' decision conflicts with opinions of this Court. This Court should grant review on whether allowing the jury to hear improper propensity evidence requires a new trial for Mr. Oltman.

2. **The prosecutor's misuse of the prior act evidence improperly admitted by the trial court prevented Mr. Oltman from receiving a fair trial.**

The Court of Appeals held that the prosecution did not commit misconduct when it argued the marijuana could be used as propensity evidence to find Mr. Oltman guilty. App. 7. This holding conflicts with rulings of this Court. Because this ruling deprived Mr. Oltman of his right to a fair trial, Mr. Oltman asks this Court to accept review.

a. Arguing propensity to ensure a conviction is misconduct.

The Court of Appeals held that the prosecution did not commit misconduct because its arguments were within the scope of rulings made by the trial court. App. 8. First, this is an error. The prosecutor was never allowed to argue the jury should be allowed to rely on propensity evidence to find Mr. Oltman guilty. Second, if the trial court had made such an erroneous ruling, taking advantage of such a ruling by the prosecutor would still constitute misconduct.

Instead, this Court recognizes that when the government argues a defendant has the propensity to commit

a crime because of their other actions, it commits misconduct. *State v. Fisher*, 165 Wn.2d 727, 749, 202 P.3d 937 (2006); see also *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); U.S. Const. amend. VI. The Court of Appeals focuses on the prosecution's attempts to exceed the court's limitations in *Fisher* to distinguish it from this case, but that distinction is not the holding in *Fisher* nor other cases that address propensity evidence by this Court.

On the contrary, this Court held in *Fisher* that using evidence the trial court permitted the prosecutor to use under ER 404(b) for the limited purpose of rebutting delayed reporting went against the requirements of ER 404(b) and constituted misconduct. *Id.* at 749. This caused the jury to be left with the impression it was required to convict Mr. Fisher, not only for the crimes for which he was charged, but also for his uncharged acts. *Id.* Reversal was required, even though defense counsel did not object to this argument. *Id.*

The same thing happened here. In his closing arguments in this case, the prosecution committed the same

sort of misconduct. The prosecutor focused on the marijuana grow operation, arguing it proved Mr. Oltman's propensity to commit other drug related crimes.

The prosecutor argued:

> It's also not a large, logical leap -- and this is going back to the marijuana grow -- that he may be dealing in multiple controlled substances.

RP 306.

The prosecutor continued by stating:

> And marijuana. Plenty of marijuana was found in the house. Now, while the State is not asking you to convict him of distributing or possessing with intent to distribute marijuana or heroin, it is certainly indicative of a drug-dealing operation occurring in that home.

RP 307-07.

These arguments focused solely on Mr. Oltman's propensity to commit drug related crimes. Even if the marijuana grow operation was admissible for permissible purposes, the prosecution's use of it to prove propensity was improper. *Fisher*, 165 Wn.2d at 749; see also *State v. Salas*, 1 Wn. App.2d 931, 947, 408 P.3d 383, review denied, 190 Wn.2d 1016 (2018). Using the evidence to argue propensity

constitutes misconduct and deprived Mr. Oltman of his right to a fair trial.

b. This Court should accept review, to correct the trial court's error and to correct the conflict between this case and cases of this Court.

There is a substantial likelihood the prosecutor's misconduct affected the jury's verdict. The prosecution preemptively argued the marijuana grow operation demonstrated Mr. Oltman's propensity to commit drug-related crimes. This argument prejudiced Mr. Oltman in a close case. There was limited evidence Mr. Oltman was engaged in the delivery of methamphetamines and no evidence he was manufacturing that drug. During deliberations, the jury asked the court whether re-packaging a drug for personal use constituted the crime of delivery. CP 25.

Like ER 404(b), rules against misconduct are designed to ensure persons accused of a crime is only convicted of the crimes they committed. Arguing Mr. Oltman had a propensity

for committing drugs crimes deprived Mr. Oltman of his right to a fair trial. Mr. Oltman asks this Court to accept review.

3. Cumulative error prevented Mr. Oltman from receiving a fair trial.

The Court of Appeals did not address the cumulative error issue raised by Mr. Oltman in his appeal. In addition, to the issues addressed above, this Court should also address whether the cumulative error of allowing the propensity evidence to be heard by the jury requires a new trial.

The cumulative error doctrine applies to cases in which "there have been several trial errors that standing along may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *Fisher*, 165 Wn.2d at 772 (Madsen, J., concurring); see also *Salas*, 1 Wn. App.2d at 952.

Like *Salas*, the evidence in this case was not overwhelming. 1 Wn. App.2d at 952. The error in allowing the jury to hear about a marijuana grow operation, being shown photographs of the large scale nature of the operation, and then being told that the marijuana grow operation showed that it was "indicative of a drug-dealing operation" deprived

Mr. Oltman of his right to a fair trial. These errors collectively created substantial prejudice against Mr. Oltman and denied him his right to a fair trial. *See State v. Pierce*, 169 Wn. App. 533, 556, 208 P.3d 1158 (2012); *Salas*, 1 Wn. App.2d at 952.

This Court should accept review of whether the cumulative error doctrine applies when an error made by the trial court is taken advantage of by the prosecution to use propensity evidence to convict Mr. Oltman. This error deprived Mr. Oltman of his right to a fair trial and warrants review.

F. CONCLUSION

Based on the preceding, Mr. Oltman respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 19th day of May 2020.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX

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

STATE OF WASHINGTON, Respondent, v. BRIAN CHRISTOPHER OLTMAN, Appellant.	)	No. 79309-8-I UNPUBLISHED OPINION

VERELLEN, J. — Prior conduct evidence must be relevant to the crime charged to be admissible under ER 404(b). When charged with the possession of methamphetamine with intent to manufacture or deliver, evidence of the current production of a large quantity of marijuana, together with packaging materials adjacent to a scale with traces of methamphetamine and marijuana, is relevant to the intent to manufacture or deliver. Although the State did not charge Brian Oltman for illegally manufacturing or delivering marijuana, the trial court's admission of the marijuana grow operation in his home was not precluded by ER 404(b).

Oltman argues the prosecutor committed misconduct during his closing argument by using evidence of the marijuana grow operation to argue Oltman had a larger plan to manufacture and distribute a variety of drugs. Because a

prosecutor has wide latitude to make arguments from the evidence and the argument stayed within the scope of the trial court's decision to admit evidence of the grow operation, Oltman fails to show any misconduct.

Therefore, we affirm.

FACTS

The police conducted a drug raid on Oltman's split-level house in southeast Everett in May of 2016. On the upper level, officers found "a little bit" of crystalline methamphetamine in the master bedroom.[1] Three used pipes for methamphetamine were in the master bathroom. They found a 16 gram bag of methamphetamine inside Oltman's office with a likely street value of $640. The office also contained a digital scale that tested positive for traces of methamphetamine, heroin, and marijuana. There were clean, empty baggies near the scale. On the lower level, officers found a marijuana grow operation. The State charged Oltman with one count of possession of methamphetamine with the intent to manufacture or deliver.

Pretrial, Oltman moved to exclude evidence of the grow operation and of electricity theft. The court denied the motion for the grow operation, reasoning it was allowed under ER 404(b) as relevant evidence of a "larger enterprise," and granted the motion for electricity theft.[2] The jury found Oltman guilty on the single

[1] Report of Proceedings RP (Oct. 31, 2018) at 207, 279 (drug lab technician testimony confirming the powder found was meth).

[2] Id. at 139.

charge of possession of methamphetamine with the intent to manufacture or deliver.

Oltman appeals.

ANALYSIS

Oltman argues retrial is required because he was prejudiced by the trial court's admission of testimony and photos of the marijuana grow operation. We review a trial court's interpretation of an evidentiary rule de novo.[3] If the trial court interpreted the rule correctly, we review its decision to admit or exclude evidence for abuse of discretion.[4]

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character."[5] But character evidence can be admitted for any number of proper purposes, such as showing the existence of a common scheme or plan or as intent evidence.[6] To admit character evidence, the trial court must

> "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to

[3] State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012) (quoting State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)).

[4] Id.

[5] Id. at 420.

[6] Id. at 421; State v. Dillon, ___ Wn. App. 2d ___, 456 P.3d 1199, 1207 (2020).

> prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."[7]

Oltman does not dispute that he had a marijuana grow operation in his house.

The State offered the evidence "to show that a drug distribution operation was occurring within the home" because "it goes part and parcel [ ] with the drug distribution operation that the substances found in the home are also found on attendant paraphernalia that are used to distribute those substances" such as the scale.[8] The court reasoned Oltman's general plan was the "delivery of substances of . . . a chemical nature"[9] and admitted the marijuana grow operation evidence because it allowed an inference Oltman was running "a larger enterprise" and intended to distribute various controlled substances, including methamphetamine.[10]

A court may admit evidence of other acts under ER 404(b) as proof of intent. The evidence must be relevant to the crime charged. It may not be admitted "simply to prove the character of the accused in order to show that he or she acted in conformity with it."[11]

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[7] State v. Sage, 1 Wn. App. 2d 685, 699, 407 P.3d 359 (2017) (quoting Gresham, 173 Wn.2d at 421).

[8] RP (Oct. 31, 2018) at 136, 137.

[9] Id. at 138.

[10] Id. at 139.

[11] State v. Thomas, 68 Wn. App. 268, 273, 843 P.2d 540 (1992).

In State v. Thomas, this court upheld the conviction of Thomas for possession of cocaine with intent to manufacture or deliver.[12] The trial court admitted evidence of three apparent drug sales by Thomas witnessed by police officers outside a restaurant before they arrested him inside the restaurant. This court recognized that the three apparent drug sales "logically relate[d] directly to the material issue of what Thomas intended to do with the cocaine he possessed when he was arrested."[13] Because the evidence was highly probative of what Thomas intended to do with the cocaine and its probative value greatly outweighed the prejudicial effect, the trial court properly admitted the evidence consistent with ER 404(b).[14]

Here, the intent of Oltman to package and distribute the $640 worth of methamphetamine in his possession was in dispute. The scales and the clean, empty baggies next to it were relevant to his intent by showing he owned and used the tools to divide larger quantities of drugs into measured amounts. Evidence of Oltman's intent to manufacture or distribute one controlled substance in his possession, marijuana, logically related to his intent to distribute the other controlled substance in his possession. On the record before us, the marijuana grow operation was relevant to Oltman's intent to carry out the manufacture and/or

[12] 68 Wn. App. 268, 843 P.2d 540 (1992).

[13] Id. at 273.

[14] Id. at 274.

distribution of controlled substances. The court did not err by concluding ER 404(b) allowed admission of the grow operation evidence.

Oltman argues the State did not prove the marijuana grow operation was illegal and so was more prejudicial than probative. But a past act does not need to have been illegal to be admissible as evidence of intent under ER 404(b).[15] As the State contends, Oltman's "intent to deliver or manufacture marijuana was interrelated and co-occurring with evidence of his plan to deliver marijuana."[16] This connection is particularly probative of his intent because the scale used to weigh methamphetamine and divide it into smaller quantities was also used to weigh marijuana, which is a controlled substance regardless of its legality. The marijuana grow operation evidence was prejudicial, but "unfair prejudice," not mere prejudice, is the standard for exclusion.[17] As discussed, the marijuana grow operation and the drug-tainted scale were part of the relevant circumstances. The circumstances showed a direct link between the methamphetamine and marijuana. The jury could infer Oltman's intent "'as a logical probability from all the facts and circumstances.'"[18] The grow operation evidence was more probative of

[15] See State v. Johnson, 159 Wn. App. 766, 773, 247 P.3d 11 (2011) (concluding ER 404(b) allowed as intent evidence a receipt showing a defendant's sale of 150 pounds of copper wire from the day before he was arrested for allegedly stealing copper wire).

[16] Resp't's Br. at 6.

[17] ER 403.

[18] State v. Yarbrough, 151 Wn. App. 66, 87, 210 P.3d 1029 (2009) (quoting State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)).

Oltman's intent to manufacture and distribute controlled substances than it was prejudicial. The court did not abuse its discretion by admitting evidence of the grow operation.

Oltman contends the prosecutor engaged in misconduct by arguing in closing that the existence of the marijuana grow operation demonstrated his intent to manufacture or distribute methamphetamine.

Oltman must demonstrate the prosecutor's closing argument was both improper and prejudicial.[19] A prosecutor has "wide latitude" during closing argument to argue reasonable inferences from the evidence.[20] We review allegedly improper arguments in the circumstances of the entire trial.[21]

Oltman relies on State v. Fisher.[22] In Fisher, a stepfather was on trial for sexually abusing his stepdaughter. The trial court properly allowed evidence of the stepfather's history of physically abusing his children but only for a limited purpose and only then if the defense opened the door for it.[23] But the prosecutor brought up the history of physical abuse both in his opening argument and repeatedly in his case in chief, violating the court's ruling and depriving the defendant of the decision on whether to open the door to that evidence.[24] And

[19] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

[20] Id.

[21] Id.

[22] 165 Wn.2d 727, 733, 202 P.3d 937 (2009).

[23] Id. at 734, 736.

[24] Id. at 734-35, 747-48.

during closing, the prosecutor again violated the court's ruling by urging the jury to rely on the defendant's history of physical abuse to conclude he committed sexual abuse.[25] Because the prosecutor repeatedly violated the court's pretrial ruling and those violations introduced highly prejudicial evidence, the court ordered a retrial.[26]

Here, the prosecutor's closing argument stayed within the scope of the court's pretrial ruling allowing the State to introduce testimony and photos of the grow operation and evidence about the marijuana on the scale. It prohibited pictures of "marijuana-related paraphernalia" only.[27] In closing, the prosecutor argued:

> It is not a large, logical leap that a person who is conducting a drug-trafficking business is doing so out of his office. It is also not a large, logical leap that while doing so he is keeping his drug-dealing supplies nearby. It's also not a large, logical leap—and this is going back to the marijuana grow [operation]—that he may be dealing in multiple controlled substances. The digital scale was covered in residue of two other drugs besides methamphetamine. Heroin. No heroin was found in the house. And marijuana. Plenty of marijuana was found in the house. Now, while the State is not asking you to convict him of distributing or possessing with intent to distribute marijuana or heroin, it is certainly indicative of a drug-dealing operation occurring in that home.[28]

Unlike Fisher, the prosecutor here made arguments within the scope of the court's pretrial ruling. Although the prosecutor used the marijuana grow operation to argue Oltman was distributing more than methamphetamine, the argument was a

[25] Id. at 747-48.

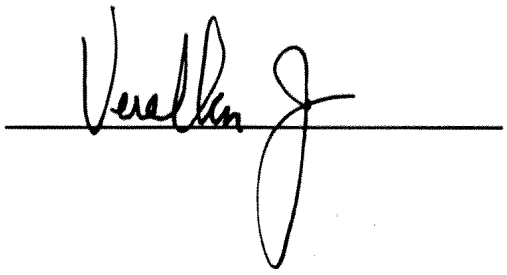
[26] Id. at 749.

[27] RP (Oct. 31, 2018) at 139.

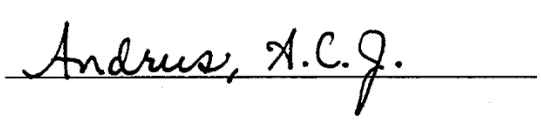
[28] RP (Nov. 1, 2018) at 306-07.

logical inference permitted by the evidence properly admitted by the trial court. Because the prosecutor did not engage in misconduct by making arguments within the scope of the court's ruling, Oltman fails to demonstrate prosecutorial misconduct occurred.

Therefore, we affirm.



WE CONCUR:



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MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 19, 2020
Washington Appellate Project

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