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No. 63749-5-1

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

2010 FEB 23 AM 8:32

COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
FILED

STATE OF WASHINGTON, Respondent

v.

LARRY GRUBB, Appellant

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR:

- A. Defendant was Denied his Due Process Right to a Fair Trial when he was Denied his Right to a Bill of Particulars.
- B. The Trial Court Abused its Discretion by Admitting the Mukilteo Incident as a Prior Bad Act
- C. The Trial Court Abused its Discretion by Allowing the State's Expert Witness to Testify at Trial.
- D. The Cumulation of Errors Denied Defendant a Fair Trial.

II. STATEMENT OF THE CASE.

A. Facts.

Larry Grubb, appellant, has been married to his wife, Lynne Grubb, for 20 years. RP 562, ll. 24-25. Since then they have lived in their current house in Mukilteo, Snohomish County, Washington. RP 565, ll. 19-25.

Lynne Grubb is the mother of Tami O'Neill-Riddle. RP 212, ll. 5-6. Tami is married to Ralph Riddle and they have a daughter, ER, born July, 1997, as well as a son, JR. RP 107, ll. 11-14. The Riddles moved into a new home in Lynden, Whatcom County, Washington, in late 2004. RP 254, ll. 9-10.

Occasionally, the Grubbs would travel to Lynden to see the Riddle family or the Riddle family would travel to Mukilteo to see the Grubbs. RP 737, ll. 17-22. The families usually visited at one or the other of their houses

around the holidays and the Riddle children's birthday celebrations. RP 216, ll. 20-25; RP 689, ll. 21-25; 690, ll. 1-7.

The Grubbs holiday visits to the Riddles were limited by Lynne's nursing schedule. RP 561-562. Lynne worked as a school nurse during the school year and summer school. RP 561, ll. 21-25; 562, l. 1. When school was out, Lynne worked for Children's Hospital. RP 562, ll. 2-9. Children's Hospital asked Lynne to work at least one holiday each year, sometimes more, and Lynne preferred to work on Thanksgivings and New Years, so she could spend Christmas with her grandchildren. RP 562, 11-21. Occasionally, when Larry had to work, Lynne would visit the Riddles by herself, but those times when Lynne had to work, Larry remained home, as he did not go up to visit the Riddles by himself. RP 151, ll. 17-23; RP 573, ll. 9-14, 15-19.

The Grubbs did not travel to the Riddles for Thanksgivings, because Lynne always worked on Thanksgiving. RP 709, ll. 18-24. The Grubbs traveled up to the Riddles for Christmas Day, 2004. RP 575, ll. 10-19. The Grubbs spent Christmas' 2005 at their house in Mukilteo. RP 575, ll. 23-25. For Christmas' 2006, Lynne traveled up to the Riddles by herself. RP 576, ll. 1-4. The Grubbs traveled up to the Riddles and stayed the night on New Year's Eve, 2006. RP 696, ll. 15-25; 697, ll. 1-6. The Grubbs also traveled

up to the Riddle's house for Christmas in 2007. RP 576, ll. 5-12.

When the Grubbs celebrated Christmas with the Riddles, Larry liked to document the occasions by videotaping the events. RP 119, ll. 16-22; RP 146, ll. 21-25; 147, l. 1; RP 577, ll. 2-11. Lynne had videos that Larry took from 2003-2007, but not one for 2006. RP 577, ll. 6-7, Defense Exhibit # 26.

On one unspecified date, ER and JR spent the night at the Grubb's home in Mukilteo. RP 346, ll. 7-12; 760, ll. 2-10. ER and JR decided to sleep in the Grubb's bed with the Grubbs because the bed in the guest room squeaked. RP 349, ll. 2-7. During the night, Larry woke up because he was being repeatedly kicked by one of the Riddle children. RP 762. Larry removed the foot and got up and went to sleep in the other room. RP 762, ll.19-25; 763, ll. 1-5.

In July, 2008, Tami asked Lynne to take ER, and her brother JR, to her home in Mukilteo because Tami had to work. RP 236, ll.16-18. ER and JR attended a relative's wedding with Lynne and spent the remainder of the weekend with the Grubbs. RP 303, ll. 9-25; 304, ll. 1-6. Upon ER's return home, in response to unprompted questioning from Tami, ER claimed that, while nothing happened that time, Larry had touched her inappropriately in the past. RP 306, ll. 3-18. According to Ralph, ER gave a detailed account of

events where Larry had done things to her in the past. RP 116, ll. 14-22.

On August 7, 2008, Lynden Police Detective Beld met with ER and her family. RP 478, ll. 15-22. ER's account to Detective Beld was detailed. RP 121, ll. 9-18.

Prior to returning to the Riddle's home for the purpose of writing ER's statement, Detective Beld spoke with the Whatcom County Prosecuting Attorney's office, seeking advice on what information to include in the statement. RP 482, ll. 23-25; 483, ll. 1-6.

On August 25, 2008, Detective Beld returned to the Riddle home and typed out ER's statement. RP 481, ll. 12-25.

The statement Detective Beld typed for ER included the following facts regarding the timeframe of the alleged acts:

The first time occurred, “[a]bout when I was 8 years old, my **grandpa was over for either Christmas or Thanksgiving**”, that it happened “**approximately 9 times in all**” occurring “**about every Thanksgiving, Christmas, and New Years**” and ER was “**pretty sure it happened last on Christmas of 2007.**”

Plaintiff's Exhibit #8.

The typed statement also included an allegation that once, when ER and JR spent the night with the Grubbs in their bed at the Grubb's home in Mukilteo, ER awoke to find Larry holding her foot and rubbing her foot on

his penis (the Mukilteo incident). Plaintiff's Exhibit #8. The only specific date alleged in ER's statement written by Detective Beld, was the date that ER claimed she told her friend about the incidents. Plaintiff's Exhibit #8.

On August 28, 2008, Larry was charged in Whatcom County Superior Court with nine counts of Rape of a Child in the first degree, alleged to have occurred between July 29, 2005 and December 31, 2007. CP 150-52.

B. Procedural History

1. Pretrial

(a) Defendant's Motion for a Bill of Particulars.

On January 14, 2009, in the hearing on the bill of particulars, defense counsel moved the trial court to require the State to provide defendant with a bill of particulars on the dates the alleged incidents were alleged to have occurred, asserting that defendant had a right to a bill of particulars in this case because: (1) this was not a case of "generic" sexual abuse; (2) defendant understood that ER was alleging specific holidays; and (3) defendant intended to assert an alibi defense. CP 31, p. 6.

The State opposed defendant's motion for a bill of particulars, asserting that: (1) the information was sufficient as it put defendant on notice of the crimes alleged and the acts that constitute the crime; (2) that the bill of

particulars would bind the State in this case and that was not practical as this case was more like a “generic” sexual abuse case than a single or few counts; (3) that time was not an element of the offense, not of the essence, and (4) that defendant did not have a due process right to a bill of particulars. CP 31, pp. 7-11.

The trial court agreed with the State and found that, although some cases did seem to suggest that defendant might have right to bill of particulars in this case, the State should not be required to provide a bill of particulars for the following reasons: (1) the State cannot know what the alleged victim will say about the dates; (2) access could be unchecked even if for a couple hours during a day visit; (3) time is not of the essence and not an element of the offense; (4) if defendant did not commit the alleged crimes he should be able to defend against them with or without specific dates; and (5) defense is aware that the holidays are at issue and that is sufficient to allow defense to prepare an alibi defense. CP 31, pp. 20- 25.

(b) ER’s Defense Interview.

Also on January 14, 2009, after the motion for a bill of particulars, the defense interviewed ER. RP 377, ll. 5-11; Defense Exhibit #17. ER did not allow the interview to be tape recorded, so defense was required to take notes

to document the interview. RP 378, ll. 8-12. During her interview, ER alleged specific information for nine alleged events, by which dates could be determined with reasonable certainty.

According to ER:

The first alleged incident occurred around Christmas time, 2004, in her new house.

The second alleged incident occurred on an unknown date when ER's parents went to a Christmas party, the Grubbs came up to her house to babysit and stayed night.

The third alleged incident occurred on Christmas, 2005. The Grubbs came up to the Riddles on Christmas Eve. The Grubbs stayed the night.

The fourth alleged incident occurred between Christmas 2005 and New Year's Day, 2006. ER stated she was 8 years old at that time.

The fifth alleged incident occurred on New Year's Eve, 2005.

The sixth alleged incident occurred on Christmas, 2006. The Grubbs came up on Christmas Eve and stayed the night.

The seventh alleged incident occurred on an unknown date at Larry's house in Mukilteo.

The eighth alleged incident occurred on Christmas Eve, 2007.

The ninth alleged incident occurred two weeks after Christmas, 2007.

Defense Exhibit #17.

On April 1, 2009, defense counsel filed its trial brief in this case. CP

127-137. No trial brief was filed by the State.

The weekend before trial, in response to questions posed by the defendant, the State informed defendant: (1) that while it was agreeing to dismiss the Mukilteo incident as a charged count in the Information, it planned to seek admission of the incident as a prior bad act under ER 404(b) and RCW 10.58.090; RP 39, ll. 18-22; and (2) that Joan Gaasland-Smith, named on the witness list, was an expert witness it might call to testify on issues of credibility of ER such as delayed reporting and denial of abuse. RP 57, 3-9.

2. Trial.

(a) Motions in Limine:

On April 13, 2009, the morning of the first day of trial, the trial court heard motions in limine. RP 3-73.

(i) The Mukilteo Incident.

The State agreed, in motions in limine, to dismiss the Mukilteo incident as a charged count and filed an Amended Information, deleting count nine and changing the alleged beginning date of the offenses from June 25, 2005, to December, 2004. RP 36, ll. 17-25; CP 122-24.

Defendant objected to the State's intention to seek admission of the

Mukilteo incident because defendant was not given notice and because it was inadmissible as a prior bad act under both ER 404(b) and RCW 10.58.090. RP 39, ll. 23-25; RP 40-43, l. 7; RP 52, ll. 2-25; RP 53-54, l. 4.

Conversely, the State argued that notice was sufficient under RCW 10.58.090. RP 45, l. 1-25; RP 46, ll. 1-4. The State also argued that the Mukilteo incident would come in as a prior bad act under both ER 404(b) and RCW 10.58.090 and asked the Court to make findings to admissibility of the Mukilteo incident as a prior bad act under both ER 404(b) and RCW 10.58.090. RP 46, ll. 14-25, RP 47-51, l. 11.

The trial court granted the State's motion to introduce the Mukilteo incident at trial, concluding that the Mukilteo incident was admissible as a prior bad act under both RCW 10.58.090 and ER 404(b). RP 56, ll. 6-12.

(ii) The State's Expert Witness.

On February 17, 2009, the State filed its List of State's Witnesses in the present case. CP 138. The State's Witness list identified six witnesses. One of the State's identified witnesses was identified as "Joan Gaasland-Smith – Prosecutors – Sex Aslt Spec." CP 138.

Prior to the weekend before trial, defendant had not received any information on Ms. Gaasland-Smith from the State, other than that she was

named on the State's witness list. RP 57, ll. 10-20; CP 138.

All of the other witnesses on the witness list were fact witnesses. There was nothing on the witness list to distinguish Ms. Gaasland-Smith from the other witnesses on the witness list. Defendant had no reason to believe that Ms. Gaasland-Smith would be called as an expert witness in this case.

On the first day of trial, at the hearing on the motions in limine, defendant informed the court of the late notice and moved for the witness to be excluded. RP 57, ll. 3-20.

The trial court inquired of the State as to whether an Omnibus Order was entered in this case and noted that this should have been disclosed when the Omnibus Order was entered. RP 60, ll. 9-10, 14-17. The State said an Omnibus Order was sent out, but did not know if had ever been returned with a signature. RP 60, ll. 11-13.

The trial court ordered the State to present Ms. Gaasland-Smith for a defense interview so defendant could determine if he needed to obtain his own expert. RP 61, ll. 4-13.

The defense interviewed Ms. Gaasland-Smith the morning of the second day of trial, and, after the jury was empanelled, the defendant moved

for her to be excluded for lack of relevance and improper notice. RP 88, l. 25; 89, ll. 1-3.

The State believed that it sent a copy of Ms. Gaasland-Smith's resume to defense months prior, but in response to the trial court's question, acknowledged that it did not have proof showing that the CV was sent to defendant. RP 90, ll. 18-24.

The trial court determined that Ms. Gaasland-Smith's testimony was relevant but expressed concern about the State's lack of disclosure, as a violation of Criminal Court Rule 4.7. RP 97, ll. 3-25; 98, 1-5. The trial court acknowledged the discovery error, but concluded that defendant's failure to seek a continuance prior to the jury being empanelled put the trial court in the untenable position of either declaring a mistrial or excluding the witness. RP 101, 5-6; RP 101, ll. 14-21. The trial court ruled that the expert witness would not be excluded, despite the State's violation of the rules of discovery. RP 103, ll. 4-9.

(b) Trial Testimony.

(i) Ralph Riddle.

ER's father, Ralph Riddle, testified at trial that when he first discussed this matter with ER, she gave a very detailed account of what

occurred. (RP 116, ll. 19-22). Ralph Riddle also testified to the detailed account that ER first gave to Detective Beld. (RP 121, ll. 15-18).

(ii) Tami Riddle

Tami O'Neill-Riddle testified that the Riddles and the Grubbs did not get together regularly for Thanksgivings as Lynne worked a lot of Thanksgivings. RP 218, ll. 23-25; 219, ll. 1. The Riddles sometimes went to the Grubbs for Thanksgivings. RP 219, ll. 3-5. Lynne would come up in the summers to babysit the Riddle children, but Larry was often working. RP 219, ll. 20-21. When both the Grubbs came up to the Riddles to stay overnight, it was for Tami's work's Christmas party. RP 219, ll. 24-25; 220, ll. 1-2. Tami only recalled that Larry came up for New Year's Eve, 2006. RP 222, ll. 4-10. Tami was uncertain whether the Grubbs came up for Thanksgiving at her house. RP 222, ll. 19-20. Tami was uncertain of whether the Grubbs attended all of Riddles' Christmas celebrations from 2004 to 2007. RP 222, ll. 21-25; 223, l. 1; RP 255, ll. 11-25; 256, ll. 1-17. Tami recalled that when the Grubbs did travel to the Riddles to celebrate Christmas, they usually came up Christmas morning. RP 224, ll. 6-22; 224, ll. 23-25; 225, l. 1. Tami agreed that Larry taped the holiday get-togethers. RP 251, ll. 16-25.

(iii) ER's Trial Testimony.

ER testified that she sees the Grubbs on Christmas, Thanksgiving, and birthdays. RP 300, ll. 16-18.

The relevant parts of ER's testimony regarding the time frame of the alleged sexual acts went as follows:

The first alleged incident occurred in her new house. RP 307, ll. 8-25. ER did not remember when the alleged incident occurred, or whether it was a holiday or not. RP 308, ll. 5-18.

The second alleged incident occurred a few months later, also at her house. RP 314, ll. 10-23; 315, ll. 17-19.

The third alleged incident occurred the next year, at her house, on an unknown holiday in 2005. RP 319, ll. 7-16; 320, ll. 7-13.

The fourth alleged incident occurred on New Year's Eve, 2005, at her house. RP 323, ll. 12-20; 324, ll. 1-4.

The fifth alleged incident occurred around Thanksgiving, 2006, at her house. RP 330, ll. 14-22; 331, ll. 16-18; 332, ll. 1-7.

The sixth alleged incident occurred on Christmas Eve, 2006. RP 335, ll. 23-25. ER was sure about the date because the Grubbs normally come up Christmas Eve and stay the night. RP 336, ll. 4-5.

The seventh alleged incident occurred on Thanksgiving, 2007, at her house. RP 338, ll. 10-18; 339, ll. 1-2.

The eighth alleged incident occurred on Christmas Eve, 2007, at her house. RP 341, ll. 4-5; 341, ll. 14-15; 342, ll. 6-7.

The Mukilteo incident.

On an unknown date, ER alleged that after she fell asleep in the Grubb's bed, she woke up to find Larry holding her foot and rubbing it on his penis. RP 353, ll. 2-11; 355, ll. 1-14. A picture, depicting the event, which was drawn by ER in a defense interview, was admitted. RP 356, ll. 3-25; 357-358, l. 1; Plaintiff's Exhibit # 7.

After being shown Plaintiff's Exhibit #8, Detective Beld's typed statement of ER's statement, ER recalled that another alleged act occurred the first year, on Christmas Eve, 2004. RP 362, ll. 12-25; 363, ll. 1-22.

Defense counsel cross-examined ER on her testimony at trial versus the statements she made in her defense interview on January 14, 2009. RP 378, ll. 5-25; Defense Exhibit #17 - defense investigator's notes of January 14, 2009 defense interview. ER could not explain why her initial statement typed by Beld was vague, why she was provided detail in her defense interview, and why her trial statements were vague. RP 408, ll. 16-21; RP

408, ll. 22-25, 409, 1.3; RP 409, ll. 20-23.

(iv) Detective Beld's Trial Testimony.

On direct-examination, Detective Beld testified to the following regarding the information he sought and included in the August 25, 2008, statement he typed for ER:

Q: At the time it was important for you to find out when the abuse that she was describing began; is that right?

A: Correct.

Q: And was it also important for you to find out when it had ended, when the last time it happened?

A: Correct.

Q: Did you try to get from her specific details about any incidences [sic] between the first time and the last time?

A: I did not.

Q: Can you explain why you did not do that?

A: I had made a phone call into the prosecutors office. I believe I talked to Mac Setter. Mac said, you know, I think really the best - -

RP 482, ll. 12-25.

Q: You might not be able to get into what you were told.

A: Okay.

Q: But is it a result of that conversation?

A: Yeah, I was told as a result of that conversation, I took up the first incident that she remembered and the last incident that she remembered.

RP 483, ll. 1-6.

(v) Ms. Gaasland-Smith's Trial Testimony.

Ms. Gaasland-Smith testified on why children deny or delay reporting

instances of child abuse. RP 471, ll. 4-25; 472, ll. 6-18. Ms. Smith also testified that children will typically disclose sexual abuse to other children without telling their parents. RP 472, ll. 19-25; RP 473, ll. 1-11. Ms. Gaasland-Smith concluded her testimony testifying that it is not unusual for parents to allow someone whom they suspect of abusing their child to continue to have contact with their child. RP 475, ll. 3-19.

(vi) Lynne Grubb's Trial Testimony.

Lynne Grubb testified at trial that she worked as a nurse for a school and that when school was out, she worked for Children's Hospital as a consulting nurse. RP 561, ll. 21-25; 562, l. 1; RP 561, ll. 7-9; RP 562, ll. 2-10. Children's Hospital asked its nurses to work at least one holiday a year, sometimes more. RP 562, ll. 13-15. Lynne preferred to work on Thanksgiving and sometimes New Years for Children's Hospital. RP 562, ll. 11-18. Lynne chose to work those holiday shifts so she could spend Christmas with her grandchildren. RP 562, ll. 19-21. When Lynne worked for Children's Hospital over the holidays, it was usually the early shift, 6:00 a.m. – 2:30 p.m. or 7:00 a.m. to 3:30. RP 579, 18-24. Lynne would also work a 2:00 a.m. to 6:00 am. shift due to staff shortages. RP 579, ll. 17-21. When Lynne worked the early shift she usually did not travel to the Riddle's. RP 579, l. 25;

580, ll. 1-6. Defense provided Lynne's work records from Children's Hospital to substantiate her work history. Defense Exhibit #25.

Sometimes, Lynne went to the Riddle's without Larry. RP 573, ll. 4-8; 12-14. Larry did not spend any holidays at the Riddle's without Lynne RP 573, ll. 15-22. Due to Lynne's work schedule, the Grubbs did not celebrate Thanksgivings with the Riddles. RP 575, ll. 7-9; 583, ll. 4-9; 585, ll. 10-25; 586, l. 1; RP 589, ll. 16-20; RP 691, ll. 2-5; 8-25; 692, ll. 1-10. Due to Lynne's work schedule, the Grubbs did not spend New Year's Eve, 2004 or New Year's Day, 2005, with the Riddles. RP 583, ll. 10-25; 584, ll. 1-25; 593, ll. 18-25; 594, ll. 1-3. The Grubbs spent Christmas Eve and Christmas 2005 at their home in Mukilteo. RP 575, ll. 23-35; RP 594, ll. 18-25; 595, ll. 1-2; Defense Exhibit 26.

The Grubbs did not spend New Year's Eve, 2005 or New Year's Day, 2006, with the Riddle's as Lynne worked on-call New Years Eve, 2005, and a full shift New Years Day, 2006. RP 587, ll. 14-25; RP 595, ll. 12-17. Lynne defined on-call as being ready to go to work on short notice, half an hour, and she generally stayed home when she was on-call. RP 588, ll. 12-25.

Lynne worked an eight hour shift on Christmas Eve, 2006. RP 589, ll. 21-25; 590, ll. 1-2. On Christmas day, 2006, Lynne went to the Riddle's

home without Larry. RP 573, ll. 23-25; 574, ll. 1-2; 576, ll. 1-4; RP 596, ll. 1-4. Lynne worked on-call from December 17-23, 2007, actually going in for a shift on December 21, 2007. RP 591, ll. 13-21. After Christmas, 2007, Lynne worked on-call from December 27-30, 2007, with a regular shift on December 30, 2007, and twice activated on December 29-30, 2007. RP 591, ll. 21-25. Lynne worked both New Year's Eve, 2007, and New Year's Day, 2008. RP 591, ll. 9-12.

Lynne Grubb testified that she went up to visit the Riddles once when she was on-call, for Christmas, 2007, but that was only after she had requested and was granted permission to do so. RP 649, ll. 20-25; 650-51, l. 1.

Lynne had video, documenting their Christmases with the Riddles, taken by Larry for Christmas' 2004, 2005, and 2007. RP 577, ll. 6-11; 595, ll. 3-5; 596, ll. 22-25; 597, ll. 1-3; 655-659, l. 10, ll. Defense Exhibit # 26.

In summary, Lynne Grubb's testimony, together with her work records and the videos presented at trial, demonstrated that the only times that Larry was at the Riddles in Whatcom County during the holidays from 2004 to 2007, were Christmas Eve and Christmas, 2004, New Year's Eve, 2006, and Christmas, 2007.

Lynne also recalled one occasion when the Riddle children spent the night with the Grubbs at their Mukilteo home in their bed. RP 671, ll. 20-24. Lynne recalled the Riddle children moving around in the bed. RP 672, ll. 11-13. Lynne recalled waking up, seeing Larry waking up, but it was too dark to see anything. RP 672, ll 21-25.

On cross examination, Lynne acknowledged that she had earlier told the defense investigator that, when she awoke that night in Mukilteo, she saw Larry holding ER's foot. RP 714, ll. 12-23. The State marked Plaintiff's Exhibit #30, a "confidential memo to attorney". RP 714, ll. 10-12. Lynne also acknowledged, on cross-examination, that she told the defense investigator that Larry later told her that ER had been flopping around in her sleep and her foot touched his private while she was sleeping. RP 715, ll. 8-13.

(vii) Larry Grubb's Trial Testimony.

Larry videotaped the Christmas and birthday gatherings. RP 749, ll.9-13. Larry did not go to the Riddle's for Christmas of 2006, as he and Lynne had a disagreement. RP 749, ll. 21-25; 750, ll. 1-2. Larry recalled going to the Riddle's for Christmas Eve, 2007, and staying the night. RP 751, ll. 8-25; 752, ll. 1-6. Larry recalled travelling up to the Riddles on a New Years Eve, either 2005 or 2006, and staying the night. RP 753, ll. 1-14. No

Thanksgivings were spent at the Riddles. RP 753, ll. 24-25; 754, l. 1. Larry recalled spending Christmas with the Riddles, twice, in 2004 and 2007. RP 754, ll. 2-3.

III. LEGAL AUTHORITY/ARGUMENT

A. Defendant Was Denied His Due Process Right to a Fair Trial When he was Denied his Request for a Bill of Particulars in Preparation for his Alibi Defense and the State Possessed the Requested Information.

An accused has a constitutional right to be informed of the nature and cause of the accusation against him or her so as to enable the accused to prepare a defense. U.S. Const. amend. 6; Wash. Const. art 1, § 22, amend. 10.

1. Bill of Particulars.

Where an information does not allege the nature and extent of the crime with which the defendant is accused, so as to enable the defendant to properly prepare his or her defense, a bill of particulars is appropriate and is specifically authorized by court rule. *State v. Bergeron*, 105 Wn.2d 1, 18-19, 711 P.2d 1000 (1985) (citing *State v. Holt*, 104 Wn.2d 315, 320-21, 704 P.2d 1189 (1985) and CrR 2.1(e) (now CrR 2.1(c)).

CrR 2.1(c) provides in pertinent part:

The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10

days after arraignment or at such later time as the court may permit.

The granting of a bill of particulars is within the discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 844, 809 P.2d 190 (1991), citing *State v. Devine*, 84 Wn.2d 467, 471, 527 P.2d 72 (1974) and *State v. Brown*, 45 Wn.App. 571, 578, 726 P.2d 60 (1986). The function of such a bill is to amplify or clarify particular matters considered essential to the defense. *Noltie*, 116 Wn.2d at 845, citing *Holt*, 104 Wn.2d at 321.

(a) Information.

The original Information in this case charged the defendant with committing nine acts of Rape of a Child in the first degree over a two and one-half year period. CP 150-52.

(b) ER's Written Statement of August 25, 2009.

During discovery, Defendant received a copy of ER's statement. Plaintiff's Exhibit #8. ER's statement was notably vague on the dates of the alleged acts, alleging that it began when she was "about 8" that the acts occurred "approximately 9 times" and "about every Thanksgiving, Christmas, and New Years" and ended, "I'm pretty sure" on "Christmas of 2007". Exhibit #8.

Defendant knew he did not commit the alleged acts and planned to prove that by presenting evidence that not only did he not commit the alleged acts, but he could not have committed the alleged acts because he was not present on most of the alleged dates.

Accordingly, defendant sought a bill of particulars to determine the exact dates of the allegations.

(c) Bill of Particulars Hearing of January 14, 2009.

In the bill of particulars hearing, both the State and defense cited *State v. Hayes* and *State v. Brown*, the State also cited *State v. Cozza*, and the trial court cited *State v. Jensen*. The trial court stated that its decision denying the bill of particulars relied primarily on *State v. Hayes*, 81 Wn.App. 425, 914 P.2d 788 (1996).

The cases cited by the trial court and the State in support of denying defendant's motion for a bill of particulars are inapposite to the present case. First, distinguishable from the present case, all of the cited cases are properly classified as "resident" offender cases, where a defendant lives with an alleged victim over a period of time, and has "virtually unchecked access" to the defendant. *State v. Jensen*, 125 Wn.App. 319, 323, 104 P.3d 717 (2005); *Hayes*, 81 Wn.App. at 433; *State v. Cozza*, 71 Wn.App. 252, 271, 858 P.2d

270 (1993).

Also distinguishable, *Brown* and *Hayes* both involved “generic” or regular, frequent, sexual abuse. *Brown*, 55 Wn.App. 738, 780 P.2d 880 (1989), review denied, 114 Wn.2d 1014 (1990)); *Hayes*, 81 Wn.App. at 435;

Further distinguishable, none of the defendants in the cited cases sought a bill of particulars, or even presented an alibi defense, at trial. *Hayes*, 81 Wn.App. at 440, 441; *Cozza*, 71 Wn.App. at 257; *Jensen*, 125 Wn.App. at 323-24; *Brown*, 55 Wn.App. at 748.

Finally, the cited cases stand largely on the fact that the alleged victims in each case could not provide the alleged dates. *Brown*, 55 Wn.App. at 741-42; *Jensen*, 125 Wn.App. at 326-27; *Cozza*, 71 Wn.App. at 272; *Hayes*, 81 Wn.App. at 429. However, as seen below, that was not the case here.

The trial court possessed enough information to grant defendant’s motion. The trial court was made aware that the incidents were alleged to have occurred three times a year during major holidays of Thanksgiving, Christmas, or New Years. CP 130, 13-14. Defense made an offer of proof, that the times at issue were a matter of hours two or three times a year, at most. CP 130, p. 16. Defense properly requested that the State be required to

narrow its focus to those dates that ER was alleging. Yet, the Court declined to require the State to provide a bill of particulars in keeping with the represented dates. CP 130.

The defendant was denied a bill of particulars in the present case because the trial court presumed that ER did not possess knowledge from which the specific dates could be determined and the trial court failed to distinguish the present case from the cited cases.

(d) ER Possessed Information from Which Specific Dates Could be Determined.

In present case, ER did possess knowledge sufficient to determine specific dates, but this knowledge was not recorded by the State.

ER's father, Ralph Riddle, testified at trial that when he first discussed this matter with ER, her allegations were very detailed. RP 116, ll. 19-22. Ralph further testified that he was present when Detective Beld met with ER and ER also gave Detective Beld detailed allegations regarding the alleged events. RP 121, ll. 15-18. Detective Beld's impression of ER was that she was "sharp". RP 481, ll. 4-11.

However, the information provided in ER's statement typed by Detective Beld when he met with ER again on August 25, 2008, was not detailed; it was remarkable only for its vagueness. Plaintiff's Exhibit #8.

It is now known that the vague nature of the statement Detective Beld typed for ER, specifically regarding the lack of dates for the alleged acts, was not an accurate description of the information ER alleged, but was generalized on the advice of the State.

(e) The State Controlled the Flow of Information in this Case.

The prosecuting attorney represents the people and is presumed to act with impartiality ““in the interest only of justice.”” *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (quoting *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1986) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Detective Beld testified at trial that he was acting on advice from the Whatcom County Prosecuting Attorney’s Office when he only took the first and last dates of the occurrences and did not get specifics regarding the other alleged acts. RP 482, ll. 12-25. The State requested and received from Detective Beld the specific information it needed to support the charges against the defendant.

That ER’s allegations were more detailed than either defense or the

bill of particulars' court were aware of at the time of the hearing on defendant's motion for a bill of particulars, was made clear when defense interviewed ER.

(f) ER's Interview

During her defense interview ER alleged specific information to support specific dates for most of the alleged charges. Defense Exhibit # 17. The specific information provided by ER regarding the alleged occurrences was in stark contrast to the general nature of the information provided by the State. Plaintiff's Exhibit # 8.

Due to the State's either sitting on information or choosing not to seek such information from the alleged victim, from which certain dates could be ascertained, the trial court hearing the bill of particulars argument did not possess all the information necessary to make a proper ruling on the bill of particulars. It is very likely that had the trial court known that ER possessed specific dates, defendant's motion for the bill of particulars would have been granted.

2. Defendant was Denied his Due Process Right to a Fair Trial by the Court's Refusal to Grant his Motion for a Bill of Particulars.

A defendant's fundamental right to due process is implicated where the evidence may be so general that it effectively precludes mounting a

successful defense, such as alibi or misrepresentation. *State v. Brown*, 55 Wn.App. 738, 748, 780 P.2d 880 (1989) (citations omitted). Whether a defendant has been afforded due process depends in part upon the defense available to him. *Id.*

A defendant has no due process right to a reasonable opportunity to raise an alibi defense in single or multiple act sexual assault cases. *Hayes*, 81 Wn.App. at 441 (citing *Cozza*, 71 Wn.App. at 259). Time is not of the essence in sexual assault cases, and it does not become an element of an offense merely because defendant pleads an alibi defense. *Id.* (citing *Cozza*, 71 Wn.App. at 258-59).

In the hearing on the bill of particulars, the State cited both *Hayes* and *Cozza* for the proposition that time is not of the essence in sexual assault cases and that defendant has no due process right to a reasonable opportunity to raise an alibi defense in single or multiple sexual assault cases. CP 13, pp.10-11.

However, neither *Cozza* nor the *Hayes* cases are fatal to defendant's due process argument here, as neither case deals with the issue presented herein. The question in this case is whether or not a defendant's due process rights are violated when the alleged victim possesses sufficient information to

determine the alleged dates supporting the charges, and the defendant requests a bill of particulars and the bill of particulars is denied, based in part on the mistaken assumption that the alleged victim does not possess the requested information.

The trial court's denial of defendant's motion for a bill of particulars denied defendant his due process right to a fair trial as he was entitled to a bill of particulars when ER possessed the requested information.

(a). Defendant Prepared his Alibi Defense Based Upon the Specific Information Provided by ER in her Interview.

Defendant prepared his alibi defense based on the specific statements provided by ER in her unrecorded interview. Defendant had tapes and his wife's work records to prove that he was not present at the Riddles for many of the dates that ER alleged in her defense interview. Defense Exhibit #25; Defense Exhibit #26.

(b). Defendant Was Surprised at Trial When ER's Testimony Reverted To Generalities on the Alleged Dates.

At trial, ER surprised the defense by changing her statements from the specific dates she gave in her interview to general times, thereby circumventing defendant's alibi defense.

Defendant was surprised and prejudiced at trial by the inability to

defend against ER's vague trial testimony at trial. There is no other reasonable explanation for the initial general statements provided by the State, ER's specific statements to defense, and ER's general testimony at trial, but that it was orchestrated to defeat defendant's alibi defense. This is not a shell game and the defendant should not be prejudiced by subterfuge.

Defendant was denied his due process right to a fair trial by the denial of his request for a bill of particulars in the present case.

3. The Denial of Defendant's Right to a Bill of Particulars was Not Harmless Error.

Error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of error. *State v. Anderson*, 112 Wn.App. 828, 51 P.3d 179 (2002).

In the present case, defendant was highly prejudiced by the trial court's denial of his motion for a bill of particulars. The bill of particulars was denied based largely on the trial court's mistaken assumption that ER could not provide the requested information. ER gave specific dates in her interview. Defendant relied upon those dates in preparing his alibi defense. Defendant presented a compelling alibi defense at trial, that was undermined when ER reverted at trial to general statements. The prejudice to defendant

was not harmless error.

Accordingly, defendant requests that this Court find that defendant's due process right to a fair trial was violated and that violation was not harmless error.

B. The Trial Court Abused its Discretion by Admitting Evidence of The Mukilteo Incident as a Prior Bad Act.

1. The Trial Court Abused its Discretion by Admitting the Mukilteo Incident as a Prior Bad Act Under RCW 10.58.090.

RCW 10.58.090(1) provides:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

Evidence Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or unfair prejudice, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In *State v. Gresham*, this Court recently determined that RCW 10.58.090 survived a separation of powers constitutional attack because "RCW 10.58.090 is permissive, preserving to the court authority to exclude evidence of past sex offenses under ER 403." 2009 Wash. App. LEXIS 3108,

12.

Further, this Court reasoned, “[w]ith this language [RCW 10.58.090(1)] the legislature recognized the court’s ultimate authority to determine what evidence will be considered by the fact finder in any individual case. Since the statute permits, but does not mandate, the admission of evidence of past sex offenses, it does not circumscribe a core function of the courts.” *Id.* at 12-13.

- (a) The Trial Court Abused its Discretion by Determining that RCW 10.58.090 Mandated Admission of the Mukilteo Incident as a Prior Bad Act.

In the present case, the trial court interpreted RCW 10.58.090 to be mandatory, not permissive.

The trial court’s initial interpretation of RCW 10.58.090 is important,

I find the statute to be curious because it says in its initial paragraph that these things **shall be admissible** regardless of 404(b).” RP 54, ll. 5-7. Then, a moment later, “it’s pretty clear that the statute [RCW 10.58.090(1)] says these acts **shall be admissible** unless 403 prohibits and precludes them and so we have to look at 403, and frankly, if the *Guzman* case and the other cases say that under 404(b) such acts are admissible, and routinely admissible which I think they are routinely admissible as long as it involves the same victim and having to do with lustful disposition, under those circumstances, they are presumptively admissible under 403, **because of the reasons under 403 could exclude some of those things. I can see where they might be excluded.**” RP 54, ll. 19-25; RP 55, ll. 1-5.

(Emphasis added).

The trial court concluded that its “only concern” was how to construct a limiting instruction to prevent confusing or misleading the jury on the uncharged prior bad act. RP 55, ll. 6-18. (Emphasis added).

The trial court initially read the statute’s language to say the prior bad act “shall” be admitted. RP 54, l. 7; RP 54, 19-20. The trial court’s mandatory interpretation of RCW 10.58.090 is further supported by its reasoning that “because of the reasons under 403 could exclude some of those things. I can see where they might be excluded.” ER 403. RP 55, ll. 3-5. The trial court reasoned that the statute mandated admittance where “some things” might otherwise be excluded under ER 403.

Further light is shed on the trial court’s mandatory interpretation of RCW 10.58.090 by reviewing the trial court’s reference to RCW 10.58.090 a few paragraphs later in its ER 404(b) analysis. RP 56, ll. 6-12.

So, in looking at that, it tells me, 10.58.090 would indicate as long as its admissible under 403, it should be admissible, and under 403, evidence of prior sexual activity with the alleged victim is routinely admissible under 404(b), which means it’s also admissible under 403. So, therefore, I think it comes in.”

Here, the trial court used the word “should” instead of “shall”, but the

emphasis was the same and this time the trial court used RCW 10.58.090 to bootstrap its ER 404(b) analysis.

In the present case, the trial court abdicated its authority to determine what evidence will be considered by the fact finder by interpreting RCW 10.58.090 to mandate admissibility. The trial court's reference to ER 403 does not cure this defect. The trial court's interpretation of the mandatory language of RCW 10.58.090 precluded it from conducting a proper ER 403 analysis and is contrary to this Court's position on the permissive nature of RCW 10.58.090.

The trial court abused its discretion in finding that RCW 10.58.090 mandated admission of the Mukilteo incident as a prior bad act.

(b) The Trial Court Also Abused its Discretion in Failing to Consider the Factors Included in RCW 10.58.090 When Admitting the Mukilteo Incident as a Prior Bad Act.

RCW 10.58.090(6) requires the court to consider the following factors to reach its decision on whether or not to admit the evidence under this statute:

When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, **the trial judge shall consider the following factors:**

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;

- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

(Emphasis added).

The trial court relied heavily upon its mandatory interpretation of RCW 10.58.090 in admitting the Mukilteo incident, yet the trial court gave no indication that it considered any of the factors mandated by the legislature in RCW 10.58.090, other than (g), to reach its decision that the prior bad act was admissible under this statute. RP 55, ll. 6-7.

The trial court abused its discretion by failing to consider the factors mandated by the legislature, when using this statute, which it largely relied upon to admit the prior bad act.

2. The Trial Court Abused its Discretion in Admitting the Mukilteo Incident as a Prior Bad Act Under ER 404(b).

Evidence Rule 404(b), Other Crimes, Wrongs, Acts, provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The primary purpose of [ER 404(b)] is to restrict the admissibility of related, but uncharged, criminal activity in a criminal case, though other applications are possible.

Karl B. Tegland, *Courtroom Handbook on Evidence*, p. 235. (1) Scope and Purpose of Rule 404(b), (Thomson West, 2008-2009 Ed).

A trial court's interpretation of ER 404(b) is reviewed de novo. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

(a) The State Failed to Notify Defendant of its Intent to Use ER 404(b) Evidence at trial.

As stated supra, the trial court's ER 404(b) analysis, if any, was bootstrapped to the trial court's analysis under RCW 10.58.090. RP 54, ll. 19-25; RP 55, ll. 1-5; RP 56, ll. 6-12. Nonetheless, the trial court may have found that the Mukilteo incident was also admissible as a prior bad act under ER 404(b). If the trial court did find that the Mukilteo incident was admissible as a prior bad act under ER 404(b), then the court erred as the State failed to notify defendant of its intent to seek admission of the Mukilteo incident as a prior bad act under ER 404(b).

A review of the court's docket does not show that an Omnibus Order was ever entered in this case. Trial Court Docket.

On April 1, 2009, defense counsel filed its trial brief in this case. CP

127-137. A copy was also sent to the State. No trial brief was received from the State. Defendant's trial brief is telling on the issue of lack of notice of the State's intent to use 404(b) evidence, as it plainly shows that defense was concerned about the Mukilteo incident, asserting that it should be dismissed out of the Whatcom County court for improper venue and, importantly, the brief is devoid of any argument on the admittance of the Mukilteo incident as a prior bad act under ER 404(b) or RCW 10.58.090. CP 127-137.

Defendant was notified of the State's intent to seek admission of the Mukilteo incident as a prior bad act the week before trial. RP 39, ll. 18-23. The State asserted that defendant was on notice as it discussed other ways to admit the Mukilteo incident with defense on other occasions well before trial. RP 45, ll. 1-11. Nonetheless, the State's failure to provide actual notice of its intent to seek to admit ER 404(b) evidence is a violation of the rules of discovery.

- (b) The Trial Court Abused its Discretion in Failing to Exclude the Mukilteo Incident as a Remedy for the State's failure to provide proper notice.

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). In ruling on suppression a court should consider: (1) the effectiveness of less severe sanctions, (2) the impact of suppression on the evidence at trial and the outcome, (3) the extent to which the objecting party will be surprised or prejudiced by the

evidence, and (4) whether the violation was willful or in bad faith. *Id.* at 882-83 (citations omitted).

In the present case, a review of the *Hutchinson* factors favors exclusion.

(1) The Effectiveness of Less Severe Sanctions.

In the present case, there were no less severe sanctions that would have resolved this issue. Either the Mukilteo incident was allowed in or it was not.

(2) The Impact of Exclusion on the Evidence at Trial and the Outcome.

There suppression of the Mukilteo incident undoubtedly would have impacted the State's case, as it did impact the outcome of the case. That is the very reason the State sought to admit the evidence and defendant objected to its admittance. By the State's own admission, the evidence provided potentially corroborating evidence of ER's claims. RP 50, ll. 15-20. However, the State did not need the Mukilteo incident with eight other counts facing the defendant.

(3) The Extent to which the Objecting Party will be Prejudiced or Surprised by the Evidence.

The defendant was both surprised and prejudiced when the State informed defense, right before trial, that it still intended to seek to admit the

prior bad act that it had previously agreed to dismiss. The State assertion that it discussed other ways to admit the Mukilteo incident with defense prior to trial does not cure the surprise to defendant. Without actual notice, defendant had no reason to expect that the evidence would be admitted against him.

Defendant does not claim that the State's failure to notify defendant of its intent to seek admittance of the prior bad act was willful or in bad faith. Nonetheless, three of the four factors cited in *Hutchinson* favor suppression of the evidence as a result of the discovery violation. The admittance of the prior bad act was extremely prejudicial to the defendant, and the prejudice substantially outweighed any probative value.

The trial court abused its discretion in failing to exclude the prior bad act as the only available remedy when the State failed to comply with the rules of discovery.

(c) The Trial Court Also Abused its Discretion by Failing to Properly Analyze the Mukilteo Incident under ER 404(b) Prior to Ruling on its Admission as a Prior Bad Act.

Before admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of the evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect." *State v. Baker*, 89 Wn.App. 726, 731-32, 950 P.2d 486 (1997) (citing *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)).

A trial court should always “begin with the presumption that evidence of other bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). “In doubtful cases, the evidence should be excluded.” *Baker*, 89 Wn.App. at 732 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

If the trial court interprets ER 404(b) correctly, the trial court’s ruling to admit or exclude evidence of misconduct is reviewed for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d at 174. A trial court abuses its discretion where it fails to abide by the rule’s requirements. *Id.*

In the present case, as stated *supra*, the trial court bootstrapped its ER 404(b) analysis with its analysis of RCW 10.58.090. RP 54, ll. 19-25; 55, ll. 1-5. The trial court did identify the purpose for admitting the Mukilteo incident as a prior bad act, however, the trial court failed to: (1) find that the Mukilteo incident occurred by a preponderance of the evidence; and (2) failed to conduct an ER 403 analysis, weighing the prejudicial value of admitting the Mukilteo incident against its probative value.

The record is devoid of any evidence that the trial court made a determination that the Mukilteo incident occurred by a preponderance of the evidence.

Further, the trial court reasoned that the caselaw supported admitting the Mukilteo incident under ER 404(b), but the court also failed to weigh the probative value of admitting the Mukilteo act against the prejudice to the

defendant, instead bootstrapping its ER 403 analysis with its analysis of RCW 10.58.090. RP 54, ll. 19-25; 55, ll. 1-5. Had the trial court done so, it likely would have determined that, in this case, the prejudice of the admission of the prior bad act significantly outweighed its probative value.

(d) The Trial Court's Errors in Admitting the Mukilteo Incident as a Prior Bad Act under ER 404(b) were Not Harmless Error.

The Improper admission of evidence under ER 404(b) pertaining to other crimes, wrongs, or acts, is determined under the "non-constitutional" harmless error standard. *State v. Myres*, 49 Wn.App. 243, 249, 742 P.2d 180 (1987). The error will not be considered harmless where the State's other untainted evidence, within reasonable probabilities, does not support a guilty verdict. *Id.*

In the present case, the introduction of the Mukilteo incident was extremely prejudicial to the defendant. The only other evidence facing the defendant in this trial was the uncorroborated testimony of ER. The defendant presented an alibi defense at trial to show that he was not present on many of the alleged occurrences at the Riddle's home.

Due to the highly prejudicial nature of the Mukilteo incident, the trial court's errors committed in admitting the Mukilteo incident was not harmless

error.

C. **The Trial Court Abused its Discretion by Failing to Exclude State's Expert Witness.**

CrR 4.7 provides in pertinent part:

- a. Prosecuting Authority's Obligations.
 - (ii) The prosecuting attorney shall disclose to the defendant:
 - (ii) **any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney; ... (Emphasis added).**
- (h) Regulation of Discovery.
 - (7) Sanctions.
 - (i) [I]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action **or enter such other order as it deems just under the circumstances.** (Emphasis added).

CrR 4.7 requires the State to provide notice to defendant of any expert witnesses it intends to call at trial and the subject of their testimony.

(1) The State's Failure to Disclose its Expert Witness Prior to Trial Was a Violation of the Rules of Discovery.

It is undisputed that the State's expert witness was in the State's possession or control. The expert works for the prosecutor's office. RP 476,

ll. 2-4.

The State asserted that it had sent defendant a copy of the expert's curriculum vitae, but the State provided no proof supporting its contention and defense counsel stated that, prior to trial, he never received a copy of the expert's resume. RP 91, ll. 4-7.

The State's failure to notify defendant of its expert witness and the nature of the expert witnesses' testimony was a violation of CrR 4.7.

(2) The Trial Court Erred in Failing to Exclude the State's Expert Witness.

Exclusion of a witnesses' testimony is a proper remedy for a violation of the rules of discovery. *State v. Wilson*, 149 Wn.2d 1, 65 P.3d 657 (2003) (citing *State v. Hutchinson*, 135 Wn.2d at 880-84).

A trial court's decision on whether or not to exclude a witness for a discovery violation is reviewed for an abuse of discretion. See *Hutchinson*, 135 Wn.2d at 882. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. *State ex rel. Carroll. v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A review of the *Hutchinson* factors in the present case favors exclusion.

(a) The Effectiveness of Less Severe Sanctions.

There were no less severe sanctions available to the trial court. At the point in the proceedings where defendant raised his objection, the only options available to the Court were to either admit or exclude the State's expert witness. Because the State failed to notify defendant of its intent to call the expert witness, the trial court should have excluded the State's expert.

(b) The Impact of Suppression on the Evidence at Trial and the Outcome.

The suppression of the expert's testimony would have impacted the State's case as the expert's testimony served to legitimize, to the jury, issues in this case such as initial denial and delayed reporting, matters which went to the very credibility of ER's accusations.

(c) The Extent to which the Objecting Party will be Prejudiced or Surprised by the Evidence.

The defendant was both surprised and prejudiced by the State's failure to properly notify the defendant that they intended to call someone from their office to testify on matters going to the credibility of the alleged victim.

This was not a case where the defendant was waiting in the weeds. Defendant only learned of the State's expert witness immediately before trial,

and had interviewed her that morning. Defendant should not be prejudiced by the State's failure to disclose.

In the present case, the State's failure to notify the defendant was not willful nor in bad faith. Ultimately, however, the expert's testimony was not evidence necessary to the determination of this case, served to bolster the credibility of the State's fact witnesses, and was highly prejudicial to the defendant.

The trial court was faced with a clear violation of the rules of discovery by the State. The expert testimony added no substantive evidence to the trial, but was used to bolster the credibility of the alleged victim. In such a case, the trial court should have excluded the State's expert's testimony as the only proper remedy available to the trial court at that time for the State's lack of proper notice to the defendant.

The trial court abused its discretion by failing to exclude the expert witness. Defendant was prejudiced by the trial court's abuse of discretion.

4. **The Cumulative Errors in this Case Denied Defendant his Due Process Right to a Fair Trial**

The cumulative error doctrine applies to cases in which "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v.

Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

In the present case, the errors cited herein, even if not determined to individually deprive the defendant of a fair trial, when taken into consideration as a whole, denied defendant his right to a fair trial.

D. CONCLUSION

Larry Grubb was convicted of seven counts of Rape of a Child in the first degree, based solely on the allegations of his step-granddaughter, ER.

Despite initially alleging specific information against the defendant, the statement written by the detective for ER was intentionally vague. Due to the vague nature of the allegations, and intent on asserting an alibi defense, Larry moved the trial court to require the State to provide a bill of particulars. The trial court denied Larry's motion for a bill of particulars based on the trial court's failure to properly distinguish the present case with the cited case-law and the trial court's mistaken assumption that ER did not possess the information sought in defendant's request for the bill of particulars. As a result, defendant was forced to rely on ER's unrecorded interview to prepare his defense. Larry asserted his alibi defense at trial and showed that he could not have been at ER's house on many of the alleged occasions, but ER's vague testimony at trial, circumvented his defense.

On the eve of trial, the State informed defense that it was seeking to admit the Mukilteo incident as a prior bad act and that it might be calling an expert witness to testify which it had not previously disclosed.

The trial court admitted the Mukilteo incident despite the discovery violations. The trial court erred in admitting the Mukilteo incident as a prior bad act by combining its mandatory interpretation of the new statute on the admission of sex offenses and the rules of evidence, such that neither analysis was properly conducted. The introduction and use of the Mukilteo incident at trial seriously undermined Larry's defense and had a significant impact on the outcome of the trial.

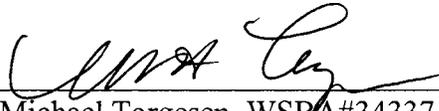
The trial court also allowed the State's expert witness to testify despite the acknowledged discovery violation. The State's expert witness's testimony, while general in nature, unsurprisingly happened to shore up some difficulties that the State had regarding the credibility of its witnesses.

The numerous errors that occurred in this trial deprived Larry of his due process right to a fair trial.

For the foregoing reasons, Larry respectfully requests that this Court vacate the convictions and remand for a new trial.

Respectfully submitted this 22nd day of February, 2010.

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