

NO. 36586-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LaCHANCE, JR.,

Appellant.

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

The Honorable H. John Hall, Judge
The Honorable Richard L. Brosey, Judge

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BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of his due process right to a fair trial by impartial jury.
2. Appellant received ineffective assistance at trial.
3. The court erred in failing to give limiting instructions for ER 404(b) evidence.
4. Cumulative error deprived appellant of his due process right to a fair trial.
5. Appellant was deprived of his due process right to be present at sentencing.
6. Appellant received ineffective assistance at sentencing.
7. The court failed to unambiguously credit appellant for the correct amount of time served.

Issues Pertaining to Assignments of Error

1. The prosecutor committed flagrant misconduct by (1) expressing a personal opinion against appellant's credibility; (2) vouching for the credibility of the State's chief witnesses by arguing facts not in evidence; (3) improperly invoking the missing witness doctrine; (4) inciting the jury to convict based on emotion rather than reason; and (5) placing damaging evidence before the jury by means of innuendo. Considered singly and cumulatively, do these instances of misconduct require reversal of the convictions?

2. Was defense counsel ineffective in failing to object to the prosecutor's misconduct where no legitimate trial tactic could justify lack of objection?

3. Was defense counsel ineffective in failing to object to the admission of pornography evidence offered to prove appellant's propensity to commit the alleged crimes?

4. The court admitted ER 404(b) evidence that (1) LaChance raped and gave meth to another girl; (2) LaChance possessed a large collection of pornography; and (3) LaChance watched a pornographic video with two teenage girls. Did the trial court err in failing to give limiting instructions to prevent the jury from considering these acts as evidence of his propensity to commit the charged crimes? Was defense counsel ineffective in failing to request limiting instructions for this evidence?

5. Did cumulative error, in the form of prosecutorial misconduct, ineffective assistance of counsel, and the failure to give limiting instructions, deprive appellant of a fair trial?

6. Where the court entered an order amending the judgment and sentence to include imposition of attorneys fees, must the judgment and sentence be reversed because (1) the order violated appellant's due process right to be present at sentencing; and (2) defense counsel's advocacy for additional punishment in the form of attorney fees deprived appellant of his right to assistance of counsel?

7. Must the court remand this case to enable the court to correct an order that directs the Department of Corrections to credit appellant for an improper amount of time served?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged appellant Joseph Frederick LaChance, Jr. with two counts of third degree child rape (counts I and III), three counts of distribution of a controlled substance to someone under age 18 with sexual motivation (counts II, IV and V), and one count of possession of a controlled substance with intent to deliver and with sexual motivation (count VI). CP 96-99. The jury found LaChance guilty on counts I, II, III, IV and V and returned special verdicts finding sexual motivation on counts II, IV and V.¹ CP 25-27, 30-34. It found LaChance guilty of the lesser included offense of simple possession on Count VI. CP 24, 28. The court sentenced LaChance within the standard range to 120 months on counts II, IV and V; 60 months on counts I and III; and 18 months on count VI. CP 7. This appeal timely follows. CP 1.

¹ The court dismissed an allegation pertaining to distribution within 1000 feet of school bus stop on Count II. 2RP 60.

2. Substantive Facts

a. Testimony of M.M. and M.D.

M.M. (d.o.b. 7/31/90) and M.D. (d.o.b. 4/12/92) were friends with LaChance's teenage daughter, J.L. 3RP² 4-5, 28, 40-41. In January 2006, they spent the night at J.L.'s house. 3RP 5-6, 40. After J.L. fell asleep, M.M. and M.D. went to LaChance's room and smoked methamphetamine ("meth") provided by LaChance. 3RP 6-8, 41, 43-44.

This was the first time M.M. was high on meth. 3RP 6. M.D. testified this was the first time she smoked meth, but M.M. said M.D. "quite often" smoked meth with LaChance before January 2006. 3RP 31, 46.

After smoking, all three watched a pornographic video while "messaging around." 3RP 10, 20-21, 44. LaChance inserted a dildo into M.M.'s vagina and used the dildo on M.D. as well. 3RP 9-10, 45. LaChance had sexual intercourse with M.M. 3RP 10-11, 20. The girls' stories were inconsistent on whether LaChance had sexual intercourse with M.D. 3RP 29-30, 48-52.

In July 2006, M.M. again spent the night at LaChance's house. 3RP 13. She bought meth from LaChance and smoked it. 3RP 13-14. There was no sexual activity that night. 3RP 14. M.M. later contradicted herself by

² The verbatim report of proceedings is referenced as follows: 1RP - 5/9/07; 2RP - 5/23/07; 3RP - 5/24/07; 4RP - 5/25/07; 5RP - 7/11/07.

claiming sexual activity followed each and every time she got high with LaChance. 3RP 15.

In February 2007, LaChance picked M.M. up from school, drove up a mountain road, and gave meth to M.M. 3RP 15-17, 24, 27. On another occasion in February 2007, she became high and had sex with LaChance at his house. 3RP 18.

Between January and September 2006, M.M. used meth as much as 255 times, which interfered with her memory. 3RP 22-24. LaChance always supplied the meth to M.M. 3RP 22, 34, 103-04. M.M. described a "routine" of getting high on meth and then having sex with LaChance. 3RP 15, 32, 36. LaChance did not force himself on M.M; she had sex with LaChance because she was "high all the time." 2RP 19.

M.M. and LaChance's daughter, J.L., used to be best friends. 3RP 25. In September 2006, M.M. and J.L. had a big fight over M.M.'s brother, who was not romantically interested in J.L. 3RP 26. M.M. wanted to "get back" at LaChance for some reason. 3RP 26-27.

b. Testimony of Deputy Susan Shannon

LaChance lived with his mother, father and brother. 2RP 11; 3RP 76. After speaking with M.M., Deputy Susan Shannon searched LaChance's in February 2007 bedroom and found methamphetamine weighing about .4 grams

inside a blue makeup bag.³ 2RP 10-11, 14. Digital scales, a scoop straw, and some baggies were also found in the blue bag. 2RP 15. Shannon also found a glass pipe with white residue, another glass pipe, and additional baggies elsewhere in the room. 2RP 13-14, 24-26.

She found a pornographic DVD titled "Tasty Teens" from a DVD player in LaChance's room and three pornographic magazines underneath the bed mattress. 2RP 27-28. 21 more pornographic DVD's were in the bedroom closet, two of which were titled "Barely Legal Horny Girls" and "Sweet Young Girls." 2RP 29, 32.

Shannon found baggies and a piece of paper she believed to be a drug ledger in LaChance's car. 2RP 35-37. LaChance acknowledged it was an old drug ledger but that he stopped being a dealer in August.⁴ 2RP 41, 69.

Shannon also found a dildo in LaChance's car. 2RP 37-38. Shannon claimed LaChance made a number of admissions to her, including his use of a dildo on M.M. 2RP 43. He further admitted to giving drugs to M.M. about eight times and had sex with her on some of those occasions. 2RP 43. LaChance specifically admitted to two episodes in February 2007 where he and M.M. smoked meth and had sex. 2RP 48-49, 63. LaChance told her

³ A crime lab scientist testified the substance tested positive for meth and that it weighed .2 grams. 2RP 65-66.

⁴ Shannon did not specify the year.

the blue bag containing meth belonged to him.⁵ 3RP 100. LaChance denied giving meth to either girl. 2RP 44, 47. He also denied having sex with M.M. in January 2006. 2RP 47.

c. LaChance's Testimony

LaChance denied supplying meth to M.M. and M.D. 3RP 73-74, 86-87, 89. M.M. received her meth from somebody in Packwood. 3RP 89. M.D.'s supplier was a person named "Tolton." 3RP 89. M.D. supplied meth on the night all three smoked together. 3RP 73-74.

LaChance denied having sexual contact with either girl that night. 3RP 74-75, 79, 97. LaChance did not otherwise have a sexual relationship with M.M. 3RP 84, 86. He was impotent and unable to sexually perform. 3RP 96. Regarding the alleged February 2007 event, LaChance maintained M.M. brought the meth and the two smoked it using LaChance's pipe. 3RP 86-87, 90.

He admitted to selling meth in the past but said the ledger found by Deputy Shannon was only an "IOU" list of people he owed money to. 3RP 82-83. He said one of the pipes found in his room belonged to his brother's girlfriend, Myra Story. 3RP 75, 92. LaChance denied the meth and scales

⁵ M.M. and M.D. identified the blue bag recovered by Shannon was the same bag used by LaChance to store meth and the meth pipe. 3RP 16, 42, 45-46.

found in the blue makeup bag belonged to him. 3RP 81, 92. The bag belonged to his brother's girlfriend. 3RP 76.

C. ARGUMENT

1. MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT VIOLATED LACHANCE'S RIGHT TO A FAIR TRIAL BY IMPARTIAL JURY.

The prosecutor, as an officer of the court, has a duty to see an accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Id. at 664. A defendant's due process right to a fair trial and the right to be tried by an impartial jury is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amends. 5, 6 and 14; Wash. Const. art. 1, § 22. A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To determine whether misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect on the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). The cumulative effect

of errors may be so flagrant that no instruction can erase their combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000).

a. The Prosecutor Committed Misconduct In Expressing His Personal Opinion Of Defendant's Credibility.

LaChance testified he did not supply meth to the girls. 3RP 73-74, 86-87, 89. Rather, the girls obtained the meth elsewhere and he merely smoked it with them on occasion. 3RP 74, 77, 86-87, 89-90. In closing argument, the prosecutor told the jury "What kind of things did Mr. LaChance say, *in my opinion is just asinine*, the whole idea of, gee, they brought their own meth, we did it together, I didn't give them any. Where are these girls going to get this stuff." 4RP 41 (emphasis added).

"It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." United States v. Young, 470 U.S. 1, 8, 105 S. Ct. 1038, 84 L. Ed.2d 1 (1985); see also Reed, 102 Wn.2d at 145-46 (misconduct for prosecutor to express personal opinion regarding credibility of witness or guilt of defendant). Prejudicial error occurs when it is clear and unmistakable that counsel is expressing a personal opinion rather than arguing an inference from the evidence. State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

The Supreme Court in McKenzie cited the prosecutor's comment in State v. Case as an example of what constitutes a "clear and unmistakable" expression of personal opinion requiring reversal. McKenzie, 157 Wn.2d at 54. In Case, the prosecutor argued, "I doubt that you haven't already made up your mind. Now, you must have, as human beings. But if you haven't, don't hold it against me. I mean, *that is my opinion* about what this evidence shows and how clearly this evidence indicates that this girl has been violated." McKenzie, 157 Wn.2d at 54 (emphasis in original) (quoting Case, 49 Wn.2d at 68). The prosecutor's prejudicial argument was "a personal appeal to the jury and explicitly acknowledged that he was offering his own opinion." McKenzie, 157 Wn.2d at 54.

The prosecutor here argued LaChance's story was "in my opinion just asinine." 4RP 41. This comment likewise expressed an unmistakably personal opinion about the validity of LaChance's testimony and his defense.

Defense counsel did not object to the prosecutor's improper argument. Even in the absence of objection, appellate review is not precluded if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice produced by the misconduct. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Id. at 508.

Statements made during closing argument are presumably intended to influence the jury. Reed, 102 Wn.2d at 146. Otherwise, there would be no point in making them at all. Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal). "The wisdom of experience is embodied in the aphorism that the scent of a skunk thrown into the jury box cannot be wiped out by a trial court's admonition to ignore the smell." Reed v. General Motors Corp., 773 F.2d 660, 664 (5th Cir. 1985).

A prosecutor's expression of personal opinion about a defendant's credibility is subject to heightened scrutiny because the prosecutor "commands the respect of the people of the county, and usually exercises a great influence upon jurors." Case, 49 Wn.2d at 71. Professed prosecutorial opinions regarding guilt are especially prejudicial because a prosecutor's argument "carries an aura of special reliability and trustworthiness." State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001).

LaChance's defense to the distribution charges (counts II, IV and V) hinged on whom the jury believed. M.M. and M.D. testified LaChance supplied them with meth. 3RP 6-8, 22, 34, 41, 43-44, 103-04. LaChance

testified he did not give them meth. 3RP 73-74, 86-87, 89. Although Deputy Shannon testified LaChance admitted he supplied M.M. with meth on some occasions, LaChance's trial testimony contradicted Shannon's testimony on this point. 2RP 43. The case still came down to whether the jury believed LaChance's trial testimony. Even Shannon testified LaChance denied ever giving meth to M.M. or M.D. in January 2006 (count II). 2RP 44, 47. Under such circumstances, the prosecutor's unmistakable opinion that LaChance's denial was "asinine" was so flagrant and prejudicial that no objection or instruction could cure it.

The prosecutor's opinion of LaChance's credibility likewise tainted juror deliberation on remaining counts. LaChance's defense to all the counts was denial. If the jury could be induced to disbelieve one instance of denial, then its disbelief likely carried over to denials regarding other counts. His defense strategy was a "take it or leave it" affair. If LaChance's denial of supplying meth was "asinine," then the jury likely considered the prosecutor's comment as a general opinion that LaChance's entire defense was asinine. Reversal on all counts is therefore required.

b. The Prosecutor Personally Vouched For The Victim's Credibility And Argued Evidence Not In Record.

The State subpoenaed M.M. and M.D. to testify against LaChance. CP 128, 130. The theme of the prosecutor's closing argument was that the girls' story made sense and LaChance's story did not. 4RP 2-22. The theme

of defense counsel's closing argument was that M.M. and M.D. were not credible and the State's evidence was too weak to prove guilt beyond a reasonable doubt. 4RP 32-40. At one point, defense counsel argued M.M. and M.D. "want some kind of redemption, this is a way to redeem themselves, this is a way to improve their lot as to the way they look to their parents or to their community. And the sense is that despite their own drug use, their own drug addiction, they're clearly into using drugs, foggy memories, inconsistent stories, we're not so bad because it is all his fault. It is all Mr. LaChance's fault." 4RP 30-31.

In rebuttal, the prosecutor addressed the girls' motivation for testifying:

Well, what are the motivations. I thought [defense counsel] mentioned redemption. These girls are up here today because they feel guilty themselves. Those two young ladies, *they looked to me to be scared to death. They looked to me to not want to be here on some kind of redemptive quest, but they're here giving testimony on crimes they were victims of because they had to be here.* They're not here to atone for anything they've done.

4RP 42 (emphasis added).

The jury alone determines issues of witness credibility. State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005). It is improper for a prosecutor to personally vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Here, the prosecutor exhorted the jury to believe the State's chief witnesses because it seemed to the prosecutor that they did not have an illegitimate reason for testifying

against LaChance. The prosecutor in this manner improperly bolstered the girls' credibility in a case that turned on whose story the jury believed. The prosecutor's comment was an unmistakable expression of personal opinion about how he viewed their testimony. See Brett, 126 Wn.2d at 175 (prejudicial error will be found when counsel expresses a "clear and unmistakable" opinion about the credibility of a witness).

A prosecutor also commits misconduct when he encourages a jury to render a verdict on facts not in evidence. State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007). The prosecutor's statement that M.M. and M.D. "had to be here" referred to the fact that the prosecutor needed to subpoena M.M. and M.D. to secure their presence and testimony at trial. CP 128, 130. The remark was improper because the fact that "they had to be here" (i.e., the fact of their involuntary testimony via subpoena) was never presented to the jury. In this manner the prosecutor attempted to convince the jury that the girls did not testify for improper reasons, but rather because they had no choice but to testify. The prosecutor impermissibly bolstered the credibility of the girls' testimony by referring to facts not in evidence.

The jury's verdict turned on whether they believed LaChance was being truthful in testifying he did not supply drugs to the girls and did not have sex with M.M. Both sides debated the credibility of their respective witnesses

during closing arguments. The jury sided with the State's argument. Under these circumstances, there is a substantial likelihood that the prosecutor's improper comment on the girls' credibility influenced the verdict on all counts. Even the Count VI conviction for meth possession is tainted because both girls testified the blue bag containing the meth belonged to LaChance, whereas LaChance maintained the bag belonged to his brother's girlfriend. 3RP 16, 42, 45-46, 76.

Defense counsel did not object to the prosecutor's improper argument but the cumulative effect of errors may be so flagrant that no instruction can erase their combined prejudicial effect. Henderson, 100 Wn. App. at 804. The prejudicial influence of the prosecutor's improper bolstering argument, in combination with his clear expression of personal opinion that LaChance's story was "asinine," resulted in enduring prejudice.

c. The Prosecutor's Expressions of Personal Discomfort Invited The Jury To Convict On The Basis Of Emotion Rather Than Reason.

M.M. and M.D. testified they watched a pornographic videotape with LaChance while engaging in sexual activity with him in January 2006. 3RP 10-11, 19-21, 44. LaChance allegedly used a dildo on the teenagers that night and on M.M. at other times. 3RP 9-10, 18, 45. Deputy Shannon found pornographic DVD's and magazines in LaChance's room. 2RP 27-29, 32.

The pornographic DVD's and magazines recovered by Shannon were admitted into evidence. 2RP 27-29.

Shannon also found a dildo in the trunk of LaChance's car, which was admitted into evidence as one of the dildos used on the girls. 2RP 37-38. While examining M.D., the prosecutor used a glove to handle the dildo. 3RP 45.

Leading off closing argument, the prosecutor told the jury "when I started off the other day I told you this case was going to be difficult to try and it was. *It's difficult for me to handle some of the items in evidence and as difficult as it was*, however, it is not going to be difficult for you to decide on each of the charges in this case." 4RP 2 (emphasis added). The prosecutor's comment about handling some of the items was an unmistakable reference to the dildo and pornography entered into evidence.

Towards the end of closing argument, the prosecutor explained what the term "sexual motivation" meant. In prefacing the explanation, the prosecutor informed the jury:

This last thing I would like you to consider, quite frankly, the hardest thing for me to explain just in terms of the way I feel about it, but let me try to go through it. Sexual motivation means that one of the purposes for which the defendant commits the crime was for purposes of sexual gratification. Let me take you back to January of 2006. Let's look at all of the evidence. [J.L.'s] asleep, the two girls go in to get high and mess around, whatever that is. What does Mr. LaChance do? Mr. LaChance provides the methamphetamine, gets them high, then he puts in a pornographic DVD.

Why would you do that . . . Then he gets out his toys. And you have seen them. He had a whole bunch of pornographic magazines. Now, I offer the magazines not to be flippant about this whole thing, I ask you when you go back to the jury room just look at the titles, I'm offering them for the titles. Some of the titles read like, Young Teens, Barely Legal, they go to show that Mr. LaChance has an interest in younger women. He had his toys and he had sex with these girls.

4RP 18-19 (emphasis added).

Defense counsel did not object to the prosecutor's statements regarding personal discomfort with items in evidence and the concept of sexual motivation.

A prosecutor, as a quasi-judicial officer, has the duty to ensure that a defendant receives a fair and impartial trial, which means a verdict free from prejudice and based on reason. Case, 49 Wn.2d at 70-71. A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prosecutor is therefore forbidden from appealing to the passions of the jury and thereby encouraging it to render a verdict based on emotion rather than properly admitted evidence. Belgarde, 110 Wn.2d at 507-08.

The State's tactics used during closing fit squarely within the forbidden category. The prosecutor's personal discomfort with the dildo and pornography, and with the concept of "sexual motivation," was irrelevant to whether the State proved every element of the crime and sexual motivation beyond a

reasonable doubt. "A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." Belgarde, 110 Wn.2d at 508.

Repeatedly telling the jury about his personal discomfort could have no purpose but to incite the jury to focus on their own discomfort with sexual matters in deliberating on LaChance's guilt and to assure jurors that the prosecutor shared their discomfort. The prosecutor's remarks likely stimulated an emotional response from the jury rather than a rational decision based on the evidence because the prosecutor's personal discomfort had no rational connection to any fact the jurors were being asked to decide. "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Under these circumstances, there is a substantial likelihood the prosecutor's improper argument influenced the jury's verdicts on all counts and resulted in incurable prejudice when considered in combination with the cumulative prejudicial effect of other misconduct. Henderson, 100 Wn. App. at 804.

d. The Prosecutor Committed Misconduct By Improperly Invoking The Missing Witness Doctrine Against LaChance.

On direct examination, LaChance denied ever supplying meth to the girls. 3RP 73-74, 86-87, 89. He said M.D. received meth from "a guy named Tolton," who was currently in jail. 3RP 89. LaChance further testified

the blue bag found in his bedroom, which contained the meth, scales, and baggies, actually belonged to his brother's girlfriend, Myra Story. 3RP 75, 76. 92. LaChance said Story lent the bag to M.D. and LaChance so that they could weigh M.D.'s meth. 3RP 79. He claimed the scales belonged to Story and his brother. 3RP 76, 92. Story sold LaChance the car in which police recovered baggies. 2RP 54-55, 3RP 92-93. He did not know the baggies were in his car. 3RP 92-93. On cross-examination, the prosecutor confirmed Story was not "here today." 3RP 90.

In addressing count VI, the possession with intent to deliver charge, the prosecutor argued:

I know when he testified the defendant raised a couple of other names, I heard it for the first time, a Mr. Tolten in jail. Do you think if Mr. Tolten had anything positive to say regarding this case they wouldn't have brought him up from jail and had him testify, no. There was a Myra Story, parents, his brother. None of those people are here either. I submit that's just Mr. LaChance trying to once again to deflect attention from the facts of the case.

4RP 16.

"Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence." State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Only under limited circumstances may a prosecutor comment on a defense failure to call a witness under the missing witness doctrine. State v. Blair, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). Under this doctrine, where a party fails to call a witness

that could provide favorable testimony, the jury may draw an inference that the testimony would be unfavorable to that party. Id. at 485-86. The missing witness doctrine, however, is inapplicable if the missing testimony was unimportant. Id. at 489. The doctrine is also inapplicable if the missing witness could aid the defense only by incriminating himself. Id. at 489-90; United States v. Pitts, 918 F.2d 197, 200-01 (D.C. Cir. 1990). Misconduct occurs when the prosecutor improperly draws an adverse inference from a missing witness. Cheatam, 150 Wn.2d at 653.

The prosecutor here improperly commented on LaChance's failure to call Tolten, Story, and his brother as witnesses because their testimony would have been self-incriminating. Tolten would have incriminated himself in testifying he supplied meth to M.D. Story would have incriminated herself had she testified the blue bag containing meth and drug paraphernalia belonged to her. LaChance's brother would have incriminated himself in admitting the scale belonged to him, especially in light of M.D.'s testimony that LaChance's brother supplied meth to her. 3RP 49.

A witness may not be put on the stand for the purpose of allowing the jury to watch him "take the Fifth." Pitts, 918 F.2d at 200. If these witnesses had testified, it was likely they would have been hostile witnesses, intent on saving themselves by shifting the blame back to LaChance. Id. The missing

witness inference was improper because these witnesses could not be expected to support LaChance's version of events. Id.

Invoking the missing witness doctrine in regard to Totten was also improper because his testimony would have been unimportant. Blair, 117 Wn.2d at 489. He only supplied meth to M.D., whereas LaChance was only charged with giving meth to M.M.

The prosecutor also improperly commented on LaChance's failure to produce his mother and father as witnesses. Neither parent had important exculpatory information to give on the possession with intent to deliver charge, which was the charge referred to by the prosecutor in making his missing witness argument. In fact, they did not have any important information to give related to this or any other charge. 3RP 75-76, 78-79, 94.

In Pitts, the defendant was convicted of possession with intent to distribute a controlled substance. Pitts, 918 F.2d at 198. Pitts claimed the drugs belonged to a man named Polk. Id. at 199. The trial court erred in allowing the prosecutor's missing witness argument and in giving a related instruction because the missing witness's testimony would have been self-incriminating. Id. at 200-01. The error was not harmless because the evidence against Pitts, consisting of his proximity to the bag containing the drugs and the presence of his jacket in the bag, was not overwhelming. Id. at 201. His defense depended on the jury's view of his credibility and its

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decision whether to accept his explanation that the drugs belonged to another.

Id.

As in Pitts, there is a substantial likelihood the jury would have been influenced by the prosecutor's argument because LaChance's defense to count VI depended on the jury's view of his explanation that the meth and drug paraphernalia actually belonged to Story and his brother. Further, LaChance's defense to the distribution charges (counts II, IV and V) depended on whether the jury accepted his explanation that the girls received their meth from someone else. By inviting the jury to draw an adverse inference from LaChance's failure to produce witnesses who could help his case, the prosecutor damaged the credibility of LaChance's defense that he did not distribute meth to M.M. The prosecutor's improper invocation of the missing witness doctrine, in undermining LaChance's credibility, also affected the rape charges. LaChance's defense to those two counts, as on all the others, was denial.

Even if this instance of misconduct, standing alone, could have been cured by instruction or did not amount to a substantial likelihood of prejudice, the cumulative effect of other errors should be taken into account in determining prejudice on all counts. Henderson, 100 Wn. App. at 804.

e. The Prosecutor Incited The Jury To Convict LaChance By Means Of Innuendo.

The prosecutor committed flagrant misconduct by questioning LaChance about giving meth to his daughter without producing extrinsic evidence of the prejudicial fact implied in that question.

The prosecutor questioned LaChance as follows:

Q: You gave methamphetamine to your daughter, didn't you?

A: No. I sure did not. I walked in the next day, the stuff that [M.D.] saved that I weighed up for her--

Q: You weighed some stuff up for [M.D.]?

A: That she bought that day that we were smoking in my room, yes. I broke it down, I told you that.

Q: Oh, that's right. You broke it down, weighed it, gave it to her.

A: We smoked the rest that she purchased. Then you asked me about giving it to my daughter. No, sorry.

3RP 98 (emphasis added).

The prosecutor, by asking "You gave methamphetamine to your daughter, didn't you?," insinuated LaChance had in fact given meth to his daughter. "A person being tried on a criminal charge can be convicted only by evidence, not by innuendo." State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). A prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact. State v. Miles, 139

Wn. App. 879, 886, 162 P.3d 1169 (2007). A prosecutor may not use impeachment as a means of submitting evidence to the jury that is otherwise unavailable. Id. It is therefore flagrant misconduct for a prosecutor to ask questions that imply the existence of a prejudicial fact without proving that fact by means of extrinsic evidence. Id. at 888. The State produced no extrinsic evidence to back up its implied claim that LaChance supplied meth to his daughter.

Miles involved a charge of delivery of a controlled substance. Id. at 881. Miles claimed he was incapacitated at the time he was alleged to have delivered the substance. Id. at 882. The prosecutor committed flagrant misconduct by questioning defense witnesses about Miles's participation in specific boxing matches during the time Miles claimed to be incapacitated without producing extrinsic evidence of those fights. Id. at 881, 888.

Miles follows a long line of cases holding it is misconduct for the prosecutor to ask questions implying the existence of a prejudicial fact and then fail to introduce extrinsic evidence of the fact after the witness disputes its existence. See, e.g., State v. Babich, 68 Wn. App. 438, 441-42, 842 P.2d 1053 (1993) (prosecutor tried to impeach defense witnesses by questioning them about contents of allegedly recorded conversation; prosecutor did not enter recorded conversation into evidence after witnesses either denied making the statements or stated they could not remember making them); State v.

Beard, 74 Wn.2d 335, 338-39, 444 P.2d 651 (1968) (prosecutor questioned defendant about several prior convictions but produced no evidence of those convictions upon defendant's denial of their existence); Yoakum, 37 Wn.2d at 143-44 (prosecutor tried to impeach defendant by questioning him about transcript of taped interview with police, but did not offer the interview as extrinsic evidence).

Here, as in the cases described above, the prosecutor attempted to place evidence before the jury that he was either unable or unwilling to prove.⁶ The State presented no extrinsic evidence that LaChance gave meth to his daughter but nevertheless asked the question, knowing LaChance would almost certainly deny the allegation. Without such extrinsic evidence, the prosecutor's question was a "flagrant attempt to place evidence before the jury that appeared to have been otherwise unavailable." Miles, 139 Wn. App. at 888.

The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington State Constitution grant criminal defendants the right to confront and cross-examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). A prosecutor's impeachment of a witness by referring to extrinsic evidence that is never introduced violates a defendant's

⁶ At the CrR 3.5 hearing, Officer Shannon testified LaChance admitted he gave meth to his daughter, but the prosecutor never elicited this testimony from Shannon in its case in chief and never called Shannon as a witness to rebut LaChance's denial at trial. 1RP 52.

right to confrontation where "the focus of the questioning is to impart evidence within the prosecutor's personal knowledge without the prosecutor formally testifying as a witness." State v. Lopez, 95 Wn. App. 842, 855, 980 P.2d 224 (1999).

Without introducing extrinsic evidence that LaChance gave meth to his daughter, the prosecutor in effect testified he had personal knowledge of that alleged fact by asking the question. In the absence of calling a rebuttal witness to contradict LaChance's testimony, there is no purpose for asking this question other than to impart to the jury the prosecutor's knowledge of the fact implied in the question. Miles, 139 Wn. App. at 887. Moreover, defense counsel cannot be faulted for failing to object to the improper question because counsel had no way of knowing at the time whether the State would prove the implied fact in rebuttal. Id. at 889.

Prosecutorial misconduct that violates the right to confrontation is constitutional error. Babich, 68 Wn. App. at 446. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Constitutional error is harmless only if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Id. To avoid reversal, this Court must be "convinced beyond a reasonable doubt any

reasonable jury would reach the same result absent the error" and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The State cannot make the necessary showing to avoid reversal of the convictions. The implied fact that LaChance also gave meth to his daughter was not harmless beyond a reasonable doubt because it constituted impermissible propensity evidence under ER 404(b).⁷ ER 404(b) prohibits the admission of evidence to show the defendant's propensity to commit a certain crime. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). "ER 404 is intended to prevent application by jurors of the common assumption that 'since he did it once, he did it again.'" State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). Evidence of a crime that is similar or identical to the one charged can be extremely prejudicial because it is likely jurors will conclude the defendant had a propensity for committing that type of crime. State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993).

Evidence that LaChance gave meth to his minor daughter was similar to the charged crimes of distributing meth to M.M. and possession of meth with intent to deliver. The prosecutor asked this question to not only show

⁷ ER 404(b) provides "[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. 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."

LaChance had a propensity for distributing meth to minors but also to show LaChance was so depraved as to give meth to his own daughter. See State v. Ra, ___ Wn. App. ___, 175 P.3d 609, 615 (2008) (prosecutor forbidden from introducing evidence designed to show defendant is a bad person). The implied fact further damaged LaChance's credibility in a case that turned on whether the jury believed his defense of denial to all charges. This Court should therefore reverse the convictions on all counts.

f. Reversal Is Required Because Counsel Was Ineffective In Failing to Object to the Prosecutorial Misconduct and In Failing To Request a Curative Instruction.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, § 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). This makes sense because the purpose behind both the prohibition against prosecutorial misconduct and the right to effective assistance is to protect the defendant's right to a fair and impartial trial. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); Reed, 102 Wn.2d at 145; Charlton, 90 Wn.2d at 664-65.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). There was no legitimate reason not to object given the prejudicial nature of the prosecutor's improper arguments. LaChance derived no conceivable benefit from letting the jury consider those arguments as it deliberated on his fate.

Further, if this Court rules curative instructions could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. No legitimate strategy justified

allowing the prosecutor's prejudicial comments to fester in the juror's minds without instruction from the court that these improper arguments should be disregarded and play no role in their deliberations. There is a reasonable probability counsel's failure affected the verdict for the reasons set forth above.

2. COUNSEL WAS INEFFECTIVE IN ALLOWING THE JURY TO CONSIDER IMPROPER PROPENSITY EVIDENCE UNDER ER 404(b).

Defense counsel was ineffective in failing to object to admission of evidence showing LaChance possessed pornography under ER 404(b). Reversal on all counts is required because there is a reasonable probability improper admission of the pornography evidence affected the outcome.

a. LaChance's Possession Of Pornography Constituted Inadmissible Evidence Under ER 404(b).

M.M. and M.D. claimed they watched a pornographic videotape with LaChance in January 2006. 3RP 10, 20-21, 44. When Officer Shannon searched LaChance's room in February 2007, she found a pornographic DVD titled "Tasty Teens." 2RP 27, 32. She also found three pornographic magazines underneath the bed mattress and 21 additional pornographic DVD's in the closet. 2RP 28-29, 32. Two of those DVD's were titled "Legal Horny Girls" and "Sweet Young Girls." 2RP 29. The pornographic DVD's and magazines recovered by the officer were admitted into evidence as exhibits. 2RP 27-29. The State did not establish the girls ever saw the pornographic DVD's and magazines admitted into evidence.

During cross-examination, the prosecutor accused LaChance of having sex with the girls because the pornography no longer satisfied him. 3RP 95. LaChance denied it. 3RP 95. The prosecutor asked if LaChance lured the girls into his room because "they were young girls just like you'd seen in the pornography." 3RP 96. LaChance denied it. 3RP 96. He further denied the pornography even belonged to him. 3RP 88-89, 94-95, 97. In closing, the prosecutor told the jury he offered the pornographic magazines "to show that Mr. LaChance has an interest in younger women. He had his toys and he had sex with these girls." 4RP 19.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." Wade, 98 Wn. App. at 333. To that end, ER 404(b) prohibits the admission of evidence designed simply to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336.

ER 404(b) evidence includes "acts that are merely unpopular or disgraceful." State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993); see also State v. Everybodytalksabout, 145 Wn.2d 456, 466-68, 39 P.3d 294 (2002) (ER 404(b) prohibits evidence of any act, regardless of whether it is a "bad" act, used to show the character of a person acted in conformity with his character on a particular occasion).

LaChance does not challenge admission of evidence that M.M. watched a pornographic videotape on the night the two allegedly had sex in January 2006. LaChance challenges the admissibility of pornography recovered by officer Shannon.

Evidence that LaChance possessed the pornography recovered by officer Shannon constituted impermissible propensity evidence because it invited the jury to infer that he must have raped M.M. and gave her drugs for the purpose of having sex with her because he enjoyed looking at pornography. Indeed, the prosecutor explicitly argued LaChance's possession of pornography showed he must have had sex with the girls. 4RP 19.

i. The Evidence Was Not Admissible To Show Lustful Disposition Towards M.M.

ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for purposes other than to show propensity, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evidence showing lustful disposition is one permissible purpose under ER 404(b). State v. Medcalf, 58 Wn. App. 817, 823, 795 P.2d 158 (1990).

In this case, however, the lustful disposition exception is inapplicable because there is no evidence M.M. looked at the pornography later admitted into evidence at trial or that LaChance attempted to arrange for her to look

at this pornography.⁸ At most, the evidence showed M.M. watched a pornographic video once in January 2006. No one indicated the title of the video she watched. M.D. only said the video showed "[s]exual intercourse." 3RP 44.

In Medcalf, the court held testimony regarding Medcalf's possession of X-rated videos constituted propensity evidence under ER 404(b) and should not have been admitted. Medcalf, 58 Wn. App. at 822-23. A police officer searching Medcalf's apartment observed a number of videocassettes on which children's film titles were followed by X-rated movie titles. Id. at 823. The State argued the evidence was admissible because the movies were "a rather unique device to, one, entice children, and then two, apparently to show them exactly how to do it." Id. However, the alleged victim testified she had never been invited to Medcalf's apartment to watch movies and there was no evidence she had watched any of the tapes while she was there. Id. Evidence of Medcalf's pornography was not admissible under the "lustful disposition" exception to ER 404(b) because the evidence did not show lustful inclination directed toward the offended female. Id. The videotapes had no connection with the alleged victim. Id.

⁸ The pornography admitted into evidence consisted of magazines and DVD's. 2RP 27-29, 32. M.M. and M.D. testified they watched pornographic videotape, not a DVD, on the January night in question. 3RP 10, 44. LaChance testified the girls watched a DVD. 3RP 77-78.

There was no evidence that LaChance proffered the pornography admitted as exhibits at trial to M.M., As a result, there was no connection showing LaChance's possession of this pornography and a lustful inclination towards M.M.

ii. The Evidence Was Not Admissible To Show Intent To Commit The Crimes.

Bad act evidence is inadmissible to prove intent when intent is not at issue in a case. State v. Powell, 126 Wn.2d 244, 262, 893 P.2d 615 (1995). The intent exception would otherwise swallow the rule against propensity evidence. Id.

Intent is not an element of the crime of third degree child rape. RCW 9A.44.079. Indeed, there is no mens rea element at all. State v. Chhom, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996). The pornography therefore could not have been properly admitted to show intent to rape M.M.

The pornography is not admissible to show intent regarding distribution of methamphetamine to a minor with sexual motivation because the prior acts do not demonstrate more than a general propensity to commit the charged offense. Wade, 98 Wn. App. at 334. To use bad acts for a non-propensity based theory, there must be similarity among the facts of the acts themselves. Id. at 335. Without this similarity, evidence of other bad acts is be relevant to show only mere propensity to act, which ER 404(b) prohibits. Here, no sufficient connection exists between the act of possessing pornography and the

acts of delivering meth to her with sexual motivation. Again, there was no evidence that M.M. ever looked at the pornography admitted into evidence, or that LaChance ever offered to show it to her.

iii. The Evidence Was Inadmissible To Show A Common Plan For The Crimes.

The common plan exception to ER 404(b) applies when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. Lough, 125 Wn.2d at 855, 860. The common plan exception does not apply because the evidence shows LaChance and M.M. watched pornography one time. There was no evidence that LaChance repeatedly plied M.M. with pornography and then had sex with her.

iv. The Res Gestae Exception Is Inapplicable.

The res gestae, or "same transaction" exception to ER 404(b) applies when evidence is necessary "'[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989) (citation omitted). "The other acts should be inseparable parts of the whole deed or criminal scheme." Id. The res gestae exception is inapplicable because LaChance's possession of the pornography admitted into evidence was not part of the same transaction of either rape or methamphetamine distribution.

The evidence did not show any of the DVD's admitted into evidence was the video watched by M.M., and therefore the pornography recovered

by officer Shannon and admitted into evidence did not constitute a part of any criminal deed.

v. The Evidence Was Inadmissible To Show Motive For The Crimes.

The motive exception to ER 404(b) refers to an impulse, desire, or any other moving power that causes an individual to act. Powell, 126 Wn.2d at 260. To be admissible under the motive exception, the bad act evidence must be of consequence to the action. Id. Evidence demonstrating motive is of consequence when only circumstantial evidence of the crime exists. Id.

The motive exception is inapplicable here because the eyewitness testimony of M.M., in which she related the "routine" of getting high and having sex with LaChance, constituted direct evidence of the rape and distribution charges. The pornography evidence was therefore not of consequence to the action within the meaning of the motive exception to ER 404(b).

Moreover, LaChance's possession of pornography did not give him a motive to give meth to M.M. LaChance's desire to have sex with M.M. was the motive to give her drugs. There was no evidence LaChance relied on the pornography as a moving power to give drugs to M.M. or rape her. Mere possession of pornography did not relate to the circumstances of the alleged crimes beyond showing simple propensity.

- vi. Even If The Pornography Evidence Could Have Theoretically Been Used For A Permissible Purpose, The Evidence Was Still Inadmissible Because It Was Unduly Prejudicial.

Even evidence relevant to a material issue must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.⁹ This is part of the ER 404(b) analysis as well. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Given the lack of connection between the pornography admitted into evidence and LaChance's acts in relation to M.M., it is apparent evidence of LaChance's pornography collection was unfairly prejudicial because it was of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (citation and internal quotation marks omitted); see also State v. Read, 100 Wn. App. 776, 782-83, 998 P.2d 897 (2000) (evidence is unfairly prejudicial "if it has the capacity to skew the truth-finding process."). The pornography evidence likely caused jurors to experience the very type of revulsion that the character evidence prohibition is designed to guard against.

⁹ ER 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 misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Furthermore, a court should consider the availability of other means of proof in determining whether the probative value of evidence outweighs its unfair prejudice. Powell, 126 Wn.2d at 264. The eyewitness testimony of M.M. and M.D. constitute direct evidence of the rapes and distribution offenses. The probative value of pornography that had no connection to M.M. is nil compared to its prejudicial impact.

b. Counsel Was Ineffective In Failing To Object To The Admission Of Pornography That Had No Connection With The Alleged Victim.

Evidence of prior bad acts is presumptively inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "Doubtful cases should be resolved in favor of the defendant." Wade, 98 Wn. App. at 334. The trial court would have likely sustained an objection to the pornography evidence on ER 404(b) grounds because, as set forth above, the State did not use this evidence for any permissible purpose and it was unduly prejudicial.

Counsel was deficient in failing to object to evidence showing LaChance possessed pornography that had no legitimate connection with the alleged crimes. LaChance derived no conceivable benefit from this evidence. The evidence only hurt him.

The standard of prejudice for an ineffective assistance of counsel claim is essentially the same for evidentiary error: an error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially

affected had the error not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." Id. However, "the concept of harmless error is not a license to inject naked prejudice into any case." State v. Avendano-Lopez, 79 Wn. App. 706, 722, 904 P.2d 324 (1995).

The outcome of this case depended upon the credibility of the parties because LaChance denied having sex with M.M. or supplying her with meth. Admission of the pornography evidence materially affected the outcome by confirming LaChance was the type of person who would have sex with a teenager and give her drugs for sexual purposes. This evidence wrecked LaChance's credibility with the jury. Counsel's failing was of major significance and undermines confidence in the outcome of this case. Reversal on all counts is required.

3. THE COURT ERRED IN FAILING TO ISSUE LIMITING INSTRUCTIONS ON ER 404(b) EVIDENCE AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST SUCH INSTRUCTION.

The court erred in failing to issue limiting instructions to prevent the jury from considering LaChance's bad acts as proof of LaChance's propensity to commit the charged crimes. Alternatively, counsel was ineffective in failing to request limiting instructions.

LaChance's possession of pornography admitted into evidence as exhibits is not the only ER 404(b) evidence for which a limiting instruction should have been provided. Evidence that LaChance watched a pornographic video with the girls on the night of January 2006 also constituted ER 404(b) evidence. See Halstien, 122 Wn.2d at 126 (ER 404(b) evidence includes acts that are unpopular or disgraceful). Evidence that LaChance had sex with M.D. and gave meth to her in January 2006 and evidence that M.D. "quite often" smoked meth with LaChance before January 2006 likewise constituted ER 404(b) evidence.¹⁰ 3RP 31, 41-46, 49-50, 52.

Evidence that LaChance watched a pornographic DVD with the girls in January 2006 may have been admissible as res gestae under ER 404(b). Evidence that LaChance had sex with M.D. and gave her meth may have been admissible under the common plan or res gestae exceptions to ER 404(b).

Regardless of admissibility, in no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." Saltarelli, 98 Wn.2d at 362. "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." Bacotgarcia, 59 Wn. App. at 822. For

¹⁰ The State charged LaChance with two counts of third degree child rape and three counts of distribution of a controlled substance to someone under age 18 with sexual motivation. CP 96-99. The "to convict" instructions specified these crimes were committed against M.M. CP 47-48, 53-55.

this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. Saltarelli, 98 Wn.2d at 362. Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). Indeed, the Supreme Court recently reiterated, "a limiting instruction *must* be given to the jury" if evidence of other crimes, wrongs, or acts is admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added). When ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. Saltarelli, 98 Wn.2d at 362. The court erred in failing to issue a limiting instruction in this case.

Some courts hold the failure to request a limiting instruction waives the error. See, e.g., State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975); Donald, 68 Wn. App. at 547. If this Court finds defense counsel waived the error by failing to request a proper limiting instruction or in failing to object

to its absence, then counsel's failure constitutes ineffective assistance of counsel.

Defense counsel was deficient for failing to propose a limiting instruction that would have prevented the jury from considering his possession of pornography and commission of acts associated with M.D. as evidence of LaChance's propensity to supply meth and have sex with M.M. There was no legitimate reason not to propose a limiting instruction given the prejudicial nature of this character evidence. If evidence of other bad acts is admitted, "the court must explain its purpose to the jury. These steps are particularly important in sex cases . . . where the potential for prejudice is at its highest." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993) (citations and internal quotation marks omitted) (counsel ineffective in failing to object to evidence of uncharged molestation acts). Allowing the jury to convict LaChance on the basis of bad character sealed LaChance's fate and did nothing to advance his defense.

In closing, defense counsel argued M.M.'s testimony did not match M.D.'s testimony regarding whether LaChance had sex with M.D., and that M.D.'s testimony was internally inconsistent on this point. 4RP 22-25, 28-29, 38. This legitimate argument could still have been made without allowing the jury to consider bad acts perpetrated against M.D. as evidence of LaChance's propensity to commit crimes against the charged victim, M.M.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" rationale is inapplicable here. Evidence that LaChance raped M.D. and gave her meth was not of a fleeting nature. M.D. and M.M. testified to these things. Even without a limiting instruction, the jury could not reasonably be expected to forget this testimony. In fact, evidence regarding M.D.'s victimization was set forth again and again by the prosecutor in closing argument. 4RP 5, 8, 20, 42-43. The prosecutor made a point of arguing LaChance provided meth and had sex with both girls. 4RP 5, 20, 42-43. He repeatedly characterized both girls as "victims," even though LaChance was not charged with victimizing M.D. in any way. 4RP 42. Similarly, the prosecutor made sure LaChance's possession of pornography was a central theme throughout the trial. 1RP 29, 2RP 27-29, 32; 3RP 10, 20-21, 44, 95-97; 4RP 19. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. This evidence permeated the proceedings.

The only question was whether the jury would use this evidence for an improper purpose. There is no reason to believe the jury did not consider evidence regarding crimes against M.D. as evidence of LaChance's propensity to commit the charged crimes against M.M. Nor is there any reason to believe the jury disregarded the prosecutor's argument that LaChance's possession of pornography showed his propensity to have sex with young girls. The jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822. If that were not the case, there would never be any reason to give a limiting instruction for ER 404(b) evidence. In sex cases, the limiting instruction restricts "the jury from basing its verdict on the forbidden 'once a sexual predator always a sexual predator' reasoning that ER 404(b) is designed to guard against.'" State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999).

There is a reasonable probability the outcome of the trial would have been different absent counsel's deficient performance. As noted, the potential prejudice from evidence of other acts is highest in sex cases. Saltarelli, 98 Wn.2d at 363. "One need not display an imposing list of statistics to indicate that community feelings everywhere are strong against sex offenders . . . Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State v. Coe,

101 Wn.2d 772, 781, 684 P.2d 668 (1984) (citation omitted). Evidence of similar acts of rape and distribution of meth with sexual motivation created a likelihood that the jury convicted solely upon character in the absence of a limiting instruction. See State v. Baker, 89 Wn. App. 726, 736, 950 P.2d 486 (1997) (addressing similar acts of child molestation). Reversal is required on all counts is required.

4. REVERSAL IS REQUIRED BECAUSE A COMBINATION OF ERRORS CUMULATIVELY PRODUCED AN UNFAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial under Article 1, § 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.¹¹ State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a

¹¹ The right to a fair trial also implicates article 1, § 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. Reed, 102 Wn.2d at 145.

fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

As set forth above, a number of errors occurred, including prosecutorial misconduct, ineffective assistance, and the failure to give limiting instructions. Even if one of these errors, standing alone, did not affect the outcome of LaChance's trial, there is a reasonable probability their cumulative force influenced deliberations for the reasons set forth above.

5. THE AMENDED JUDGMENT AND SENTENCE MUST BE REVERSED BECAUSE LACHANCE WAS NOT PRESENT FOR THE AMENDED SENTENCING AND COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

a. LaChance Was Deprived Effective Assistance of Counsel Because Defense Counsel Breached His Duty of Loyalty In Facilitating Imposition Of Additional Punishment.

Approximately two weeks after the Honorable H. John Hall entered judgment and sentence, defense counsel moved the court for payment of attorneys fees. CP 113-16. A few days later, counsel presented his own draft of an order entitled "Order Directing Payment of Attorney Fees and Amending Judgment and Sentence." CP 112. The order "approved" by the prosecutor states "the Judgment and Sentence is amended to include

attorney's fees in the sum of \$3,432.00." CP 112. The Honorable Richard L. Brosey entered this order on an ex parte basis without revision. CP 112.

The right to effective assistance extends to the sentencing stage. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). The core purpose of the right is to ensure assistance when the defendant is "confronted with both the intricacies of the law and the advocacy of the public prosecutor." United States v. Cronig, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The adversarial nature of the criminal process is the "very premise" underlying the right to counsel. Id. at 655-56. The right to counsel requires that the defendant have "counsel acting in the role of an advocate" and where "the process loses its character as a confrontation between adversaries," the constitutional guarantee to assistance of counsel is violated. Id. at 656-57.

Certain failings of counsel thus mandate reversal without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the outcome. Id. at 650, 658; In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). For example, prejudice is presumed when defense counsel breaches his duty of loyalty to his client, the "most basic of counsel's duties." In re Pers. Restraint of Benn, 134 Wn.2d 868, 890, 952 P.2d 116 (1998) (quoting Strickland, 466 U.S. at 692). Under no circumstance may defense counsel abandon his "overarching duty to advocate the

defendant's cause" and join the state's prosecution effort. Benn, 134 Wn.2d at 890 (quoting Strickland, 466 U.S. at 688); State v. Webbe, 122 Wn. App. 683, 695, 94 P.3d 994 (2004).

LaChance's counsel breached the duty of loyalty by drafting and presenting an order to impose additional punishment on LaChance in the form of attorney fees. In so doing, counsel ceased to act as an advocate and, in effect, joined the State's effort to punish LaChance.

The issue here is not whether defense counsel acted appropriately in seeking payment for his efforts as assigned counsel. LaChance does not challenge trial counsel's motion for compensation. LaChance challenges counsel's abandonment of his duty to advocate for LaChance's interests. Counsel's inclusion of language in the order amending the judgment and sentence by imposing thousands of dollars in additional costs upon his client was gratuitous. Amendment of the judgment and sentence was not a prerequisite to attorney compensation. This breakdown in the adversarial process requires reversal of the attorney costs imposed in the amended judgment and sentence.

b. The Court's Amendment Of The Judgment And Sentence Violated LaChance's Due Process Right To Be Present At A Critical Stage Of The Proceeding.

A criminal defendant has a constitutional right to be present during all "critical stages" of the criminal proceedings under the Due Process Clause of

the Fourteenth Amendment. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed.2d 486 (1985). Sentencing is a critical stage. State v. Rupe, 108 Wn.2d 734, 743, 743 P.2d 210 (1987); Gardner, 430 U.S. at 358. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Gardner, 430 U.S. at 358.

LaChance's due process right to be present was violated when the court amended his judgment and sentence in his absence. The court's sentencing amendment was not a trivial matter. The imposition of additional court costs imposed additional punishment. State v. Angulo, 77 Wn. App. 657, 660, 893 P.2d 662 (1995). Court-appointed attorneys' fees are a form of legal financial obligation. RCW 9.94A.030. RCW 9.94A.760(10) provides: "The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in RCW 9.94A.634, 9.94A.737, or 9.94A.740." The failure to pay legal financial obligations subjects the offender to arrest, sanction and confinement. RCW 9.94A.634; RCW 9.94A.737; RCW 9.94A.740.

In State v. Davenport, this Court held the defendant had a constitutional right to be present at sentencing where the court's entry of a new sentence on

remand involved the exercise of discretion and was not merely a ministerial act. State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007). In that case, the trial court exercised its discretion not to hear sentencing issues raised by counsel without Davenport being present or having the opportunity to be heard. Id. Although a defendant need not be present when his presence would be useless or "the benefit but a shadow," Davenport did have a right to be present because the court's decision not to consider issues related to a correct determination of his sentence amounted to more than a ministerial act. Id. (quoting State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988)).

The court's imposition of additional punishment here likewise amounted to more than a ministerial act. The court retained the discretion to impose attorney fees. State v. Williams, 65 Wn. App. 456, 459, 828 P.2d 1158, 840 P.2d 902 (1992); RCW 10.01.160(1). The court also had the statutory duty to ascertain LaChance's ability to pay those costs prior to imposing them. RCW 10.01.160(3). The court exercised its discretion to impose additional punishment on LaChance without giving him the opportunity to inform the court of his ability to pay. LaChance's due process right to be present at a critical stage of the proceeding was therefore violated.

6. THE COURT WRONGLY ORDERED THE DEPARTMENT OF CORRECTIONS TO GIVE LACHANCE LESS CREDIT FOR TIME SERVED THAN WAS ACTUALLY DUE.

Pursuant to RCW 9.94A.505(6), "[t]he sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." This statutory requirement reflects constitutional mandate. The failure to accurately provide credit for time served violates due process, equal protection, and the double jeopardy prohibition against multiple punishments. In re Pers. Restraint of Costello, 131 Wn. App. 828, 832, 129 P.3d 827 (2006).

The court correctly gave LaChance 139 days credit for time served in the judgment and sentence. CP 7. The warrant of commitment, however, specifies 2 days credit for time served and orders the Department of Corrections to confine LaChance as ordered in the "Committing Document." CP 117.

Review of the sentencing hearing reveals why the mistake was made. LaChance was simultaneously sentenced on two different cause numbers. 5RP 1, 5. The cause number for this case is 07-1-00136-5, as reflected in the warrant of commitment. 5RP 1. The cause number for the other case was 71-1-89-0. 5RP 1. The prosecutor said LaChance had three days credit for time served on the 89-0 cause number. 5RP 6-7. The court later said "[w]e're

going to have to straighten out the credit for time served" on the 89-0 cause number. 5RP 30. The two days credit for time served should have been applied to the 89-0 cause number rather than to his sentence on the charges at issue in this case.

A sentence must be "definite and certain." Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946). A sentence is therefore void where the court orders inconsistent lengths of confinement. Davis v. Catron, 22 Wn. 183, 185-86, 60 P. 131 (1900). "No rule is better settled than that the sentence of imprisonment must be certain." Id. at 186. "Sentences in criminal cases should reveal with fair certainty the intent of the court and *exclude any serious misapprehensions by those who must execute them.*" United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926) (emphasis added).

The sentence here fails this test. It is uncertain whether LaChance actually received credit for time served as required by statute and constitutional mandate. As the record now stands, the Department of Corrections in all likelihood inaccurately credited LaChance for time served because the warrant of commitment orders the DOC to give him only two days credit instead of 139 days credit. To ensure LaChance receives proper credit against his period of confinement, this case should be remanded to the trial court for correction

of the scrivener's error in the warrant of commitment. CrR 7.8(a); In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

D. CONCLUSION

For the reasons stated, this Court should reverse conviction on all counts and remand for a new trial. In the event this court declines to reverse conviction, this Court should reverse the challenged portions of the sentence.

DATED this 31st day of March, 2008.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. ~~67301~~
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)

Respondent,)

vs.)

JOSEPH LACHANCE, JR.,)

Appellant.)

COA NO. 36586-3-II

FILED
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LIAM MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET
FLOOR 2
CHEHALIS, WA 98532

[X] JOSEPH LaCHANCE
DOC NO. 307226
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 1809
AIRWAY HEIGHS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH, 2008.

x. Patrick Mayovsky

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STATE OF WASHINGTON
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