

NO. 40295-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES WRIGHT,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
10 SEP 16 PM 2:45
STATE OF WASHINGTON
BY 
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-00296-5

BRIEF OF RESPONDENT

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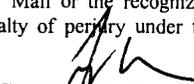
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 16, 2010, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iv
CASES	iv
I. COUNTERSTATEMENT OF THE ISSUES.....	1
II. STATEMENT OF THE CASE.....	1
A. PROCEDURAL HISTORY.....	1
B. FACTS.....	2
III. ARGUMENT.....	18
A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF WRIGHT’S UNCHARGED SEXUAL ABUSE OF THE VICTIM PURSUANT TO ER 404(B) BECAUSE: (1) THE EVIDENCE DEMONSTRATED THAT WRIGHT HAD A LUSTFUL DISPOSITION TOWARD THE VICTIM AND SHOWED THAT WRIGHT COMMITTED BOTH THE UNCHARGED ABUSE AND THE CHARGED OFFENSES WHILE USING A COMMON SCHEME OR PLAN; (2) THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED THE DANGER OF UNFAIR PREJUDICE: AND (3) THE TRIAL COURT MINIMIZED THE DANGER OF ANY PREJUDICE BY GIVING THE APPROPRIATE LIMITING INSTRUCTION.....	18
B. WRIGHT’S VARIOUS CLAIMS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WRIGHT’S MOTIONS TO INTRODUCE CERTAIN ITEMS OF EVIDENCE OR TESTIMONY ARE WITHOUT MERIT BECAUSE WRIGHT HAS FAILED TO SHOW THE THAT THE TRIAL COURT’S RULINGS WERE MANIFESTLY UNREASONABLE OR BASED ON UNTENABLE GROUND, OR UNTENABLE REASONS.....	24

1. The trial court properly rejected Wright’s proposed reputation evidence under Washington law a community comprised of other family members is neither neutral nor sufficiently generalized to constitute a community for the purposes of ER 608.....25

2. The trial court did not abuse its discretion in precluding Wright from introducing SNJ’s prior out of court statement that she lied “a lot” about trivial matters because: (1) SNJ’s previous statement was inadmissible hearsay; (2) the statement was specifically limited to subjects other than the abuse allegations, and thus did not contradict or impeach any of SNJ’s testimony; and, (3) because the statement constituted an admission to nothing more than the SNJ often lied about trivial matters the evidence was of such marginal relevance that it was inadmissible under ER 403 and/or any error in failing to admit the evidence was harmless given the limited nature of the statement.27

3. The trial court did not abuse its discretion in precluding Wright from introducing evidence that SNJ had had sexual contact with her friend Chrissy because this evidence carried no independent relevance, especially in light of the fact that SNJ admitted: (1) that she was the one who came to Wright with questions about sex; (2) that she was angry with Wright over his disapproval of Chrissy; and, (3) Wright introduced evidence from other witnesses that SNJ was angry and upset with Wright over his disapproval of Chrissy and the denial of SNJ’s request that Chrissy be allowed to move in.....30

4. The trial court did not abuse its discretion in precluding Wright from cross examining SNJ regarding his claim that SNJ’s friend Chrissy had made an allegation of sexual abuse and had been placed in foster care (and that SNJ therefore knew that “alleging sexual abuse was the fast track into foster care”) because Wright’s offer of proof failed to show that Chrissy had ever been placed in foster care or removed from her home in any way.....34

5. The trial court did not abuse its discretion in denying Wright’s attempt to introduce Exhibits 10 and 11 because the exhibits were inadmissible irrelevant hearsay and because Wright failed to lay a proper foundation for introduction of the exhibits as evidence of prior inconsistent statements. In addition, even if this Court were to assume that the trial court erred, any error was harmless given the minimal probative value of the exhibits.35

IV. CONCLUSION.....40

TABLE OF AUTHORITIES
CASES

Associated Mortgage Investors v. G.P. Kent Construction Co.,
15 Wn. App. 223, 548 P.2d 558 (1976)25

Mayer v. Sto Industrial, Inc.,
156 Wn. 2d 677, 132 P.3d 115 (2006).....25

State v. Bourgeois,
133 Wn. 2d 389, 945 P.2d 1120 (1997).....39

State v. Cameron,
100 Wn. 2d 520, 674 P.2d 650 (1983).....37

State v. DeVincentis,
150 Wn. 2d 11, 74 P.3d 119 (2003).....23

State v. Dewey,
93 Wn. App. 50, 966 P.2d 414 (1998).....23

State v. Everybodytalksabout,
145 Wn. 2d 456, 39 P.3d 294 (2002).....39

State v. Foxhoven,
161 Wn. 2d 168, 163 P.3d 786 (2007).....20

State v. Gregory,
158 Wn. 2d 759, 147 P.3d 1201 (2006).....26, 27, 30

State v. Guzman,
119 Wn. App. 176, 79 P.3d 990 (2003)20

State v. Hudlow,
99 Wn. 2d 1, 659 P.2d 514 (1983).....30, 31

State v. Kennealy,
151 Wn. App. 861, 214 P.3d 200 (2009)..... 21-23

State v. Kilgore,

147 Wn. 2d 288, 53 P.3d 974 (2002).....	18, 19
<i>State v. Land,</i>	
121 Wn. 2d 494, 851 P.2d 678 (1993).....	26
<i>State v. Lough,</i>	
125 Wn. 2d 847, 889 P.2d 487 (1995).....	19, 20
<i>State v. McDonald,</i>	
138 Wn. 2d 680, 981 P.2d 443 (1999).....	25
<i>State v. Parr,</i>	
93 Wn. 2d 95, 606 P.2d 263 (1980).....	37
<i>State v. Powell,</i>	
126 Wn. 2d 244, 893 P.2d 615 (1995).....	18
<i>State v. Ray,</i>	
116 Wn. 2d 531, 806 P.2d 1220 (1991).....	20
<i>State v. Rivers,</i>	
129 Wn. 2d 697, 921 P.2d 495 (1996).....	19
<i>State v. Russell,</i>	
154 Wn. App. 775, 225 P.3d 478 (2010).....	19
<i>State v. Sanchez-Guillen,</i>	
135 Wn. App. 636, 145 P.3d 406 (2006).....	36
<i>State v. Sexsmith,</i>	
138 Wn. App. 497, 157 P.3d 901 (2007).....	19
<i>State v. Stenson,</i>	
132 Wn. 2d 668, 940 P.2d 1239 (1997).....	19
<i>State v. Wilder,</i>	
4 Wn. App. 850, 486 P.2d 319(1971).....	38
<i>United States v. Brown,</i>	
490 F.2d 758 (D.C.Cir.1973).....	37

STATUTES

RCW 9A.44.0205, 31

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in admitting evidence of Wright's uncharged sexual abuse of the victim pursuant to ER 404(b) when: (1) the evidence demonstrated that Wright had a lustful disposition toward the victim and showed that Wright committed both the uncharged abuse and the charged offenses while using a common scheme or plan; (2) the probative value of the evidence outweighed the danger of unfair prejudice; and (3) the trial court minimized the danger of any prejudice by giving the appropriate limiting instruction?

2. Whether Wright's various claims that the trial court abused its discretion in denying Wright's motions to introduce certain items of evidence or testimony are without merit when Wright has failed to show that the trial court's rulings were manifestly unreasonable or based on untenable grounds, or untenable reasons?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James Wright was charged by a second amended information filed in Kitsap County Superior Court with one count of child molestation in the third degree and three counts of rape of a child in the third degree. CP 34. During trial, one of the rape of a child counts (Count II) was dismissed on an agreed motion. RP 224-25. The jury returned verdicts of guilty on counts: I (child

molestation in the third degree); III (rape of a child in the third degree); and IV (rape of a child in the third degree). CP 59. The trial court then imposed a standard range sentence. CP 77. This appeal followed.

B. FACTS

The charges in the present case alleged that Wright sexually abused S.M.J. who was the 14-year-old daughter of Wright's live-in girlfriend. CP 1. The allegation was that this abuse occurred while Wright, SMJ, and SMJ's mother and grandmother were all living together in a residence in Port Orchard, Washington. CP 1.

Pre-Trial Motions

Prior to trial the State filed a written motion in limine asking the trial court to prohibit Wright from presenting evidence from the victim's grandmother that the victim frequently lies and evidence that the victim had admitted in pre-trial interviews that she often lies about minor things such as taking cookies or doing her homework. CP 26-28.

At the hearing on the motions in limine the State explained that that the victim had stated in a forensic child interview and in a defense interview that she lied "quite a bit," but that she also explained that this was in reference to minor things such as taking cookies or doing her homework. RP 22-23. Furthermore, there was no indication that the victim had lied with

respect to anything relevant to the charges at issue. RP 23. The State acknowledged that if there was some admission by the victim that she had lied about the charges then the issue of admissibility might well be different, but the mere fact that the victim had acknowledged that she had told lies in the past was not relevant and should not be the subject of cross-examination. RP 24. The State also argued that the defense should be prohibited from introducing testimony from the victim's grandmother that the victim lied in the past or had a reputation for lying. RP 24-25.

Wright argued that in the forensic child interview the victim stated that she lied a lot but followed that statement up by stating that "but I am not lying about this." RP 27-28. Wright also stated that he intended to ask the victim, the victim's mother, and the victim's grandmother, pursuant to ER 608, about the victim's reputation in the community for being a truthful person (and that the expected testimony would be that the victim does not have a reputation for being a truthful person). RP 28-29.

The State responded that the proposed reputation evidence from the victim's mother and grandmother did not qualify as evidence of reputation in a "neutral and generalized" community. RP 31. Rather, the victim's mother was the defendant's long-time girlfriend, and the grandmother had lived in the same house with the defendant and the victim's mother. RP 31. Thus, the mother and grandmother who all were a part of a domestic relationship

represented the opposite of a neutral community. RP 32.

The trial court then ruled as follows:

Well under Evidence Rule 608 there is a very strong foundational requirement, and that's to show that this person who is going to testify knows the reputation in the community, and the case law from the older times was the community of Kitsap County, and the case law has chipped away at that to the size of the community, and it says in Tegland, there's one where the Boy Scouts, they were allowed – a person was allowed to testify based on the Boy Scout community of which the defendant was a member, but what's been presented so far would not in my opinion meet the foundational requirements for showing that they know the reputation in the community, and also, they don't – they are not a generalized and neutral community. That's a quote out of that one case, but we had State v. Lord, and that was a corrections officer, the community within the jail, and found that was – for other reasons that was not allowed in, not on the foundational requirement, but you are entitled to attempt to lay foundation outside the presence of the jury, for me to rule whether that meets the requirements that this is a generalized and neutral community, but I can tell you, this would be – I mean, the mother and the grandmother don't attend the school of [the victim] and wouldn't know her reputation in the school community which may – her reputation in the school community and her school may meet the community foundational requirement. I am not saying it does or does not, but I don't think the mother and grandmother would meet the foundational requirement, although you will have an opportunity to lay foundation if you wish to do so.

RP 33-34. Wright, however, never asked to make a further offer of proof nor did he make any later attempts to lay a foundation for this proposed testimony.

The trial court also ruled that the victim's statement that she often lied about trivial matters was not a proper subject for cross-examination because

it was “not tied to this case” and was not being offered to impeach any specific statement she made related to the case. RP 35.

Finally, the trial court also held that the victim could not be asked about her own reputation for truthfulness because she did not represent a neutral person in the community making an objective assessment of her reputation.

RP 35. The trial court also told defense counsel that,

If you can find some authority, case law authority that you can ask the complaining witness in this case what her opinion is of herself in the community, I will listen to it, but under 608, how I read the rule, it’s generalized community, and the goal is to get somebody objective in the community that can state that. It can’t be your best friend or your mother or your grandmother.

RP 37. Wright never provided any additional authority and the issue was never raised again at trial.

The State also filed a written motion in limine asking the trial court to prohibit the defense from presenting evidence regarding the victim’s sexual history, citing ER 405 and RCW 9A.44.020. CP 28. Specifically, the State asked the court to preclude evidence that the victim had previously kissed and engaged in other sexual activity with a female friend named Christine. RP 39.

Wright argued that this evidence was relevant to show that the victim was mad at the defendant and that this anger was what prompted the

allegations of abuse. RP 43. Specifically, Wright argued that the victim asked him if “Chrissy” could move in with them because Chrissy was having troubles at home, and that when Wright denied this request the victim became really “upset” and the victim’s disclosure of the abuse occurred shortly thereafter. RP 42. Wright also argued that he became aware of the victim’s relationship with the other girl and that this is what motivated him to have discussions with her “about sexual matters in the context of sex education.” RP 40-44.

The trial court ruled that “clearly the defendant can testify that he believed [the victim] was sexually active and that she was in need of sexual education and however, he proceeded to introduce web sites or anything else . . . but the fact that she was having a relationship with Chrissy I think is barred under the Rape Shield statute.” RP 45-46. The court also stated that the defendant could testify that he believed the victim was becoming sexually active based on conversations he had with her “without going into Chrissy or anybody else. That is out under the Rape Shield statute.” RP 47. In addition, the court specifically stated that Wright was free to discuss that Chrissy was a friend of the victim’s and that the victim wanted her to move into the house. RP 48.

Prior to trial the State also asked the court to allow it to introduce evidence of one uncharged act sexual abuse pursuant to ER 404(b). RP 70.¹ Specifically, the State made an offer of proof that victim would testify that in addition to the charged offenses there had been one other incident of abuse that occurred while Wright and SMJ were driving home after they had visited a friend of Wright's. RP 71. SMJ described that on the way home Wright had pulled the car over to the side of the road in a fairly remote area and that they then had a discussion about sex. RP 71. Wright then touched and penetrated SMJ's vagina with his finger. RP 72.

The State argued that this evidence was admissible pursuant to ER 404(b) as it was evidence of Wright's lustful disposition towards the victim and it was evidence of sexual abuse of the same victim and involved similar sexual contact as the charges offenses. RP 73. Wright argued that the evidence should not be admissible because the alleged event took place outside of the home and because the probative value of the evidence was outweighed by its prejudicial effect. RP 75-77.

The trial court ultimately held that the evidence was admissible under ER 404(b). RP 81-84. In ruling that the evidence was admissible, the trial

¹ The act at issue was originally charged as a count of rape of a child in the third degree (Count III of the first amended information – CP 21), but due to the fact that the victim was unable to definitively state whether the actual abuse occurred in Kitsap County or in Pierce County, the State decided to dismiss that particular count and therefore filed a second

court first found that the State had shown through its offer of proof that the incident had occurred by a preponderance of the evidence. RP 81. The court next found that there were two purposes under ER 404(b) for which the evidence could be admitted: common scheme or plan and lustful disposition. RP 81-82. The trial court also found that the evidence was relevant and that the probative value of the evidence outweighed any unfair prejudice to the defendant. RP 83.

Trial Testimony

At trial SMJ testified that Wright was her mother's boyfriend, and that she, her mother, her grandmother, and Wright had all lived in the same house in Port Orchard, Washington. RP 109-10. SMJ has known Wright since she was seven-years-old and that Wright moved in with her family sometime in the summer before she started seventh grade (which was in 2007). RP 110-12. SMJ testified that when Wright first moved in she didn't like him because he was dating her mom, but later when she got to know Wright she thought he was cool. RP 114.

SMJ explained that during seventh grade she started asking Wright questions about sex and Wright answered her questions and had "sex ed." conversations with her in response to her questions. RP 120. Wright also

amended information that omitted this count. See RP 13-14, CP 34.

showed SMJ some things on the computer, beginning with what she described as “diagrams and stuff.” RP 123. Later, Wright showed SMJ pornographic videos of people having sex. RP 152-53.

SMJ described that later Wright had sexual contact with her on four occasions. Three of the incidents formed the basis for three charges that the jury was asked to render verdicts on, and testimony regarding the fourth incident was admitted pursuant to ER 404(b).

Regarding the first of the charged events, SMJ described that she and Wright were sitting on a couch in their home at night, and SMJ’s believed that both her mother and grandmother were asleep at the time. RP 123-25. While SMJ and Wright were on the couch, SMJ unbuttoned her own jeans and Wright touched her vagina with his hand. RP 126. SMJ could not recall whether Wright put his hand inside or outside of her underwear, but did recall that Wright had touched her vagina with his hand. RP 126. SMJ also said that she didn’t know why she had unbuttoned her pants, and admitted that she did not try to push Wright away. RP 126-27.

With respect to the second charged incident, SMJ testified that she and Wright were sitting on the couch watching TV at night. RP 138. SMJ’s mother and grandmother were both at home, but SMJ again believed that both were asleep. RP 138. While watching TV, Wright and SMJ were

talking about sex, although SMJ could not remember the specific nature of the conversation. RP 139-40.² Wright then touched SMJ's vagina with his fingers and this contact was under her underwear. RP 141-42. On this occasion SMJ also put Wright's penis inside her mouth. RP 143.

SMJ also described an incident that took place the following morning and formed the basis for the third charged offense. RP 145. At approximately nine in the morning SMJ went into Wright's bedroom where Wright was lying on the bed. RP 145-46. She described that she sat down on the bed and was talking about sex with Wright, although she did not remember the exact nature of the conversation. RP 147-48. At some point Wright began masturbating in front of SMJ and SMJ briefly put her mouth on Wright's penis. RP 147-49. Wright then asked SMJ to get some "conditioner" for him, and SMJ then retrieved some conditioner from the bathroom and gave it Wright and Wright used the conditioner to assist his masturbation. RP 150-51. SMJ stood at the door watching out for her grandmother while Wright did this. RP 151. This episode was the last sexual contact that Wright had with SMJ. RP 152.

² SMJ did describe that before Wright would have contact with her they usually were talking sex and that these conversations generally started out with discussions about diseases (and how one got them) or discussions of "how you do it" (which SMJ explained meant how you have sex). RP 140.

The State also introduced the ER 404(b) evidence that had been discussed pre-trial. Prior to testimony on this subject, however, the trial court gave the jury a limiting instruction as requested. RP 129. SMJ then described that in the summer of 2008 she and Wright had driven to Tacoma so that Wright could help a friend of his skin a bear. RP 129. On the drive back home, SMJ and Wright were talking in the car and Wright pulled the car over to the side of the road. RP 131. SMJ could not say exactly where they were at the time, but she estimated that they were approximately halfway home. RP 131. As they sat in the car, Wright then touched her vagina with his hand, and SMJ recalled that on this occasion Wright touched her underneath her underwear. RP 133. Wright then briefly got out and went around to the back of the vehicle, but soon returned and the two drove home. RP 134-35.

SMJ did not disclose any of these events to her mother or to her grandmother. RP 145. The prosecutor asked SMJ if she ever felt like telling them about these events, and SMJ responded,

- A. I don't know. I think, I guess. I wanted to, but –
- Q. What do you think, if anything, kept you from doing that?
- A. Because he was going out with my mom.

RP 145.³

Although SMJ did not tell her mother or her grandmother about any of the incidents with Wright, SMJ eventually told a friend about what had occurred. RP 153. SMJ made this disclosure shortly after she started the eighth grade. RP 153. SMJ described that she told her friend, “Because he’s my best friend. He’s practically my brother, and we tell each other everything.” RP 154. SMJ’s described that her friend then went to the school counselor’s office and put their names on a list. RP 154. SMJ stated that she was unaware that her friend was going to do this, and that she “didn’t want to,” but that the counselor then called their names and her friend told the counselor what had happened, noting that he “like spilled everything.” RP 154-55. SMJ then described to the counselor what had gone on with Wright. RP 155.

On cross-examination, defense counsel asked SMJ numerous questions about her female friend “Chrissy,” and SMJ acknowledged that Chrissy was an old friend of hers. RP 165. Defense counsel then asked if SMJ knew whether Chrissy had ever been in foster care. RP 165. The State objected based on relevance, and the trial court excused the jury. RP 166.

³ Later, on cross-examination, SMJ explained that she believed that if she had told her mother about what was going on with Wright that her mother would have left with Wright, leaving SMJ alone with her grandmother. RP 182.

Defense counsel then argued that the defense was attempting to show that SMJ was trying to get herself placed into foster care and that the defense should be allowed to explore what she knew about foster care, as it was the defense position that SMJ knew that alleging sexual abuse was the fast track into foster care. RP 166-67. Defense counsel also explained that it was his understanding that Chrissy had been in foster care because of allegations of sexual abuse. RP 168.

The State questioned what basis the defense had for this belief. RP 168. Defense counsel responded that he had not spoken to Chrissy, but that SMJ's had told about this. RP 168. Defense counsel acknowledged that if SMJ "says no, then I think I am stuck with the answer, but I don't know that the question itself is irrelevant." RP 168. The trial court then stated that it needed an offer of proof outside the presence of the jury. RP 169. Defense counsel consented, and a brief offer of proof was made as follows:

- Q. [By defense counsel] [SMJ], to the best of your knowledge, has Chrissy ever been placed in foster care?
- A. I don't know.
- Q. To the best of your knowledge, has Chrissy ever made allegations of sexual abuse against anyone?
- A. Yes.
- Q. Who has she made the allegations of sexual abuse against?
- A. One of her uncles.

- Q. Did the two of you discuss that?
- A. Yes.
- Q. And as a result of her making allegations against her uncle, were there any – did Child Protective Services, CPS ever get involved?
- A. I don't know.
- Q. To the best of your knowledge, as a result of her making allegations against her uncle, was there anything ever put in place by any official body that prevented her from having contact with her uncle?
- A. I don't know. I just – I don't think – I think she just didn't see him anymore.
- Q. And, so were for instance her parents preventing her from seeing her uncle as a result of the allegations?
- A. I don't know. I didn't know much about her home life.

RP 170-71. The trial court then sustained the State's objection, finding that,

Based on this offer of proof, the court will sustain the State's objection that this is not relevant, and that under 402, it would be confusing to the jury because this doesn't fit together, that [SMJ] knows anything about CPS and Chrissy.

RP 172.

Defense counsel then continued his cross-examination of SMJ and SMJ acknowledged that Wright had told her that he was concerned that her relationship with Chrissy was not a healthy relationship and that she disagreed with him about this. RP 175-76. SMJ also admitted that in the school year of 2008 she had asked if Chrissy could move into the family

home, but SMJ denied the Wright had denied this request. RP 176. Rather, SMJ explained that,

[Wright] had said yes, that it was all right. It was my mother, I guess, that was saying no. I am not sure about who was saying yes and who was saying no, but last I heard he was saying yes and my mother was saying no.

RP 176.⁴ SMJ, did acknowledge, however, that she was upset that her request had been denied. RP 176.

Defense counsel then inquired about SMJ's request that she be allowed to move in with a male friend and his family. RP 177. SMJ admitted that she had asked to move in with a friend and that she made this request around September of 2009, only days before her eventual disclosure of the abuse. RP 177. SMJ also acknowledged that Wright and her mother had both denied this request and that she was pretty upset at this time with her situation at home and wanted out. RP 177-78.⁵

During a break in the cross-examination, defense counsel also informed the court that it wanted to introduce two exhibits (Exhibits 10 and

⁴ SMJ's mother, Jennifer Jorge, was later called as a defense witness and she confirmed that she was the one (not Wright) who had told SMJ that Chrissy could not move in RP 238. Ms. Jorge explained the when SMJ approached Wright about having Chrissy move in, Wright told her that she needed to speak to her mom, as that was a decision that she needed to make. RP 238.

⁵ During the defense case Wright also called several witnesses who testified that SMJ was upset by several thing including:: that her mother and Wright did not approve of Chrissy; that Chrissy was not allowed to move in; and, that she herself was not allowed to move into

11), but that the State would be objecting to those exhibits. Defense counsel explained that the two exhibits were print outs from SMJ “Myspace.com” web page. RP 184. Defense counsel argued that these exhibits were relevant for two reasons, the first being that the page shows that SMJ misrepresented her age as 19. RP 184. In addition, defense counsel explained that shortly after SMJ was interviewed by defense counsel and by the prosecutor prior to trial, SMJ had made postings expressing what her “mood” was following the interviews. RP 185.⁶ Defense counsel then stated that he wanted to be allowed to question SMJ about the statements that she had posted. RP 185.

The Court then reviewed the proposed exhibits and found that they were inadmissible as they were not relevant and were not proper impeachment evidence. RP 188.⁷

When the cross-examination resumed, SMJ acknowledged that in the spring of 2008 “Wright was becoming concerned about some issues regarding sexuality” with her. RP 191. SMJ also admitted that she started asking Wright a lot of questions about sex, that Wright was becoming

the home of a friend. See, RP 231, 237-239.

⁶ The State went over the actual postings with the court, explaining that after the defense interview SMJ wrote, “Tired of all this fucking shit and just want all of this to go away”; and after the prosecution interview SMJ write, “I want it over. I am so fucking tired of this shit. Just let it be done. I just want to get it over with. I hate him and her. Why did this happen?” RP 185-86.

⁷ The court also found that the pages also contained a lot of other irrelevant information, including the victim’s sexual orientation. RP 189.

concerned that SMJ was thinking about becoming sexually active, and that the SMJ's questions gave rise to that concern. RP 192. SMJ also acknowledged that Wright used the Internet to show SMJ information about sexually transmitted diseases and that, at the time, she felt that his answers to her questions were appropriate answers for a father to give to his daughter. RP 193.

In addition to the testimony above, the State also presented testimony that Deputy Bernard Brown, who was assigned as a school resource officer, came to the counselor's office in response to a phone call from the counselor. RP 90. Deputy Brown spoke briefly with SMJ and then transported her to the special assault unit of the Kitsap County Prosecutor's Office so that SMJ could be interviewed by a forensic child interviewer. RP 91-92.

Deputy Brown then later went to Wright's home and contacted him. RP 93. Deputy Brown explained why he was there, advised Wright of his Miranda warnings, and told Wright about SMJ's allegations. RP 94, 96. Wright stated that SMJ had come to him with some questions and he admitted that he had looked at some adult porn with her on the Internet, but Wright denied that he had touched SMJ inappropriately. RP 96.

III. ARGUMENT

- A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF WRIGHT'S UNCHARGED SEXUAL ABUSE OF THE VICTIM PURSUANT TO ER 404(B) BECAUSE: (1) THE EVIDENCE DEMONSTRATED THAT WRIGHT HAD A LUSTFUL DISPOSITION TOWARD THE VICTIM AND SHOWED THAT WRIGHT COMMITTED BOTH THE UNCHARGED ABUSE AND THE CHARGED OFFENSES WHILE USING A COMMON SCHEME OR PLAN; (2) THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED THE DANGER OF UNFAIR PREJUDICE; AND (3) THE TRIAL COURT MINIMIZED THE DANGER OF ANY PREJUDICE BY GIVING THE APPROPRIATE LIMITING INSTRUCTION.**

Wright argues that the trial court abused its discretion in admitting evidence or prior bad acts pursuant to ER 404(b). App.'s Br. at 16. This claim is without merit because the trial court properly admitted the evidence under the lustful disposition and common scheme or plan exceptions to ER 404(b).

A trial court's ER 404(b) determination is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Under ER 404(b), evidence of prior bad acts is inadmissible to prove character in order to show conformity with them. ER 404(b); *State v. Kilgore*, 147 Wn.2d 288, 291-92, 53 P.3d 974 (2002). But such evidence may be admissible for other purposes such as proof of motive, opportunity, intent, preparation,

common scheme or plan, knowledge, identity, or absence of mistake or accident. ER 404 (b); *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995); *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

In order to admit evidence of previous bad acts, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence, (2) identify the purpose for admitting the evidence, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect. *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

Regarding this last factor, Washington courts have noted that a trial judge has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997)(citing *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996)). In addition, courts will generally find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014, 180 P.3d 1291 (2008); *State v. Russell*, 154 Wn. App. 775, 785, 225 P.3d 478 (2010). Furthermore, a trial court's balancing of probative value against prejudicial effect is reviewed for an abuse of discretion. *Sexsmith*, 138 Wn. App. at 506, 157 P.3d 901. Discretion

is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Under Washington law, evidence of a defendant's prior acts of sexual abuse against the same victim are routinely held to be admissible as evidence of a defendant's lustful disposition toward the victim. *See, State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991) ("This court has consistently recognized that evidence of collateral sexual misconduct may be admitted under Rule 404(b) when it shows the defendant's lustful disposition directed toward the offended female"); *State v. Guzman*, 119 Wn. App. 176, 79 P.3d 990 (2003) (rejecting evidence that such evidence was unfairly prejudicial).

Evidence of prior bad acts may be admitted to prove a common scheme or plan. *Lough*, 125 Wn.2d at 852, 889 P.2d 487. In *Lough*, our Supreme Court noted that the common scheme or plan exception to ER 404(b) arises "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" or "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Lough*, 125 Wn.2d at 855.

In the context of cases involving child molestation, Washington courts have upheld trial court orders that have admitted evidence of prior acts under the common scheme or plan exception to ER 404(b). For instance, in

State v. Kennealy, 151 Wn. App. 861, 887-89, 214 P.3d 200 (2009), this court upheld the trial court's admission of evidence regarding the defendant's prior acts admitted to show a common scheme or plan even though defendant argued that the prior incidents differed from the charged incidents. In *Kennealy* the defendant was charged with several sex offenses stemming from his sexual abuse of several children who were staying in the same apartment complex as the defendant. *Kennealy*, 151 Wn. App. at 868-69. At trial, the court had admitted evidence of Kennealy's uncharged prior misconduct involving his daughter and three of his nieces, finding that the evidence showed that Kennealy had a common scheme or plan to molest children. *Kennealy*, 151 Wn. App. at 875. The trial court found the incidents were "remarkably similar and seemed consistent" with the evidence in the case before it; it admitted the statements for the limited purpose of proving a common scheme or plan to sexually molest young children, not to prove character. *Kennealy*, 151 Wn. App. at 875.

On appeal, the defendant in *Kennealy* argued that the prior incidents of sexual misconduct were different from the current charges because they each involved close relatives, the locations differed, and they did not involve gifts or enticements as had been the case in the charged offense. *Kennealy*, 151 Wn. App. at 888-89. This Court, however, held that although there were some differences in the prior acts (and the nature of the touching involved

was substantially different in at least one of the cases) the incidents were still substantially similar and showed the defendant's "design or pattern to gain the trust of children between the ages of 5 and 12 to allow him access to the children in order to sexually molest them." *Kennealy*, 151 Wn. App. at 889.

In the present case the trial court found that the State's offer of proof established by a preponderance of the evidence that the prior act occurred and that the evidence was admitted to show lustful disposition and common scheme or plan. This finding was in accord with Washington cases finding that prior acts against the same victim are relevant to show lustful disposition.

In addition, the trial court properly found that the State's evidence was evidence of a common scheme or plan since the evidence demonstrated that Wright had repeatedly exploited his relationship with the victim and sought to molest her on occasions when he was alone with the victim. Thus, the trial court did not abuse its discretion in finding that the evidence was admissible as common scheme or plan evidence since such evidence is admissible, as in the present case, "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" or "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Lough*, 125 Wn.2d at 855.

Wright, however, claims that under the common scheme or plan exception evidence must be unique and uncommon to most sexual assaults, and

cited *State v. Dewey*, 93 Wn. App. 50, 966 P.2d 414 (1998) as support for this argument. See App.'s Br. at 21-22. Wright, however, fails to recognize that the Washington Supreme Court has expressly rejected the Dewey requirement that the acts be unique. See *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003) (“*Dewey* reflects a misreading of *Lough* because our analysis in *Lough* requires similarity of the acts, not uniqueness”). Thus, since at least 2003 it has been well settled in Washington that while the prior acts must be similar to the charged offenses in order to be admissible as common scheme or plane evidence, the acts need not be “unique” or uncommon to other molestations or rapes.

Wright also argues that the State’s proposed evidence occurred at a different location than the charges offenses and that this somehow renders the State’s evidence inadmissible as common scheme or plan evidence. App.’s Br. at 18. Under Washington law, however, the prior act need not be exactly identical to the charged offenses nor does the mere fact that the acts occurred at a different place negate a finding that the evidence represented a common scheme or plan. See, e.g., *State v. Kennealy*, 151 Wn. App. 861, 889, 214 P.3d 200 (2009)(holding that the trial court did not abuse its discretion in admitting evidence of prior misconduct as evidence of a common plan or scheme, despite the fact that the acts occurred at different locations, as the

common features showed a plan or design to gain access to children in order sexually abuse them).

In the present case the trial court applied the correct standards governing common scheme or plan evidence and properly found that Wright's various acts were naturally to be explained as caused by a general plan since he had first engaged in grooming behavior by talking with her about sex and showing her pornographic images, and had then exploited his relationship with the victim in order to have time alone with her and then engage in sexual contact that was extremely similar to the State's proposed 404(b) evidence. In short, Wright has failed to show that the trial court abused its discretion.

B. WRIGHT'S VARIOUS CLAIMS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WRIGHT'S MOTIONS TO INTRODUCE CERTAIN ITEMS OF EVIDENCE OR TESTIMONY ARE WITHOUT MERIT BECAUSE WRIGHT HAS FAILED TO SHOW THE THAT THE TRIAL COURT'S RULINGS WERE MANIFESTLY UNREASONABLE OR BASED ON UNTENABLE GROUNDS, OR UNTENABLE REASONS.

Wright next claims that the trial court abused its discretion by precluding him from admitting evidence on certain subjects. These claim are without merit because the trial court's rulings complied with Washington law.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on “untenable grounds, or for untenable reasons.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)). A trial court's decision is manifestly unreasonable if it “adopts a view that ‘no reasonable person would take.’” *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *Id.*

1. ***The trial court properly rejected Wright’s proposed reputation evidence under Washington law a community comprised of other family members is neither neutral nor sufficiently generalized to constitute a community for the purposes of ER 608.***

Wright claims that the trial court erred in precluding the defense from presenting evidence from the victim’s mother and grandmother that SNJ has a reputation for being dishonest. App.’s Br. at 12.

Evidence Rule 608 provides that the credibility of a witness may be attacked by evidence of the witness's reputation for untruthfulness in the community, but “to establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and

general.” *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). Whether a party has established a proper foundation for reputation testimony is within the trial court's discretion. *Id.* In addition, the Washington Supreme Court has held specifically upheld a trial court's finding that a community comprised of other family members were neither neutral nor sufficiently generalized to constitute a community for the purposes of ER 608. *State v. Gregory*, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006). As the Supreme Court noted, “the inherent nature of familial relationships often precludes family members from providing an unbiased and reliable evaluation of one another.” *Gregory*, 158 Wn.2d at 805. In addition, the Supreme noted any community comprised of two individuals is too small to constitute a community for purposes of ER 608. *Gregory*, 158 Wn.2d at 805, *citing State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1991) (community must be general).

In the present case Wright's proposed reputation testimony from the victim's mother and grandmother fell far short of the requirements for admissibility under ER 608. In addition, Wright provided the trial court with no evidence that the victim's mother or grandmother had any familiarity with the victim's reputation outside of her family. In addition, although Wright also proposed asking the victim herself about her reputation for truthfulness, Wright made no showing that the victim herself represented a neutral or sufficiently generalized community for the purposes of ER 608. Furthermore,

Wright made no offer of proof at all that the victim, her mother, or her grandmother, had any awareness of the victim's reputation outside of the family unit. This failure to make any such offer of proof occurred despite the fact the trial court specifically told Wright that he would be allowed to make additional attempts to lay a proper foundation if he wished to do so. Absent any further offers of proof, and given the fact that the Washington Supreme Court has held that family members were neither neutral nor sufficiently generalized to constitute a community for the purposes of ER 608, Wright has failed to show that the trial court abused its discretion in precluding him from presenting reputation evidence under ER 608. *State v. Gregory*, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006).

2. ***The trial court did not abuse its discretion in precluding Wright from introducing SNJ's prior out of court statement that she lied "a lot" about trivial matters because: (1) SNJ's previous statement was inadmissible hearsay; (2) the statement was specifically limited to subjects other than the abuse allegations, and thus did not contradict or impeach any of SNJ's testimony; and, (3) because the statement constituted an admission to nothing more than the SNJ often lied about trivial matters the evidence was of such marginal relevance that it was inadmissible under ER 403 and/or any error in failing to admit the evidence was harmless given the limited nature of the statement.***

Wright also claims that the trial court erred in precluding the defense from presenting evidence that SNJ stated in a pretrial interview that she lied, frequently, although she also stated that her statements about the present case

were truthful. App.'s Br. at 15. Wright specifically argues that he should have been allowed to ask SNJ about her admission that she lied "a lot." App.'s Br. at 16.

SNJ's specific statement at issue was made at the end of the forensic child interview and the although SNJ did state that she lied a lot, she followed that statement up by stating "but I am not lying about this." RP 27-28. The trial court also ruled that the victim's statement that she often lied about trivial matters was not a proper subject for cross-examination because it was "not tied to this case" and was not being offered to impeach any specific statement she made related to the case. RP 35.

The victim's statement was hearsay as it was made outside of court and was being offered to show the truth of the matter asserted. ER 801, 802. In addition, as SNJ specifically qualified her statement by explaining that she did not lie about her abuse, the trial court correctly found that the statement would not directly impeach any of her trial testimony.

In addition, the trial court noted that the only offer of proof about the proposed evidence that was made was that SNJ's statement referred only to trivial things like talking about homework. RP 35. This was correct since Wright failed to make any offer of proof about what SNJ would have said or that she would have admitted lying about anything in the past about other

than minor, trivial matters. Given Wright's failure to make any offer of proof to the contrary, the trial court did not abuse its discretion. The trial court's ruling, of course did not preclude Wright from cross-examining SNJ about her credibility or even from asking her if she had lied about relevant things in the past (assuming counsel had a good faith basis for believing that she had done so). Rather, the trial court's actual ruling only prohibited Wright from introducing a hearsay statement that by its own content did not apply to any of SNJ's statement's regarding the alleged abuse. Furthermore, the mere fact that a witness has lied about trivial matters in the past is irrelevant under ER 403. Given all of these facts, and given Wright's failure to make any further offer of proof, Wright has failed to show that the trial court abused its discretion.

Finally, even if the trial court erred in precluding Wright from introducing the statement, any error in this regard was harmless since the statement by its own terms only applied to minor matters and did not apply to any statements that were relevant to the facts at issue.

3. ***The trial court did not abuse its discretion in precluding Wright from introducing evidence that SNJ had had sexual contact with her friend Chrissy because this evidence carried no independent relevance, especially in light of the fact that SNJ admitted: (1) that she was the one who came to Wright with questions about sex; (2) that she was angry with Wright over his disapproval of Chrissy; and, (3) Wright introduced evidence from other witnesses that SNJ was angry and upset with Wright over his disapproval of Chrissy and the denial of SNJ's request that Chrissy be allowed to move in.***

Wright next claims that the trial court erred in precluding the defense from presenting evidence that the victim had previously engaged in sexual contact with a female friend. App.'s Br. at 22. Wright claims that the evidence was relevant to rebut the assertion that the victim was sexualized because of the actions of the defendant and because it was evidence of bias and motive to lie. App.'s Br at 24.

The admissibility of evidence of past sexual conduct is within the sound discretion of the trial court. *State v. Hudlow*, 99 Wn.2d 1, 17-18, 659 P.2d 514 (1983); *State v. Gregory*, 158 Wn.2d 759, 784, 147 P.3d 1201 (2006). Furthermore, a criminal defendant has no right to have irrelevant evidence admitted in his or her defense. *Hudlow*, at 15, 659 P.2d 514. Relevant evidence is that which tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence of past sexual behavior or promiscuity, nonchastity, or sexual mores contrary to

community standards, is inadmissible for the general purpose of attacking a rape victim's credibility, and is admissible to prove the victim's consent only in limited circumstances. RCW 9A.44.020(3); *See Hudlow*, at 8-9, 16-17, 659 P.2d 514.

Wright's argument on appeal is that the trial court's ruling prevented the defense from arguing its theory that SNJ fabricated the allegations against Wright because she was angry with him for taking steps to minimize her contact with Chrissy and because he denied her request to allow Chrissy to move in. App.'s Br. at 25. This argument, however, is without merit because it misconstrues the trial court's ruling and its consequences.

In the present case the State did not seek to limit Wright's ability to introduce evidence that SNJ was angry with Wright, nor did the State seek to prohibit Wright from arguing that SNJ's anger motivated her to report the abuse. Rather, the State only asked the court to preclude evidence that the victim had previously kissed and engaged in other sexual activity with Chrissy. RP 39.

While it is true that Wright argued that this evidence was relevant to show that SNJ was upset with Wright because he didn't approve of Chrissy and denied SNJ's request to allow Chrissy to move in, and because it was SNJ's conduct with Chrissy was one of the reasons that Wright began to

discuss sex or sex education with SNJ, the trial court ruling did not hinder Wright's ability to argue his case in this regard. Rather, the only evidence that was precluded was that SNJ had had sexual contact with Chrissy. The trial court specifically allowed Wright to introduce evidence that; (1) he believed SNJ was sexually active and that she was in need of sexual education; (2) and Wright believed the victim was becoming sexually active based on conversations he had with her (without naming Chrissy specifically); and (3) Chrissy was a friend of the victim's and that the victim wanted her to move into the house and was upset when this wasn't not allowed to occur. RP 48.

In addition, the record below demonstrates that the victim readily admitted that she came to Wright with questions about sex and that he reasonably believed that she was potentially becoming sexually active. RP 120. Furthermore, SMJ acknowledged that Wright had told her that he was concerned that her relationship with Chrissy was not a healthy relationship and that she disagreed with him about this. RP 175-76. SMJ also admitted that she was upset that Chrissy was not allowed to move in. RP 176. Furthermore, both SMJ and the defense witness, Jennifer Jorge, explained that it was Ms. Jorge, and not Wright who had denied the request. RP 176, 238. Thus, Wright's argument pre-trial that the sexual nature of SMJ's relationship with Chrissy was admissible to explain SNJ's anger toward

Wright for denying her request proved to be unfounded and without support.

Wright was not limited or prohibited in any way from introducing testimony that SNJ was angry that Wright and Ms. Jorge took steps to preclude SNJ from seeing Chrissy and that this upset her. Rather, Wright was allowed to question SNJ about her anger and she readily admitted that she was angry with Wright for prohibiting her from seeing Chrissy. RP 175. Wright was also allowed to call several witnesses who testified that SMJ was “upset” and “angry” that her mother and Wright did not approve of Chrissy, prohibited her from seeing Chrissy and did not allow Chrissy to move in with them. See, RP 231, 237-239.

In short, the only evidence excluded by the trial court’s ruling on this issue was the fact that SNJ had had some previous sexual contact with Chrissy. This evidence, however, had no independent relevance and Wright was allowed to introduce evidence that SNJ was angry with Wright regarding his disapproval of Chrissy: a fact which SNJ herself admitted at trial. In short, Wright has failed to demonstrate that the fact that SNJ had sexual contact with Chrissy carried any relevance or prevented him from pursuing his theory of the case, and thus Wright has failed to show that the trial court abused its discretion in excluding reference to SNJ’s prior sexual contact with Chrissy.

4. ***The trial court did not abuse its discretion in precluding Wright from cross examining SNJ regarding his claim that SNJ's friend Chrissy had made an allegation of sexual abuse and had been placed in foster care (and that SNJ therefore knew that "alleging sexual abuse was the fast track into foster care") because Wright's offer of proof failed to show that Chrissy had ever been placed in foster care or removed from her home in any way.***

Wright next claims that the trial court erred in precluding the defense from cross-examining the victim regarding her knowledge that a friend had alleged sexual misconduct by an uncle and had subsequently been placed in foster care as a result. App.'s Br. at 25-26. This argument is without merit because Wright's offer of proof failed to show that SNJ's friend had ever been placed in foster care or removed from her home in any way.

At trial, Wright argued that SNJ knew that "alleging sexual abuse was the fast track into foster care" based on her conversations with her friend Chrissy who Wright claimed had been placed in foster care after making allegations of sexual abuse. RP 166-67. The trial court allowed Wright to make an offer of proof regarding this evidence, but when Wright questioned SNJ outside the presence of the jury on this issue SNJ stated she had no knowledge that her friend had ever been placed in foster care. RP 170-71. In addition, the offer of proof did not show that SNJ's friend had been removed from her home. Rather, the evidence at best showed that SNJ's friend no longer had contact with her uncle who had abused her, although SNJ was

unaware of the specific circumstances of her friend's home life and offered little specific information. RP 170-71. Wright offered no other evidence on this issue whatsoever, and defense counsel admitted to the trial court prior to the offer of proof that if SNJ denied that she had gained this knowledge from Chrissy, "then I think I am stuck with the answer, but I don't know that the question itself is irrelevant." RP 168

Given the minimal information that was produced in the offer of proof, Wright has failed to show that the trial court abused its discretion in precluding cross-examination on this topic, as the offer of proof fell far short of demonstrating that SNJ knew that "alleging sexual abuse was the fast track into foster care" based on her conversations with her friend when there was no evidence her friend had ever been placed in foster care or anything remotely similar.

5. ***The trial court did not abuse its discretion in denying Wright's attempt to introduce Exhibits 10 and 11 because the exhibits were inadmissible irrelevant hearsay and because Wright failed to lay a proper foundation for introduction of the exhibits as evidence of prior inconsistent statements. In addition, even if this Court were to assume that the trial court erred, any error was harmless given the minimal probative value of the exhibits.***

Wright next claims that the trial court erred in precluding the defense from admitting Exhibits 10 and 11, which purported to be copies of internet postings that the victim had made shortly after being interviewed about the

case. In both exhibits Wright claimed that SNJ made statements about her “mood” shortly after a defense interview and a prosecution interview and described that she was “tired” of dealing with the case. RP 184-86

The trial court held that proposed exhibits and found that they were inadmissible as they were not relevant and were not proper impeachment evidence. RP 188. Wright has failed to show that the trial court abused its discretion in failing to admit these exhibits as Wright failed to lay a proper foundation for their admission.

As a preliminary matter, the Internet postings were clearly out of court statements that Wright was seeking to introduce for the truth of the matter asserted. Thus, the postings were hearsay. ER 810, 802. Furthermore, the victim’s state of mind immediately following an interview is simply not relevant. Thus, although out of court statements about mental or emotional condition are sometimes admissible to show a person’s state of mind, Washington courts have held that such evidence is only relevant if it demonstrates the person’s mental condition at a relevant time. *See, e.g., State v. Sanchez-Guillen*, 135 Wn. App. 636, 646, 145 P.3d 406 (2006)(holding that defendant was not allowed to introduce statements he made during a police interview that showed his state of mind because the defendant’s state of mind at the time of the interview was irrelevant). In addition, in order to be admissible, evidence of the victim's state of mind must be relevant to a

material issue of fact before the jury. *State v. Cameron*, 100 Wn.2d 520, 531, 674 P.2d 650 (1983) (citing *State v. Parr*, 93 Wn.2d 95, 98-104, 606 P.2d 263 (1980) and *United States v. Brown*, 490 F.2d 758 (D.C.Cir.1973)).

In the present case the victim's state of mind during a period of time after a defense or prosecution interview was not relevant to a material issue of fact before the jury. Even assuming that the victim's state of mind during the offenses or at the time she reported the crime might have been relevant, Wright made no showing that victim's state of mind after an interview was relevant. This is especially true when the proposed exhibits showed little more than that the victim was tired of, and frustrated by, the criminal process: a feeling that would come as no surprise to anyone, and by itself is no indicator of either truthfulness or fabrication.

As with several of the issues Wright raises on appeal, one of the central problems with Wright's attempt to introduce the internet postings is that while these items might have been admissible as impeachment evidence or evidence of prior inconsistent statements if SNJ testified at trial in a manner inconsistent with these out of court statements, Wright did not offer the evidence as impeachment evidence but rather was trying to question SNJ about these out of court statements without laying a proper foundation. As this Court has previously explained, when a prior inconsistent statement is used, usually "the witness should first be given an opportunity either to

demonstrate his bias or to deny having uttered the prior inconsistent statement.” *State v. Wilder*, 4 Wn. App. 850, 855, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971). In addition, ER 613(b) specifically prohibits the introduction of extrinsic evidence of a prior inconsistent statement (such as the two documentary exhibits offered below) unless the witness is first afforded an opportunity to explain or deny the statements. Here, defense counsel failed to follow the procedure outlined in the rule.

Thus, in the present case if defense counsel had asked SNJ how she felt after the defense interview and if SNJ answered that question in a way that was inconsistent with her internet postings, then the documentary exhibits containing the out of court statements might have been admissible as a prior inconsistent statements or as impeachment evidence. Wright, however, never asked this foundational question. In short, although the evidence might have been admissible as impeachment evidence if Wright had established the proper foundation, Wright failed to lay the appropriate foundation. The trial court, therefore, did not abuse its discretion in denying Wright’s attempt to introduce SNJ’s out of court statements in the form of Internet postings concerning her “mood.”

Finally, even if the trial court erred in excluding Exhibits 10 and 11, any error in this regard was harmless. Under Washington an evidentiary error that does not result in prejudice to the defendant is not grounds for reversal.

State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002), quoting *Bourgeois*, 133 Wn.2d at 403.

Here the statements contained in Exhibits 10 and 11 were of little probative value. The fact that a 14 year old victim would feel frustrated by having to go through repeated interviews about sexual abuse and that she would be “tired” of a case and would want it to end is hardly surprising. Rather, it would be shocking if a minor victim felt differently. Thus, even if the trial court erred in excluding the exhibits, any error in this regard was harmless.

For all of these reasons, Wright has failed to show that the trial court abused its discretion in denying the admission of SNJ’s Internet postings relating to her mood, and even if this Court were to assume that the trial court erred in excluding the exhibits, any error in this regard was error.

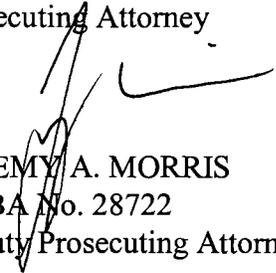
IV. CONCLUSION

For the foregoing reasons, Wright's conviction and sentence should be affirmed.

DATED September 16, 2010.

Respectfully submitted,

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