

No. 42202-6-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

JESSE SCOTT LAKE

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 09-1-03264-7

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to allow the defendant to testify as to the reasons for not giving a complete statement upon his arrest.

2. The trial court erred when it when it refused to allow the defendant to testify as to conversations that he engaged in or overheard.

3. The trial court erred when it admitted exhibit 15-A, Mr. Lake's handwritten statement made at the time of his arrest.

4. The trial court erred when it allowed evidence of defendant's calling his daughter whore and slut.

5. The trial court erred when it allowed testimony of Kathy Lake's and her sister's prior sexual abuse.

6. The accumulation of errors in the trial court denied Mr. Lake a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it refused to allow the defendant to explain why he did not give details to the police when first arrested?

(Assignments of Error #1)

2. Whether the trial court erred when it ruled that conversations either overheard or participated in by a witness are hearsay?

(Assignments of Error #2)

3. Whether a defendant's actual written statement is admissible into evidence when it does not amount to a confession?

(Assignments of Error #3)

4. Whether name calling is relevant evidence?

(Assignments of Error #4)

5. Whether Kathy Lake's prior sexual abuse was relevant?

(Assignments of Error #5)

6. Whether Mr. Lake was denied a fair trial as a result of the accumulation of errors occurring during the trial?

(Assignments of Error #1-6)

III. STATEMENT OF THE CASE

A. Procedural History

On July 9, 2009, Jesse Lake was charged with two counts of child molestation in the first degree and two counts of incest in the second degree involving his daughter and stepdaughter. The counts involving his daughter, Samantha Lake, alleged conduct occurring between May 2001-2002 and February, 2009. The counts involving his stepdaughter, A.M., alleged conduct occurring between October 1995-1998 and September 2006 and July 2007. CP 1-2.

As trial approached, the State was allowed to amend the charges to broaden the charging period from 1994-2004 for both individuals. CP 70-71. This occurred on February 11, 2011. Then, during trial, the State amended the charges again on February 28, 2011 and for the last time on March 10, 2011. CP 82-83; 139-40. He was found not guilty on count 1 and guilty on counts 2-4. CP 166-69. He was ultimately sentenced to a total of 89 months in the Department of Corrections. CP 187-201.

During the course of the trial, the state continually objected, and the court continually sustained, numerous questions of Jesse Lake and Kathy Lake that were not offered for the truth of the matter asserted, some of which had been gone into by the state through other witnesses. For instance, in the questioning of Kathy Lake, the defense attempted to

question her about what she told a person over the phone. RP 654:20. The state objected and the court sustained the objection, even after substantial argument attempting to explain the difference between hearsay and non hearsay testimony. RP 654:20–661:1-2. Similarly, the defense attempted to ask Brett Howell about the content of the same phone conversation, but was not permitted to do so based on a hearsay objection. RP 258:23-259:17. Thus, the defense was unable to demonstrate the entire context and motivation for A. M.'s accusations.

Additionally, the defense was not able to get into the number of text messages Howell sent A.M. because the court ruled that the information was hearsay. RP 230-234. Finally, Howell was able to further testify about his normal relationship with A.M. after the disclosures and arrest of Mr. Lake. RP 243:9-18. He was further allowed to answer that S.M. and A.M. told him that her father had molested them. RP 244:7-246:17. RP 247:8-22.

These types of questions, followed by objections, continued throughout the trial. For instance, S.M., one of the alleged victims, testified that based on her research, she did not believe they were Native American. RP 204:7-13. Conversely, Mr. Lake was set to testify about his understanding of his Native American history, which was objected to as hearsay and sustained. RP 714:6-715:15.

S. M. was allowed to testify, over objection, that Mr. Lake referred to both she and A.M. as a slut and a whore. RP 214:1-9. Moreover, the

court again, over objection, allowed S.M., as well as her natural mother to testify that he said A.M. looked like Kathy. RP 215:13-220:3. RP 269:19-270:13. Likewise, the mother was able to testify about the alleged sexual abuse that she and Kathy Lake suffered from as children, to explain why she did nothing to stop Jesse Lake. RP 229:15-20. RP 346:7-18.

Additionally, after the state cross-examined Mr. Lake about his failure to give a complete statement upon his arrest initial arrest in February 2009, he was not allowed to answer questions regarding the reasons for not giving a full disclosure. RP 808:6-21. This occurred after the state's motion in limine was granted preventing him from bringing up the matter prior to trial, unless the door was opened. 5/1/11 RP 5:1-7. Despite opening the door to the questioning, the court affirmed the objections

Furthermore, during closing argument, the state then argued matters to the jury that the defense was unable to rebut because of the court's prior rulings. RP 858:17-859:23.

B. Facts

Jesse Lake is the father of S.L. and step-father to A.M. Mr. Lake met Kathy Lake in approximately September 1995 and they subsequently married in 2003. RP 551:23- RP 552:5. She moved in with Mr. Lake in approximately December of 1995 at the Glenn Park Apartments located in Federal Way. RP 554:4-17. They resided there until approximately August

of 1996, while her children lived with their father on Fort Lewis, as well his parents' house in Ohio. RP 555:20-556:25.

Subsequently, her children returned to Washington and they moved in with her at the Crystal Pointe Apartments. RP 557:17-25. Mr. Lake moved into the apartments during the late spring of 1997. RP 558:3-18. They lived at this residence until the fall of 1999. RP 626:2-5. A.M. was 7-9 years old during this time frame. RP 626:8-10. Other than approximately 18 months between April 2002 and October 2003, Mr. and Mrs. Lake lived together ever since. RP 624:1-21.

During the years at Crystal Point, A.M. would typically go to daycare after school and continued to do so until she was in either the 6th or 7th grade. RP 632:11-25. Typically, Mrs. Lake would pick the children up from daycare. RP 634:12-23. She testified that Jessie Lake never picked the kids up from daycare. RP 634:17-23. Frankie Lake confirmed this scenario.

From all appearances, the family appeared to be doing well until A.M. wanted to begin a relationship with a person by the name of Brett Howell and the Lakes received a large phone bill that included numerous text messages between Howell and A.M. RP 652:10-662:10. This was in violation of their LDS faith. RP 651:14-652: 16. It was not until finding out about the relationship that accusations, without specifics, were made. RP 663:7-24. She testified that the abuse began when they lived at the Crystal Point apartments after school when her mother was not home.

Until his arrest, Kathy Lake witnessed nothing to suggest that any abuse was occurring. RP 642:24–645:1. Nor did they possess rubber lips or a rubber vagina or cylinder shaped device. RP 645:19-646:8.

Throughout the time the family was together, Mr. Lake would give massages to the kids. RP 692:20-23; RP 694:16-23. The reasons for Mr. Lake giving massages, as opposed to anyone else was because he had received training in this area through his martial arts training. RP 730:20-731:25. Exs. 31-33. His son, Jesse, had testified he had no training at all in massage. Part of the reasons for the massages for A.M. was because she suffered from migraine headaches. RP 695:12-15; RP 706:12-17. She suffered these since the 5th or 6th grade. RP 648:12-15. Jesse Lake had consulted with Dr. Summers about giving A.M. massages for her migraine headaches during her sophomore year. RP 734:18. Dr. Summers supported his testimony by acknowledging that she had been brought in for treatment of neck and back complaints, as well as headaches. RP 608:9-17.

He testified he did not begin giving A.M. general massages until her junior year, when she began participating in cross country racing. RP 735:1-23. However, he did massage various injuries during her martial arts training, beginning in approximately 1998, while living at their residence in Surprise Lake. RP 736:4-10.

Mr. Lake denied touching either A.M. or S.L. in a sexual manner. RP 733.

A. M. testified that no accusations occurred until her then boyfriend, Brett Howell, suggested to her that she had been sexually abused. RP 87:1-12. This was during the time that she was attempting to keep the relationship from her parents. RP 87:14-24. Howell indicated that he had the suspicions after she reacted differently occurred when he was attempting to have sexual contact. RP _____. Conversely, A.M. denied this, indicating that it was at a conversation at school. RP 88:1-11. Afterwards, Howell spoke to S. M. RP 263:11-13. She then made similar accusations against Mr. Lake. Subsequently, S.M. made similar accusations against her counselor. He denied the conduct that she alleged. RP390:14-391:12.

Subsequently, the police were called and S. L. and A.M. were brought into school to prepare their written statements together. RP 261:10-14.

IV. ARGUMENT

Throughout the trial, the court continually sustained hearsay objections made by the state, which fundamentally did not fall within the hearsay rules. Additionally, Mr. Lake was prevented from offering explanations as to why he did not give a complete statement to the police when initially questioned and the state used this “new testimony” to impeach him and then argue to the jury that he was not credible. Based on

the erroneous evidentiary rulings, Mr. Lake was denied his due process rights to a fair trial.

A. DEFENDANT WAS DENIED HIS DUE PROCESS RIGHTS WHEN THE TRIAL COURT REFUSED TO ALLOW HIM TO EXPLAIN WHY HE DID NOT GIVE THE POLICE A FULL STATEMENT AFTER THE PROSECUTOR QUESTIONED HIM ABOUT HIS STATEMENT ON CROSS EXAMINATION AND THEN USED HIS CHANGED TESTIMONY AGAINST HIM DURING CLOSING ARGUMENTS.

As the courts in this state have continuously held, “when a party opens up a subject of inquiry on direct or cross examination, he contemplates that the rules will permit cross-examination or redirect examination...within the scope of the examination in which the subject matter was first introduced.” Ang v. Martin, 118 Wn.App. 553, 562, 76 P.3d 787 (2003), *affirmed by* Ang v. Martin, 154 Wn.2d 477, 114 P.3d 637, (2005)(*quoting* State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). The rule is all about fairness and truth-seeking. Both the defendant and prosecutor should have the opportunity to meet fairly the evidence and arguments put forward by the other. State v. Stackhouse, 90 Wn.App. 344, 359, 957 P.2d 344, 957 P.2d 218 (1998)(*citing* United States v. Robinson, 485 U.S. 25, 33, 108 S.Ct. 864, 99 L.Ed.2d 23 (1998)).

As stated in Gefeller:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves

the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

76 Wn.2d at 455.

It is this curious rule that the trial court utilized in denying defendant the opportunity to meet fairly the evidence and arguments put forward by the state in this case. Adhering to pretrial rulings, defendant was not questioned nor did he testify to his lack of criminal history, which the court held was not relevant. However, the state then extensively questioned him regarding his failure to give complete statements to the authorities when initially questioned. RP 773:6- 777:25; RP 789:19-793:24; 799:5-801:9; 807:10-808:2. To explain this lack of a complete statement, the defense, on rebuttal, attempted to demonstrate that this was the first time he had been arrested and questioned by the police and was, therefore, unaware of the importance of a complete statement. However, despite those questions, the court refused to allow the defense to respond. RP 808:6-15.

In an analogous situation, a defendant, in a criminal bench trial, was prevented from explaining why he was unaware of his rights, due to his limited educational and environmental background. City of Seattle v. Gerry, 76 Wn.2d 689, 458 P.2d 548 (1969). Because he was unable to do so, the court reversed the conviction. Likewise, Mr. Lake was prevented from explaining his lack of giving a complete statement—because he had

never been in this situation prior to this time and, as a result, he was not aware of the importance of giving all details.

The only question, then, is whether Mr. Lake was prejudiced by the erroneous exclusion of the evidence. Reversal is required “if, within reasonable probabilities, it materially affects the outcome of the trial.” State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1989). Typically, this involves a review of the entire record. State v. Cunningham, 93 Wn.2d 823, 831, 613 P. 2d 1139 (1980). Here, the case hinged entirely on the credibility of the witnesses, including Mr. Lake. The state highlighted, in its cross examination of Mr. Lake, the differences between his testimony and that contained within the original statement. It also highlighted this discrepancy during its closing argument. Because of the emphasis of this credibility or lack thereof, prejudice is at its greatest and the court should reverse.

B. THE COURT SHOULD REVERSE DEFENDANT’S CONVICTIONS BECAUSE THE TRIAL COURT ERRONEOUSLY PREVENTED THE DEFENSE FROM OFFERING EVIDENCE OF CONVERSATIONS PERTINENT TO THE DEFENSE BASED ON HEARSAY OBJECTIONS WHEN THE CONVERSATIONS WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED.

The decision whether to admit or refuse evidence is within the discretion of the trial court and will be reversed based on a manifest abuse of discretion. State v. Iverson, 126 Wn.App. 329, 336, 108 P.3d 799 (2005). A trial court abuses its discretion when the decision is manifestly

unreasonable, exercised on untenable grounds or untenable reasons. In other words, if the court's decision is based on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. State v. Hudson, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

In sustaining the state's hearsay objections on numerous occasions, the court applied the wrong legal standard and based its ruling on an erroneous view of the law. Specifically, the court simply did not understand the hearsay rule, essentially ruling that any verbal statement made outside of the courtroom was, in fact, hearsay. However, the hearsay rule is not all encompassing. It is defined as:

...a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801 (c). Conversely, when a statement is not offered for the truth of the contents of the conversation, but only the fact that it was made, it is not hearsay. State v. Gonzalez-Hernandez, 122 Wn.App. 53, 57, 92 P. 3d 789 (2004).

For example, an out of court statement is not hearsay if it is offered to explain its effect on the listener, rather than the truth of its content. See State v. Roberts, 80 Wn.App. 342, 352, 908 P. 2d 892 (1996). Kathy Lake attempted to testify about the conversation she had with Brett Howell. The defense attempted to question him about the same conversation. However, the court sustained the hearsay objections from the state even

though it went directly to why and how Mr. Lake reacted and the credibility and motivations for A. M. to make false accusations.

Additionally, Mr. Lake was prevented from testifying regarding his knowledge and understanding of his Native American heritage, even though S.M. testified about her understanding and research into the issue. In a case hinging on credibility this testimony was pertinent to the issues and would have addressed one more issue that the state used to attach his credibility. As such the evidence was not hearsay, was relevant, and the court erred by not allowing the testimony.

C. THE COURT SHOULD REVERSE THE TRIAL COURT BECAUSE IT ALLOWED INTO EVIDENCE, OVER OBJECTION, EVIDENCE THAT WAS NOT RELEVANT TO THE ISSUES OF THE CASE AND, EVEN IF RELEVANT, ITS PREJUDICIAL EFFECT OUTWEIGHED ITS PROBATIVE VALUE.

1. The evidence was not relevant.

The evaluation of relevant evidence is analyzed under ER 401. ER 401 defines relevant evidence of that evidence having the tendency to make the existence of any fact as a consequence to the determination of the action more probable or less probable than it would be without the evidence. As mentioned above, the admissibility of evidence, while generally within the sound discretion of the trial court, will only be reversed if there is an abuse of discretion. An abuse of discretion exists when no reasonable person would take the view adopted by the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-914, 16 P.3d 626 (2001).

In State v. Cissne, 72 Wn.App. 677, 865 P.2d 564 (1994), Division III of the Court of Appeals discussed whether statements made by the defendant in the course of the arrest were relevant to prove an element of the crime of driving under the influence. While reversing on other grounds, the court found that particular statements the defendant made to the police officer were relevant because "objective manifestations of insobriety, personally observed by the officer, are always relevant where ... the defendant's physical condition is an issue." 72 Wn.App at 687 (*quoting State v. Nagel*, 30 Ohio.App.3d 80, 80, 506 NE.2d 285, 286 (1986)). The court, therefore, ruled that defendant's statements were properly admitted because the issue in that case was the defendant's intoxication. Id.

Here, the court allowed in testimony on no less than two occasions, including statements that Mr. Lake told A.M. that she looked like her mother, and that Kathy Lake and her sister were sexually abused by their father, neither of which had anything to do with the elements of the offense, which was whether Mr. Lake sexually abused his two children. Additionally, the court allowed testimony that Mr. Lake called his daughters sluts and whores.

None of this evidence was relevant for any purpose. It was at most character assassination. Thus, none of it was relevant to prove an element of the crimes.

First, the evidence regarding the prior sexual abuse of the sisters was allowed in to suggest that Kathy Lake was somehow impacted by it to ignore the alleged abuse involving her own children. However, there was no expert testimony suggesting that this was a product of one's own abuse and was admitted merely to undermine Kathy Lake's credibility and ultimately the credibility of the defense of the case

Likewise, the comments regarding whether A.M. looked like her mother did not demonstrate any sexual attraction by Mr. Lake towards his step daughter. Nor did any alleged name calling prove an element of the charge. It was admitted merely to undermine Mr. Lake's credibility to show some type of speculative propensity and disparage him.

2. The probative value of the evidence was outweighed by its prejudicial effect.

Assuming some relevance, the evidence was still prejudicial. 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.

Unfair prejudice is evidence that is more likely to arouse an emotional response rather than a rational decision by the jury. State v. Stackhouse, 90 Wn.App. 344, 356, 957 P.2d 218, rev. denied 136 Wn.2d 1002, 966 P.2d 902 (1998). Moreover, the court is required to weigh the evidence to determine unfairness during trial. 90 Wn.App. at 356. The court's decision is reviewed on an abuse of discretion standard. State v.

Ames, 89 Wn.App. 702, 706, 950 P.2d 514, *rev. denied* 136 Wn.2d 1009, 966 P.3d 903 (1998). Evidence of other acts is inadmissible to prove the character of the defendant. ER 404(b).

In State v. Trickler, 106 Wn.App. 727, 25 P.3d 445 (2001), the Court of Appeals addressed the admission of evidence of other crimes, wrongs or acts. In Trickler, the defendant was prosecuted for possession of stolen credit cards, the various witnesses all testified to the defendant's possession of other stolen items. In reversing the conviction, the Court of Appeals held that this testimony was highly prejudicial because he was not on trial for possessing any of those other items. 106 Wn.App. at 733. Moreover, the state's theory that it was admissible under a *res gestae* theory was meritless because it had not been demonstrated that his possession of the other items was "an inseparable part of his possession of the stolen credit card." Because of its admission, the jury was left to conclude that the defendant was a thief, which is prohibited under ER 404(b). Id. at 734.

Additionally, the court was required to go through a balancing test prior to admitting the evidence—something it did not do here. As stated in State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984), the court is required to go through a balancing test, beginning with the basis for its admissibility. As the court stated:

ER 404(b) states that evidence of other crimes, wrongs or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith. Such evidence is admissible, however, to prove motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. If the evidence is admissible for one of these purposes, a trial judge must determine whether the danger of undue **prejudice** from its admission outweighs the probative value of the evidence.

We have frequently observed that this balancing of probative value versus **prejudice** should be done on the record. Thus in State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981), we noted:

Before exercising its discretion to admit the prior conviction and the furlough status, the trial court should weigh the necessity for its admission against the **prejudice** that it may engender in the minds of the jury. Without such balancing and a conscious determination made by the court *on the record*, the evidence is not properly admitted.

In State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982), this court was more specific as to the trial court's obligations:

The court must identify the purpose for which the evidence is to be admitted. ... Only after the court has concluded ... that the evidence is relevant, can it appropriately balance the probative value against the prejudicial effect under ER 403.

We cannot overemphasize the importance of making such a record. Here, as in cases arising under ER 609, the absence of a record precludes effective appellate review. See State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984). Moreover, a judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating the specific reasons for a decision insures a thoughtful consideration of the issue. These reasons, as well as others, led us to conclude in Jones that a trial judge errs when he does not enunciate the reasons for his decision.

We hold that the same rule applies to evidence of prior misconduct admitted under ER 404(b). Indeed, these cases present an even more compelling need for adequate records. In ER 609 cases, the evidence is only admitted for one purpose – to impeach the defendant's **credibility**. Evidence can be admitted under ER 404, however, for several substantive purposes. Unless the trial court identifies the purpose for which it believes the evidence is

relevant, it is difficult for that court (or the reviewing court) to determine whether the probative value of the evidence outweighs its prejudicial effect. See State v. Saltarelli, supra at 366.

We conclude, therefore, that the trial court erred.

Likewise, the potential for prejudice was extremely high, with it leaning towards propensity evidence. It was admitted to show that Mr. Lake was a bad person, deserving of a conviction -- evidence that ER 404(b) is designed to preclude. The basis of the admission of evidence regarding Kathy Lake's prior abuse was not supported in anyway. Thus, the prejudicial effect outweighed any probative value and an objection should have been sustained.

As a result, this court should reverse the convictions and remand for a new trial.

D. THE COURT SHOULD REVERSE BECAUSE THE TRIAL COURT ADMITTED THE WRITTEN STATEMENT MADE BY MR. LAKE INTO EVIDENCE AS SUBSTANTIVE EVIDENCE

During the course of the trial, the state was allowed, over objection, to admit Mr. Lake's written statement made at the time of his initial arrest. Importantly, Mr. Lake never confessed to the crimes and the statement was allowed to go to the jury as impeachment evidence. However, this admission allowed undue influence as to a particular piece of evidence.

In addressing this issue, and holding that it is reversible error to allow the admission of such evidence, the Washington Supreme Court stated in State v. Gregory, 25 Wn.2d 773,777, 171 P.2d 1021 (1946):

It was admitted, doubtless upon the theory that it embodied a confession by appellant of the offense charged. But the transcript, in this instance, was not admissible as a confession, for, throughout the examinations and at all times, appellant has steadfastly denied that she killed the child or inflicted any injuries whatsoever upon it. The evidence of her conflicting statements was, of course, admissible, but not so the transcript of the examinations. To hold it admissible would, in effect, by authority for the transcription of the testimony of any particular witness in a case and submission of it the jury as an exhibit.

(citations omitted).

This is precisely what happened here. The defense did not contest that the oral testimony could be used as a prior inconsistent statement for impeachment purposes, but objected to the admission of the exhibit. By allowing it in, the court allowed it to receive undue influence above and beyond any other testimony. Pursuant to Gregory, this was error, and the court should reverse.

E. ASSUMING THE COURT FINDS THE ABOVE ERRORS DID NOT INDIVIDUALLY AFFECT THE OUTCOME OF THE TRIAL, THE COURT SHOULD STILL REVERSE THE CONVICTIONS BECAUSE THE COMBINED EFFECT OF THE ERRORS PREVENTED MR. LAKE FROM RECEIVING A FAIR TRIAL.

The courts of this state have long held that the combined effect of an accumulation of errors, none of which standing alone might be sufficient to constitute grounds for reversal, may well require a new trial

when considered together. State v. Badda, 63 Wn.2d 176, 183, 63 P.2d 176 (1963). In so doing, the court should consider all errors, preserved and not preserved, in determining whether Mr. Lake received his constitutional right to a fair trial. State v. Alexander, 64 Wn.App. 147, 151, 822 P.2d 1250 (1992)(citing State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Curry, 62 Wn.App. 6776, 679, 814 P.2d 1252 (1991)). The doctrine applies when the defendant establishes the impact the errors had on his right to a fair trial. State v. Thorgerson, 172 Wn.2d 438, 454, 258 P.3d 43 (2011).

Applying these standards in State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984), the Washington Supreme Court reversed the defendant's conviction wherein it held that the accumulated evidentiary errors necessitated a new trial. See also, Alexander, supra (cumulative error necessitates a new trial).

Similarly, in this situation, the cumulative impact of all of the evidentiary errors necessitate a new trial, a fair trial, one that allows the defense to counter the state's case based on proper evidentiary rulings-- something that did not occur in this trial.

V. **CONCLUSION**

Based on the files and records herein and the above points and authorities, Mr. Lake requests that this court reverse his conviction and remand for a new trial.

RESPECTFULLY SUBMITTED this 30th day of January, 2012.

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CERTIFICATE OF SERVICE

Lee Ann Mathews hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day below set forth, I delivered true and correct copies of appellant's opening brief to which this certificate is attached, by United States Mail or by ABC Legal Messengers, Inc., to the following:

Kathleen Proctor, WSB #14811
Deputy Prosecuting Attorney
946 County-City Building
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Jesse Scott Lake
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Signed at Tacoma, Washington this 30th day of January, 2012.


LEE ANN MATHEWS

HESTER LAW OFFICES

January 30, 2012 - 10:29 AM

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