FILED
December 19, 2012
Court of Appeals
Division III
State of Washington

No. 30789-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD DEAN OCHOA,

Appellant.

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

The Honorable Vic L. Vanderschoor

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# BRIEF OF APPELLANT

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## A. ASSIGNMENT OF ERROR

Mr. Ochoa's right to due process and a fair trial was violated by prosecutorial misconduct during closing argument.

## B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Prosecutorial misconduct which has a substantial likelihood of affecting the jury's verdict violates the defendant's right to a fair trial, and thus, right to due process. Here, the trial court admitted several acts of Mr. Ochoa as a common scheme or plan, but in closing argument, over repeated defense objections, the prosecutor urged the jury to use the evidence as propensity evidence against Mr. Ochoa. Was there a substantial likelihood that this misconduct affected the jury's verdict necessitating reversal of Mr. Ochoa's conviction and remand for a new trial?

## C. STATEMENT OF THE CASE

Richard Ochoa was charged with a single count of first degree child molestation involving M.F. CP 42-43. Prior to trial, the State moved to admit the testimony of M.F.'s sisters, Teela Erickson and Hollie Erickson, regarding other alleged acts of molestation involving

Mr. Ochoa. 12/9/2011RP 2-3.[1] The court heard the testimony of the two sisters and ruled the evidence was admissible as a common scheme or plan under ER 404(b).[2] 1/30/2012RP 2-4.

In his rebuttal closing argument, the prosecutor began by stating:

> We have not one girl, saying that her uncle was an abuser, not two girls saying that the uncle abused her, but three different girls. All three girls living under the defendant's roof. All three girls sisters. All three roughly the time same [sic] frame. Is that just a wild coincidence?

RP 377. Mr. Ochoa objected that this was exceeding the common scheme or plan purpose of ER 404(b) and instead arguing propensity. *Id.* The court overruled the objection without comment. RP 377.

The prosecutor immediately began the same theme:

> Do we not have evidence of what was going on at the defendant's residence with girls that were not his biological daughters? Do we not have evidence of his plan, his scheme. Do we not have evidence that there was a girl there living under the defendant's roof, and that she was in danger of being abused. This is – it's not one girl's statement to you, it's the three girls living

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[1] The State originally moved to admit this evidence under both ER 404(b) and RCW 10.58.090. 12/9/2011RP 2-4, 18.

[2] In its ruling, the trial court recognized the rule enunciated in *State v. Gresham,* 173 Wn.2d 405, 269 P.3d 207 (2012), which invalidated RCW 10.58.090, and as a result, the court stated it was not making a ruling regarding admissibility under the statute. 1/30/2012RP 4-6.

> under the same roof. All related. All sisters. All his nieces. Those are the three girls that are before you.

RP 378. Again the defense objected and asked for a continuing objection, to which the court agreed. *Id.*

At the close of argument, the defense noted:

> I thought the closing went way to [sic] far. Your Honor was kind enough to give me a continuing objection.

RP 383.

The jury subsequently convicted Mr. Ochoa as charged. CP 108.

D. ARGUMENT

THE PROSECUTOR'S CLOSING ARGUMENT URGING THE JURY TO USE THE OTHER ACTS EVIDENCE AS PROPENSITY CONSTITUTED MISCONDUCT AND VIOLATED MR. OCHOA'S RIGHT TO A FAIR TRIAL

1. Mr. Ochoa had a constitutionally protected right to a fair trial free from prosecutorial misconduct. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from

prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger,* 295 U.S. at 88.

Prosecutorial misconduct may deprive a defendant of the due process right to a fair trial, and only a fair trial is a constitutional trial. U.S. Const. amend. XIV; *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Comments made by a deputy prosecutor constitute misconduct and require reversal where they were

improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice the defendant must show a substantial likelihood that the misconduct affected the jury verdict. *Id.*

> Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

*In re the Personal Restraint of Glasmann,* ___ Wn.2d ___, 286 P.3d 673, 681 (2012) (internal citations omitted).

2. <u>The prosecutor's repeated arguments urging the jury to use the prior acts evidence as propensity evidence constituted misconduct</u>. The trial court admitted the prior acts involving Teela and Hollie Erickson as part of a common scheme or plan under ER 404(b). In closing argument, over repeated objections, the prosecutor ignored this limitation and urged the jury to use the prior acts as propensity evidence: Mr. Ochoa had done it before on two occasions, thus it was

likely he did it this time as well. This Court should find the prosecutor's argument constituted misconduct.

Evidence of a defendant's prior acts is not admissible to show that he likely committed the crime charged, that he acted in conformity with prior bad acts, or that he had a propensity to commit the crime. ER 404(b); *State v. Fuller*, 169 Wn.App. 797, 829, 282 P.3d 126 (2012). The underlying reasoning for the exclusion of propensity evidence was explained in *Michelson v. United States*:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is *by propensity* a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

The Washington Supreme Court has also recently explained the inadmissibility of propensity evidence:

> Properly understood, then, ER 404(b) is a *categorical bar* to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. *Id.* (" *In no case,* ...

> regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." (emphasis added)). Critically, there are no "exceptions" to this rule. 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.9, at 497 (5th ed.2007). Instead, there is one improper purpose and an undefined number of proper purposes. Though the other purposes are sometimes referred to as exceptions, this is simply legal shorthand for "other purposes." In most circumstances, this shorthand is of no consequence and creates little risk of misunderstanding. Only when the term "exception" is read out of context and the plain text of ER 404(b) is ignored does the possibility of confusion arise.

*State v. Gresham,* 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012) (emphasis added). Thus absent a "proper purpose," propensity evidence is not admissible at trial because of its overwhelming prejudicial effect.

Evidence of prior acts may be admissible as a common scheme or plan under ER 404(b) to show whether the charged incidents actually occurred or whether the victim was fabricating or mistaken. *State v. Lough,* 125 Wn.2d 847, 862, 889 P.2d 487 (1995). This prior misconduct must show a "strong indication of a design (not a disposition)." *Id.* at 858–59, *quoting* 2 John H. Wigmore, *Evidence* § 375, at 335 (James H. Chadbourn rev. ed.1979). If the evidence is

offered for a legitimate purpose, then the exclusionary provision of ER 404(b) does not apply. *Lough*, 125 Wn.2d at 853.

In *United States v. Brown,* 327 F.3d 867 (9th Cir.2003), the Circuit Court reversed 29 counts of wire fraud where the prosecutor argued in closing argument properly admitted prior act evidence as propensity evidence. The district court had admitted evidence of the defendant's prior petty fraud as evidence of his knowledge and intent under the federal counterpart of ER 404(b). *Brown,* 327 F.3d at 870. In closing argument, the prosecutor tabulated the prior fraud, then posited to the jury over defense objection: "And my question to you is, if a man is willing to cheat a little bit over here, wouldn't he be willing to cheat just a little bit over here?" *Id.* at 871. The district court overruled the defense objection and denied the motion for a mistrial, but did find the prosecutor's argument to be "bordering on propensity evidence." *Id.*

The Ninth Circuit reversed, finding "[t]he prosecutor's statements were clearly designed to show Brown's criminal propensity, in violation of Fed.R.Evid Rule 404(b)." *Id.* at 872.[3]

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[3] The Court was also was persuaded by the district court's lack of a curative instruction. *Id.*

> Based on the disfavored nature of propensity evidence, its placement within the larger context of the prosecutor's closing argument, and the district court's failure to cure the improper statement, it is 'more probable than not that the [prosecutor's misconduct] materially affected the verdict." *United States v. Christophe,* 833 F.2d 1296, 1301 (9th Cir.1987).

*Brown,* 327 F.3d at 872.

Here, the misconduct by the prosecutor was not a single statement as in *Brown*, but multiple statements, each objected to by the defense. In addition, there is no appreciable difference between the misconduct in *Brown* and here: the prosecutors urged the jury to use properly admitted evidence as propensity evidence in violation of the evidence rule and the defendants' right to a fair trial. The prosecutor's argument here was misconduct.

3. <u>There was a substantial likelihood that the prosecutor's misconduct affected the jury's verdict</u>. As stated *supra,* to show prejudice and thus gain reversal of the conviction, the defendant must show a substantial likelihood that the misconduct affected the jury verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). It is *not* a matter of determining whether there is sufficient evidence to justify upholding the verdicts. *Glasmann*, 286 P.3d 681.

THE issue for the jury to determine at Mr. Ochoa's trial was whether to believe M.F. and her allegations against him. There were no witnesses to the events claimed by M.F., thus the entire prosecution rested on her credibility. There was reason to question M.F.'s credibility. Despite attempts by M.F.'s paternal grandmother, M.F. did not disclose any abuse. RP 148. The most damaging detail was M.F.'s dishonesty with the Idaho County deputy who interviewed her and to whom M.F. admitted lying. RP 158, 182. Thus, the two instances testified to by Hollie and Teela bolstered M.F.'s questionable credibility before the jury and could very well have tipped the scales against Mr. Ochoa.

In addition, the prosecutor's argument cannot merely be forgotten or ignored by the jury during its deliberations. "[A] bell once rung cannot be unrung." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976).

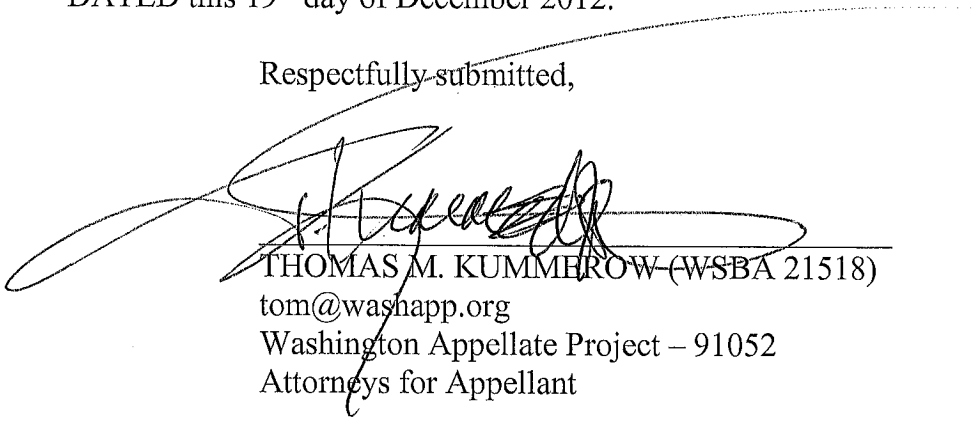
There was a substantial likelihood that the prosecutor's misconduct in closing argument affected the jury's verdict. This Court must reverse Mr. Ochoa's conviction and remand for a new and fair trial that comports with due process.

E. CONCLUSION

For the reasons stated, Mr. Ochoa requests that Court reverse his conviction and remand for a new trial.

DATED this 19th day of December 2012.

Respectfully submitted,



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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION THREE

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| STATE OF WASHINGTON, | ) | |
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| RICHARD OCHOA, | ) | |
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| APPELLANT. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 19TH DAY OF DECEMBER, 2012.

X_____

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