

No. 30917-7-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Dewitt Allen Harrelson,

Appellant.

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

The Honorable Maryann C. Moreno

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT1

B. ASSIGNMENTS OF ERROR2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR3

D. STATEMENT OF THE CASE.....3

E. ARGUMENT.....9

Issue 1: Whether the court erred by excluding evidence of A.B.’s misconduct where it was relevant, not to attack A.B.’s credibility, but to specifically support Mr. Harrelson’s defense that he did not find the child appealing, let alone sexually desirable or gratifying.....9

Issue 2: Whether defense counsel was ineffective for failing to object when the court admitted the videotaped interview of A.B., because the videotape was prejudicial, inadmissible hearsay and unnecessarily cumulative to simply bolster A.B.’s live testimony.....12

Issue 3: Whether defense counsel was ineffective for failing to object, or whether Mr. Harrelson was denied his constitutional right to a fair trial, when Ms. Hall’s opinion testimony vouched for A.B. and invaded the province of the jury.....19

Issue 4: Whether the prosecutor committed misconduct by introducing facts not in evidence.....23

Issue 5: Whether the cumulative error doctrine requires a new trial.....28

F. CONCLUSION.....30

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999).....17

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000).....28

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).....24

State v. Jones, 112 Wn.2d 488, 772 P.2d 496 (1989).....13, 14, 18, 23

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....18

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).....20

State v. O’Connor, 155 Wn.2d 335, 119 P.3d 806 (2005).....10

State v. Welchel, 115 Wn.2d 708, 801 P.2d 948 (1990).....19

State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950).....25

Thomas v. French, 99 Wn.2d 95, 659 P.2d 1097 (1983).....17

Washington Courts of Appeals

City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993).....20

State v. Babich, 68 Wn. App. 438, 842 P.2d 1053 (1993).....25

State v. Bedker, 74 Wn. App. 87, 871 P.2d 673 (1994).....14, 17

State v. Carlson, 80 Wn. App. 116, 906 P.2d 999 (1995).....21

State v. Cochran, 102 Wn. App. 480, 8 P.3d 313 (2000).....12

State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010).....24

State v. Dunn, 125 Wn. App. 582, 105 P.3d 1022 (2005).....14, 17

State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999),
superseded by statute on other grounds, RCW 46.61.024.....20

<i>State v. Frey</i> , 43 Wn. App. 605, 718 P.2d 846 (1986).....	14
<i>State v. Hakimi</i> , 124 Wn. App. 15, 98 P.3d 809 (2004).....	21
<i>State v. Harris</i> , 97 Wn. App. 865, 989 P.2d 553 (1999).....	11
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	24
<i>State v. Lopez</i> , 95 Wn. App. 842, 980 P.2d 224 (1999).....	24, 29
<i>State v. Miles</i> , 139 Wn. App. 879, 886, 162 P.3d 1169 (2007).....	25
<i>State v. Sheets</i> , 128 Wn. App. 149, 115 P.3d 1004 (2005), <i>review denied</i> , 156 Wn.2d 1014 (2006).....	11
<i>State v. Thach</i> , 126 Wn. App. 297, 106 P.3d 782 (2005).....	20, 21
<i>State v. Warren</i> , 134 Wn. App. 44, 138 P.3d 1081 (2006).....	21
<i>State v. We</i> , 138 Wn. App. 716, 158 P.3d 1238 (2007), <i>review denied</i> , 163 Wn.2d 1008 (2008).....	20, 21

Washington Statutes and Court Rules

ER 401.....	12
ER 402	9, 11
ER 403.....	17
ER 404(a).....	10
ER 608	9, 10, 12, 20
ER 701.....	20
ER 801	13
ER 802.....	13
RCW 9A.44.010	9

RCW 9A.44.083.....	9
RCW 9A.44.120.....	13, 14, 17

Federal and Outside State Authorities

<i>Pardo v. State</i> , 665 (Fla. 1992).....	14, 15
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	17, 18

Other Secondary Sources

4 John H. Wigmore, <i>Evidence</i> § 1124 (Chadbourn rev. 1972).....	15
5D WAPRAC ER 704.....	19, 20
Comment, Washington’s Child Abuse Legislation: Progressive or Over-Aggressive?, 23 Gonz.L.Rev. 453, 459-64 (1987-88).....	13
Stephen J. Ceci and Richard D. Friedman, <i>The Suggestability of Children: Scientific Research and Legal Implications</i> , 86 Cornell L. Rev. 33, 41 (2000).....	16

A. SUMMARY OF ARGUMENT

Dewitt Harrelson was convicted of first-degree child molestation based on accusations by 10-year-old A.B., who did not get along with Mr. Harrelson but was babysat by the defendant's girlfriend in their home. Mr. Harrelson was appalled by the child's history of inappropriate behaviors and sought to introduce certain behaviors to the jury in order to prove that he would never be attracted to A.B., that he was actually appalled by the child's misconduct. But the court denied Mr. Harrelson this ability to support his defense.

A.B.'s made her allegations against Mr. Harrelson after he and the child apparently had a conversation with A.B.'s father about A.B.'s need to start telling the truth. But, other than A.B.'s live testimony, there was no other evidence to support her allegations. Thus, it was highly prejudicial for the court to admit her videotaped interview to bolster A.B.'s testimony, especially when the child hearsay statute does not apply to this case and the accusations should have been limited to A.B.'s live testimony. Similarly, Mr. Harrelson was denied a fair trial when a neighbor of the child told the jury to essentially believe the child because the witness did believe her.

Ultimately, this vouching and hearsay evidence did not make A.B.'s accusations more truthful, no matter whether she repeated her

allegations prior to coming to court or not. The improper hearsay, opinions of guilt and bolstering of A.B.'s testimony invaded the province of the jury and prejudicially impacted its truth-seeking function. Finally, Mr. Harrelson was further prejudiced when the prosecutor cross examined him with statements and accusations that were never proven at trial.

Mr. Harrelson respectfully requests that his conviction be reversed and the matter remanded for a new and fair trial.

B. ASSIGNMENTS OF ERROR

1. The court erred by excluding evidence of A.B.'s prior misconduct where it supported the defendant's theory of the case as to direct elements of the charged crime.
2. The court erred by admitting the child hearsay videotaped interview. Defense counsel was ineffective for failing to object.
3. The court erred by admitting evidence of one witness who expressed her personal opinion on guilt and A.B.'s veracity. Defense counsel was ineffective for failing to object. The opinion on guilt violated the defendant's constitutional right to a decision by an unbiased jury based on factually-supported evidence.
4. The prosecutor committed misconduct that prejudiced Mr. Harrelson's defense by referring to facts not in evidence and failing to later introduce evidence to support the implied facts.
5. The court erred by accepting the jury's verdict of guilty and convicting Mr. Harrelson of first-degree child molestation following the unfair trial in this case.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred by excluding evidence of A.B.'s misconduct where it was relevant, not to attack A.B.'s credibility, but to specifically support Mr. Harrelson's defense that he did not find the child appealing, let alone sexually desirable or gratifying.

Issue 2: Whether defense counsel was ineffective for failing to object when the court admitted the videotaped interview of A.B., because the videotape was prejudicial, inadmissible hearsay and unnecessarily cumulative to simply bolster A.B.'s live testimony.

Issue 3: Whether defense counsel was ineffective for failing to object, or whether Mr. Harrelson was denied his constitutional right to a fair trial, when Ms. Hall's opinion testimony vouched for A.B. and invaded the province of the jury.

Issue 4: Whether the prosecutor committed misconduct by introducing facts not in evidence.

Issue 5: Whether the cumulative error doctrine requires a new trial.

D. STATEMENT OF THE CASE

This case is about a molestation accusation made by a troubled child against an adult she despised, and the defendant's now lifetime regret of that child ever being babysat at his home.

In September 2009, Dewitt Harrelson's live-in girlfriend, Patricia Newell, agreed to babysit ten-year-old A.B. (DOB 7-31-1999) while A.B.'s father, Lamar McKinzy, worked. (RP 161, 165, 170, 174, 204, 287, 289-90) Ms. Newell picked A.B. up from school and walked with her to Mr. Harrelson's and Ms. Newell's apartment, where the girl played

with friends, watched television, played games and was cared for by Ms. Newell. (RP 167, 192-93, 252-54, 295) Ms. Newell said there were never any occasions that the child was alone with Mr. Harrelson and that he did not ask or attempt to be alone with A.B. (RP 187, 195-96) But a neighbor, A.B. and the defendant himself acknowledged that there were unusual occasions where Ms. Newell was outside and A.B. was inside with Mr. Harrelson and/or Mr. Harrelson's own daughter who was close in age. (RP 209, 254, 255, 294, 306)

Mr. Harrelson was not pleased that Ms. Newell had agreed to babysit A.B.; he believed A.B. presented a bad influence for his daughter, who was a couple years older than A.B. and lived with Mr. Harrelson. (RP 194, 287, 293, 294) Mr. McKinzy agreed that his daughter A.B. was defiant, a little out of control and he had discipline problems with A.B. (RP 173, 175) Among other things, A.B. used profanity, called names, was disrespectful to adults, behaved "outrageous[ly]," had stolen from her teacher, and was disciplined after lying about smoking in school. (RP 167-68, 173, 226, 229, 294) There were other incidences of A.B.'s past misconduct that the court excluded, over defendant's objection, including evidence of a previous assault and knife incident perpetrated by A.B. (RP 154-57)¹

¹ Defense counsel wanted to present these incidences, not to attack A.B.'s character, but to support Mr. Harrelson's defense that he was appalled by the child's behaviors and thus

A.B. was particularly difficult during the time she was babysat by Ms. Newell, especially since she had stopped taking her medication for Attention Deficit Disorder during this time. (RP 173, 223) A.B. was often under disciplinary restrictions while at Mr. Harrelson's and Ms. Newell's home, imposed at her father's request for her misbehaviors, and A.B. did not like being babysat there. (RP 167-69, 192-93, 210, 258-60, 295)

On May 17, 2010, A.B. filled out a personal safety assessment questionnaire at school. (RP 212-14, 238) The form asked whether "anyone touched the private parts of your body or caused you to feel uncomfortable," and A.B. checked the box for "yes." (RP 213-14) A.B. had been told at some point in the past that she was touched inappropriately when she was younger and lived with her mother. (Exhibit P5, pg. 8, 9) A.B. did not immediately identify who supposedly touched her. (*Id.*)

On May 20, 2010, A.B. was caught smoking in school. (RP 20, 167, 303) During a meeting that day with A.B., Mr. McKinzy, and Ms. Newell, Mr. Harrelson told A.B. that she needed to start telling the truth, because the more lies she was caught in, the more trouble she would be in. (RP 298-99, 303) A.B. apparently hated Mr. Harrelson, and Mr.

in no way found her appealing, let alone sexually desirable. (RP 154-57) But the court deemed the evidence inadmissible under ER 608. *Id.*

Harrelson did not like A.B. being in his home, let alone spending any time with her himself. (RP 190, 294)

On May 24, 2010, the school counselor asked A.B. about her answer on the safety questionnaire from the week before, and A.B., for the first time, accused Mr. Harrelson of the inappropriate touching. (RP 231, 238, 242-45) This information was then shared with A.B.'s father and reported to law enforcement. (RP 171) Ever since confronted with A.B.'s accusation, Mr. Harrelson has vehemently denied that any inappropriate touching occurred. (RP 294) Mr. Harrelson testified that he did not find this child in particular, or any other child for that matter, sexually arousing or stimulating. (RP 294)

Karen Winston, a child forensics interviewing specialist, interviewed A.B. on June 1, 2010, although Ms. Winston never testified. (Exhibit P5; RP 273, 280, 282)² In the videotaped interview, A.B. asked Ms. Winston if she would get a prize, because a girl A.B. had talked to before the interview said that she had gotten a prize after her interview. (Exhibit P5, pg. 1) A.B. then went on to say that she hated her teacher, did not like her dad's girlfriend, would live with her daddy until she gets "sick and tired" of him and then planned to sneak out. (*Id.*, pg. 1, 3, 4)

² This marked exhibit is a transcript of the videotaped interview. The video was admitted and published for the jury, but the transcript itself was not admitted.

Ms. Winston asked A.B. if she knew why she was there, and A.B. answered that she did, that on numerous occasions between Christmas of 2009 and May 2010, Mr. Harrelson touched her under her clothes on her vagina while she watched television. (Exhibit P5, pg. 6-7) A.B. referenced a female body diagram and circled the pubic area where she claimed Mr. Harrelson had touched her. (RP 217) Ms. Winston asked A.B. whether Mr. Harrelson was ever alone with her when Ms. Newell was babysitting, and A.B. said that Ms. Newell was sometimes outside talking to the neighbor, Shannon Hall, when the touching occurred. (Exhibit P5, pg. 6) A.B. said that it did not hurt when Mr. Harrelson touched her, but it made her uncomfortable and she told him to stop. (RP 222, 245) A.B. further claimed that she did not tell her father because she did not think he would believe her, that Mr. Harrelson told her he would say she was lying if she told. (RP 222-23; Exhibit P5, pg. 8, 10)

Ms. Winston asked if anything like that had ever happened before to A.B., and A.B. answered, “a lot of people have been trying to tell me it did but I don’t remember it.” (Exhibit P5, pg. 8, 9) Ms. Winston asked whether Mr. Harrelson had done the same thing to anyone else, but A.B. said she did not know. (*Id.*, pg. 10)

After A.B.’s accusations in May 2010, there was an altercation between A.B.’s father and Mr. Harrelson. (RP 261) At that time, A.B.

was upset and ran to the neighbor, Ms. Hall. (RP 261-62) Ms. Newell had already told Ms. Hall about A.B.'s accusations against Mr. Harrelson. (RP 259) Ms. Hall testified that A.B. was a "good girl," that she does not overreact, and, for A.B. to be as upset as she was that day, it had to be "something not good." (RP 262) Ms. Hall said that, in the time A.B. was babysat by Ms. Newell (which is also the time A.B. stopped taking her medications, RP 173, 224), A.B. changed from having a good disposition to being withdrawn and angry. (RP 260) Ms. Hall testified that she would be upset too, like A.B.'s father was, if something similar happened to her own daughter. (RP 262)

Mr. Harrelson was charged with first-degree child molestation. (CP 1) The following persons testified at trial in April 2012: Mr. McKinzy, Ms. Newell, A.B., school counselor Kendra Maurer, Ms. Hall, Detective Paul Lebsock, and Mr. Harrelson. Mr. Harrelson was ultimately convicted as charged by a jury on April 18, 2012, and he received a standard-range indeterminate sentence (based on an offender score of zero) of 55 months to life. (CP 65-77) This appeal timely followed. (CP 80) Additional facts may be referenced as they pertain to the particular arguments on appeal.

E. ARGUMENT

Issue 1: Whether the court erred by excluding evidence of A.B.'s misconduct where it was relevant, not to attack A.B.'s credibility, but to specifically support Mr. Harrelson's defense that he did not find the child appealing, let alone sexually desirable or gratifying.

Mr. Harrelson's defense at trial was that he did not touch A.B. inappropriately, that he actually did not want anything to do with A.B., let alone did he find her appealing, sexually desirable or sexually gratifying. Mr. Harrelson sought to support his defense – that he was appalled by A.B. and did not want anything to do with A.B. of a sexual nature or otherwise – with specific instances of A.B.'s misconduct. This evidence was relevant to the defense and should have been admitted under ER 402; it should not have been excluded under ER 608, which was inapplicable in these circumstances since the evidence was not offered in order to attack A.B.'s character.

“A person is guilty of child molestation in the first degree when the person has...sexual contact with another person who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.083. “‘Sexual contact’ means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2).

As a threshold matter, character evidence is generally inadmissible for the purposes of proving action in conformity therewith, subject to certain exceptions. ER 404(a); c.f., ER 404(a)(2) (making admissible “[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused...”), *State v. O’Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005) (quoting ER 608(b)) (“specific instances of a witness's conduct, introduced for the purpose of attacking his or her credibility, may *not* be proved by extrinsic evidence, but may ‘*in the discretion of the court, if probative of truthfulness or untruthfulness*, be inquired into on cross examination of the witness ... concerning the witness' character for truthfulness or untruthfulness.’”) In sum, this analysis under ER 608(b) considers whether the instance of misconduct is relevant to the witness’ veracity on the stand and whether it is germane or relevant to the issues presented at trial. *O’Connor*, 155 Wn.2d at 349.

The court in this case determined that A.B.’s assault and knife incident were inadmissible pursuant to ER 608(b). But this was not the proper analysis. As counsel argued at trial, Mr. Harrelson was not seeking to admit the knife and assault incidences to attack A.B.’s character for truthfulness, as contemplated by ER 608(b), but to instead support Mr. Harrelson’s defense theory of the case and rebut actual elements the State sought to prove.

In particular, the State was required to prove that Mr. Harrelson touched A.B. inappropriately for sexual gratification. The State introduced A.B.'s testimony that she was touched, and the State introduced Detective Lebsock's testimony that the defendant had told the detective that he loved A.B. (RP 313) Under these circumstances, Mr. Harrelson was permitted to defend the allegation that he had touched A.B. for sexual gratification, along with the State's implication that Mr. Harrelson had some intimate feelings for A.B. that satisfied the sexual gratification element. Mr. Harrelson sought to introduce evidence that A.B.'s several incidences of misconduct made her unappealing to Mr. Harrelson in every way.

“As a general rule, evidence tending to establish the defendant's theory of the case, or to qualify or disprove the State's theory, is normally relevant and admissible.” *State v. Sheets*, 128 Wn. App. 149, 156, 115 P.3d 1004 (2005), *review denied*, 156 Wn.2d 1014 (2006) (citing *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (“Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible.”) To that end, the defendant must demonstrate the relevance of the evidence for it to be admitted. *Harris*, 97 Wn. App. at 872; ER 402. “Evidence is relevant and thus probative if it has ‘any tendency to make the existence of any fact that is

of consequence to the determination of the action more probable or less probable that it would be without the evidence.” *State v. Cochran*, 102 Wn. App. 480, 486, 8 P.3d 313 (2000) (quoting ER 401)).

Here, Mr. Harrelson’s defense was that no touching occurred and that there was reason to doubt A.B.’s accusations of the touching, particularly since Mr. Harrelson found A.B. appalling rather than sexually desirable. In other words, it was reasonable for the jury to doubt whether the alleged touching had indeed occurred because A.B.’s multiple misbehaviors made her completely unappealing to Mr. Harrelson and certainly not gratifying on any sexual basis. The evidence of A.B.’s misconduct was relevant, not necessarily for purposes of attacking her character as the trial court rejected under ER 608(b), but to support the defendant’s theory of the case and rebut substantive evidence presented by the State regarding the actual elements of the crime. Accordingly, the court erred by refusing to admit this evidence over defense counsel’s objection.

Issue 2: Whether defense counsel was ineffective for failing to object when the court admitted the videotaped interview of A.B., because the videotape was prejudicial, inadmissible hearsay and unnecessarily cumulative to simply bolster A.B.’s live testimony.

Generally, out-of-court statements are excluded as hearsay. There is an exception that allows child hearsay to be admitted under certain circumstances, but that rule only applies for statements by children under

10-years-old. RCW 9A.44.120. Here, A.B. was already 10-years-old when the alleged inappropriate touching occurred and when A.B. made her testimonial statements in the videotaped interview with Ms. Winston. Thus, RCW 9A.44.120 does not apply, and A.B.'s statements should have been excluded under general hearsay rules. The hearsay was particularly damaging in this case as it simply bolstered A.B.'s live testimony and there was no other evidence to support A.B.'s allegations. Such cumulative hearsay statements from A.B. did not make A.B.'s in-court accusations more reliable, and they confused the truth-seeking function of the jury. Counsel was ineffective under these circumstances for stipulating to the admission of the inadmissible and highly prejudicial videotaped interview.

Hearsay is "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). Hearsay is generally inadmissible in a criminal trial except as provided by court rules or statute. ER 802. "Hearsay evidence of a child's descriptions of sexual abuse often does not fall within traditional hearsay exceptions." *State v. Jones*, 112 Wn.2d 488, 495 n.4, 772 P.2d 496 (1989) (citing generally, Comment, Washington's Child Abuse Legislation: Progressive or Over-Aggressive?, 23 Gonz.L.Rev. 453, 459-64 (1987-88)).

Thus, the Legislature enacted RCW 9A.44.120, which is “principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse.” *Jones*, 112 Wn.2d at 493-94 (“RCW 9A.44.120 is responsive to the prosecutor's need for such hearsay evidence, making it available when it would not otherwise be admissible.”) *See also State v. Dunn*, 125 Wn. App. 582, 588, 105 P.3d 1022 (2005); *State v. Bedker*, 74 Wn. App. 87, 92, 871 P.2d 673 (1994) (citing *Pardo v. State*, 665, 667 (Fla. 1992) applying similar child hearsay statute); *State v. Frey*, 43 Wn. App. 605, 608, 718 P.2d 846 (1986). RCW 9A.44.120 makes admissible in a criminal proceeding “[a] statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another...not otherwise admissible by statute or court rule...” so long as the court finds that the out of court statement has sufficient indicia of reliability and the child testifies. RCW 9A.44.120(1), (2)(a) (emphasis added); *Dunn*, 125 Wn. App. at 588.

Even though A.B. testified, the child hearsay statute does not apply in this case because A.B. was already 10-years-old when the touching allegedly occurred and her out-of-court statements were made. Thus, traditional exclusionary rules on A.B.’s videotaped hearsay statements should have been applied. Whereas RCW 9A.44.120 suggests that, due to a child’s tender years, certain out-of-court statements are less likely to be

fabricated where made by a child under 10, A.B. was not young enough for RCW 9A.44.120 to save her hearsay statements. Simply put, A.B.'s out-of-court statements did not fall within RCW 9A.44.120 and thus were inadmissible as hearsay.

Prior out-of-court statements that are cumulative of a witness's live testimony are not probative of whether the witness is telling the truth. A witness' accusations are "not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected." *Pardo*, 596 So.2d at 668 (citing 4 John H. Wigmore, *Evidence* § 1124 (Chadbourn rev. 1972)).

Without such safeguarding rules,

"a witness's testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness. This danger would seem to us to be especially acute in criminal cases like the present where the prosecutrix is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers... psychologists,... specialists, ...and the like... By having the child testify and then by routing the child's words through respected adult witnesses...there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony."

Id. (internal quotations omitted) (emphases added). In other words, mere repetition of a child's out-of-court statements along with her trial

testimony is not a measure of accuracy, particularly where research suggests that, once a child gives an erroneous response, it may become incorporated into her memory. Stephen J. Ceci and Richard D. Friedman, *The Suggestability of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 41 (2000).

Here, A.B.'s out-of-court video interview is precisely the type of out-of-court statement that should have been excluded under ER 802. It merely served to bolster the child witness's live testimony without any truth-finding benefit. The fact that A.B. may have repeated her allegations during her interview with Ms. Winston does not make her allegations more truthful. Those out-of-court statements were inadmissible under the general hearsay rules, and the child hearsay statute exception did not apply in this case. RCW 9A.44.120 would not make the statements admissible since A.B. was not of such tender years that the statute would apply (the child hearsay statute only makes admissible statements by children under 10-years-old) A.B.'s testimony should have been limited to her live testimony rather than being bolstered with her earlier out-of-court video interview.

Moreover, the video interview should have been excluded because its "probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, ... or the

needless presentation of cumulative evidence.” ER 403; *Bedker*, 74 Wn. App. at 93. Care must be taken to ensure that a child’s prior out-of-court statements do not merely constitute vouching for the child’s accusations or cumulative evidence of live testimony. *See Dunn*, 125 Wn. App. at 588 (court ultimately found the young child’s statements admissible under RCW 9A.44.120, which is not applicable in this case); *Thomas v. French*, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983) (internal citations omitted) (“In general, the testimony of a witness cannot be bolstered by showing that the witness has made prior, out-of-court statements similar to and in harmony with his or her present testimony on the stand.”)

Mr. Harrelson did not receive a fair trial because his attorney ineffectively stipulated to the admission of the most damaging evidence against him, even though that same evidence should have been excluded. The highly prejudicial video interview was not admissible under the child hearsay statute or ER 403. Generally, to demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v.*

Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The competency of counsel is based on the entire record, and there is a strong presumption that counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Here, there was no legitimate trial tactic to stipulating to the admission of the video interview. If A.B. had been under 10-years-old when she made the statement, the video would have been admissible, and it would have been objectively reasonable to stipulate to its admission. But since the child hearsay statute did not apply in this case, and since it merely served to bolster the child's live testimony without adding anything to the truth of the matter, counsel's performance fell below an objective standard of reasonableness.

This case was resolved entirely on the credibility of the witnesses, and bolstering the single-most important witness against Mr. Harrelson with an impermissible hearsay video was highly prejudicial. "A child's allegations of sexual abuse can have a powerful emotional impact on a jury." *Jones*, 112 Wn.2d at 494. Repeatedly hearing such allegations, particularly in the context of an interview with a supposed child interview specialist, gave an aura of reliability to A.B.'s accusations that was not permitted by the rules of evidence and unfairly prejudiced Mr. Harrelson before the jury. The video was particularly problematic when Detective

Lebsock testified that Ms. Winston conducted the interview in order to make sure it was done “appropriately, objectively and... in as unbiased as possible a manner.” This improperly impugned yet an additional aura of reliability on the child’s out-of-court statement, despite the fact that the mere repetition of A.B.’s statements, even to a supposed specialist, did not make the child’s accusations more truthful.

Mr. Harrelson respectfully requests that this case be reversed and remanded so that an un-biased jury can hear the child’s accusations and weigh credibility, without any impermissible bolstering or prejudicial hearsay, prior to issuing such a devastating verdict that the defendant will face the rest of his life.

Issue 3: Whether defense counsel was ineffective for failing to object, or whether Mr. Harrelson was denied his constitutional right to a fair trial, when Ms. Hall’s opinion testimony vouched for A.B. and invaded the province of the jury.

Ms. Hall’s testimony suggested her personal opinion of the defendant’s guilt and A.B.’s credibility, and it should have been stricken with instruction to the jury to disregard. Defense counsel was ineffective when he failed to object, particularly where the jury’s verdict was based entirely on the credibility of this child for whom Ms. Hall vouched.

The overarching principle is that credibility of a witness and ultimate guilt determinations are questions for the jury. *State v. Welchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); 5D WAPRAC ER 704(6), (9)

and (11). Opinion testimony by one witness regarding another witness' credibility, opinions on guilt, or expressions of personal belief invade the fact-finding province of the jury. *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005); ER 608; 5D WAPRAC ER 704; *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). "To determine whether a statement is impermissible opinion testimony or a permissible opinion pertaining to an ultimate issue, courts must consider 'the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.'" *State v. We*, 138 Wn. App. 716, 723, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). See e.g., *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999), superseded by statute on other grounds, RCW 46.61.024, (Court held inadmissible opinion testimony where trooper testified to ultimate guilt determinations without providing an adequate factual basis for personal knowledge)

ER 701 provides that,

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge..."

ER 701; *State v. Carlson*, 80 Wn. App. 116, 123-24, 906 P.2d 999 (1995) (since doctor lacked personal knowledge of whether the child had been sexually abused, her opinion was not admissible as the opinion of a lay witness).

Since “testimony concerning an opinion on guilt violates a constitutional right, it generally may be raised for the first time on appeal.” *Thach*, 126 Wn. App. at 312 (internal citations omitted). Whether a defendant seeks review of this error as one of constitutional magnitude, or as one gleaned from ineffective assistance of counsel, the defendant is required to show two traits common to each: (1) that inadmissible opinion testimony occurred and (2) that the outcome of the trial would have been different if the improper opinions had been excluded. *We*, 138 Wn. App. at 722-23 (citing *State v. Warren*, 134 Wn. App. 44, 57, 138 P.3d 1081 (2006) (manifest constitutional error); and *State v. Hakimi*, 124 Wn. App. 15, 22, 98 P.3d 809 (2004) (ineffective assistance of counsel).

Here, Ms. Hall testified that A.B. was a “good girl,” that she “doesn’t overreact to little things,” and “for her to be as upset like that... it had to be something not good.” RP 262. Ms. Hall went on to sympathize with A.B.’s father’s anger toward Mr. Harrelson, stating “I’d be losing it too if I was a parent and my daughter... had had that happen.” *Id.*

Ms. Hall's testimony did not speak to any element of the crime and was highly prejudicial under the circumstances of this case. Ms. Hall delivered her personal opinion of the accusations in this case, suggesting that they must be true because A.B. was so upset, and that she would be upset just like A.B.'s father if something like A.B. alleged had happened to her daughter. Ms. Hall is not an expert on child or adult psychology, she had no independent facts that would support her personal opinion of the defendant's guilt or A.B.'s credibility, and her testimony did nothing to aid the jury in its truth-seeking function. Rather, Ms. Hall's personal opinion testimony simply vouched for A.B.'s accusations and invaded the province of the jury by indicating that the defendant must be guilty given the child's mere accusations. This is not helpful to a determination of the issues and only served to cloud the jury's determination of guilt. A.B.'s accusations were not more truthful just because she later relayed them to Ms. Hall. Ms. Hall's personal opinion testimony should have been excluded as inadmissible opinion testimony that vouched for another witness.

Ms. Hall's opinion testimony was significantly prejudicial in this case, so that the outcome of trial would have been different if the testimony had been excluded. There was no corroborative evidence to support A.B.'s accusations. After A.B. had once again gotten into trouble

in May 2010, and after Mr. Harrelson joined A.B.'s father in telling the child that she needed to start telling the truth, A.B. accused the defendant of the inappropriate touching. There was certainly reason to doubt the veracity of A.B.'s accusations. Ms. Hall's testimony should have been limited to her personal observations – such as the fact that Ms. Newell sometimes visited outside with Ms. Hall while A.B. was at the apartment (which Mr. Harrelson acknowledged himself). This was at least relevant and based on Ms. Hall's personal observations, rather than her personal assumptions in this case.

The remainder of Ms. Hall's personal opinion testimony went too far and should have been excluded. "A child's allegations of sexual abuse can have a powerful emotional impact on a jury." *Jones*, 112 Wn.2d at 495. A witness's factually unsupported opinion on guilt can be the nail in the coffin for a jury, resulting in a jury verdict based on passion, prejudice and improper speculation rather than fact. Mr. Harrelson respectfully requests a fair trial before an untainted jury.

Issue 4: Whether the prosecutor committed misconduct by introducing facts not in evidence.

On cross examination of the defendant, the prosecutor stated a leading question that suggested facts never introduced into evidence that was extremely prejudicial to Mr. Harrelson's defense.

“A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). “In determining whether prosecutorial misconduct occurred, [this Court] evaluate[s] whether the prosecuting attorney’s statements were improper.” *Id.* The prosecutor’s allegedly improper comments are reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument and the jury instructions given.” *Id.*

Prosecutors have a duty to “seek a verdict free of prejudice and based on reason.” *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). “In general, a prosecutor errs by expressing a ‘personal opinion about the credibility of a witness and the guilt or innocence of the accused... Just as it ‘is improper for a prosecutor personally to vouch for the credibility of a witness,’ it is improper for a prosecutor to personally vouch against the credibility of a witness.” *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003) (internal quotations omitted).

To that end, it is also improper for a prosecutor to “use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” *State v. Lopez*, 95 Wn. App. 842, 855, 980 P.2d 224 (1999) (internal quotations omitted). “Thus, a prosecutor's

impeachment of witnesses by referring to extrinsic evidence never introduced may rise to a violation of the right to confrontation.” *Id.* ““A person being tried on a criminal charge can be convicted only by evidence, not innuendo.”” *State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007) (quoting *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950)). “[A] prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact.” *Id.* Finally, the Court explained in *State v. Babich* that failure to object or request a curative instruction under such circumstances of improper cross examination is not a waiver of the issue on appeal:

“It was not the questions themselves that were improper; *it was the failure to prove the statements in rebuttal that was error.* Until the State rested its rebuttal, [the defendant] had no way of knowing whether the State would or would not prove the prior statements. By that time it was too late to undo the prejudice resulting from the prosecutor citing those prior statements in questions heard by the jury.”

State v. Babich, 68 Wn. App. 438, 445, 842 P.2d 1053 (1993).

Here, the prosecutor asked Mr. Harrelson whether he had talked with Detective Lebsock, and the defendant agreed that the detective came to his house with two officers in June 2010. RP 309, 312. Mr. Harrelson testified that at this initial visit with the detective, Detective Lebsock told him about A.B.’s molestation allegations. RP 310. The prosecutor then immediately asked, “And isn’t it true that when you talked to Detective

Lebsock, you told Detective Lebsock you loved [A.B.]?” RP 310. The implication, of course, was that the defendant was not truly appalled by A.B. as he had claimed throughout his entire defense, but instead Mr. Harrelson had great affection for the child, such that he could have indeed perpetuated the crime. The defendant vehemently responded to the prosecutor’s question, “That’s a lie... That’s a straight lie.” *Id.*

After Mr. Harrelson’s testimony, the prosecutor recalled Detective Lebsock to testify. The prosecutor said “I’d like to focus your attention to the date, August 11, 2010... during this particular contact on August 11, 2010, did Mr. Harrelson tell you his feelings about [A.B.]?” RP 311-12. Clarifying that the defendant’s statements were made in August rather than June, Detective Lebsock testified, “he told me specifically that he loved her.” RP 312.

The prosecutor’s questioning in this case was improper and highly prejudicial. With a suggestive leading question, the prosecutor asked Mr. Harrelson whether he had told Detective Lebsock in June 2010 that he loved A.B. The defendant responded quite assertively that the prosecutor’s statement was not true. The prosecutor then sought to impeach Mr. Harrelson by recalling Detective Lebsock to testify to the supposed evidence that the prosecutor had suggested. But the detective

clarified that the defendant did not say he loved A.B. in June, that this statement did not occur until August.

Although the detective attempted to correct the prosecutor's misstatement, the damage had already been done. Mr. Harrelson's credibility had already been tainted by the prosecutor in the attempt to impeach the defendant, suggesting that the prosecutor knew facts not in evidence that would prove the defendant to be a liar. Had the prosecutor made his leading statement and the detective then testified to support that statement, this would have been permissible cross examination. But the prosecutor was not able to close the evidence gap by admitting *different evidence* from the August meeting to support the prosecutor's misstatement about the meeting in June.

The effect of the prosecutor's questioning was that the defendant was portrayed as a liar based on something for which he was never given the opportunity to answer honestly. Had Mr. Harrelson been questioned specifically about his interview in August with Detective Lebsack, the defendant may very well have agreed that he said he loved A.B. and then been able to qualify or explain the circumstances of such a statement. Instead, it was implied that, when asked about the molestation accusations, Mr. Harrelson proclaimed his love for the child, which was inconsistent with Mr. Harrelson's defense that he wanted nothing to do with the child.

In other words, the defense was crushed by the prosecutor's untrue leading statement that carried devastating implications. The improper impeachment resulted in the jury improperly perceiving Mr. Harrelson as a liar based on unsupported statements by the prosecutor.

Since the conviction in this case hinged on the jury's credibility determination, the prosecutor's unsupported portrayal of the defendant as a liar in the final minutes of the defendant's testimony was incredibly prejudicial. And this error is properly raised on appeal for the first time. Defense counsel would not know for certain whether the prosecutor could introduce evidence to support his leading statement until the damage had already been done. Mr. Harrelson respectfully requests the opportunity to receive a fair trial, free of jury bias and improper attacks on his credibility that are based on untrue suggestive statements by the prosecutor.

Issue 5: Whether the cumulative error doctrine requires a new trial.

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the many prejudicial errors in this case warrants reversal. *See e.g. State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (holding, "a series of errors, each of which is harmless, may have a cumulative effect that is prejudicial.")

“It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless.” *State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999) (internal quotations omitted). “Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence.” *Id.* “Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error.” *Id.* Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” *Id.*

Here, the defendant was denied his constitutional right to a fair trial, effective assistance of counsel, and a verdict based on the decision of an untainted jury. The trial court improperly excluded evidence of the victim’s past conduct that was directly relevant to Mr. Harrelson’s defense as to why he would have had no contact with the child. In addition, Mr. Harrelson was denied his right to effective assistance of counsel when his attorney failed to object when the inadmissible child hearsay video was introduced, when Ms. Hall improperly offered her non-factual opinion testimony and when the prosecutor improperly impeached with facts never

introduced into evidence. Each of these errors was also of constitutional magnitude as they deprived Mr. Harrelson of his right to a decision by a fair and impartial jury, particularly since the jury's truth-seeking function was invaded by improper testimony and statements.

F. **CONCLUSION**

Mr. Harrelson's guilty verdict was not achieved following a fair trial before an impartial jury. The defendant was denied his right to present his defense with supporting evidence. The child's live testimony was also improperly bolstered by the child's own prior out-of-court statements, even though her statements did not fall within the child hearsay statute exception. A.B.'s allegations were further improperly vouched for by a lay witness who lacked any personal knowledge pertaining to the allegations. And the prosecutor improperly stated facts not in evidence so that Mr. Harrelson's credibility was seriously damaged for the jury.

Ultimately, the verdict in this case was based on the jury's decision of whether to believe A.B. or Mr. Harrelson. But there was not any corroborating evidence to support A.B.'s allegations, so the errors in this case were particularly prejudicial. The errors deprived Mr. Harrelson of his opportunity to receive an unbiased verdict based only on factually

supported allegations. As such, Mr. Harrelson respectfully requests that his conviction be reversed and remanded.

Respectfully submitted this 5th day of November, 2012.

/s/ Kristina M. Nichols
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 30917-7-III
vs.)
DEWITT A. HARRELSON) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 5, 2012, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission from Spokane County Prosecutor's Office, I also served Mark Lindsey at kowens@spokanecounty.org by e-filing electronic e-mail service.

Dated this 5th day of November, 2012.

/s/ Kristina M. Nichols
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