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Court of Appeals  
Division III  
State of Washington

NO. 34220-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

Roger William Flook, Jr.,

Appellant.

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

The Honorable Scott D. Gallina

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion for a mistrial.

2. A witness violated a motion in limine by stating twice during her testimony that appellant was in jail.

3. An officer improperly testified as to his opinion on appellant's guilt.

4. An officer improperly testified as to his opinion on the truthfulness of the complaining witness.

5. The trial court erred in allowing an officer to testify as to his opinion on the truthfulness of the complaining witness.

6. An officer violated a motion in limine by testifying that appellant appeared to be under the influence of a substance.

7. The trial court, without any analysis on the record, erroneously admitted evidence of other bad acts under ER 404(b).

8. Defense counsel failed to object to an officer's improper opinion testimony.

9. Defense counsel failed to object to an officer's testimony that appellant appeared to be under the influence of a substance in violation of a motion in limine.

10. Defense counsel failed to propose a limiting instruction to evidence of other bad acts admitted under ER 404(b).

11. Appellant was denied his constitutional right to effective assistance of counsel.

12. Cumulative error denied appellant his constitutional right to a fair trial.

13. In the event the State substantially prevails on appeal, this Court should deny any request for costs.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is reversal required because the trial court erred in denying appellant's motion for a mistrial where a witness violated a motion in limine by stating twice that appellant was in jail, which denied appellant his constitutional right to a fair trial?

2. Is reversal required where an officer improperly testified as to appellant's guilt by opining that he was evasive and deceptive during his interview and the complaining witness was truthful during her interview, and the error was not harmless beyond a reasonable doubt?

3. Is reversal required where, without any analysis on the record, the trial court erroneously admitted unduly prejudicial evidence of other bad acts under ER 404(b) and the error was not harmless?

4. Is reversal required where appellant was denied his constitutional right to effective assistance of counsel because defense counsel's representation was deficient in failing to object to an officer's improper testimony and failing to propose a limiting instruction to evidence of other bad acts admitted under ER 404(b) and appellant was prejudiced by counsel's deficient representation?

5. Is reversal required where cumulative error denied appellant his constitutional right to a fair trial and the presumption of innocence?

6. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs where Flook is presumably still indigent because there has been no evidence provided to this Court, and no findings by the trial court, that Flook's financial condition has improved or is likely to improve?

C. STATEMENT OF THE CASE

1. Procedure

On September 30, 2015, in the name and by the authority of the State of Washington, the Asotin Prosecutor's Office charged appellant, Roger W. Flook, with rape of a child in the first degree and child molestation in the first degree. CP 1-2; RCW 9A.44.073, 9A.44.083.

The Honorable Scott D. Gallina held a pretrial hearing on defense motions in limine on February 1, 2016. RP 4-13. The court entered an

order on motions in limine on February 9, 2016. CP 39-40. Following a two-day trial on February 18-19, 2016, a jury found Flook guilty as charged. RP 331-33; CP 68.

On March 23, 2016, the court sentenced Flook to concurrent sentences of 279 months and 174 months and community custody and imposed legal financial obligations. RP 341-62; CP 105-08.

Flook filed a timely notice of appeal. CP 120-36.

2. Facts

a. Order on Motions in Limine

The trial court's order included exclusion of evidence of Flook's release from prison, exclusion of evidence of Flook's drug use, and denial of defense motion to exclude evidence of other bad acts under ER 404(b). CP 39-40.

b. Investigation

On August 24, 2015, the sheriff of Whitman County, Brett Myers, received a referral from Child Protective Services (CPS) of a report of inappropriate sexual contact between a young female and her stepfather. RP 34. Myers has specialized training in interviewing children of sexual assault. RP 32. CPS identified the alleged victim as A.S. and the suspect as Roger Flook. RP 34-35. On August 25, 2015, Myers and a CPS worker met with twelve-year-old A.S. at her biological father's home. RP 35-37.

A.S. said that in April 2014, she and her family traveled to “Lewiston” for a conference and spent the night in a hotel. RP 37, 41-42. They stayed in a standard room that had one bed and the entire family slept on the bed. RP 37-38. Flook was on one end, A.S. was next to Flook with her brother, J.S., next to her, and her mother on the other end. RP 38. A.S. described that she felt someone’s hand go in her pants. RP 60. She initially said she thought it was Flook but as the interview continued, she said she was sure it was Flook. RP 60, 68-69.

A.S. revealed other inappropriate incidents that occurred in the summer of 2015. RP 49, 62, 64. Myers learned that about the same time, A.S. was caught engaging in inappropriate internet conversations in chat rooms, sexting, and viewing adult type cartoons. RP 63-64. A.S. did not tell him about any inappropriate touching before the hotel incident, but Flook had been out of the home for two years. RP 62, 72. A.S. said she told a friend, C.S., who she met at summer camp, about the hotel incident. RP 40-41. C.S. talked to her mother about what A.S. said, which prompted the mother to locate A.S.’s father who contacted A.S.’s counselor. After the counselor met with A.S., she notified C.P.S. RP 41. Although A.S. had been previously seeing the counselor, she never told her about the hotel incident. RP 65-66. Myers is trained to identify signs of deception by observing a person’s demeanor. A.S.’s body language was consistent with

someone “that was telling the truth” and he did not observe any signs of deception. RP 70-71.

On August 27, 2015, Myers met with A.S.’s mother, Martha Flook.<sup>1</sup> Martha said they were attending a church marriage counseling retreat and stayed at the Quality Inn. She confirmed that the family slept on one bed as A.S. had described. RP 42-43. After the meeting, Martha left and returned two or three hours later with Flook. RP 43. Myers interviewed Flook in the presence of Martha and the CPS worker. RP 44. Myers advised Flook of his rights but told him that he was not under arrest. Flook signed an advisement of rights form and agreed to talk to him. RP 45-47.

During the interview, Flook appeared to be very tired, “possibly under the influence of a substance.” RP 51. He showed signs of trying to be “evasive” and being “deceptive.” RP 74-75. When Myers asked Flook about going to a marriage retreat, he did not remember until Martha reminded him about the retreat and staying at the hotel. RP 47. Flook denied touching A.S. inappropriately and said that he could have just touched her when he reached over to calm J.S. who was having seizures. RP 48. Flook denied other allegations made by A.S. RP 49-51.

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<sup>1</sup> For clarity, Martha Flook will be referred to as Martha and Roger Flook as Flook.

While conducting his investigation, Myers went to the Quality Inn in Clarkston and obtained a receipt which reflected that the Flocks stayed at the hotel in a room with a single bed on June 6 and checked out on June 7, 2014. RP 52-54, 61. After interviewing C.S.; C.S.'s mother, Toni [Salerno]; A.S.'s counselor; and A.S.'s father, Myers provided his report to the Clarkston Police Department. RP 54-59.

c. Parents

Aaron Sheridan is A.S.'s father. A.S. is thirteen years old. Sheridan's son and A.S.'s brother, J.S., is twelve. RP 80-81. J.S. has epilepsy which causes startle-induced seizures. RP 86-88. Their mother is Martha Flook, who has been married to Roger Flook for four or five years. RP 82. After being away for a period of time, Flook returned home in April 2014. RP 82. In August 2015, Sheridan learned about allegations of sexual abuse when the Moscow Parks and Recreation contacted him and he spoke with Toni [Salerno]. RP 83. He immediately texted Martha from Walmart and told her that he needed to speak with A.S. Coincidentally, Martha happened to be at Walmart with A.S. RP 83. He talked to A.S. and Martha and contacted a counselor who notified CPS. RP 85-86.

Sheridan recalled that Martha and Flook stayed with the children at a hotel in Clarkston on June 6, 2014. RP 92. At the time, A.S. did not tell him about anything that happened at the hotel. RP 94. He has full custody

of the children but allowed them to stay with Martha on weekends. RP 95-96.

Before April 2014, A.S. was doing good and had good grades in school. RP 88. After April 2014, she started sexting, chatting on line, watching violent Japanese cartoons, and her grades dropped. RP 89-90, 96-98. Flook discovered A.S.'s inappropriate activities on her computer and told Sheridan and Martha. The three of them met with A.S. and decided to take away her electronics and sent her to counseling. RP 90-91, 98. A.S. had about 50 sessions with her counselor, Nicole Konen, but never told her about the touching at the hotel. RP 98-100.

Martha Flook married Roger Flook in July 2010. She has two children, A.S. and J.S., from a previous marriage. Flook was not living at home from December 2012 to April 2014. RP 163-64. On June 6, 2014, the family took a trip to Clarkston and stayed at the Quality Inn. Martha and Flook were attending a marriage growth seminar and had not planned to take the children so the room had only a king-size bed. RP 165-66, 179-81. Flook slept on one end with A.S. next to him and J.S. next to A.S. and she slept on the other end. RP 167. Martha had a bad cold and did not sleep well that night. She ended up resting in a chair on the side of the bed where Flook was sleeping because her coughing kept causing J.S. to have seizures. RP 168-69, 183-84. Martha did not hear A.S. or Flook say anything through

the night. RP 169-70, 185-86. In the morning, the family had breakfast before she and Flook went to the seminar. A.S. did not tell Martha anything about Flook touching her inappropriately. RP 186-87.

In April 2015, Flook discovered that A.S. was sexting and chatting with older men on the internet and told Martha about it. RP 188-89. They had a family meeting and took away A.S.'s electronics and she started counseling. RP 172-73. Just before Flook talked to her about A.S.'s misbehavior, A.S. told her that Flook may have touched her on the thigh when they all spent the night at the hotel. A.S. said she talked to Flook about it and "they figured it out and that she knew that that didn't happen." RP 190. Although A.S. said things were okay, she seemed very upset and on edge. RP 200, 203.

In August 2015, Sheridan told her what A.S. had revealed to C.S. at camp. RP 174-75. She asked A.S. to describe exactly what Flook did at the hotel. RP 176-78. When Martha met with Sheriff Meyers about A.S.'s allegations, she told him that A.S. could have made accusations against Flook because she was caught engaging in internet activities and she can be dishonest. RP 192-93. She also told Myers that A.S. may have gotten the idea from a movie the family watched about a woman who has a boyfriend named Roger who sexually molested her children. RP 197. At the time of

her meeting with Myers, she was influenced by the explanation Flook gave her rather than looking at everything. RP 203-05.

d. A.S.<sup>2</sup>

In the summer of 2014, A.S. went to Clarkston with her family and stayed at a hotel. RP 107-08, 133. They all slept on a big bed. Flook was on the left side, she was next to Flook and her brother, and her mother was on the other end. RP 108-10. She was not quite asleep when she felt something touching her under her clothes. RP 112-13. The touching stopped and then started again, which woke her up. She realized it was Flook's fingers touching her outside her vagina. RP 114-118, 137. She kept her eyes closed but knew it was Flook and not her brother who was having seizures and has really small hands. RP 114-15. When Flook removed his hand, A.S. turned toward her brother and put her arm between her legs. RP 116. Then she felt someone grab and pull her arm and she heard Flook whisper "come on." RP 116-17. She started crying and he let go of her arm. He asked "what's wrong" but she did not respond. RP 119-20.

In the morning, A.S. did not tell anybody about what happened. RP 120. A few months later, she talked to Flook and he said J.S. touched her while having seizures and he tried to pull J.S.'s arm away. RP 120-21, 139-

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<sup>2</sup> A.S. was thirteen years old at the time of trial.

40. She did not tell anybody else because she was scared and embarrassed and “didn’t really want to start anything.” RP 121. At some point, she sent a text message to Flook saying she knew what he did. Flook asked her what she meant and A.S. said she felt someone touching her inappropriately at the hotel. Flook denied touching her and said that may have been her brother having seizures and she should not tell her mother. RP 139-40.

A.S. finally told C.S., a friend she met at summer camp in Moscow. RP 121-22. A.S., C.S., and another friend, Nakeisha, went to the aquatic center. RP 145-46. While swimming around in the pool, they played truth or dare and started telling secrets. RP 146. She told C.S. about what Flook did because she was nice and seemed trustworthy. RP 146-148. A.S. did not have a boyfriend then and did not talk to the girls about a boyfriend. RP 147.

C.S. told her mother who called A.S.’s father. Her father talked to her about what happened when he saw her at Walmart with her mother and brother. RP 122-23, 150-51. Her father told her that C.S.’s mother said she had a similar experience as a child. RP 122, 148. Afterwards, she told her mother she was sure that Flook “touched her privates.” RP 151. Her relationship with her mother is better now that Flook is gone. RP 152.

Flook made A.S. uncomfortable in other situations. When they were driving somewhere, she had a hole in her jeans high up on her thigh and he

put his finger in the hole and laughed. RP 124, 148-49. Another time, he showed her “Japanese anime porn.” RP 124. Once when they were home, he went outside and sat in his truck. She followed him hoping to catch him smoking. She sat on his leg and he picked her up and moved her between his legs. She felt his private area moving. RP 125-27, 149-50. Flook would randomly spank her on the butt when she walked by him and her mother said not to do that, telling him “it’s weird because you do that to me.” RP 127-28.

A.S. was listening to music one night on her phone and when she fell asleep, Flook searched through her phone. He discovered that she was sexting and chatting with people she met online. A.S. was grounded for a few months and was mad at Flook. RP 119-30. She was sent to a counselor to help settle her down. RP 143. She never told her counselor about what happened at the hotel because her counselor would have to report anything that endangered her to the police and inform her parents. RP 144.

e. C.S.<sup>3</sup>

C.S. met A.S. at summer camp. RP 259-60. C.S., A.S., and another friend, Keisha, walked to the aquatic center which had a swimming pool and slide. RP 261-62. They started talking about friends and boys. RP 263.

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<sup>3</sup> C.S. was nine years old at the time of trial.

They were not playing truth or dare or telling secrets. RP 264-65. A.S. said she had a boyfriend named Alex and told her about the sexual things they did. RP 270. While they were talking, A.S. just blurted out what happened with her stepdad. RP 264. When A.S. kept talking, C.S. felt uncomfortable, “I was like in shock but scared at the same time.” RP 265, 267. A.S. said she did not like her stepdad. RP 267-68, 275, 278. She seemed upset and kind of scared. RP 278. C.S. wanted to make her feel better so she told her that something similar happened to her mother when she was a little girl. RP 266. C.S. told her mother about A.S. because she felt sorry for her and wanted to help. RP 269.

f. Counselor

Nicole Konen started seeing A.S. in April 2015. RP 210. A.S. was referred to her for counseling because of concerns about A.S. accessing the internet with “sexualized kind of behavior, chatting, sexting.” RP 210. A.S. was watching violent anime videos such as Jeff the Killer. RP 226-27. The counseling sessions stopped during the summer and resumed in late August. RP 212. During a session on August 24, 2015, A.S. said she met C.S. at summer camp and disclosed what happened with her stepdad. RP 214. A.S. told C.S. that while in bed at a hotel with Flook and her brother, she felt a large hand near her crotch area. RP 216. She said this happened “[r]ight after he got out of jail.” RP 216. Defense counsel objected and moved to

strike and the court responded, “That will be stricken.” RP 216. A.S. also disclosed other instances when Flook made her feel uncomfortable. RP 216-19, 225-26. A.S. never told her that anything had happened with her stepdad during the previous eight to ten sessions. RP 222, 229.

Counseling restarted in August 2015 after A.S.’s father learned about what A.S. told C.S. at summer camp because A.S. was going through a challenging period. RP 223. A.S. said the hotel incident happened fourteen months earlier but Konen did not know the date, “I just knew it was sometime after and I didn’t know when Roger was even in jail, so I --” RP 224. Defense counsel moved to strike and for the court to instruct the witness. The court responded, “That will be stricken and you’re not to make reference to any kind of jail or anything associated about that.” RP 224. Since August 24, 2015, the counseling sessions with A.S. have not been consistent because life has been busy for her father and mother. RP 231.

g. Aunt

On October 4, 2015, Kenda Hergert, Flook’s aunt, had a discussion with Martha about A.S.’s allegations against Flook. RP 239. Martha told her that she knew nothing happened and because she was in the room, she would have known if something had happened. RP 239. Martha said A.S. had a motive to accuse Flook because he caught her communicating with a 30-year-old man on the internet. A.S. was mad at Flook because she had

her social media privileges taken away. RP 240. Hergert saw Martha again in November and she said she was not sure what happened but she did not say that she did not have any doubt. RP 241-43.

h. Rebuttal

Martha denied telling Hergert in October that nothing happened at the hotel. RP 283. She told Hergert “he could have, he might not have, and I was just telling her you just don’t know.” RP 280. When she saw Hergert again in November, she told her “there’s no doubt in my mind.” RP 282. Defense objected and the court instructed the jury that the “purpose of the testimony being given here is to show that conversations did take place, not the truth of them.” RP 282-83. Martha acknowledged that after the allegations against Flook arose, she and Sheridan went to court over a dispute about limiting A.S.’s visitations with Martha. RP 284-86.

i. Motion for Mistrial

After the State rested, defense counsel moved for a mistrial based on a blatant violation of the court’s order on motions in limine. RP 233. Counsel argued that despite the court’s exclusion of any testimony of Flook being in jail, the counselor said he got of jail twice and “we can’t un-ring that bell.” RP 233-34. The prosecutor argued that he cautioned the counselor pursuant to the court’s limine ruling and she was merely saying what A.S. used as a time frame. He noted that the court orally instructed

the jury to disregard the comment and it could give a written instruction. RP 234. The court denied the motion, reasoning that it gave a curative instruction twice and “I don’t find that the references were overly overt or prejudicial in the context in which they were given.” RP 235.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING FLOOK’S MOTION FOR MISTRIAL BASED ON A WITNESS’S VIOLATION OF THE COURT’S ORDER IN LIMINE WHICH DEPRIVED FLOOK OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

This Court has recognized that in determining whether a witness’s testimony requires a mistrial, the “test is not whether the remark was deliberate or inadvertent but whether the defendant was denied a fair trial.” *State v. Essex*, 57 Wn. App. 411, 415, 788 P.2d 589 (1990).

A trial court’s denial of a motion for mistrial is reviewed for abuse of discretion. *State v. Thompson*, 90 Wn. App. 41, 45, 950 P.2d 977 (1998), (citing *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). A trial court’s denial of a motion for mistrial will only be overturned when there is a “substantial likelihood” that the error prompting the mistrial affected the jury’s verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002), (citing *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). A trial court should grant a mistrial when a trial irregularity is so prejudicial that it

deprives the defendant of a fair trial. *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008)(citing *State v. Post*, 59 Wn. App. 389, 395, 797 P.2d 1160 (1990), *aff'd*, 118 Wn.2d 596 (1992); *State v. Johnson*, 60 Wn.2d 21, 371 P.2d 611 (1962)). Generally, the trial court is best suited to determine the prejudice of a statement. *Thompson*, 90 Wn. App. at 45-46 (citing *Lewis*, 130 Wn.2d at 707; *State v. Webber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983)).

Here, the trial court granted the defense motion in limine to exclude evidence or testimony concerning the defendant's release from prison. The court ordered that "[t]his motion is granted to the extent that the State is to caution its witnesses from referring to a release of the defendant from prison as time frames can be established without this reference." CP 40. In violation of the court's order, Nicole Konen, stated twice that Flook was in jail while testifying about what A.S. told her during a counseling session:

[PROSECUTOR]: What did she -- what did she say about the hotel incident?

KONEN: She said that she was in a bed with Roger and her brother and that she felt a hand, a large hand near her crotch region.

[PROSECUTOR]: Did she indicate to you a timeframe when this happened?

KONEN: *Right after he got out of jail.*

RP 216 (emphasis added).

Defense counsel objected and moved to strike the answer. The court responded, "That will be stricken." RP 216.

Despite the court's ruling, Konen repeated herself during cross examination:

[DEFENSE COUNSEL]: And so she tells you for the first time something that she said happened fourteen months earlier?

KONEN: Right.

[DEFENSE COUNSEL]: Did you understand the date to be June of 2014?

KONEN: I did not know the date. I just knew it was sometime after and *I didn't know when Roger was even in jail*, so I --

RP 224 (emphasis added).

Defense counsel moved to strike the reference to jail and asked the court to instruct the witness. The court responded, "That will be stricken and you're not to make reference to any kind of jail or anything associated about that." RP 224.

After the State rested, defense counsel moved for a mistrial based on "a blatant violation of the Court's order on Motions in Limine." RP 233. Counsel argued that the jury was told twice that Flook was in jail and further emphasis was placed on Flook being in jail because he was forced to object twice, "so we can't un-ring that bell and the only solution is a mistrial." RP 233-34. The prosecutor claimed that he cautioned Konen pursuant to the court's limine ruling and that she did not intentionally violate the court's order by referring to the time frame used by A.S. He pointed out that the court orally instructed the jury to disregard the comment and it could give a written cautionary instruction. RP 234-35. Defense counsel responded that

the court's order specifically stated that the time frame can be established without any reference to Flook being in jail and that a cautionary instruction would "emphasize again that he was in jail." RP 234-35.

The court denied the motion for mistrial:

I'm going to deny the motion for mistrial at this point for the reason that it was not the witness relating her personal knowledge of Mr. Flook being released from jail. She didn't mention prison, prison term or release from prison, she said the word jail twice, which I believe has a different connotation for most people.

Secondly, curative instruction was given twice and I don't find that the references were overly overt or prejudicial in the context in which they were given.

RP 235.

To determine whether a trial irregularity deprived a defendant of a fair trial, appellate courts examine: 1) the seriousness of the irregularity, 2) whether challenged evidence was cumulative of other evidence properly admitted, and 3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. *Babock*, 145 Wn. App. at 163 (citing *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987)(citing *State v. Webber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

The law is well settled that a violation of a court's order in limine, is a serious irregularity. *Thompson*, 90 Wn. App. at 46 (witness's remark was sufficiently serious because it violated a motion in limine to exclude

it); *Essex*, 57 Wn. App. at 416 (witness's remark was sufficiently serious in light of an order in limine which excluded the evidence). Consequently, Konen's remark that Flook was in jail constitutes a serious irregularity and the irregularity was even more egregious because she made the remark twice. Furthermore, her remarks were not cumulative because no other evidence of Flook's incarceration was admitted at trial. Most notably, the court's order advised that "due to the age of the alleged victim in this case, her inadvertent lack of strict adherence to this order will be viewed more leniently than with other witnesses." CP 40. A.S. was able to comply with the court's order, but inexplicably, the counselor could not refrain from violating the court's order twice.

Although the court gave a curative instruction, and the jury is presumed to follow the court's instruction, no instruction can remove the prejudice created by evidence that "is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *Babock*, 145 Wn. App. at 164 (citing *Escalona*, 49 Wn. App. at 255, 742 P.2d 190). Importantly, the jury heard from other witnesses that Flook was not living at home for a time before the family went to Clarkston on June 6, 2014. Sheriff Meyers testified that Flook "was not present in the home for approximately two years." RP 72. Sheridan testified that after being away for a period of time, Flook returned home in April 2014. RP 82. Martha

Flook testified that Flook was not in the family home from December 2013 until April 2014. RP 164. As a consequence of Konen's statements that A.S. said the hotel incident happened right after Flook got out of jail, the jury knew that Flook was incarcerated for a year and a half for committing a crime. The court's finding that Konen's statements were not overly prejudicial in the context they were given disregards the fact that the jury was instructed that it "must consider all of the evidence." CP 53. Further, the court's rationalization that jail has a different connotation than prison for most people was misplaced where the jury knew that based on the length of time, Flook must have been incarcerated in prison and not just in jail for a minor offense. There is no meaningful difference between Konen using the term jail rather than prison. Moreover, Konen's remarks prompted objections and admonishments by the court which drew the jury's attention to the fact that Flook was in jail.

Clearly, the court excluded evidence of Flook's incarceration due to the inherently prejudicial effect of such evidence because it leads to the conclusion that since he committed a crime before, he must have committed this crime. The statements were especially prejudicial here where the evidence was not overwhelming and credibility was a significant aspect of the case. When considering the seriousness of the violation of the court's order in limine, the fact that the evidence was not cumulative, and the

unduly prejudicial effect of the evidence, there is a substantial likelihood that the irregularity deprived Flook of his right to a fair trial.

“ ‘A bell once rung cannot be unrung. ’ ” *State v. Easter*, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996)(quoting *State v. Trickel*, 16 Wn. App. 18, 30, 553 P.2d 129 (1976)). Here, the bell was rung twice. Reversal is required because the record substantiates that the trial court abused its discretion by refusing to grant a mistrial. *Babcock*, 145 Wn. App. at 166.

2. REVERSAL IS REQUIRED WHERE THE SHERIFF'S OPINION TESTIMONY AS TO FLOOK'S GUILT IMPROPERLY INVADED THE PROVINCE OF THE JURY AND THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

“No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)(citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159, *review denied*, 82 Wn.2d 1006 (1973)). Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's Sixth Amendment right to a jury trial, including the independent determination of the facts by the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)(citing *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993)).

Testimony from an officer may be especially prejudicial because an officer's testimony often "carries a special aura of reliability." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

a. Myers's Interview with Flook

Sheriff Meyers testified that he has "several hundred hours of training in investigations" of both offenders and victims. RP 32. The prosecutor asked Myers if he observed any signs of deception during his interview with Flook:

[PROSECUTOR]: As to the *truth or the falseness of the statements* he made. Did you observe any signs or signals to you that there may be *deception*?

MYERS: Inconsistencies from what other people had indicated would be that there were some inconsistencies with what he said.

[PROSECUTOR]: How about the lack of memory about the general subject matter when you initially inquired?

MYERS: So, often times when asking people questions of something as memorable as maybe going to a marriage counseling retreat when you ask that, that would be something that most people would be like oh yeah, I remember going to that a year ago. It's not a guarantee, but in this particular case it's a very important fact of the case and when one of the very important facts is when you ask that question and there's not an immediate memory and in fact it's a memory that has to be jarred and then they remember that. *To me that's a sign of trying to be evasive in providing an answer, which is a sign of deceptiveness. So, when we look for evasiveness in answering, having to repeat questions several times that are very direct and simple questions, often times those are indications that a person is being deceptive and in the interview with Mr. Flook I did see that.*

....

[PROSECUTOR]: So, remember or not remembering the general event but then remembering details immediately about that event?

MYERS: Like sleeping arrangement, where everybody slept.

[PROSECUTOR]: Or ---

MYERS: Reaching over specifically not being able to remember going to the hotel, but then once being reminded being able to remember that during the night when there was a seizure that they reached over to stop the flailing of the arms. *Those are, I guess sometimes you look for convenient memories or convenient losses of memory, as a deceptive answer.*

[PROSECUTOR]: Or the -- him not remembering her sitting on his lap in the vehicle but then remembering he terminated the contact by needing to go to the bathroom.

MYERS: Right.

RP 74-75 (emphasis added).

Myers's testimony where he repeatedly stated his opinion that Flook was evasive and deceptive is essentially indistinguishable from the testimony in *State v. Barr*, where this Court reversed, holding that the police officer's opinion testimony as to the defendant's guilt constituted a manifest constitutional error that was not harmless. 123 Wn. App. 373, 384, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009 (2005).

In *Barr*, an officer testified that he had been trained to use the Reid Investigative Technique that taught him to look for verbal and nonverbal clues that someone was being deceptive. He said he applied his training when he interviewed Barr. The officer opined that based on Barr's responses, he "thought there was deception" and when you bunch his utterances together, you "get an idea somebody is being deceptive." *Barr*, 123 Wn. App. at 378-79. As in *Barr*, defense counsel did not object, but this Court concluded that the error could be raised for the first time on

appeal because it is a manifest error involving a constitutional right under RAP 2.5(a)(3). *Barr*, 123 Wn. App. at 380-84. This Court concluded that the officer's testimony invaded the province of the jury by impermissibly commenting on Barr's guilt, and likewise, Sheriff Myers impermissibly commented on Flook's guilt. *Barr*, 123 Wn. App. at 383. *See also, Easter*, 130 Wn. App. at 242 (officer's testimony that defendant was evasive, implying that defendant was hiding his guilt, was impermissible opinion as to defendant's guilt).

b. Myers's Interview with A.S.

Sheriff Myers testified that he has "Harborview training," which is specialized training required by the State "in interviewing children of sexual assault crimes." RP 32-33. In response to the prosecutor's question, Myers said as part of his training, he identifies signs of deception during an interview:

Well, certainly any time that you are interviewing someone, just like establishing whether a person knows the truth from the untruth, or having some sort of grandiose statement. Sometimes what you do is you ask questions several different ways to make sure that what they're saying is consistent and then you also take into consideration their body language, their demeanor, *to help determine whether or not a statement on its face value is true. In this particular case, all of her body language was consistent with someone, based on my training and experience, that was telling the truth. . . .*

RP 70.

Defense counsel did not object. Then over defense counsel's objection, the trial court allowed Myers to respond that he did not observe any signs of deception with A.S.

RP 70-71.

In a consolidated case, the Washington Supreme Court held that testimony of an investigating officer, if not objected to at trial, does not necessarily give rise to a manifest constitutional error. "Manifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact. *State v. Kirkman*, 159 Wn.2d at 938. In *Kirkman*, the detectives described a competency protocol they administered before interviewing the child and said they tested the child's ability to distinguish between a truth and a lie and the child promised to tell the truth. *Id.* at 930, 933. The Court concluded that in testifying about protocol, "including that the child promised to tell the truth, does not impermissibly infringe on the jury's province given that the same child takes the witness stand in front of the jury and swears under oath that the testimony given will be truthful." *Id.* at 934.

Unlike in *Kirkman*, Sheriff Meyers made an explicit or at least an almost explicit statement on whether A.S. was telling the truth by opining that "all of her body language was consistent with someone, based on my training and experience, that was telling the truth." His opinion was

validated by his testimony that he had specialized training in detecting signs of deception while interviewing children of sexual assault. Furthermore, the trial court erred in allowing Meyers to respond that he did not observe any signs of deception with A.S. As defense counsel argued, Meyers is essentially saying he believes A.S. RP 71. Meyers's opinion constitutes a manifest error of constitutional magnitude that can be raised for the first time on appeal under 2.5(a)(3). *Kirkman*, 159 Wn.2d at 934-36.

c. Errors were not Harmless Beyond a Reasonable Doubt.

A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error and the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Easter*, 130 Wn.2d at 242 (citing *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995), *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)). The State bears the burden of showing a constitutional error was harmless. *Id.* "Where the error was not harmless, the defendant must have a new trial." *Id.* (citing *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979)).

In *Barr*, this Court employed the "overwhelmingly untainted evidence" test to determine if the error was harmless beyond a reasonable doubt. 123 Wn. App. at 383-84. As in *Barr*, the untainted evidence was

not so overwhelming as to necessarily lead to a finding of guilt where “[a]t its heart, the ultimate issue here revolved around an assessment of the credibility” of Flook and A.S. because no one else witnessed what happened. *Id.* at 384. Martha Flook was in the hotel room and did not hear A.S. or Flook say anything through the night. RP 169-70, 185-86. She initially told Sheriff Meyers that A.S. could have made accusations against Flook because she was caught engaging in internet activities and she can be dishonest. RP 192-93. Martha also told Myers that A.S. may have gotten the idea from a movie the family watched about a woman who has a boyfriend named Roger who sexually molested her children. RP 197. Kenda Hergert testified that Martha told her that she knew nothing happened and because she was in the room, she would have known if something had happened. RP 239. On rebuttal, Martha denied telling Hergert that nothing happened. RP 283. A.S. testified that she did not tell C.S. that she had a boyfriend, but C.S. testified that A.S. told her that she had a boyfriend named Alex. RP 147, 270. Consequently, the conflicting evidence did not render Sheriff Meyers’s improper opinion, which implied guilt, harmless beyond a reasonable doubt.

Importantly, this Court recognized that the “opinion of a government official, especially a police officer, may influence a jury.” *Barr*, 123 Wn. App. at 384. Sheriff Meyers’s opinion that Flook was

deceptive and evasive and A.S. was telling the truth, which was bolstered by his testimony that he had extensive investigative training, was “unfairly prejudicial” because “it invaded the exclusive province of the jury.” *Demery*, 144 Wn.2d at 759. Reversal is required where Myers’s testimony constituted a manifest constitutional error that was not harmless beyond a reasonable doubt. *Barr*, 123 Wn. App. at 384.

3. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT, WITHOUT ANY ANALYSIS ON THE RECORD, ERRONEOUSLY ADMITTED EVIDENCE OF OTHER BAD ACTS UNDER ER 404(B) AND THE ERROR WAS NOT HARMLESS.

Interpretation of an evidentiary rule is a question of law, which appellate courts review de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Provided the trial court has interpreted the rule correctly, appellate courts review the trial court’s determination to admit evidence for an abuse of discretion. *Id.*

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b)<sup>4</sup> prohibits a trial court from admitting evidence of other crimes, wrongs, or acts to prove the character of a person

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5. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

in order to show action in conformity therewith. *State v. Foxhoven*, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). ER 404(b) is designed to prevent the State from suggesting that a defendant is guilty because he is a criminal-type person who would be likely to commit the crime charged. *Id.* at 175 (citing *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). However, “evidence of a defendant’s prior sexual acts against the same victim is admissible to show the defendant’s lustful disposition toward the victim.” *State v. Guzman*, 119 Wn. App. 176, 182, 79 P.3d 990 (2003)(citing *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991)). “The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition.” *DeVincentis*, 150 Wn.2d at 17.

To admit evidence of a person’s prior misconduct, “the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *Gresham*, 173 Wn.2d at 421 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)(citing *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). This analysis must be conducted on the record. *Foxhoven*, 161 Wn.2d at 175 (citing *State v. Smith*, 106 Wn.2d 772,

776, 725 P.2d 951 (1996)(citing *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)). “In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.” *State v. Bennett*, 36 Wn. App. 176, 180, 772 P.2d 772 (1983).

Here, defense counsel filed a motion in limine and memorandum moving to exclude evidence of other bad acts under ER 404(b). CP 10-19. The State filed a memorandum in response asserting that the evidence should be admitted under ER 404(b). The State alleged that Flook shared sexually explicit cartoons, discussed sex toys, bragged about his pornography site, touched her inappropriately, and used vulgar language. CP 20-23. The trial court held a pretrial hearing on February 1, 2016. RP 4-13. Defense counsel argued that ER 404(b) precludes evidence of prior bad acts because the defendant “should be tried on the evidence of the charge and not on extrinsic evidence of whether he’s a bad person.” RP 6. He pointed out that A.S. has alleged that the other bad acts occurred long after the hotel incident and there was no proof that they actually happened. RP 5-6. Counsel moved to exclude the highly prejudicial evidence of unrelated acts. RP 7. The prosecutor argued that the purpose of the evidence is not to demonstrate the defendant’s character but to prove the defendant’s lustful disposition toward the victim:

That is the issue with regard to lustful disposition evidence and that evidence, as long as it's relevant to the timeframe, the fact that his first opportunity or attempt was in this hotel and then he subsequently continued to try to groom her with various activities. To the extent that counsel can make excuses for why it's appropriate to show a twelve year old girl anime porn or whether it's appropriate to tell her about her mother's toys that are in the dresser, or explain why it's appropriate to not only point out a hole near the crotch area of her thighs, but also to put his finger in it to demonstrate the hole, that certainly --- if defense counsel can do that, they certainly are at liberty to do that, but that goes to weight, not admissibility as they so see fit.

RP 7-9.

The trial court reserved ruling, stating that it would "go back and review these cases in greater detail now that I've heard the argument and concerns of attorneys and I will let you know my decision with respect to that probably in an email message later today or tomorrow." RP 12-13. The court entered an order on February 9, 2016, denying the motion to exclude sexually inappropriate conduct directed toward A.S. The court ruled that the "proffered evidence, if believed, has a strong tenancy (sic) to demonstrate a lustful disposition toward the alleged victim. It also tends to show motive, intent, knowledge, and absence of mistake or accident." CP 39.

First and foremost, the trial court erred in failing to undergo the required analysis on the record before admitting the "proffered evidence." The Washington Supreme Court underscored in *State v. Jackson*, that it

“cannot overemphasize the importance of making such a record” because “the absence of a record precludes effective appellate review.” 102 Wn.2d 689, 694, 689 P.2d 76 (1984). The Court observed that “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 specific reasons for a decision insures a thoughtful consideration of the issue.” *Id.* This Court has no assurance that the trial court thoughtfully considered admission of the evidence and interpreted the rule correctly because the court absolutely made no record at all, which constitutes an egregious disregard for the “thorough analytical structure for the admission of evidence of a person’s prior crimes, wrongs, or acts” developed by Washington appellate courts. *Gresham*, 173 Wn.2d at 421.

Further, this Court cannot ascertain from the record what specific acts the court admitted and whether they actually occurred because the court ordered that the “proffered evidence” is admissible without any findings of fact and conclusions of law. No one else witnessed the other acts alleged by A.S. except Martha who said she saw Flook spank A.S. as she walked by Flook, but Martha did not think that was abnormal. RP 173-74. In any event, the trial court erred where the other bad acts alleged by A.S. were not admissible for any proper purpose. A.S. claimed that when they were driving somewhere, she had a hole in her jeans high up on her thigh and

Flook put his finger in the hole and laughed. RP 124, 148-49. Another time, he showed her “Japanese anime porn” of someone having sex. RP 124-25. Once when they were home and he went outside to sit in his truck, she followed him hoping to catch him smoking. When she sat on his leg, he picked her up and moved her between his legs and she felt his private area moving. RP 125-27, 149-50. Flook would randomly spank her on the butt when she walked by and her mother said not to do that, telling him “it’s weird because you do that to me.” RP 127-28.

In *State v. Ferguson*, the Washington State Supreme Court emphasized that when evidence of collateral sexual misconduct is admitted to show lustful disposition, the “important thing is whether it can be said that it evidences a *sexual desire for the particular female*.” 100 Wn 2d 131, 134, 667 P.2d 68 (1983)(citing *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953)(emphasis added). In *Thorne*, the Supreme Court described lustful disposition as sexual inclination or lustful desire toward the alleged victim making it more probable that the offense charged was committed. 43 Wn.2d at 61. While the acts alleged by A.S. may show general sexual misconduct, they do not show that Flook had a sexual desire particularly for A.S. which made it more probable that Flook raped and molested A.S. fourteen months earlier. Moreover, these other acts alleged to have occurred long after the hotel incident have no tendency to show motive,

intent, knowledge, and absence or mistake. Admissibility of other bad acts requires, first, an analysis of the relevancy of the evidence and, second, a balancing of the prejudicial effect and probative value of the evidence. *Ferguson*, 100 Wn.2d at 133 (citing *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982)). The record substantiates that the evidence was irrelevant and the danger of undue prejudice outweighed any probative value. Consequently, the trial court erred in admitting evidence of the other acts under ER 404(b).

It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error. *Gresham*, 173 Wn.2d at 433. Therefore, the question upon review is whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Id.*

As a result of the court’s erroneous admission of the other bad acts, other witnesses reinforced A.S.’s allegations. Sheriff Meyers testified that A.S. told him that in the summer of 2015, Flook was outside in his car and he asked her to sit on his lap and when she sat on his leg, he moved her over to his pelvis area. RP 49. Counselor Konen testified that A.S. said Flook would often bring up anime porn on his phone and have her watch it with him. RP 217. A.S. also told her that once when they were in a car, Flook

put his finger in a hole in her clothing “near the crotch region.” RP 217. Another time when Flook was in his car outside their home, he asked A.S. to sit on his lap and she “felt something wiggling underneath her bottom and his hands were around her so she knew it wasn’t his hands.” RP 217-18.

As the Washington Supreme Court recognized in *Saltarelli*, a “careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.” 98 Wn.2d at 363.

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

Slough and Knightly, *Other Vices, Other Crimes*, 41 Iowa L.Rev. 325, 333-34 (1956).

Without evidence of the other bad acts, the record substantiates even more so that the remaining evidence was conflicting and consequently not overwhelming, which raised reasonable doubt. Reversal is required because there is reasonable probability that had the error not occurred, the outcome of the trial would have been materially affected. *Gresham*, 173 Wn.2d at 433-34.

4. REVERSAL IS REQUIRED BECAUSE FLOOK WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution and art. I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). “The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *Thomas*, 109 Wn.2d at 225.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced defendant, i.e. there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing *Thomas*, 109 Wn.2d at 225-26)(applying the two-prong test in *Strickland*, 466 U.S. at 687)).

There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable

professional judgment. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). A criminal defendant can rebut the presumption of reasonable performance by showing that there “is no conceivable legitimate tactic that explains counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If counsel’s conduct can be characterized as “legitimate trial strategy or tactics,” it cannot serve as a basis for a claim of ineffective assistance of counsel. *Lord*, 117 Wn.2d at 883.

a. Failure to Object to Sheriff Meyers’s Improper Testimony.

An ineffective assistance of counsel claim based on counsel’s failure to object must show that the objection would likely have been successful. *State v. Gerds*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). The record establishes that Sheriff Meyers improperly opined that Flook was deceptive and evasive during his interview and that A.S. was truthful during her interview. RP 70, 74-75. If defense counsel had objected, his objection would likely have been sustained because “[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d at 348. Defense counsel was ineffective in failing to object where there is no conceivable tactical or strategic reason not to object to improper opinion testimony that is prejudicial to the defense.

Further, when the prosecutor asked Meyers to describe Flook's demeanor or appearance during the interview, his response violated a motion in limine:

Mr. Flook, it was about three o'clock in the afternoon. Mr. Flook appeared to be very tired, possibly -- *possibly under the influence of a substance*, rolled his eyes quite a bit, couldn't keep his eyes open sometimes, acted -- it seemed like he had just been rolled out of bed almost and often times questions needed to be asked a couple of times in order to elicit an answer.

RP 51 (emphasis added).

Meyers's statement that Flook was possibly under the influence of a substance violated the trial court's order in limine which excluded evidence of the defendant's drug use. CP 40. Clearly, if defense counsel had objected, his objection would likely have been sustained where the court had prohibited evidence of drug use. Defense counsel's representation was deficient where there is no conceivable tactical or strategic reason for failing to object to a violation of a defense motion in limine, which excluded irrelevant and prejudicial evidence.

b. Failure to Propose a Limiting Instruction

Failure to propose instructions supported by the law and warranted by the facts constitutes deficient performance. *State v. Kruger*, 116 Wn. App. 685, 693-94, 67 P.3d 1147 (2003); *Thomas*, 109 Wn.2d. at 228. When evidence is admitted under ER 404(b), "a limiting instruction must be

given.” *Foxhoven*, 161 Wn.2d at 175 (citing *Lough*, 125 Wn.2d at 864, 889 P.2d 487)). In *Lough*, the trial court instructed the jury that “the evidence of the uncharged allegations could not be considered to prove the character of the Defendant in order to show that he acted in conformity therewith, and could only be considered to determine whether or not it proved a common scheme or plan.” *Lough*, 125 Wn.2d at 864. Defense did not propose a similar instruction to limit the purpose of the court’s admission of evidence of other bad acts. Defense counsel’s representation was deficient where there is no conceivable tactical or strategic reason for failing to propose a limiting instruction that is required and helpful to the defense.

c. Prejudice

Flook was prejudiced by defense counsel’s failure to object where Sheriff Meyers’s improper opinion that Flook was deceptive and evasive and A.S. was truthful was detrimental to Flook’s credibility, and his improper comment that Flook appeared to be under the influence of drugs cast Flook in negative light. Evidence of drug use is “generally inadmissible on the ground that it is impermissibly prejudicial.” *State v. Stockton*, 91 Wn. App. 35, 41-42, 955 P.2d 805 (1998)(citing *State v. Tigano*, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021, 827 P.2d 1392 (1992)). Meyer’s statements were especially damaging because an officer’s testimony often “carries a special aura of reliability.”

*State v. Kirkman*, 159 Wn.2d at 928. Furthermore, Flook was prejudiced by defense counsel's failure to propose a limiting instruction which allowed the jury to consider the evidence of other bad acts as evidence of guilt. Where credibility and believability was critical in this case due to the lack of overwhelming evidence, but for defense counsel's deficient representation, the result of the trial would have been different.

The Sixth Amendment right to have a reasonably competent counsel is fundamental and helps assure the fairness of our adversary process. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000)(citing *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, L. Ed. 2d 799 (1963)). Reversal is required because Flook was denied his constitutional right to effective assistance of counsel.

5. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED FLOOK HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND THE PRESUMPTION OF INNOCENCE.

The Sixth Amendment to the United States Constitution and article I, section 21 of the Washington State Constitution guarantee a criminal defendant the right to a fair trial and an impartial jury. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). "Only a fair trial is a constitutional trial." *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981)(citing *State v. Case*, 49 Wn.2d 66,

298 P.2d 500 (1956)). Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Appellate courts do not need to decide whether these deficiencies alone were prejudicial where other significant errors occurred that, considered cumulatively, compel reversal. *Mak v. Blodgett*, 970 F.2d 614, 622 (9<sup>th</sup> Cir. 1992).

The record here establishes that reversal is required because the accumulation of errors denied Flook his constitutional right to a fair trial and the presumption of innocence: 1) Counselor Konen stated twice that Flook was in jail, in violation of a motion in limine, 2) Sheriff Meyers improperly opined that Flook was deceptive and evasive during his interview and A.S. was truthful during her interview, implying guilt, 3) Sheriff Meyers stated that Flook appeared to be under the influence of a substance, in violation of a motion in limine, 4) the trial court, without any analysis on the record, erroneously admitted unduly prejudicial evidence of other bad acts under ER 404(b), 5) defense counsel's representation was deficient in failing to object to improper opinion testimony, 6) defense counsel's representation was deficient in failing to propose a limiting instruction to evidence of other bad acts admitted under ER 404 (b), and 7) Flook was prejudiced by defense counsel's deficient representation.

“While it is possible that some to these errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.” *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

6. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE FLOOK REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The

report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs “is a matter of discretion for the appellate court, consistent with the appellate court’s authority under RAP 14.2 to decline to award costs at all.” The Court emphasized that the authority “is permissive” as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute states that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that he is indigent. The trial court found that Flook is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. Supp CP \_\_\_\_ (Motion for Order of Indigency and Order of Indigency, 03/23/16). This Court should therefore presume that

Flook remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the Court exercised its discretion and ruled that an award of appellate costs was not appropriate, noting that the procedure for obtaining an order of indigency is set forth in RAP Title 15 and the trial court is entrusted to determine indigency. “Here, the trial court made findings that support the order of indigency. . . . We have before us no trial court order finding that Sinclair’s financial condition has improved or is likely to improve. . . . We therefore presume Sinclair remains indigent.” *Sinclair*, 192 Wn. App. at 393.

As in *Sinclair*, there has been no evidence provided to this Court, and no findings by the trial court, that Flook’s financial condition has improved or is likely to improve. Flook is presumably still indigent and this Court should exercise its discretion to not award costs.

E. CONCLUSION

“Every criminal defendant is entitled to a fair trial by an impartial jury. The right to a fair trial includes the right to the presumption of innocence. This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial.” *State v. Guzman*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005)(citations omitted). For the reasons stated, this Court should reverse Flook’s convictions because he did not receive a fair trial.

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because Flook remains indigent.

DATED this 29<sup>th</sup> day of August, 2016.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Roger William Flook, Jr.

**DECLARATION OF SERVICE**

On this day, the undersigned sent by e-mail, a copy of the document to which this declaration is attached to the Asotin County Prosecutor's Office at [lwebber@co.asotin.wa.us](mailto:lwebber@co.asotin.wa.us) by agreement of the parties and by U.S. Mail to Roger William Flook, Jr., DOC # 841039, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, Washington 99001-1899.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29<sup>th</sup> day of August, 2016.

/s/ Valerie Marushige  
VALERIE MARUSHIGE  
Attorney at Law  
WSBA No. 25851