

79801-0
NO. 242536-III

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY SCOTT FISHER,

Appellant.

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

The Honorable Vic L. VanderSchoor, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ARGUMENT IN REPLY	1
1. THE STATE'S "STATEMENT OF THE CASE" OMITS ALL OF THE FACTS RELEVANT TO THE DECISION ON APPEAL.....	1
2. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MR. FISHER'S ALLEGED PRIOR BAD ACTS, IN FAILING TO GIVE A LIMITING INSTRUCTION, AND IN ADMITTING THE EVIDENCE IN THE FORM OF HEARSAY STATEMENTS.....	2
a. Improper admission of ER 404(b) evidence	2
b. Failure to give jury instruction	3
c. The inadmissible CPS reports	4
d. Erroneous finding that the door was opened	4
e. Summary	6
3. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CROSS EXAMINE MR. FISHER AND A REBUTTAL WITNESS ABOUT IRRELEVANT AND UNFAIRLY PREJUDICIAL MATTERS	6
4. THE PROSECUTOR'S MISCONDUCT DENIED MR. FISHER A FAIR TRIAL	7
a. Impugning integrity of defense counsel	7
b. Eliciting sentencing consequences.....	9

TABLE OF CONTENTS -- cont'd

	Page
c. Arguing propensity	10
d. Misstatement of the burden of proof	11
e. Reversible error	12
5. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE DEFENSE INVESTIGATOR AS A WITNESS AND ELICIT TESTIMONY DEALING WITH WORK PRODUCT	13
6. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CALL THE COUNSELOR OF THE COMPLAINING WITNESS AND HER SIBLINGS AS A WITNESS; THE COUNSELOR'S TESTIMONY CONSTITUTED AN IMPERMISSIBLE OPINION AS TO GUILT AND INVADED THE PROVINCE OF THE JURY	14
7. THE TRIAL COURT ERRED IN DENYING MR. FISHER THE RIGHT TO CROSS EXAMINE A WITNESS TO ESTABLISH MOTIVE AND BIAS AND BY DENYING HIM THE RIGHT TO CALL WITNESSES IN HIS OWN BEHALF TO ESTABLISH MOTIVE AND BIAS	15
8. THE COURT'S INSTRUCTIONS TO THE JURY DENIED MR. FISHER HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT AND TO PROOF BEYOND A REASONABLE DOUBT ON EVERY ELEMENT OF EACH CRIME CHARGED	17
9. CUMULATIVE ERROR DENIED MR. FISHER A FAIR TRIAL	21
B. CONCLUSION	22

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Barragan</u> , 102 Wn. App. 754, 9 P.3d 942 (2000)	3
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988)	12
<u>State v. Bland</u> , 71 Wn. App. 345, 860 P.2d 1046 (1993)	20
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1984).....	21
<u>State v. Charlton</u> 90 Wn.2d 657, 585 P.2d 142 (1978)	9
<u>State v. Clemons</u> , 56 Wn. App. 57, 782 P.2d 219 (1989), <u>review denied</u> , 114 Wn.2d 1005 (1990)	10
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>review denied</u> , 131 Wn.2d 1018 (1997)	12
<u>State v. Gitchel</u> , 41 Wn. App. 820, 706 P.2d 1091, <u>review denied</u> , 105 Wn.2d 1003 (1985)	21
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	19
<u>State v. Jury</u> , 19 Wn. App. 256, 576 P.2d 1302, <u>review denied</u> 90 Wn.2d 1006 (1978)	9

TABLE OF AUTHORITIES -- cont'd

	Page
<u>State v. Kelly</u> , 102 Wn.2d 188, 685 P.2d 564 (1984)	5
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988)	20, 21
<u>State v. Loehner</u> , 42 Wn. App. 408, 711 P.2d 377 (1985), <u>review denied</u> , 105 Wn.2d 1011 (1986)	20
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	18, 20
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980)	20
<u>State v. Wright</u> , 76 Wn. App. 811, 888 P.2d 1214 (1995)	11
 <u>FEDERAL CASES</u>	
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	21
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)	4
<u>Geders v. United States</u> , 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 692 (1976).....	7, 8

TABLE OF AUTHORITIES -- cont'd

	Page
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	19
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	19

RULES, STATUTES AND OTHERS

5th Amendment, U.S. Constitution	7
6th Amendment, U.S. Constitution	9
14th Amendment, U.S. Constitution	7, 12
ER 404(b)	2, 3, 4, 6, 10, 12
ER 405(a)	5

A. ARGUMENT IN REPLY

1. THE STATE'S "STATEMENT OF THE CASE" OMMITS ALL OF THE FACTS RELEVANT TO THE DECISION ON APPEAL.

The state's "Statement of the Case" describes a trial that is simply not the trial that occurred in this case; it is perhaps closer to the trial Mr. Fisher should have had, but is nothing like the trial he actually had. The state's "Statement of the Case" omits any mention of the testimony about physical abuse and alleged bad character that flooded into the courtroom and engulfed the trial -- testimony that culminated in the prosecutor's argument to the jury that they should convict Mr. Fisher because of his "distinctive pattern" of physical abuse and that to acquit Mr. Fisher they would have to doubt the credibility of the witnesses who described the physical abuse. RP 661, 709.

The state omits as well the considerable evidence which gave rise to reasonable doubt about the allegations. For one example, the state omits that Melanie Lincoln's sister, Brittany, with whom she shared a room, and Mr. Fisher's two children, who frequently stayed at the house, all contradicted Ms. Lincoln's testimony by testifying that they never saw Mr. Fisher and Ms. Lincoln go upstairs together, much less five days a week. RP 275, 402. Melanie Lincoln's brother, Brett was so inconsistent between his testimony at a pretrial hearing where he said he heard her "screaming for [her] life each time each and every time" she was with Mr.

Fisher and his denying this completely at trial, that his credibility was completely undermined. See Opening Brief of Appellant (AOB) 5. Ms. Lincoln herself was inconsistent in details between her trial testimony and her pretrial statement. For example, Ms. Lincoln's testimony at trial that Mr. Fisher had her remove all her clothing was inconsistent with her pretrial statement. RP 61-62, 144.

Mr. Fisher set out what really happened at the trial in his "Statement of the Case." AOB 3-25. It is this reality against which the issues on appeal should be decided.

2. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MR. FISHER'S ALLEGED PRIOR BAD ACTS, IN FAILING TO GIVE A LIMITING INSTRUCTION, AND IN ADMITTING THE EVIDENCE IN THE FORM OF HEARSAY STATEMENTS.

a. Improper admission of ER 404(b) evidence

The state's cursory, almost generic, argument in support of the widespread introduction of alleged physical abuse in this case, without citation to relevant authority or reference to relevant facts, asks this Court to hold that prior physical abuse against any person may be relevant to explain a delay in reporting of allegations of sexual abuse by the complaining witness. Brief of Respondent 5-6. The state does not even attempt to explain why this would be true where the complaining witness was not aware of the allegations, as would be true for the considerable

testimony about Mr. Fisher's children and stepchildren. BOR 5-6. In fact, the only authority cited by the state, State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000), involved a charge of felony harassment where prior bad acts *known to the victim* were directly relevant to establishing the objective reasonableness of the victim's fear of the defendant's threats.

In responding to the ER 404(b) argument, the state does not address the fact that the prosecutor used the evidence to argue propensity, not to explain a delay in reporting. See AOB 20-24.

Moreover, the state does not acknowledge that the actual testimony in this case established that in 1999, long before Ms. Lincoln reported her allegations of sexual abuse, Officer Lance Mathey came to her house to investigate allegations that Mr. Fisher hit Brett and she spoke to him about physical abuse. RP 71-72. Obviously, she knew she could complain to the police about Mr. Fisher without any consequence to her.

b. Failure to give jury instruction

The state fails to respond to Mr. Fisher's argument that given the persistence of the objection to the ER 404(b) evidence at trial, the trial court should have given a limiting instruction. The state fails to respond to Mr. Fisher's alternative argument that because the record of the motion for new trial establishes that trial counsel had no strategic reason for not asking for the instruction, Mr. Fisher should be given a new trial based on the ineffectiveness of his attorney in not requesting a limiting instruction.

It is virtually certain, given the pervasiveness of the evidence and the misuse of it by the prosecutor, that the jurors misused the evidence and improperly convicted because of the ER 404(b) evidence.

c. The inadmissible CPS reports

Defense counsel objected to the Child Protective Services (CPS) report on hearsay grounds as soon as the prosecutor showed the document to Mr. Fisher. RP 617-618. The Court then let the prosecutor examine Mr. Fisher about the facts in the report. RP 617-620. This was error and the improper admission of hearsay whether or not the actual report was admitted as an exhibit.

The state's argument that the testimony about the contents of the CPS report was not hearsay should be rejected; to argue that this was not admitted to show that the abuse had occurred is not credible. The only possible relevance of the evidence was its truth. The accusations were not only hearsay, they were testimonial hearsay. They were made with the expectation that they would lead to an investigation and possibly criminal charges. Admitting the statements was constitutional error under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

d. Erroneous finding that the door was opened

This Court should reject the state's invitation to hold that by denying the allegations against him and the allegations of prior bad acts which the state has been permitted to introduce at trial in their case-in-

chief, an accused person opens the door to cross examination on specific acts of misconduct unrelated to the charged conduct. BOR 11-12.

Here, Mr. Fisher testified long after the state had been permitted to introduce an unprecedented amount of inflammatory and irrelevant evidence. To claim, as the state does now, that *he* opened the door to further improper evidence is not credible. Under the state's theory any time a defendant denied committing the acts with which he is charged, he would put his character at issue and be forced to undergo cross examination about any instance of alleged misconduct the prosecutor chose to ask about. This has never been the law.

Similarly, asking Peggy Fisher to describe Mr. Fisher's methods of disciplining her children and if she was comfortable leaving her daughters alone with Mr. Fisher did not put his good character with children in issue. RP 469-472. Certainly this was not evidence of his reputation in the community for being good with children. Her testimony did not open the door to reputation evidence by the state, nor did the state offer any reputation evidence, as the state suggests. BOR 11; State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984); ER 405(a). Since Ms. Fisher did not offer reputation evidence there was nothing to impeach by inquiring about specific instances of conduct. BOR 11.

The state had already introduced allegations of prior misconduct through the testimony of witness after witness; Mr. Fisher's testimony on his own behalf in denying the allegations and the testimony of his wife

about her own feeling that she could leave her daughters with him could not justify the admission of what came before or open the door to further improper evidence.

e. **Summary**

The state fails to engage the issue of the improper admission of evidence of prior acts in any meaningful way. Nevertheless, for the reasons set forth in the opening brief, the introduction of the ER 404(b) evidence and the failure to give a limiting instruction should require reversal of Mr. Fisher's convictions. The prejudicial impact of the evidence was overwhelming and unfair. There is simply no authority permitting the wide scale introduction of such evidence and the improper argument to the jury by the state that the evidence established just what ER 404(b) prohibits. The evidence was not admissible and it was so persistently misused that it denied Mr. Fisher any semblance of a fair trial.

3. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CROSS EXAMINE MR. FISHER AND A REBUTTAL WITNESS ABOUT IRRELEVANT AND UNFAIRLY PREJUDICIAL MATTERS.

The state offers no logical argument or authority, legal or psychological, in support of its claim that Mr. Fisher's sexual relationship with his wife and his gastric bypass surgery helped establish his sexual motivation with regard to Ms. Lincoln. The trial court erred in allowing the state to present this highly prejudicial and irrelevant evidence.

4. THE PROSECUTOR'S MISCONDUCT DENIED MR. FISHER A FAIR TRIAL.

The prosecutor deprived Mr. Fisher of his Fifth and Fourteenth Amendment due process right to a fair trial by: (1) impugning the integrity of defense counsel; (2) eliciting testimony about the sentencing consequences of conviction; (3) arguing that Mr. Fisher committed the crime because the act was consistent with his character; (4) arguing that in order to acquit Mr. Fisher, the jurors would have to believe that the state's witnesses were not credible; and (5) making inappropriate gestures during examination of Mr. Fisher and during defense counsel's opening statement and closing argument. This misconduct was not limited to a few isolated incidents; it was pervasive and continuous throughout the trial. The state's defense of this misconduct on appeal never actually acknowledges the breadth and depth of the misconduct or that it was flagrant and ill-intentioned. The state's response mis-cites authority and asks this Court to shrug its shoulders and look the other way. The state's arguments should be rejected.

a. Impugning integrity of defense counsel

The state argues in response that Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 692 (1976), somehow holds that defendants can always be impeached with questions about whether they have been "coached" in their testimony. BOR 16-17. The state missed the point of Geders. Geders is a case about the importance of an accused

person's right to counsel; holding that a trial court cannot constitutionally prevent a defendant from speaking to his attorney during an overnight recess during his testimony. In reaching this holding, the Geders Court found that (1) a defendant may certainly discuss his testimony with his attorney up until the time he takes the stand and (2) if there is evidence after a break in the defendant's testimony that his attorney has coached him to change the testimony he has already given, a skilled prosecutor may uncover this coaching on cross examination.

Here there was simply no evidence that Mr. Fisher had been coached during a break in his testimony. The state is wrong in its argument that going over testimony with one's attorney is improper.

The state also asks this Court to excuse the prosecutor's conduct in making noticeable gestures during opening and closing argument because such gestures and facial expressions cannot be captured for the appellate record and because attorneys should not have to remain "stonefaced" in the courtroom. BOR 24-27. In this case, the trial court stated on the record that the court did observe reactions and gestures by the prosecutor. RP(12/21/04) 2-6; CP 82-103; CP 56-72. This finding constitutes a sufficient record under the facts of the case. Prosecutors try cases every day in Washington and manage not to mug during the arguments of defense counsel. Here, the reactions were not isolated to one or two instances; the prosecutor engaged in this behavior during both opening statement and closing argument, essentially whenever defense counsel

addressed the jury. This is unacceptable in a person representing the state in the criminal justice system. A prosecutor's unfounded attempts to undermine the defendant's case by denigrating defense counsel insidiously undermines defense counsel's constitutional duty to provide effective assistance of counsel, investigate and interview witnesses and denies the defendant his Sixth Amendment right to counsel and his due process right to a fair trial. State v. Jury, 19 Wn. App. 256, 263-66, 576 P.2d 1302, review denied 90 Wn.2d 1006 (1978). The attempt to undermine the defense in this case denied Mr. Fisher his state and federal constitutional rights to the effective assistance of counsel and of his state and federal due process rights to appear and defend at trial.

b. Eliciting sentencing consequences

The state implicitly concedes that the prosecutor committed misconduct in asking Mr. Fisher about the consequences to him if he was convicted, but argues that the failure to object should excuse this misconduct. BOR 19-20. To the contrary, every jury is instructed, usually both at the beginning and ending of trial, that they must not consider the sentencing consequences of conviction. In disregarding the court's instruction, the prosecutor's conduct was flagrant and ill-intentioned. As the Court held in State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978), when a prosecutor improperly refers to a matter which he or she knows is improper, in Charlton the husband-wife privilege, the prosecutor's action should be presumed to be flagrant and ill-intentioned.

Here, the prosecutor wanted to conjure up a picture in the minds of the jurors of a sex offender forced to register with the state so that his whereabouts could be monitored. The prosecutor did this in order to prejudice Mr. Fisher. This conduct is inexcusable.

c. Arguing propensity

The prosecution represented to the court that it was seeking admission of prior bad acts to establish Ms. Lincoln's reasons for delaying her accusations. RP 2-3, 15. That was the only purpose for which the evidence was admitted. RP 203. Then, in closing argument, the prosecutor repeatedly and unambiguously argued that Mr. Fisher should be convicted because his actions in committing the charged crime were consistent with his abusive character. The prosecutor's improper propensity argument could not have been clearer. See AOB 20-22. On appeal, the state apparently argues that the prosecutor's argument was reasonably close to the evidence. This invitation to ignore a clear violation of the trial court's in limine ruling should be rejected. The misconduct instead requires reversal of Mr. Fisher's conviction. See State v. Clemons, 56 Wn. App. 57, 62, 782 P.2d 219 (1989), review denied, 114 Wn.2d 1005 (1990) (the state's violation of a motion in limine can justify a mistrial).

Similarly, the state's argument that Mr. Fisher opened the door to the ER 404(b) evidence as substantive evidence must be rejected. The accusations that Mr. Fisher abused his children and stepchildren were

admitted long before he testified and he had a constitutional right to take the stand and deny the accusations.

d. Misstatement of the burden of proof

In closing argument the state told the jury that their job was to weigh the credibility of Ms. Lincoln against the credibility of Mr. Fisher, and to conclude that the "balance tips heavily" towards Ms. Lincoln. RP 655. Towards the end of his closing argument, the prosecutor returned to this theme of it "comes down in the end to whose credibility you believe. Do you believe Melanie's or do you believe the defendant's?" RP 718. This improperly implied that the burden of proof was whether Ms. Lincoln was more credible and that to acquit Mr. Fisher, the jury must find that Mr. Fisher was truthful and Ms. Lincoln was not. This is well-established misconduct and the prosecutor's continued engagement in it was flagrant and ill-intentioned.

The state cites the case of State v. Wright, 76 Wn. App. 811, 888 P.2d 1214 (1995), for the proposition that a prosecutor may argue that "in order to believe a defendant the jury must find that the State's witnesses are mistaken." BOR 22. What the state omits is the further holding of Wright that it is misconduct to go further and argue that in order to acquit, the jurors must find the state's witnesses are lying. This latter holding is what the prosecutor argued here. "It comes down to whose credibility do you believe, Ms. Lincoln's or Mr. Fisher's" is precisely what Wright and other cases have held to be misconduct.

e. Reversible error

Where there is a "substantial likelihood" that the prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where defense counsel fails to object to the misconduct, appellate review is not precluded (1) if the cumulative effect of the misconduct rises to the level of manifest constitutional error that is not harmless beyond a reasonable doubt, State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997); or (2) "if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice" of the misconduct. Belgarde, 110 Wn.2d at 507.

To the extent that defense counsel did not make objections to all of the misconduct, the conduct is reviewable as flagrant and ill-intentioned. The prosecutor was well aware of his own argument for the admissibility of the ER 404(b) evidence and well aware that he was using the evidence to argue propensity and character. The prosecutor should certainly have been aware of the decisions holding that it is misconduct to argue that to acquit a defendant the jury must disbelieve the state's witnesses. The prosecutor should certainly be aware of the standard jury instructions given in every criminal case. Ignoring these duties and these legal

requirements was flagrant and ill-intentioned and should result in reversal of Mr. Fisher's convictions.

5. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE DEFENSE INVESTIGATOR AS A WITNESS AND ELICIT TESTIMONY DEALING WITH WORK PRODUCT.

The state argues that the prosecutor did not try to elicit work product because he simply asked about recorded or transcribed interviews. BOR 27-28. In fact, the state asked Ms. Goodman about whom the defense had interviewed and whether defense counsel conducted the interviews and her opinion about defense counsel's strategic choices in conducting interviews. RP 182-183. The prosecutor asked whether defense counsel asked Ms. Lincoln about the sexual abuse and tried to elicit her opinion that such questions should have been asked. RP 206-207. These were hardly questions about what a witness said in a recorded interview.

The state argues next that the prosecutor was entitled to cross examine the defense investigator to uncover her bias or interest in testifying. BOR 28-29. By calling the defense investigator as a witness, however, the prosecution was conducting direct examination, not cross examination.

The state argues that it was entitled to call the defense investigator as a witness to try to elicit that Ms. Lincoln testified consistently with her trial testimony in a pretrial interview. BOR 29-31. This argument makes

no sense; none of the statements made during the defense interview were made prior to when the motive to fabricate arose, nor was there any reason for the prosecutor to suppose that the defense investigator would be able to establish prior consistent statements. In fact, the investigator Ms. Goodman impeached Ms. Lincoln's testimony. Ms. Lincoln had testified at trial that several months after Mr. Fisher left the house, she had seen him on one occasion by the school where she was picking up Brittany. RP 72, 150. Ms. Goodman testified in the defense interview that Ms. Lincoln had said that she had seen Mr. Fisher for two or three months in a row near Brittany's school. RP 214-215. Ms. Goodman further testified that when asked if she told Officer Manthey about the sexual abuse, Ms. Lincoln said no, she lied to him. RP 204.

The prosecutor had no legitimate grounds for calling Ms. Goodman as a witness and no legitimate grounds for asking her questions about defense strategy and theory. On appeal, the grounds suggested for upholding this are simply not supported by the record or by the law.

- 6. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CALL THE COUNSELOR OF THE COMPLAINING WITNESS AND HER SIBLINGS AS A WITNESS; THE COUNSELOR'S TESTIMONY CONSTITUTED AN IMPERMISSIBLE OPINION AS TO GUILT AND INVADED THE PROVINCE OF THE JURY.**

The state identifies no proper basis for the testimony of the counselor or why her opinion about the focus of Ms. Lincoln's or Brett's concern was relevant to any issue at trial. BOR 32-34. The state argues only that her testimony did not constitute an impermissible comment on Mr. Fisher's guilt. This argument is not supported by the record.

The assumption underlying the counselor's entire testimony was that Ms. Lincoln and Brett had been abused; her description of them was her opinion that their behavior was a result of having been abused. RP 338-339, 341-342. In particular, she gave her opinion as to guilt when describing Brett's guilt or remorse over not having been able to protect Ms. Lincoln. RP 341-342. This was error and constitutional error.

7. THE TRIAL COURT ERRED IN DENYING MR. FISHER THE RIGHT TO CROSS EXAMINE A WITNESS TO ESTABLISH MOTIVE AND BIAS AND BY DENYING HIM THE RIGHT TO CALL WITNESSES IN HIS OWN BEHALF TO ESTABLISH MOTIVE AND BIAS.

In arguing that the court properly denied Mr. Fisher the right to cross examine Judy Ward to establish her motive and bias, the state once again fails to acknowledge the actual record of what occurred at trial.

At trial, the prosecutor asked Ms. Lincoln if Mr. Fisher owed her any money or property or if she ever owed him anything or had filed a civil lawsuit against him -- to show that she had no motive or bias in accusing him. RP 98. The prosecutor also asked Ms. Lincoln to confirm

that neither Brett nor Brittany had anything to gain from their testimony. RP 99. In spite of this, the court denied Mr. Fisher the right to introduce evidence about their mother Judy Ward's financial motive and bias in testifying against Mr. Fisher. RP 23-26, 298. The jurors heard only one side of the issue and this denied Mr. Fisher his state and federal constitutional rights to confrontation of the witnesses against him.

Mr. Fisher's defense was that Ms. Ward had animosity and a bias against him over their long, bitter divorce and that her children were likely influenced by her. RP 23-24. The defense was prepared to cross examine Ms. Ward to establish her motive and bias and to present testimony that Ms. Ward had, in fact, told a colleague that she would "get" Mr. Fisher if necessary. RP 23-24. Clearly there was both money and property at issue. Ms. Ward had refused to comply with a judgment awarding Mr. Fisher half of the equity in the house; it had taken Mr. Fisher three years to obtain the money owed to him. RP 297-298. Defense counsel asserted in his offer of proof that Ms. Ward had been held in contempt and had even tried to file for bankruptcy to avoid paying Mr. Fisher what he was owed. RP 297-298.

Judy Ward had a strong motive arising from her divorce and her having to pay money to Mr. Fisher which she did not want to pay, for testifying against him. Mr. Fisher had a constitutional right to cross examine her about her motive and bias. The error in excluding the

evidence was constitutional error and should require reversal of Mr. Fisher's convictions. See AOB 50-53 and cases cited there.

8. THE COURT'S INSTRUCTIONS TO THE JURY DENIED MR. FISHER HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A UNANIMOUS JURY VERDICT AND TO PROOF BEYOND A REASONABLE DOUBT ON EVERY ELEMENT OF EACH CRIME CHARGED.

The state once again ignores the actual jury instructions given at trial and argues in a vacuum that the instructions were adequate because they informed the jury that they had to find acts on four separate days over the course of a year, and were given four verdict forms and because they were instructed on unanimity. BOR 37-40.

First, the Court's Instructions to the Jury did not include separate "to convict" instructions for each of the four counts of child molestation in the second degree charged by the state. RP 651. Instead, in Instruction No. 7, the jury was instructed:

To convict the defendant of the crime of child molestation in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on four separate days between January 1, 1997 and December 30, 1997, the defendant had sexual contact with Melanie Lincoln:

.....

CP 118.

The state did not elect which acts or even which days it was relying on for each count in closing argument. Instead, the court's instructions included what purported to be a "Petrich" or unanimity instruction. RP 650. In Instruction No. 5, however, the jury was told only that:

There are allegations that the defendant committed acts of child molestation on multiple occasions. To convict the defendant, *one or more* particular acts must be proven beyond a reasonable doubt and you must unanimously agree as to which *act or acts* have been proven beyond a reasonable doubt. *You need not unanimously agree that all the acts have been proven beyond a reasonable doubt.*

(emphasis added). The jury was never informed that each count constituted a separate crime and that its verdict on one count should not control its verdict on any other count. CP 116.

During the course of deliberations, the jurors sent out a note asking "Why are there 4 counts? Why not 3 or 6? What was basis for 4 counts?" CP 108. The court responded, "You must rely on the instructions already given to you by this Court." CP 108. The instructions already given were of no help.

These instructions by the court did not comply with the requirement that a jury must be told that they are required to unanimously agree on the same act for conviction and that it is not enough that each agrees that there were four days during the year when the abuse occurred. It is unconstitutional to obtain a conviction where some jurors find one act

to have been committed and other jurors find a different act on a different day for conviction. It is also fundamental that jurors must find all of the elements of each charged count beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Here the court's instructions did not require either unanimity or proof beyond a reasonable doubt for each conviction. First, the instructions failed to set out each count charged in a separate "to convict" instruction. The one "to convict" instruction, Instruction No. 7, did not require unanimity. Instruction No. 7 only required that jurors agree that on any four days -- rather than the same four days -- during the charging period, Mr. Fisher engaged in sexual contact.

Second, Instruction No. 5 made the problem worse rather than curing the problem. Instead of requiring unanimity, Instruction No. 5 actually informed the jurors that they need only unanimously agree that one specific act was committed for conviction. Instruction No. 5 makes no reference to separate counts or the need to unanimously agree on the same act for each count. Instruction No. 5 tells the jury that "to convict the defendant" -- of all of the counts that have been lumped together in one "to convict" instruction-- "*one or more particular acts* must be proven beyond a reasonable doubt and you must unanimously agree as to which *act or acts* have been proven beyond a reasonable doubt." To compound

the problem, the jurors are then expressly told that that they "need not unanimously agree that all the acts have been proven beyond a reasonable doubt." The jury was clearly confused and asked what was the basis for four counts and why not either fewer or more counts. CP 108.

The clear and unambiguous import of Instruction No. 5 is to tell the jurors that they could convict if they agreed that one specific act had been proven. This was constitutional error that requires reversal of Mr. Fisher's convictions.

Mr. Fisher had a state and federal constitutional right, for each count charged, to have the jury determine unanimously that he committed the criminal act with which he was charged in that count. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) modified by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Const., art. 1, § 22 (amend. 10); U.S. Const., amend. 6. To assure this right, where evidence of multiple acts is presented, the state must elect the particular criminal act on which it will rely for conviction, or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Kitchen, supra, at 411; Petrich, at 572.

Where the prosecutor does not elect, the failure to give the required unanimity instruction is constitutional error. State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993); State v. Loehner, 42 Wn. App. 408, 409, 711 P.2d 377 (1985), review denied, 105 Wn.2d 1011 (1986). As such, it may

be raised for the first time on appeal. State v. Gitchee, 41 Wn. App. 820, 821, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985); see also State v. Camarillo, 115 Wn.2d 60, 63 n. 4, 794 P.2d 850 (1984).

Reversal is required unless the failure to properly instruct the jury was harmless beyond a reasonable doubt. Kitchen, 110 Wn.2d at 409; Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). The error is presumed to be prejudicial and "will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." State v. Kitchen, 110 Wn.2d at 405-406.

The error was constitutional and not harmless beyond a reasonable doubt. The jurors may well have concluded that they need only believe that one act had to be proven and that the state had no burden to establish all of the elements of each charge. The jurors clearly did not understand their duty to agree on specific acts forming the basis of each charged crime; their note indicated that they did not understand the reason for there being four counts or why there were not fewer or more counts. CP 108. Certainly the jury was not required by the instructions given to agree in any way on which act it was relying for conviction in each count. Mr. Fisher's convictions should be reversed for the inadequacy and unconstitutionality of the jury instructions given in his case.

9. CUMULATIVE ERROR DENIED MR. FISHER A FAIR TRIAL.

The trial errors which pervaded every aspect of the trial individually and certainly cumulatively denied Mr. Fisher a fair trial and should result in a reversal of his conviction.

B. CONCLUSION

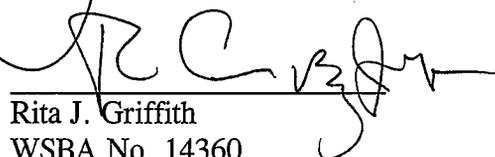
Appellant respectfully submits that his convictions should be reversed and remanded for retrial.

DATED this 27 day of MARCH, 2006

Respectfully submitted,



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