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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

84003-2

No. 26996-5-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

ALBERTO PEREZ-VALDEZ,  
Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT  
HONORABLE ROBERT L. ZAGELOW

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in excluding evidence that the girls burned down a foster parent's home after being removed from the Perez-Valdez home.

2. The trial court erred in granting the State's motion to strike evidence of Mr. Perez-Valdez's moral character and prohibiting defense counsel from mentioning the evidence in closing argument.

3. The trial court erred in denying Mr. Perez-Valdez's motion for a mistrial and later denying his motion for a new trial on the same basis.

*Issues Pertaining to Assignment of Error*

1. Should evidence that the girls burned down a foster parent's home have been admitted under ER404(b) to show motive, i.e. that the girls would go to any means to get out of a living situation they did not like?

2. Should defense counsel have been allowed to mention in closing argument evidence regarding Mr. Perez-Valdez's moral character, where the State failed to timely object to the character evidence?

3. Should the trial court have granted the motion for a mistrial where the CPS investigator testified that the alleged victims were telling the truth?

**B. STATEMENT OF THE CASE**

Alberto Perez-Valdez and his wife Ramona cared for a number of adopted children including—Samantha, her younger sister Ashley, her stepsister Ana, and five stepbrothers. RP 47-49<sup>1</sup>. The three girls resented the living situation because they thought it was unfair they had to help with the housework chores. RP 62-63, 99. Samantha and Ana also resented that Mr. Perez-Valdez and his wife would not allow them to have boyfriends at ages 10-13 and 11-14, respectively. RP 78, 101. However, Ana said she had lots of boyfriends on the sly. RP 102.

In December 2004, Samantha and Ana accused Mr. Perez-Valdez of raping them repeatedly between the ages of 10-13 and 8-14, respectively. RP 49-58, 81-84. Samantha testified that Mr. Perez-Valdez fully penetrated her with his eight-inch penis over 500 times. He did not use a condom but withdrew before ejaculation. RP 67-74, 147. She also said she had unprotected sexual intercourse with her stepbrother Jose about once per month over the same 3-year period. RP 75-76. Samantha said she began having menstrual periods before the time frame in which

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<sup>1</sup> Citations to the transcript of the trial and sentencing will be designated “RP” followed by the page number(s). Citations to the supplemental transcript (jury voir dire and opening statements of counsel) will be designated “Supp. RP” followed by the page number(s).

she had sex with Mr. Perez-Valdez. RP 66. She never became pregnant and testified she was not infertile. RP 78. She was examined by a doctor after being removed from the Perez-Valdez house. She did not suffer any health problems or contract any sexually transmitted diseases as a result of these alleged incidents. RP 66-67. There was no evidence of any scarring or disruption of her hymeneal tissue. RP 149.

Ana testified Mr. Perez-Valdez had sexual intercourse with her 72-84 times per year over a three-year period. He did not use a condom—except for one time when it broke—but usually withdrew before ejaculation. RP 87, 95. Ana admitted having sexual intercourse with her stepbrother Jose “pretty often” over the two-year period preceding her removal from the house. Jose did not use a condom and ejaculated inside her. RP 112-13, 115. Ana began having menstrual periods at age 11 or 12. RP 155. She never became pregnant as a result of these alleged numerous sexual episodes. She was examined by a doctor after being removed from the Perez-Valdez house. She had a disruption to the back portion of her hymen, described by the doctor as the 6:00 position. RP 143-44. She did not suffer any health problems or contract any sexually transmitted diseases as a result of these alleged incidents. RP 114-15.

Dr. Regina Karmy, an Obstetrician and Gynecologist, testified as an expert witness. RP 351-54. She stated that the percentage of women who have sufficiently elastic tissues to allow penetration without laceration of the hymen is rare—less than 10%. RP 356. She also stated it was possible but not probable that a girl Ana's age would have only a single isolated laceration of the hymen at the 6:00 position if she had been penetrated vaginally as many times as she alleged. RP 357-59.

Dr. Karmy also testified that the likelihood of pregnancy using the withdrawal method over the course of one year is about 85%. RP 357, 359-60. She also testified that the likelihood of bladder infection from vaginal penetration would be fairly high in prepubescent girls, i.e. 10-12 years old. RP 359.

Ana did not tell the truth much of the time. RP 62. She admitted she had a bad reputation for lying and being manipulative, which frustrated both her mother and her school teachers. RP 88-91. Her middle school principal testified that Ana would rather fabricate a story than tell the truth. RP 339-42. Sheila Woelfle, the detention/timeout supervisor at the middle school, testified Ana had a reputation for being untruthful, especially with the faculty. Ms. Woelfle testified Ana's degree of lying was "significantly above average." Ms. Woelfle had personally had Ana

lie to her and witnessed her lying to the principal with a straight face looking them right in the eye so convincingly that they would have believed her had they not known the true facts. RP 225-30.

Ms. Woelfle also recalled a personal discussion with Ana in which Ana said she would do whatever she needed to do to get out of the Perez-Valdez house and be reunited with her biological mother. At no time did Ana suggest she was being sexually abused. RP 229.

Sometime during this same three-year period but before allegations were made by Samantha and Ana, Samantha's younger sister Ashley was removed from the house after Ashley alleged she was molested by Mr. Perez-Valdez.<sup>2</sup> RP 63-64. At that time CPS workers asked Samantha and Ana if they had been sexually abused by Mr. Perez-Valdez. Both girls said "no" and continued to say "no" for several years. RP 63-64, 92-93. Samantha and Ana knew that Ashley got removed from the house by accusing Mr. Perez-Valdez of molesting her. RP 63, 91-92. Ana knew allegations of sexual abuse would get her removed from the Perez-Valdez house, too. RP 99.

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<sup>2</sup> But testimony by Ashley's foster parent and aunt indicate Ashley likely fabricated these allegations. She continued her behavior of lies, manipulation and threats to get what she wanted after being placed in a foster home. See RP 211-24.

The general theory of the defense case was that Samantha and Ana, having seen that allegations of sexual abuse resulted in Ashley's removal from the Perez-Valdez house, fabricated these allegations to achieve the same result. RP 60-78, 88-99, 396-400, 408-20. As further proof of this motive, defense counsel moved to present evidence that the girls had burned down the foster home in which they were placed after their removal from the Perez-Valdez home. He argued such evidence was permissible under ER404(b) to show motive, i.e. that the girls would go to any means to get out of a situation they didn't like. RP 104-08. The record reveals that Ana and Samantha set Ginger Burnette's home on fire because they wanted out of there. They didn't like the vegetarian diet, the religious atmosphere, and having to go to church all the time. RP 105-10. Ana stated she didn't think committing first degree arson was bad. RP 109-10.

The court held it would be "unfair" to show that Ana is an arsonist:

[Y]ou [defense counsel] haven't really shown that she just hated this house. Was she unhappy? She is unhappy as half the teenaged kids in any house are. Everybody is unhappy with parents. They don't like the rules, they don't like this or that, but we don't put in evidence of burning a house down.

RP 108

Ginger Burnette, called as a State's witness, testified that Ana never had any particular desire to leave her home, and that Samantha only wanted to leave because Ms. Burnette's home was just "too nice." RP 185, 190. When asked on cross examination whether the girls took extreme measures to get out of her home, Ms. Burnette answered "no." RP 192.

Defense counsel then renewed his motion to allow in the arson evidence lest the jury be left with the impression that nothing of consequence happened to cause the removal of the girls from Ms. Burnette's home. RP 193. The court denied the motion finding the arson incident to be a collateral issue only. RP 194.

Karen Patton was the CPS investigator in this case. RP 290. The record on cross examination reveals her immediate obvious hostility toward defense counsel in her answers. RP 301-02. She asserted that the girls' ability to describe their parents' bedroom was consistent with continual sexual abuse: "So I'm saying these children knew what the parents' bedroom looked like, and in addition, they were in there several times being sexually abused by their father." Defense counsel: "Assuming they are telling the truth?" Ms. Patton: "They are telling me the truth." RP 301-02.

Defense counsel immediately objected and moved for a mistrial based on Ms. Patton's remark about the girls telling the truth. The court sustained the objection, asked the jury to disregard Ms. Patton's comment, but denied the motion for a mistrial. RP 302. Defense counsel later moved for a new trial on the same basis—that Ms. Patton vouched for the girls' credibility. The court denied the motion. RP 441-45.

Mr. Perez-Valdez presented a number of witnesses who testified without objection they had known Mr. Perez-Valdez for a considerable time at the farm labor camp where he lives, that his general moral character and reputation was very good, and they had never witnessed anything inappropriate in his relationship with his adopted daughters. RP 203-04, 207-08, 262-67. Later on, the State moved to strike this character evidence as being contrary to the holding in State v. Griswold. The court granted the motion and agreed to give a written jury instruction even though the State failed to object at the time. RP 333-36. During the jury instruction conference, the court and the parties agreed not to give the instruction but defense counsel was prohibited from mentioning anything about moral character in closing argument.

The jury convicted Mr. Perez-Valdez of second degree rape and third degree rape. RP 437-38. This appeal followed. CP 73-74.

## C. ARGUMENT

**1. Evidence that the girls burned down a foster parent's home should have been admitted under ER404(b) to show motive, i.e. that the girls would go to any means to get out of a living situation they did not like.**

A trial court's ruling on a motion in limine or the admissibility of evidence will be reversed if the court abuses its discretion. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 283, 840 P.2d 860 (1992); State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

Under ER 401, evidence is "relevant" if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 404(b) prohibits the admission of otherwise relevant evidence to show the character of a person to prove that the person acted in conformity with that character on a particular occasion. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Although inadmissible to prove propensity on a particular occasion, evidence of

prior acts may be admissible for other purposes, including proof of motive, intent, modus operandi, or a common scheme or plan. State v. Monschke, 133 Wn. App. 313, 323, 335, 135 P.3d 966 (2006), *rev. denied*, 159 Wn.2d 1010, 154 P.3d 918, *cert. denied*, --- U.S. ----, 128 S.Ct. 83, 169 L.Ed.2d 64 (2007).

Here, defense counsel moved to present evidence that the girls had burned down the foster home in which they were placed after their removal from the Perez-Valdez home. He argued such evidence was permissible under ER404(b) to show motive, i.e. that the girls would go to any means to get out of a living situation they didn't like, and did so in the present case. RP 104-08. Defense counsel had already elicited testimony that Samantha and Ana, having seen that allegations of sexual abuse resulted in Ashley's removal from the Perez-Valdez house, fabricated these allegations to achieve the same result because they didn't like doing chores and not being allowed to have boyfriends. RP 60-78, 88-99.

The 404(b) evidence would have shown that Ana and Samantha set Ginger Burnette's home on fire for the same motive—to get out of a living situation they did not like. The evidence would have revealed these girls would burn down a house for such trivial reasons as not liking the vegetarian diet, the religious atmosphere, and having to go to church all

the time, and that Ana didn't think committing first degree arson was bad. RP 105-10. This evidence shows the girls' total lack of remorse for committing heinous acts, as well as a perverted sense of right and wrong as long as they get what they want. It was relevant to show that these girls were perfectly capable of fabricating allegations as serious as sexual abuse to get out of a living situation they did not like. Therefore, the trial court erred in not allowing the 404(b) evidence to show motive. The court's ruling that it would be "unfair" to show that Ana was an arsonist is not an adequate basis to deny admission of this relevant evidence.

After the court's ruling, Ginger Burnette testified that Ana never had any particular desire to leave her home, and that Samantha only wanted to leave because Ms. Burnette's home was just "too nice." RP 185, 190. When asked on cross examination whether the girls took extreme measures to get out of her home, Ms. Burnette answered "no." RP 192. The court's further denial of defense counsel's renewed motion following this testimony is even more egregious. The testimony is obviously untrue given the fact of the arson, and leaves the jury with the impression that nothing of consequence happened to cause the removal of the girls from Ms. Burnette's home. Furthermore, the arson evidence became even more relevant to refute the testimony of Ms. Burnette, and

was also admissible for the legitimate purpose of impeachment. See ER 607.<sup>3</sup> Therefore, the court committed additional error by again excluding this evidence.

**2. Defense counsel should have been allowed to mention in closing argument evidence regarding Mr. Perez-Valdez's moral character where the State failed to timely object to the character evidence.**

To assign error to a ruling that admits evidence, a party must raise a timely objection on specific grounds. ER 103(a)(1); State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). To be timely, the party must make the objection at the earliest possible opportunity after the basis for the objection becomes apparent. State v. Jones, 70 Wn.2d 591, 597, 424 P.2d 665 (1967). In Gray, the court of appeals held the defendant waived any objection when he failed to object to the admission of a judgment and sentence establishing one of his prior convictions by waiting until the State rested to move to dismiss based on the inadequacy of the judgment and sentence. Gray, 134 Wn. App. at 557-58, 138 P.3d 1123.

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<sup>3</sup> ER 607 provides: The credibility of a witness may be attacked by any party, including the party calling the witness.

Here, Mr. Perez-Valdez presented a number of witnesses who testified without objection they had known Mr. Perez-Valdez for a considerable time at the farm labor camp where he lives, that his general moral character and reputation was very good, and they had never witnessed anything inappropriate in his relationship with his adopted daughters. RP 203-04, 207-08, 262-67. Later on, the State moved to strike all this character evidence as being contrary to the holding in State v. Griswold. The court granted the motion and agreed to give a written jury instruction even though the State failed to object at the time. RP 333-36.

The State clearly waived any objection by failing to object when defense counsel inquired about Mr. Perez-Valdez's moral character reputation. Pursuant to the legal authority cited above, the trial court erred in granting the State's motion and agreeing to give a written jury instruction. The fact that the parties later agreed not to give the instruction does not alleviate the error, since defense counsel was prohibited from mentioning anything about moral character in his closing argument, which he should have been allowed to do.

**3. The trial court should have granted the motion for a mistrial where the CPS investigator testified that the alleged victims were telling the truth.**

A trial court should grant a mistrial when an irregularity in the trial proceedings 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, 826 P.2d 172, 837 P.2d 599 (1992); State v. Johnson, 60 Wn.2d 21, 371 P.2d 611 (1962). In determining whether a trial irregularity deprived a defendant of a fair trial, our appellate courts examines several factors: (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 which a jury is presumed to follow. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (*citing* State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)). Because the trial judge is in the best position to determine the prejudice of circumstances at trial, an appellate court reviews the decision to grant or deny a mistrial for abuse of discretion. Weber, 99 Wn.2d at 166, 659 P.2d 1102.

*Seriousness of the Irregularity.* In Babcock, this Court viewed as "extremely serious" the admission of hearsay testimony concerning the charge as to one of the alleged child rape victims, which was dismissed. The Court found the effect of this testimony on the jury may be analogized to the effect of the admission of evidence of other bad acts under ER 404(b). Babcock, 145 Wn. App. at 163-64, 185 P.3d 1213; See also Escalona, 49 Wn. App. at 255, 742 P.2d 190 (holding trial court should have granted mistrial where witness stated that defendant charged with assault had previously stabbed someone).

Furthermore, in Babcock as well as in the present case, there was no physical evidence or eyewitness testimony corroborating the allegations concerning either alleged victim. The verdict depended solely on the jury's credibility determinations about the alleged victims' testimony. And, that testimony was at times inconsistent. Babcock, 145 Wn. App. at 164, 185 P.3d 1213. In addition, in the present case there is evidence of Ana being untruthful and of both girls having a strong motive to fabricate the alleged abuse. Consequently, the testimony at trial by an expert witness that Ana and Samantha were telling the truth, had a high potential for prejudice, and represents a serious irregularity.

More significantly, expert witnesses may not state an opinion about a victim's credibility because such "testimony invades the province of the jury to weigh the evidence and decide the credibility of witnesses." State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993) (citing State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992); State v. Madison, 53 Wn. App. 754, 760, 770 P.2d 662, *rev. denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989)), *rev. denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994). It is also well-established that no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially. See State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, *rev. denied*, 82 Wn.2d 1006 (1973).

Here, Karen Patton's statement that the girls were telling the truth plainly indicated her opinion that she believed Mr. Perez-Valdez had molested Samantha and Ana. The trial court's failure to grant a mistrial was error because this irregularity in the trial proceedings was so prejudicial that it deprived Mr. Perez-Valdez of a fair trial. This error is of constitutional magnitude because it invades the province of the jury. State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985); Stepney v. Lopes, 592 F.Supp. 1538, 1547-49 (D.Conn.1984). Both the federal and state constitutions guarantee a criminal defendant the right to a trial before an

impartial jury. State ex rel. McFerran v. Justice Ct., 32 Wn.2d 544, 549, 202 P.2d 927 (1949). Thus a witness' opinion as to the defendant's guilt is not only just a serious irregularity. It violates the defendant's jury trial right by invading the province of the impartial fact-finder. Id.; Carlin, 40 Wn. App. at 702, 700 P.2d 323.

*Cumulative Evidence.* The evidence that the girls were telling the truth was not cumulative of evidence concerning the alleged rapes. Because the evidence was not cumulative of other evidence properly admitted, this factor weighs in favor of a mistrial. Id.

*Effectiveness of Curative Instruction.* The final consideration is whether the irregularity of admitting the opinion testimony could have been cured by the instruction to the jury to disregard the remark. Here, the trial court properly instructed the jury to disregard the opinion testimony. While it is presumed that juries follow court instructions to disregard testimony, *see Weber*, 99 Wn.2d at 166, 659 P.2d 1102 (1983), no instruction can " 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.' " Escalona, 49 Wn. App. at 255, 742 P.2d 190 (1987) (alteration in original) (*quoting State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

In Escalona and Miles, the Courts found the admission of evidence concerning a crime similar to the charged offenses was inherently difficult to disregard. Escalona, 49 Wn. App. at 255-56, 742 P.2d 190; Miles, 73 Wn.2d at 71, 436 P.2d 198 (involving stricken testimony that defendant had committed robbery similar to that charged). In Babcock, this Court held the admission of hearsay testimony of sexual abuse concerning the charge as to one of the alleged child rape victims that was dismissed, was so highly prejudicial that there was no guarantee the jury could effectively disregard that evidence. Babcock, 145 Wn. App. at 165, 185 P.3d 1213, *citing* State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

Herein, the situation is even more serious than Escalona, Miles, and Babcock because it involves an opinion of guilt on the current charges, not just other 404(b) type evidence on former charges or dismissed charges. Such a statement of truthfulness by an expert witness is just too inherently prejudicial to be cured by an instruction to disregard it. Therefore, the trial court should have granted the mistrial.

**D. CONCLUSION**

For the reasons stated, the convictions should be reversed.

Respectfully submitted February 17, 2009.



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