

No. 64598-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

LESLIE STEPHENSON,

Appellant.

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

BRIEF OF APPELLANT

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DIVISION ONE
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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting evidence of a 26-year-old child molestation charge of which Mr. Stephenson was acquitted.

2. The trial court abused its discretion in admitting multiple hearsay statements under the “fact of complaint” exception to the rule prohibiting hearsay.

3. Mr. Stephenson’s constitutional right to privacy was violated by the warrantless search of private text messages he sent, and by the admission of those text messages at trial.

4. The trial court abused its discretion in admitting dozens of text messages that were hearsay, irrelevant, more prejudicial than probative, and cumulative.

5. The prosecutor committed misconduct in closing argument.

6. Cumulative error denied Mr. Stephenson a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A party does not “open the door” to otherwise inadmissible evidence by make a passing reference to a subject that does not create a false impression. Furthermore, even if a party “opens the door,” a court must evaluate whether admitting the

opposing party's evidence on the topic would violate ER 403. In this case, the trial court initially ruled that evidence of a 26-year-old child molestation charge of which Mr. Stephenson was acquitted was inadmissible, but later ruled Mr. Stephenson "opened the door" to such evidence by stating he would "never, ever do something like" sexually molest the complainant in this case. Did the trial court abuse its discretion by refusing to perform an ER 403 analysis and admitting the evidence, where the prior allegation occurred 26 years ago, Mr. Stephenson was acquitted of the charge, and he was neither charged with nor convicted of any crimes in the intervening 26 years?

2. The Rules of Evidence prohibit the admission of hearsay evidence. Whether the "fact of complaint" exception to the hearsay prohibition exists is "questionable," and even if it does, it does not apply unless the complaints were made immediately after the alleged crime. In this case, the trial court allowed five people to testify that the alleged victim said she had been sexually assaulted, even though she did not make such claims until over a year after the abuse allegedly started, over seven weeks after it allegedly ended, and after Mr. Stephenson refused to give her money for shopping. Did the trial court abuse its discretion by admitting this

testimony under the “fact of complaint” exception to the rule against hearsay?

3. Under the “fact of complaint” exception to the hearsay prohibition, a witness may only report the bare complaint, and may not relate details such as the identity of the alleged perpetrator. Here, the complainant testified that she told a friend that Mr. Stephenson had sexually abused her, and another witness also testified that the complainant identified Mr. Stephenson as the alleged perpetrator. Did the testimony of these witnesses exceed the permissible scope of the “fact of complaint” exception to the rule against hearsay?

4. Article I, section 7 of the Washington Constitution prohibits the government from invading a person’s private affairs absent authority of law. Privacy rights are individually held, and even if a person exposes private information to another private party, he does not assume the risk that the government will view the information. Here, the trial court denied a motion to suppress dozens of private text messages Mr. Stephenson sent to the complainant, on the basis that the complainant consented to the search. Did the trial court err in denying the motion to suppress?

5. The Rules of Evidence prohibit the admission of hearsay evidence regardless of whether the declarant testifies and is available for cross-examination. Did the trial court abuse its discretion in overruling a hearsay objection and admitting dozens of text messages the complainant sent to Mr. Stephenson on the basis that she was “present on the witness stand, and she can be cross-examined?”

6. Evidence that is irrelevant, cumulative, or substantially more prejudicial than probative is inadmissible. Did the trial court abuse its discretion in admitting over a hundred text messages exchanged between the complainant and Mr. Stephenson, where none contained admissions of sexual or other misconduct, both the complainant and Mr. Stephenson – as well as other witnesses – testified about the nature of their relationship, the messages were redundant (e.g. nine messages simply said “please call”), and the messages created the impression that Mr. Stephenson was emotionally needy?

7. A prosecutor commits misconduct in closing argument if she vouches for her witnesses, makes statements that serve merely to inflame the jury’s passions, and tells the jury its job is to find the truth. Here, the prosecutor began closing argument with a

theme of lost innocence, repeatedly stated that her witnesses had no motive to lie, and told the jury its job was to “ascertain the truth” and that it should “find the truth” in the words of the complaining witness. Did the prosecutor commit misconduct in closing argument?

C. STATEMENT OF THE CASE

Leslie Stephenson is a 60-year-old veteran who has no criminal history apart from the instant conviction. CP 67, 75; 3 RP 98.¹ He is originally from Ohio, but moved to the Greenwood neighborhood in Seattle six or seven years ago. 3 RP 98. Mr. Stephenson made a lot of friends, and regularly invited people to his home. 3 RP 105. Through his landlord, he met and became friends with Dicksie Auer. 3 RP 99, 101. Ms. Auer went to Mr. Stephenson’s house once or twice per week to talk, watch movies, or smoke marijuana. 3 RP 102-03. The two had similar physical ailments and were able to empathize with each other. 3 RP 104.

Ms. Auer occasionally took her daughter, M., to Mr. Stephenson’s apartment with her. Mr. Stephenson, who is a trained chef, would cook for the Auers and the three would watch

¹ There are four volumes of verbatim reports of proceedings in this case: 1 RP (8/27/09, 10/12/09, 10/13/09), 2 RP (10/14/09), 3 RP (10/15/09 and 10/19/09), and 4 RP (10/20, 10/23, 12/15/09).

movies and television shows together. 3 RP 104. Several other friends stopped by regularly as well. 3 RP 105-06.

Because Dicksie Auer was disabled and of limited means, Mr. Stephenson helped her in numerous ways. He drove her to the grocery store and to run other errands, bought her small household appliances like a blender, and gave her and her daughter gifts such as t-shirts and DVD's. 3 RP 109-10. He also became a father figure to M., buying her school supplies and sending her to science camp. 3 RP 110-11.

Ms. Auer and M. sometimes spent the night at Mr. Stephenson's home, and occasionally M. would sleep over without her mother. 3 RP 118. This occurred when M. wanted to continue watching movies after her mother got tired. 3 RP 119.

On September 26, 2008, M. went to Mr. Stephenson's house to ask for money because she wanted to go shopping with her friend, Josie. 3 RP 124-26. M. and Josie went to school together and were both 12 years old. M. asked Mr. Stephenson for the \$400 that was in a savings jar he had. Mr. Stephenson refused to give it to her for a shopping spree, because he was saving it to buy her a laptop for school. It had taken him a couple of years to save that

amount. 3 RP 127. The two argued over his refusal to give her the money, and M. stormed out of the house. 3 RP 127-28.

Immediately after their argument over Mr. Stephenson's refusal to give M. money for shopping, M. told Josie that Mr. Stephenson had sexually abused her. 2 RP 88. She also sent a text message to her friend Max, making the same allegations. 2 RP 83-86. Josie told her mother, who then took M. to tell Ms. Auer and the police that Mr. Stephenson had molested her. 3 RP 64-73. M. also went to see Doctor Rebecca Wiester, who did not find any physical evidence of sexual contact or assault. 1 RP 159, 172.

The State charged Mr. Stephenson with two counts of rape of a child and one count of first-degree child molestation, for conduct alleged to have begun June 1, 2007. CP 1-2.

At trial, the State moved to admit a series of text messages that Mr. Stephenson and M. exchanged between September 27, 2008, and October 5, 2008, after their argument over the money. 1 RP 44-61, 81-85; 2 RP 112-30. M. had given the police her telephone with the text messages. 1 RP 84. The messages did not contain any admissions of sexual contact but the State argued they were relevant to show "the nature of the relationship." 2 RP 106. Mr. Stephenson moved to exclude the messages on multiple

grounds, including hearsay, lack of foundation, irrelevance, and ER 403. CP 12-17; 2 RP 106. The court admitted the messages, stating there was no hearsay problem as to the messages M. sent because “[s]he is present on the witness stand, and she can be cross-examined.” 2 RP 106. The court ruled that the other objections went to weight and not admissibility. 2 RP 107.

Mr. Stephenson also moved to suppress the messages he sent on the basis that the messages were private and the police obtained them without authority of law. 1 RP 81-83; CP 9-12. The court denied the motion, stating, “when someone generates a message knowing it will be received by another, they have given up their right of reasonable expectation of privacy in that particular communication.” 1 RP 85.

The State moved to admit testimony from M.’s friend Max, Josie’s mother Leslie Stewart, Doctor Wiester, and two police detectives, all of whom would say that on or after September 26, 2008, M. told them she had been sexually assaulted starting in June of 2007. Supp. CP ____ (Sub No. 63) at 7-11; 1 RP 26-38. Mr. Stephenson moved to exclude the testimony as inadmissible hearsay, but the Court admitted it under the “fact of complaint” or

“hue and cry” exception to the hearsay prohibition. CP 22-25; 1 RP 26-38.

Finally, the State moved to admit evidence of a 1983 Florida charge of which Mr. Stephenson had been acquitted. Supp. CP ___ (Sub No. 63) at 11-23; 1 RP 2-24. Because the prior charge had apparently been for child molestation, the court evaluated its admissibility under RCW 10.58.090. The State admitted that most of the factors did not cut in its favor, because Mr. Stephenson was acquitted, the accusation occurred over 25 years ago and no criminal activity took place in the interim. 1 RP 9. The court ruled the evidence was inadmissible for those reasons and because the State did not need the evidence. 1 RP 22-23. The court emphasized that Mr. Stephenson was acquitted of the prior allegations and that it is impossible to provide a limiting instruction that would convince a jury to give the acquittal its proper weight once it heard the allegation. 1 RP 23. The court concluded, “Here there is, I think, limited probative value, and it is substantially outweighed by the prejudicial effect of this.” 1 RP 24.

At trial, M. testified that Mr. Stephenson raped and fondled her, but admitted she did not make such claims until Mr. Stephenson refused to give her money for shopping. 2 RP 67-86,

157-58. She also admitted, "I kept changing the story and telling other people different stories." 2 RP 133.

Over Mr. Stephenson's objection, M. read text messages she had sent to her friend Max right after her argument with Mr. Stephenson. One message said, "My dad just hit me."² 2 RP 85. Another said, "The world is a cruel place. My dad has done things to me that I have never told anyone, and those things are against the law. Life sucks." The next read, "Sexual abuse, hitting, yelling, almost raped me." 2 RP 86. Max testified about the same text messages. 1 RP 112-14. The messages were admitted into evidence. Exs. 1-3.

Dr. Wiester testified that there was no physical indication that M. had been abused or raped. But she also testified:

So then I asked her, "Can you tell me about what happened?" And she thought for a long time and said, "There was a friend of the family. He touched me in places I didn't want to be touched." Then I asked, "And what was this person's name?" And she said, "Leslie."

1 RP 151.

Over Mr. Stephenson's objection, Josie's mother, Leslie Stewart, testified that M. told her she was sexually assaulted. 3 RP

² Because M.'s biological father had long since abandoned her, she sometimes referred to Mr. Stephenson as her father.

68. Similarly, Detective Jessica Taylor testified M. told her she was raped. 2 RP 178.

Also over Mr. Stephenson's objection, dozens of text messages M. had sent to Mr. Stephenson and received from him between September 27 and October 5, 2008 were admitted into evidence. 2 RP 110-29. Officer Young read many of the messages aloud to the jury. 3 RP 17-28. Although the messages did not contain any admission of sexual allegations, the messages indicated that Mr. Stephenson was very upset that M. was ignoring him.

After the State rested its case, Mr. Stephenson testified in his own defense. Toward the end of his direct examination, the following exchange took place:

Q. Mr. Stephenson, in the time you have known [M.], have you ever touched her inappropriately?

A. No, ma'am.

Q. In a sexual way?

A. No, I would never do something like that, never.

Q. Have you ever seen [M.] naked?

A. No, ma'am.

Q. Mr. Stephenson, did you force [M.] to have intercourse with you?

A. No, ma'am. I would never do anything like that.
Never, ever, ever, never.

3 RP 140.

The State argued that this testimony “opened the door” to evidence of the 1983 Florida allegation of which Mr. Stephenson was acquitted. 3 RP 144. The court agreed. 3 RP 145. Mr. Stephenson then moved for a mistrial, because he was not prepared to track down the witnesses or evidence from the 26-year-old foreign case. 3 RP 145. The court denied the motion. The court ruled, “This was a character response where he said no. Basically, the message was, ‘I’m not the type of person who would do this.’ He is going to have to live with that testimony, and there are consequences to it.” 3 RP 146.

Mr. Stephenson argued that the evidence of the decades-old accusation was still inadmissible under ER 403 and RCW 10.58.090. 3 RP 146-48. Mr. Stephenson’s attorney also pointed out that “this puts Mr. Stephenson in an unfair disadvantage of also having to defend something that happened almost 30 years ago in which he was acquitted.” 3 RP 148. The court stated, “I agree it is highly prejudicial to the defense, but it is a situation created by the defendant himself.” 3 RP 149.

As a result of the ruling, the State cross-examined Mr. Stephenson regarding the Florida accusations. The prosecutor asked, "Were you accused in 1983 of touching a female child under the age of 14 years old in a sexual way?" 3 RP 171. After asking several additional questions, the prosecutor acknowledged that Mr. Stephenson was acquitted in that case. 3 RP 173.

The next day, the State planned to call the complainant from the Florida case, Christina Howell, to testify. Mr. Stephenson again objected, and argued that he did not "open the door" because his testimony on direct examination was in response to questions about M. specifically, and were not sweeping generalizations about anyone else. 4 RP 4. Mr. Stephenson also reminded the court that even if a party "opens the door," the usual rules of evidence, especially ER 403, still serve to prohibit the admission of certain evidence. 4 RP 5. The court did not perform an analysis under ER 403 and allowed the evidence.

36-year-old Christina Howell testified for the State on rebuttal. 4 RP 33. She testified that she met Mr. Stephenson in Florida when she was 10 years old in 1983, and that Mr. Stephenson "unbuttoned my pants" and "put a finger up my vagina." 4 RP 35, 39. She testified that she was scared and in

physical pain. 4 RP 40. She said that Mr. Stephenson threatened to kill her and her family. 4 RP 41. She testified that she knew Mr. Stephenson was found not guilty of the offense. 4 RP 55.

During closing argument, the prosecuting attorney emphasized Ms. Howell's testimony as well as the hearsay testimony of M., Max Kohlenberg, Leslie Stewart, and Rebecca Wiester. She re-read a text message in which M. implied that Mr. Stephenson raped her. She told the jury its job was to find the truth, and that they should believe the State's witnesses because they had no motive to lie. She said that Mr. Stephenson stole M.'s childhood and that when M. looked back on her youth, she would not remember birthday parties but would remember Mr. Stephenson raping her. 4 RP 71-83, 110-16.

The jury could not agree on verdicts for the rape charges, but convicted Mr. Stephenson of first-degree child molestation. 4 RP 121-25. The court sentenced Mr. Stephenson to an indeterminate life sentence, with a minimum of 64 months. CP 66-75; Supp. CP ____ (Sub No. 94). Mr. Stephenson appeals. CP 56-65.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF A 26-YEAR-OLD CHILD MOLESTATION CHARGE OF WHICH MR. STEPHENSON WAS ACQUITTED.

a. As the trial court initially found, admitting evidence of a 26-year charge of which Mr. Stephenson was acquitted violated ER 403 and RCW 10.58.090. In 1983, Mr. Stephenson was acquitted of a child molestation charge in Florida. He was not accused or convicted of any crimes at all between 1983 and 2008, when the instant charges were filed. Nevertheless, the State sought to introduce evidence of the 1983 charge in this case, through both cross-examination of Mr. Stephenson and direct testimony of the Florida complainant.

As the trial court initially found, this evidence was inadmissible under ER 403 and RCW 10.58.090. ER 403 prohibits evidence that is substantially more prejudicial than probative. While RCW 10.58.090 eliminates the prohibitions of ER 404(b) for sex offenses, it reaffirms the restrictions of ER 403. Indeed, it mandates the following considerations in determining whether to admit or exclude evidence of prior sexual acts:

(a) The similarity of the prior acts to the acts charged;

- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090(6).

Here, the trial court properly found that factors (b), (c), (d), (e), (f), and (g) cut strongly in favor of excluding the evidence. The alleged prior acts occurred 26 years before Mr. Stephenson's trial on the instant charges. There was only one alleged prior act. There were no intervening circumstances, as Mr. Stephenson was not so much as charged with a misdemeanor during the intervening 26 years, let alone charged with or convicted of a felony sex offense. The evidence was not necessary given the large number of witnesses and exhibits the State presented. The prior alleged

act was not a criminal conviction; on the contrary, Mr. Stephenson was acquitted. Thus, as the trial court initially concluded, evidence of the 1983 allegation was substantially more prejudicial than probative and should have been excluded.

b. Mr. Stephenson did not “open the door” to testimony about the 26-year-old allegation. Even though the court properly excluded the above evidence initially, the State argued, and the trial court ruled, that Mr. Stephenson later “opened the door” to testimony regarding the 26-year-old allegation. The court allowed the State to cross-examine Mr. Stephenson regarding the Florida incident, and to call the Florida complainant to testify as a rebuttal witness. This ruling was erroneous.

“Otherwise inadmissible evidence is admissible on cross-examination if the witness ‘opens the door’ during direct examination and the evidence is relevant to some issue at trial.” State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). “But a passing reference to a prohibited topic during direct does not open the door for cross-examination about prior misconduct.” Id. Furthermore, the “opening the door” principle only allows a party “to introduce evidence on the same issue to rebut any false impression” created by the other party. United States v. Sine, 493

F.3d 1021, 1037 (9th Cir. 2007) (emphasis in original); State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (“the State may pursue the subject to clarify a false impression”).

Here, Mr. Stephenson did not open the door to evidence of the 1983 allegation of which he was acquitted. When he said he “would never” do something like molest M., he was responding to questions specifically regarding M., not anyone else. The questions were: “Mr. Stephenson, in the time you have known [M.], have you ever touched her inappropriately?” and “Mr. Stephenson, did you force [M.] to have intercourse with you?” 3 RP 140. In context, Mr. Stephenson’s response that he “would never” do that was relevant only to M., not to a complainant from 26 years earlier.

To the extent Mr. Stephenson’s responses can be read to apply to other people, it was a mere passing reference. Mr. Stephenson’s direct testimony is over 40 pages long, and mostly addresses his relationship with M. and her mother. He stated that he did not molest or rape M., and never would. The response was a mere passing reference to his integrity, and did not “open the floodgates” to evidence about a 26-year old accusation. See State v. Avedano-Lopez, 79 Wn. App. 706, 715, 904 P.2d 324 (1995)

(defendant's "passing reference to his release from jail did not open the floodgates to questions about prior heroin sales").

Furthermore, even if he was referring to his entire life, the statement was not false. Mr. Stephenson was acquitted of the Florida charge, and until this trial he was never convicted of a sex offense. Indeed, at age 60 his offender score was zero. CP 67. His statement thus did not open the door to inadmissible evidence. See Sine, 493 F.3d at 1037 (accurate statement on a particular topic did not open the door to other party's evidence on the topic); Fisher, 165 Wn.2d at 750 (State may only rebut evidence creating "false impression").

Washington courts have reversed convictions in several cases in which trial courts improperly ruled defendants opened the door to inadmissible evidence. In Fitzgerald, the defendant was charged with two counts of statutory rape for acts he allegedly committed against two girls from an Indian orphanage. State v. Fitzgerald, 39 Wn. App. 652, 654, 694 P.2d 1117 (1985). The defendant testified that he did not sexually abuse any girls from the orphanage and that his relationship with the girls and the orphanage was wholesome and charitable. Id. at 661. The trial court ruled that this testimony opened the door to testimony by a

third girl that the defendant had raped her in India. This Court disagreed:

The State's argument that "C"'s testimony is admissible to rebut Fitzgerald's claim that he did not abuse other girls in India is without merit. Evidence of prior misconduct is impermissible for impeachment on a collateral issue.

Id.

In Stockton, the defendant was charged with unlawful possession of a firearm. 91 Wn. App. at 37. The defendant testified that he was attacked by a group of men who had tried to sell him drugs, and he grabbed one of their guns in self-defense. Id. at 39. He testified that he "was not interested" in buying drugs. Id. The State argued this opened the door to the question, "so you have some knowledge of how to purchase drugs on the street?" Id. This Court disagreed, stating, "Stockton's testimony that he thought the men were trying to sell him drugs was no more than a passing reference to any knowledge he may have had about drugs. ... As such, it did not open the door to testimony about his prior drug use." Id. at 40.

Finally, the Supreme Court rejected the State's "open door" argument in Fisher, 165 Wn.2d 727. There, the defendant was charged with four counts of child molestation. Id. at 733. Both the

defendant and his wife testified on his behalf. His wife testified she felt comfortable leaving her two daughters, Ashland and Shelby, in the defendant's care. Id. at 736. The defendant testified that he "never threatened the children or molested" the stepdaughter at issue. Id. He did admit that he head-bashed one child and slapped another. Id. at 736-37.

The State then cross-examined him with respect to his relationship with Ashland and Shelby, and specifically questioned him regarding a CPS report alleging that the defendant physically abused them. Id. at 737. The State argued that the defense had opened the door to the question, and Division Three agreed. But the Supreme Court reversed, holding the trial court abused its discretion in admitting the evidence. Id. at 750. The Court explained:

[T]he evidence of later physical abuse of unrelated victims is collateral to the issue of whether Fisher sexually molested Melanie. Because the State could not present evidence on a matter collateral to the principal issue being tried, the trial court erred in permitting impeachment on this point. Therefore, the trial court abused its discretion by allowing the prosecution to introduce rebuttal evidence regarding allegations of physical abuse against the stepchildren.

Id. at 751.

As in the foregoing cases, the trial court abused its discretion in ruling that Mr. Stephenson opened the door to cross-examination and rebuttal testimony regarding a prior alleged act. Mr. Stephenson's response to his counsel's questions was specific to M., and, even if it touched on his behavior generally, it was a mere passing reference. Furthermore, because he was acquitted of the prior charge, his passing reference was accurate. Finally, his alleged conduct 26 years earlier was a collateral matter inappropriate for impeachment. In sum, Mr. Stephenson did not open the door to evidence of the 1983 Florida accusation.

c. Even if Mr. Stephenson opened the door, the evidence was still inadmissible under ER 403 and RCW 10.58.090. Even if a party has opened the door by raising a particular subject, contradictory evidence is still inadmissible if its introduction would violate ER 403. 5 K. Tegland, *Washington Practice, Evidence* § 103.15 at 76, 81 (5th ed. 2007); *Id.* at § 404.31, p. 599; *Fisher*, 165 Wn.2d at 750. The "opening the door" doctrine must give way to the defendant's right to a fair trial. *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). "As with other types of evidence, rebuttal evidence is inadmissible if its prejudicial effect outweighs

its probative value.” State v. Ortiz, 34 Wn. App. 694, 697, 664 P.2d 1267 (1983). Furthermore:

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.

Id. (quoting State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)). “Doubtful cases should be resolved in favor of the defendant.” State v. Trickler, 106 Wn. App. 727, 733, 25 P.3d 445 (2001).

In Ortiz, the defendant was charged with aggravated first degree murder for the rape and homicide of a 77-year-old woman. Id. at 695. The defense presented “a great deal of testimony concerning the defendant’s mental capacity,” implying that he did not have the ability to think and plan ahead. Id. at 695-96. In response, the State presented two rebuttal witnesses, one of whom testified that the defendant had threatened her at knifepoint, and one of whom testified that the defendant threatened to rape her. Id. at 696. This Court assumed that the defendant opened the door to the evidence, but reversed under ER 403:

Conceding, for the sake of argument, that the challenged evidence rebutted new evidence presented by the defense, we nevertheless conclude

that its admission was error. The inflammatory nature of the evidence far outweighed any probative value it might have had. The cumulative effect of the rebuttal testimony was to portray the defendant as a knife-wielding potential rapist, not merely as a person with the ability to think and plan ahead. Because the defendant was charged with raping, beating and stabbing a woman to death, its prejudicial effect was undoubtedly great.

Id. at 697. See also Stockton, 91 Wn. App. at 41 (Court held the defendant did not open the door to testimony of his prior drug use, and also noted its admission violated ER 403).

Here, the trial court refused to perform an ER 403 analysis once it determined Mr. Stephenson had “opened the door.” 4 RP 5. This was error. As the trial court recognized initially, the evidence of the prior charge was substantially more prejudicial than probative. Therefore, it should have been excluded even if Mr. Stephenson “opened the door.” Ortiz, 34 Wn. App. at 697.

As explained in section 1(a) above, an analysis of the RCW 10.58.090 factors demonstrates that the admission of this evidence violated ER 403. The alleged prior act occurred 26 years before Mr. Stephenson’s trial on the instant charges. Cf. State v. Acosta, 123 Wn. App. 424, 435, 98 P.3d 503 (2004) (“Testimony regarding unproved charges and convictions at least 10 years old do not assist the jury in determining any consequential fact in this case”).

There was only one alleged prior act. There are no intervening circumstances, as Mr. Stephenson was not so much as charged with a misdemeanor during the intervening 26 years, let alone charged with or convicted of a felony sex offense. Indeed, his offender score at sentencing was zero. CP 67.

The evidence was not necessary to the State's case given the large number of witnesses and exhibits the State presented. Nor was it necessary to rebut a "false impression," because Mr. Stephenson was acquitted of the prior charge. The acquittal also cuts in favor of exclusion under RCW 10.58.090(6)(f) ("Whether the prior act was a criminal conviction"). As the trial court initially recognized, evidence of acquitted conduct is extremely prejudicial because even though one jury already found the defendant not guilty, the current jury would likely be unable to "unring the bell" once witnesses testified that the alleged conduct occurred.

Finally, the nature of the prior allegation was especially prejudicial, because it was an allegation of sexual misconduct against a child. See Ortiz at 697 (rebuttal testimony portraying the defendant as a knife-wielding potential rapist extremely prejudicial); Saltarelli, 98 Wn.2d at 363 ("in sex cases, ... the prejudice potential of prior acts is at its highest"). Thus, as the trial court

initially concluded, evidence of the 26-year-old allegation was substantially more prejudicial than probative and should have been excluded irrespective of Mr. Stephenson's statement that he "would never do something like" molest M. The trial court abused its discretion in admitting the evidence.

d. Reversal is required. The error in admitting this extraordinarily prejudicial evidence cannot be considered harmless. "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). In Salas, the Supreme Court held the trial court abused its discretion under ER 403 by admitting evidence of the plaintiff's immigration status in a personal-injury case. Id. at 672-73. The Court further held that reversal was required: "We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury." Id. at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting evidence of a prior child-molestation charge is at least an order of magnitude greater. Indeed, "in sex cases, ... the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363. As in Salas, this

Court cannot say the admission of the improper evidence had no effect on the jury.

The prosecutor emphasized the prior charge by cross-examining Mr. Stephenson about it and by flying the prior complainant in from Florida to testify. The prosecutor further stressed the prior charge in closing argument, telling the jurors they should believe the prior complainant notwithstanding the acquittal. 4 RP 115. One cannot say that the improper cross-examination, rebuttal testimony, and closing argument had no effect on the jury.

This is especially so given the weakness of the State's case. M. herself admitted that she did not allege Mr. Stephenson abused her until she became angry at his refusal to give her money. 2 RP 67-86, 157-58. M. further acknowledged, "I kept changing the story and telling other people different stories." 2 RP 133. The jury could not reach a verdict on two of the three counts, even with the extraordinarily prejudicial evidence of the prior charge. 4 RP 121-25. The admission of the evidence of the prior child-molestation charge was not harmless, and this Court should reverse Mr. Stephenson's conviction and remand for a new trial. Salas, 168 Wn.2d at 673.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING MULTIPLE HEARSAY STATEMENTS UNDER THE “FACT OF COMPLAINT” EXCEPTION TO THE HEARSAY PROHIBITION.

Over Mr. Stephenson’s objections, the trial court allowed several people to testify that M. told them she was sexually abused. The testimony was inadmissible hearsay. The trial court admitted the evidence pursuant to the “fact of complaint” doctrine, but this doctrine is not part of the Rules of Evidence, and is based on the antiquated, sexist notion that a woman who alleges rape is not credible unless she complained about the rape to someone right after it occurred.

Even assuming the exception still exists, it applies only where the complaint was made immediately following the alleged crime. Here, M. did not tell anyone Mr. Stephenson molested her until well after he is alleged to have done so – indeed, she did not make the accusations until she had a heated argument with Mr. Stephenson over money.

Finally, even where the “fact of complaint” exception applies, a witness may not report the identity of the alleged perpetrator or other details of the complaint. But here, M. testified that she told

Max that Mr. Stephenson sexually abused her, hit her, and almost raped her.

For all of these reasons the trial court abused its discretion in admitting hearsay testimony under the “fact of complaint” doctrine.

a. This Court should reject the antiquated and sexist “fact of complaint” exception to the rule prohibiting hearsay. Under the Rules of Evidence, “[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute.” ER 802. There is no “fact of complaint” exception in the Rules of Evidence, other court rules, or statutes. Instead, it is a common-law doctrine whose continuing validity is “questionable.” 5C K. Tegland, Washington Practice, Evidence § 803.7 at 28-29 (5th ed. 2007).

The exception arose over a century ago – decades before the Rules of Evidence were adopted – and is derived from antiquated and sexist notions about the credibility of women who allege rape:

Thus, the Failure of the woman, at the time of an alleged Rape, to Make any complaint could be offered in evidence (as all concede) as a virtual self-contradiction discrediting her present testimony.

...

So, where nothing appears on the trial as to the making of such a complaint, the jury might naturally assume that none was made, and counsel for the accused might be entitled to argue upon that

assumption. As a Peculiarity, therefore, of this kind of evidence, it is only just that the prosecution should be allowed to forestall this natural assumption by showing that the woman was Not silent, i.e., that A complaint was in fact made.

This apparently irregular process of negating evidence not yet formally introduced by the opponent is regular enough in reality, because the impression upon the tribunal would otherwise be there as if the opponent had really offered evidence of the woman's silence. Thus the essence of the process consists in the showing that the woman did Not in fact behave with a silence inconsistent with her present story.

State v. Ragan, 22 Wn. App. 591, 598, 593 P.2d 815 (1979)

(quoting 4 J. Wigmore, Evidence, § 1135, pp. 298-300 (rev. ed. J. Chadbourn 1972)).

It does not make sense for this exception for sex crimes to exist in this day and age. This is especially so since the Rules of Evidence already allow for this type of evidence, in all cases, to rebut a claim of recent fabrication. ER 801(d)(1)(ii). This Court should hold that the common-law "fact of complaint" exception is no longer valid.

b. Even if the "fact of complaint" exception exists, it does not apply here because the complaints were not timely. Washington adopted the common-law fact of complaint doctrine in 1898, when the Supreme Court held, "it may be shown that the prosecutrix

made complaint immediately or soon after the alleged injury was committed.” State v. Hunter, 18 Wash. 670, 672, 52 P. 247 (1898) (emphasis added). In Hunter, the Court held that trial court did not abuse its discretion in allowing a 12-year-old complainant’s mother to testify that her daughter told her she was raped within an hour of the rape. Id.

More recent cases reaffirmed the rule that hearsay is not admissible under the fact-of-complaint doctrine unless the complaint was made immediately following the alleged crime. Indeed, the doctrine is sometimes called the “early complaint” exception. Ragan, 22 Wn. App. at 596; see also 65 Am.Jur.2d Rape § 61 (describing exception as the “fresh complaint doctrine”). In Ragan, hearsay testimony of a complaint made “approximately an hour after the act” was admissible under this exception. Ragan, 22 Wn. App. at 596.

In King v. Workman, the Court stated, “in cases of rape and other similar crimes, ... a witness may testify that the victim made complaint at the earliest opportunity.” King v. Workman, 58 Wn.2d 77, 78, 360 P.2d 757 (1961) (emphasis added). Thus, hearsay testimony of a complaint made three days after the alleged incident was admissible. Id.

In State v. Alexander, this Court explained , “this narrow exception allows only evidence establishing that a complaint was timely made.” State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992). Accordingly, testimony by the child, her mother, and her counselor stating that the child had complained of sexual abuse four days after the last alleged incident was admissible. Id. at 149-52.

In all of these cases, the complaint was made within hours or days of the alleged crime.³ In contrast, M. did not complain until over a year after the abuse allegedly started, and seven weeks after it allegedly ended. CP 1-2; 2 RP 83-88. Perhaps more importantly, M. did not complain until right after Mr. Stephenson refused to give her shopping money, a decision which made M. livid. 2 RP 157-58; Cf. ER 801(d)(1)(ii); Tome v. United States, 513 U.S. 150, 156, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995) (under Fed. R. Evid. 801(d)(1)(B), prior consistent statement admissible only if made before the event triggering alleged fabrication). Accordingly,

³ One possible outlier is State v. Ackerman, 90 Wn. App. 477, 953 P.2d 816 (1998). There, three witnesses were permitted to testify regarding the child's complaints. Of the three, two stated that the child complained in October about abuse that occurred on October 9, while one testified the child complained in November or December. Id. at 481. Division Three did not analyze the witnesses separately, but the testimony of the third witness did not fall within the exception under other caselaw.

M.'s complaints were not timely, and the court erred in permitting M., Max Kohlenberg, Leslie Stewart, Rebecca Wiester, and Jessica Taylor to present hearsay testimony that M. told them she was sexually abused.

c. The testimony exceeded the permissible scope of the “fact of complaint” exception. Even if the complaints had been timely and admissible, the scope of the hearsay testimony in this case exceeded permissible bounds. “The rule is that evidence of complaints made by the female is restricted to the bare complaint.” King, 58 Wn.2d at 78. “[A]nything beyond that is hearsay of the most dangerous character.” Hunter, 18 Wash. at 672. Thus, courts “recognize the admissibility of testimony to the effect that the victim made early complaint so long as details are not related.” Ragan, 22 Wn. App. at 596.

The testimony may only include the fact and general nature of the crime. The details and particulars of the out-of-court complaint, including the name of the guilty party, are inadmissible hearsay.

Id. at 597 (quoting 5 R. Meisenholder, Washington Practice § 545, p. 504 (1965)).

This Court reversed convictions on two counts of first-degree rape of a child in Alexander because testimony admitted under the

“fact of complaint” doctrine exceeded the permissible scope of the exception. At trial, the child complainant’s mother testified that her child told her the events in question occurred “over at Robert Alexander’s house.” Alexander, 64 Wn. App. at 153. A CPS social worker was also permitted to testify that he filed a CPS sexual abuse report against only one person. Id. This Court held “the trial court indirectly admitted evidence of the abuser’s identity, which is not admissible under the fact of complaint doctrine.” Id. Even though the social worker did not name anybody, his testimony that he filed only one report of sexual abuse “raised a virtually indisputable inference” that the child identified the defendant as the abuser. Id.

As in Alexander, the hearsay testimony in this case exceeded the scope of the “fact of complaint” exception. M. read text messages she had sent to her friend Max right after her argument with Mr. Stephenson. One message said, “My dad just hit me.” 2 RP 85. Another said, “The world is a cruel place. My dad has done things to me that I have never told anyone, and those things are against the law. Life sucks.” The next read, “Sexual abuse, hitting, yelling, almost raped me.” 2 RP 86. M. impermissibly divulged details, including twice identifying Mr.

Stephenson (whom she called her dad) as the perpetrator. These messages were also admitted as exhibits that the jury could re-read during deliberations. Exs. 1-3.

Dr. Wiester also testified regarding details M. told her, including Mr. Stephenson's name:

So then I asked her, "Can you tell me about what happened?" And she thought for a long time and said, "There was a friend of the family. He touched me in places I didn't want to be touched." Then I asked, "And what was this person's name?" And she said, "Leslie."

1 RP 151. The State may argue that Dr. Wiester's testimony falls within the medical exception to the hearsay rule, but it does not. See ER 803(4). That exception "allows statements regarding causation of injury, but generally not statements attributing fault." State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). "Statements concerning who assaulted a victim would seldom, if ever, be sufficiently related to diagnosis or treatment to be admissible." Fitzgerald, 39 Wn. App. at 658. "For example, the statement 'the victim said she was hit on the legs with a bat' would be admissible, but 'the victim said her husband hit her in the face' would not be admissible." Redmond, 150 Wn.2d at 496-97. Thus, the statement that M. said "Leslie," who was "a friend of the family"

molested her is inadmissible hearsay and neither the “fact of complaint” nor the “medical diagnosis” exception to the hearsay prohibition applies.

While both M. and Dr. Wiester explicitly exceeded the scope of the “fact of complaint” exception, Leslie Stewart, Max Kohlenberg, and Officer Taylor all implicitly exceeded the scope because as in Alexander, their testimony “raised a virtually indisputable inference” that M. identified Mr. Stephenson as the abuser. 64 Wn. App. at 153. Thus, even if the testimony had been timely and admissible – which it was not – it exceeded the scope of the “fact of complaint” exception.

In sum, the trial court abused its discretion in admitting the hearsay testimony of M., Max Kohlenberg, Leslie Stewart, Rebecca Wiester, and Jessica Taylor because M.’s complaints were not timely. Even if the complaints had been timely, the witnesses exceeded the scope of the “fact of complaint” exception by testifying that M. identified Mr. Stephenson as her abuser.

d. Reversal is required. As with the improperly admitted prior charge, the improper admission of the hearsay statements described above cannot be considered harmless. The jury clearly had difficulty believing M., and could not reach a verdict on two of

the three counts. The fact that five witnesses were allowed to testify that M. said she was sexually abused may well have tipped the scales toward conviction on Count II. This is especially so given that two of the hearsay witnesses identified Mr. Stephenson as the perpetrator and described the alleged misconduct in some detail. Also, the prosecutor emphasized the hearsay testimony in closing argument, including by stating “[M.] told Max that the defendant had sexually abused her.” 4 RP 73-75. As with the improper admission of the prior charge, this Court cannot find that the improper admission of multiple hearsay statements had no effect on the jury. For this reason, too, this Court should reverse and remand for a new trial. Alexander, 64 Wn. App. at 158.

3. THE TRIAL COURT ERRED IN ADMITTING OVER A HUNDRED TEXT MESSAGES BETWEEN MR. STEPHENSON AND THE COMPLAINANT.

a. The admission of the messages sent by Mr. Stephenson violated his constitutional right to privacy. Over Mr. Stephenson’s objection, the trial court admitted 107 text messages allegedly exchanged between M. and Mr. Stephenson. Exs. 13-119. Eighty-one of the messages were sent by Mr. Stephenson to M. The seizure of these messages and their admission at trial violated Mr. Stephenson’s constitutional right to privacy.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The state constitutional protection “is explicitly broader than that of the Fourth Amendment.” State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). It “clearly recognizes an individual’s right to privacy with no express limitations and places greater emphasis on privacy.” Id. In short, “Article I, section 7 is a jealous protector of privacy.” State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

Article I, section 7 protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990) (quoting State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984)). “[W]hether advanced technology leads to diminished subjective expectations of privacy does to resolve whether use of that technology without a warrant violates article I, section 7.” State v. Jackson, 150 Wn.2d 251, 260, 76 P.3d 217 (2003). Unlike the Fourth Amendment, the question is “whether the ‘private affairs’ of an individual have been unreasonably violated rather than whether a person’s expectation of privacy is reasonable.” Boland, 115 Wn.2d at 580.

In determining whether something is a “private affair” subject to the protection of the state constitution, “a central consideration is the nature of the information sought – that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person’s life.” State v. Jordan, 160 Wn.2d 121, 126, 156 P.3d 893 (2007). For example, in Miles, banking records were held to be a private affair because:

The information sought here potentially reveals sensitive personal information. Private bank records may disclose what the citizen buys, how often, and from whom. They can disclose what political recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more.

State v. Miles, 160 Wn.2d 236, 246-47, 156 P.3d 864 (2007). “Little doubt exists that banking records, because of the type of information contained, are within a person’s private affairs.” Id. at 247.

Similarly, in Boland, garbage was held to be a “private affair” because the items in the trash, like “bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person’s activities, associations, and beliefs.” Boland, 115 Wn.2d at 578. In Jackson, the Court held police may not install a

GPS device on a car without a warrant because “vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles.” Jackson, 150 Wn.2d at 262. In Gunwall, the numbers people dialed on their telephones were held to be private affairs, even though the conversations themselves were not recorded. State v. Gunwall, 106 Wn.2d 54, 63-64, 720 P.2d 808 (1986).

Given that banking records, motel registry information, location, telephone records, and even garbage are private affairs protected by article I, section 7, it is clear that the text messages Mr. Stephenson sent are also “private affairs” under our state constitution. Text messages explicitly reveal the kinds of private information that banking records, motel registries, and garbage only implicitly reveal. For instance, while an extramarital affair may be inferred from the fact that two people are staying in the same motel, a text message from one person to the other stating “I love you, but I can’t leave my wife yet” directly discloses the intimate, personal details our constitution protects from government intrusion. There can be no doubt that text messages are private affairs.

The State argued below, and the trial court apparently concluded, that there was no privacy violation because M.

consented to the government's search of both the messages she sent and those she received from Mr. Stephenson. But M. did not have the authority to consent to a search of Mr. Stephenson's text messages, which were meant only for her. Privacy rights are "individually held," and authority of law to invade one person's private affairs is not transferrable to another's. State v. Parker, 139 Wn.2d 486, 497, 987 P.2d 73 (1999). The fact that Mr. Stephenson sent the messages to M. does not mean she had the authority to hand them over to the government, any more than the bank had the authority to consent to a search of Mr. Miles's bank records, or the garbage company had the authority to consent to a search of Mr. Boland's trash. See Miles, 160 Wn.2d at 251; Boland, 115 Wn.2d at 578.

The trial court erroneously concluded, "when someone generates a message knowing it will be received by another, they have given up their right of reasonable expectation of privacy in that particular communication." 1 RP 85. This reasoning is incorrect under multiple Supreme Court decisions holding that sharing private information with another private party does not waive the right to privacy with respect to the government. In Boland, for example, the Court explained, "[w]hile a person must reasonably

expect a licensed trash collector will remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion.” Boland, 115 Wn.2d at 581. Similarly, in Gunwall the Court stated, “disclosure to the telephone company ... of the numbers dialed ... does not alter the caller’s expectation of privacy and transpose it into an assumed risk of disclosure to the government.” Gunwall, 106 Wn.2d at 67. The same is true here. While a person must reasonably expect – indeed intend – the recipient of a text message to view its contents, this expectation does not also imply an expectation of governmental intrusion. Because the private text messages Mr. Stephenson sent to M. were searched and seized without authority of law, the trial court erred in denying the motion to suppress.

b. The messages sent from M. to Mr. Stephenson were inadmissible hearsay. Twenty-six of the messages the trial court admitted were sent from M. to Mr. Stephenson. Exs. 13-26, 28, 30-31, 33, 35, 37, 50, 54, 57, 97, 99, 106. One read, “Because im a teenage who hates life and u didn’t make it any better.” Ex. 16. Another said, “Maybe the opposite place cindy went. Cindi didn’t rape ppl either.” Ex. 20. Another stated, “Because it was true. I needed to tell someon anyway.” Ex. 24. The prosecutor

emphasized these messages, especially the one reading “Cindi didn’t rape ppl either,” in closing argument. 4 RP 110.

The messages that were sent from M. to Mr. Stephenson were inadmissible hearsay. ER 802. The trial court ruled they were admissible because M. “is present on the witness stand, and she can be cross-examined.” 2 RP 106. But Mr. Stephenson did not make a confrontation-clause objection. Hearsay is inadmissible regardless of whether the declarant testifies. See Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (explaining that testimony can violate the prohibition against hearsay without violating the confrontation clause, and vice versa). “An out-of-court-statement is hearsay when offered to prove the truth of the matter asserted, even if the statement was made and acknowledged by someone who is an in-court witness at trial.” State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005) (emphasis added). The trial court abused its discretion in overruling the hearsay objection on the basis that M. testified. The messages sent by M. should have been excluded.

c. All of the messages should have been excluded as irrelevant, cumulative, and substantially more prejudicial than probative. As explained above, M.'s messages should have been excluded under the rule against hearsay, and Mr. Stephenson's messages should have been excluded under article I, section 7. Additionally, all of the messages should have been excluded as irrelevant, substantially more prejudicial than probative, and cumulative. None of the messages from Mr. Stephenson mentioned anything about allegations of sexual misconduct. Thus, they were completely irrelevant and therefore inadmissible. ER 402. The State argued they were relevant to show the "nature of the relationship," but the nature of the relationship was not an element of the charges.

Furthermore, even if the messages were relevant, they were cumulative and substantially more prejudicial than probative, in violation of ER 403. The witnesses, including both M. and Mr. Stephenson, already testified about the nature of the relationship, so text messages were not necessary for this purpose. And the messages themselves were redundant irrespective of the testimony. For example, nine messages say, "PLEASE CALL." Exs. 67-69, 71, 75-76, 89, 114.

The messages were substantially more prejudicial than probative because they portrayed Mr. Stephenson as emotionally unstable. Mr. Stephenson talked about attempting suicide in a couple of messages, and in others he talked about M. hurting his feelings by spending less time with him than she used to. Exs. 27, 29, 32, 34, 40-44. Given the nonexistent or negligible probative value of the messages, the prejudicial nature of the missives substantially outweighed their relevance.

d. The remedy is reversal and remand with instructions to suppress the text messages. The remedy for an article I, section 7 violation is reversal and remand with instructions to suppress the illegally obtained evidence. Parker, 139 Wn.2d at 505. Thus, this Court should reverse and remand with instructions to suppress the text messages sent by Mr. Stephenson. On remand, the text messages from M. must also be excluded as hearsay that is cumulative and substantially more prejudicial than probative.

4. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

a. The prosecution commits misconduct if it shifts the burden of proof to the defendant or implies that in order to acquit, the jury must believe the State's witnesses are lying. Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. Jones, 144 Wn. App.at 290

It is misconduct for a prosecutor to suggest a shift in the burden of proof during a criminal trial. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 547 (1990). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

It is also misconduct for a prosecutor to assert his or her personal opinion as to the credibility of a witness. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The State may not

argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. State v. Jackson, 150 Wn. App. 877, 888, 209 P.3d 553 (2009); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

Where a prosecutor commits misconduct, an appellate court will reverse and remand for a new trial if there is a substantial likelihood that the misconduct affected the jury's verdict. Jackson, 150 Wn. App. at 883. Even if a defendant does not object to improper remarks at trial, reversal is required if the remarks are so "flagrant and ill-intentioned" that they cause prejudice that a curative instruction could not have remedied. Jones, 144 Wn. App. at 290.

b. In this case, the prosecutor improperly told the jury its job was to find the truth, and improperly vouched for her witnesses and implied that in order to acquit, the jury had to find they were lying.

During closing argument in this case, the prosecutor stated:

So essentially in this case what it all comes down to is, do you believe [M.]? Do you believe [M.]? If you believe [M.], if you believe what she told you here in the courtroom when she mustered up all her strength, walked up here, walked past the 14 of you, sat up here on the witness stand – before sitting down, [M.] raised her right hand and promised to tell the truth – if you believe [M.] and you believe what [M.] told you up

here on the witness stand, then you are convinced beyond a reasonable doubt.

4 RP 71. She continued, “you should believe [M.] because she has no motive to lie, absolutely no reason to make this up.” 4 RP 79-80.

The prosecutor concluded:

In courtrooms across the country every day, twelve thoughtful men and women come together. They discuss and they deliberate. Truth is not some political or unattainable standard. ...

Today, the State of Washington turns to you. And there is no smoking gun in this case; there is no DNA, no fingerprints to prove to you that the defendant committed the crimes that he is charged with. Instead you have something more powerful than science. You have the testimony of an eyewitness in this case. You heard the heartfelt words of [M.]. In this trial, let [M.]’s voice be heard – even though sometimes her voice might have been a little bit too quiet – but in this trial, let [M.]’s voice be heard.

At the start of the trial I told you that proof beyond a reasonable doubt would come from the witness stand, and it has because that is the thing about the truth: once you open your eyes to it, it is easy to see. So find in the words of [M.] the truth. Find in her voice proof beyond a reasonable doubt.

4 RP 83-84.

In rebuttal, the prosecutor stated, “As a juror, your job is to search for the truth and the testimony of the witnesses in this case,

and the evidence in this case is what will guide you and help you find your way to the truth.” 4 RP 115.

This court has held that arguments similar to the above are improper and constitute misconduct. State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). In Anderson, the prosecutor stated, “by your verdict in this case, you will declare the truth about what happened.” Id. at 424. He later argued, “Folks, the truth of what happened is the only thing that really matters in this case.” Id. at 425. This Court held, “The prosecutor’s repeated requests that the jury ‘declare the truth’ ... were improper” because the “jury’s job is not to ‘solve’ a case,” but “to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” Id. at 429.

Similarly here, the prosecutor’s statement that “[a]s a juror, your job is to search for the truth” was improper. Also, her statement that “truth is not some unattainable standard” when discussing what juries do every day “around the country” was improper, as was her plea to “find in the words of [M.] the truth.” 4 RP 83-84. It is not the jury’s job to ascertain the truth, and finding the truth is not synonymous with determining whether the State

proved its allegations beyond a reasonable doubt. Anderson, 153 Wn. App. at 429.

The prosecutor committed further misconduct by vouching for her witnesses and by implying that in order to acquit Mr. Stephenson, it had to find that they were not telling the truth. State v. Barrow is instructive. 60 Wn. App. 869, 809 P.2d 209 (1991). There, the defendant's theory was mistaken identity, and in closing argument he sought to undermine an officer's testimony by emphasizing her inexperience and her likely frustration with the case. Barrow, 60 Wn. App. at 871. The prosecutor in closing argument asserted that by giving testimony contradictory to the police officers' testimony, the defendant effectively called the officers liars. Id. at 874. The prosecutor also stated, "in order for you to find the defendant not guilty, you have to believe his testimony and you have to completely disbelieve the officers' testimony. You have to believe that the officers are lying." Id. at 874-75. This Court held that the prosecutor's argument was misconduct, even though "[w]hen a defendant advances a theory exculpating him, the theory is not immunized from attack." Id. at 872, 875.

Similarly here, although the prosecutor was allowed to attack Mr. Stephenson's position that he was innocent of the charges, the prosecutor's vouching and implication that the jury could not acquit unless the State's witnesses were lying constituted misconduct. See State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying").

This Court similarly reversed for improper vouching in Jones, 144 Wn. App. at 292-94. There, the prosecutor urged the jury to believe a confidential informant because he had served as an informant repeatedly and therefore was reliable. The prosecutor also argued that it would not make sense for police detectives to put their own reputations on the line for an informant who was not credible. This Court admonished the prosecutor for relying on facts not in evidence, but also noted, "it is generally improper for prosecutors to bolster a police witness's good character even if the record supports such an argument." Id. at 293.

Here, the prosecutor improperly bolstered her complaining witness's credibility by stating, "she mustered up all her strength, walked up here, walked past the 14 of you, sat up here on the witness stand – before sitting down, [M.] raised her right hand and

promised to tell the truth ... you should believe [M.] because she has no motive to lie, absolutely no reason to make this up.” 4 RP 71, 79-80. The prosecutor then vouched for all of the State’s witnesses, proclaiming:

None of those people have any reason whatsoever to make this up. There is not a single shred of evidence that [M.], her mother, Dicksie, Leslie Stewart, or any of those people have any motive to fabricate in this case or to lodge a false allegation against Leslie Stephenson.

4 RP 80. This argument was improper. See Jones, 144 Wn. App. at 292-94; Fleming, 83 Wn. App. at 214 (improper for prosecutor to argue “there is absolutely no evidence that [the victim] has fabricated any of this or that in any way she’s confused about the fundamental acts that occurred upon her back in that bedroom. And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree”).

The prosecutor also improperly stated that Mr. Stephenson “absolutely has a reason not to be truthful with you,” and described Mr. Stephenson as a “manipulator” four times. 4 RP 78-79, 82. Just as a prosecutor may not bolster her own witness, she may not assert her opinion of the credibility or guilt of the accused. Reed,

102 Wn.2d at 145-46 (finding misconduct where prosecutor called defendant a “liar and manipulator”).

Finally, the prosecutor improperly appealed to emotion and inflamed the passions of the jury by alluding to M.’s alleged lost innocence:

When [M.] looks back on her life as an 11- and 12-year-old child, she will not remember the things that little girls should remember, like trips to Disneyland or camping with her family or her birthday parties with her friends for her 11th and 12th birthday. For [M.] it won’t be that simple. It won’t be that sweet.

..
So for [M.], there is always going to be this scar. It’s not the kind of scar that people can see when they look at her, but it’s a scar nonetheless, and it’s a scar that’s not going to go away.

4 RP 59-60. “[T]he defendant Leslie Stephenson really took [M.]’s childhood from her. He took it away from her, and [M.] will never get it back.” 4 RP 116.

“[M]ere appeals to jury passion and prejudice, as well as prejudicial allusions to matters outside the evidence, are inappropriate.” State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Here, the prosecutor’s introductory remarks were not based on fact but were mere emotional appeals intended to inflame the passions of the jury. This constituted misconduct. State v.

McKenzie, 157 Wn.2d 44, 60, 134 P.3d 221 (2006) (prosecutor's references to 12-year-old's lost innocence were improper).

Because the prosecutor improperly stated the jury's role was to find the truth, vouched for her witnesses, gave her opinion on Mr. Stephenson's credibility, and alluded to the complaining witness's alleged lost innocence, this Court should hold the State committed flagrant and ill-intentioned misconduct, requiring reversal.

5. CUMULATIVE ERROR DENIED MR. STEPHENSON
A FAIR TRIAL.

Even if each of the above errors individually does not warrant a new trial, they certainly do in the aggregate. "Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." State v. Venegas, ___ Wn. App. ___ 228 P.3d 813, 819 (2010). Here, as in Venegas, the multiplicity of improper evidentiary rulings combined with prosecutorial misconduct denied Mr. Stephenson his right to a fair trial. Mr. Stephenson was forced to defend a 26-year-old charge of which he had already been acquitted, face improper hearsay allegations from no fewer than five witnesses, address over a hundred text

messages which had been admitted in violation of his right to privacy and the Rules of Evidence, and hear the prosecutor urge the jury that its job was to “find the truth in the voice” of a child who admitted her allegations were a “story” that she had changed multiple times. This Court should reverse and remand so that Mr. Stephenson may have a fair trial.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Stephenson’s conviction and remand for a new trial.

DATED this 5th day of August, 2010.

Respectfully submitted,


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Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64598-6-I
v.)	
)	
LESLIE STEPHENSON,)	
)	
Appellant.)	

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 COURT OF APPEALS
 FILED
 DIVISION ONE

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF AUGUST, 2010.

x _____ *AMJ*

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