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NO. 65776-3-I

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

REC'D  
JAN 31 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DAMION THOMAS,

Appellant.

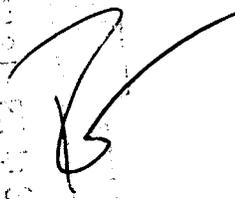
ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's ruling admitting unfairly prejudicial propensity evidence of prior sexual misconduct that did not amount to a common scheme or plan under ER 404(b) violated appellant's right to a fair trial.

2. Appellant's right to testify on his own behalf was violated when the prosecutor drew adverse inferences from his exercise of his constitutional rights.

3. Prosecutorial misconduct during closing argument violated appellant's right to a fair trial.

4. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. ER 404(b) prohibits evidence of prior bad acts unless used to prove a legitimate purpose other than mere propensity. Appellant was charged with rape and molestation of his stepdaughter. Did the trial court err in admitting evidence of two entirely different encounters with other little girls to prove a common scheme or plan?

2. The State may not penalize the exercise of a constitutional right. In closing argument, the prosecutor argued the nine-year-old complaining witness in this case "listened to [appellant] as he opined yesterday. He got the last word in, of course." Did the prosecutor violate

appellant's right to testify on his own behalf with this impermissible comment drawing an adverse inference from his exercise of a constitutional right?

3. Prosecutors may not urge verdicts on improper grounds. The prosecutor in closing argued facts not in evidence, urged the jury to consider propensity evidence in violation of the court's in limine ruling, and repeatedly voiced her own opinions and emotions as if they were those of the jury. Does this pervasive misconduct require reversal?

4. Did cumulative error violate appellant's right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Damion Thomas with one count of first-degree rape of a child, one count of first-degree child molestation, one count of witness tampering, and two misdemeanor counts of violating a sexual assault protection order. CP 6-8. Thomas pled guilty to the misdemeanors, and the jury found him guilty on the other three counts. CP 9, 41-43. The court imposed a determinate sentence of 60 months on the witness tampering charge. CP 53. That sentence is concurrent with indeterminate sentences of 318 months and 198 months up to a maximum of life on the child rape and child molestation charges, respectively. CP 53. Thomas appeals his felony judgment and sentence. CP 60.

## 2. Substantive Facts

Thomas married his wife Sarah<sup>1</sup> three years ago and the two love each other very much. 10RP<sup>2</sup> 59-60, 149-50. He had recently been able to move his family out of his father's cramped apartment and into a place of their own. 10RP 15. He took on the role of stay-at-home dad to Sarah's two daughters, D.G.<sup>3</sup> and A.G. 10RP 121, 123. He also had a good relationship with his daughter D.J. from a previous marriage, who visited every other weekend. 10RP 119. D.J.'s sister L.J. (D.J.'s mother's other daughter, no biological relation to Thomas or Sarah) would usually come along. 4RP 116-17. Although the relationships were technically more complicated, all four girls considered each other sisters. 4RP 92, 116-17; 6RP 73. Thomas was the disciplinarian of the house and also took D.G. to her first day of school. 10RP 124, 144. He attended parent-teacher conferences when Sarah could not and encouraged the children's reading and education. 10RP 124-25.

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<sup>1</sup> Sarah Thomas is referred to by her first name to prevent confusion with other family members. No disrespect is intended.

<sup>2</sup> There are 12 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 12, 2010, Apr. 2, 2010, Apr. 15, 2010; 2RP – Apr. 13-14, 2010. 3RP – Apr. 19, 2010; 4RP – Apr. 20, 2010; 5RP – Apr. 21, 2010; 6RP – Apr. 22, 2010; 7RP – Apr. 23, 2010; 8RP – Apr. 28, 2010 (court reporter Mike O'Brien); 9RP – Apr. 28, 2010 (beginning at 9:58 a.m.); 10RP – Apr. 29, 2010; 11RP – Apr. 30, 2010, May 4, 2010; 12RP – June 11, 2010. Due to a large number of "inaudible" portions, corrected transcripts for April 15 and April 30, 2010 will be filed as soon as they are available.

<sup>3</sup> This brief refers to the minor witnesses by their initials to protect their privacy.

On Saturday, April 25, 2009, the family threw a big party for Thomas' birthday. 3RP 85. While all the children were in the bedroom with an aunt, things turned ugly and the police were called.<sup>4</sup> 4RP 13-14. The next day, Thomas learned he was accused of raping his step-daughter, then eight-year-old D.G. Ex. 19,<sup>5</sup> track 1.

Eleven-year-old L.J. did not want to spend the night at Thomas' home Friday night helping prepare for the party, and when her mother insisted that she go, she put up quite a bit of resistance. 5RP 16; 10RP 20. Because of her behavior, she was sent to the bedroom and did not participate in the party preparations with the rest of the family. 10RP 22. Sarah testified L.J. was not permitted to be with the other children and could not have spoken with D.G. alone that evening. 10RP 23. Nevertheless, L.J. testified she had a quiet talk with D.G. before bedtime in which D.G. told her that Thomas "put his thing inside of her" every night. 4RP 145. When L.J. asked what she meant, D.G. said she meant have sex. 4RP 145-46.

Saturday during the party, all the children and Thomas's sister gathered in the children's bedroom and began to discuss Thomas. 3RP 89. According to a niece, L.J. told D.G. to tell everyone what Thomas had done to her. 3RP 90-91. L.J. claimed she did not tell D.G. to say anything, but

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<sup>4</sup> The reason the police were called was kept from the jury under ER 404(b). 2RP 122-24.

<sup>5</sup> A supplemental designation of exhibits was filed on January 28, 2011.

merely asked her what was wrong when she started to cry. 4RP 151. Thomas' niece testified D.G. told everyone there assembled that Thomas "put his peepee in her butt." 3RP 90-91. L.J. testified D.G. said he "would put his thing inside of her" every night. 4RP 152.

The conversation ended and the children all walked together to their grandmother's apartment just a few blocks away. 3RP 94, 97-98. When Officer Shaub arrived looking for witnesses on the unrelated matter, D.G. approached and told him Thomas raped her. 3RP 55, 57. When Officer Sheppard interviewed D.G. further, she told him her stepfather "put his thing in my butt" four times, most recently four days ago. 3RP 29-31. D.G. clarified that "thing" referred to his private part. 3RP 31. The next day when D.G.'s father came to pick her up, she made similar disclosures to him. 3RP 119.

Late Saturday night, Officer Sheppard brought D.G. and her mother to Harborview Medical Center where D.G. repeated her disclosures of sexual abuse to a social worker and an emergency room doctor. 5RP 60-61; 7RP 16. In the initial examination, the doctor observed no physical evidence or symptoms of abuse. 5RP 65-73. An appointment was made for D.G. to see a specialist at the Harborview Sexual Assault Clinic the following Monday.

Meanwhile, Thomas was arrested and began trying to keep in close contact with his family over the phone. Ex. 19, 35. His calls from jail were

played for the jury. When Sarah told him D.G. was raped, he repeatedly demanded to know who had done it. Ex. 19, track 1. On the phone with D.G., he asked her, "Is that the truth? No? Why say it if it's not the truth?" Ex. 19, track 1. She simply answered, "dunno." Ex. 19, track 1. In a subsequent call, he asked her again, "Why are you lying?" Ex. 19, track 5. At first, D.G. denied lying, but then when Thomas asked her if L.J. told her to say this, she agreed she had. Ex. 19, track 5. Thomas urged his wife to find out more about what exactly L.J. had said to D.G. and to record her statements to prove his innocence. Ex. 19, track 5. Sarah stated she would go over D.G.'s new revelations with her so it would be fresh in her mind when she went to her appointment on Monday. Ex. 19, track 7. In all of the calls, Thomas never threatened D.G. in any way, nor did he ask her to do anything but tell the truth. 6RP 18-19.

On Monday, D.G. told Dr. Wiester at the Sexual Assault Clinic that she did not know what happened when she went to the Emergency Room Saturday night. 7RP 84. She said her stepsister L.J. had told her to say that something happened and she did not know why her stepsister wanted her to tell the police Thomas had touched her. 7RP 84-85. She said no one tried to touch her or hurt her. 7RP 85.

D.G. also wrote a letter, admitted as exhibit 10, that read:

Dear Judge, The things that I said wasn't true because my stepsister told me a big lie of Damion touching me sometime. What she told me was a lie. I'm sorry that she told me a lie and made me tell the police a lie and can you tell the police that I'm sorry for telling them a lie. I'm sorry what I have done to you and the police officers. My stepsister wrong for that. Sincerely, [D.G.]

Exhibit 10. D.G.'s father testified he believed portions of the letter were in Sarah's handwriting, not D.G.'s. 4RP 55-56. D.G. testified her mother told her to write that L.J. told her to lie to the police. 6RP 94. Sarah testified D.G. admitted she lied before ever speaking on the phone with Thomas. 10RP 79-80. She denied telling D.G. what to say or writing the letter for her. 10RP 46, 55.

At trial, D.G. testified Thomas touched her private area four times total. 6RP 45-49. She testified two times were over her pajamas, and two times his "boy private" touched her bare skin and went "halfway inside" her bottom. 6RP 52-57. She said Thomas did not want to go to jail, but told her to tell the truth "sometimes." 6RP 69. She could not identify a time when he told her to lie. 6RP 80-81. She testified her mother told her to lie, to just say "no" to the prosecutor. 6RP 76-78. She said her mother wanted her to lie to the judge, but she would not do so because it is wrong. 6RP 78.

In addition to testimony about D.G.'s disclosures, the court admitted two previous accusations of sexual misconduct, one by L.J. and one by A.L., a school friend of D.G.'s older sister. 8RP 10. The court admitted this

evidence of prior bad acts under the common scheme or plan exception to ER 404(b). As similarities, the court cited the fact that both girls were members of the extended family, that the acts occurred in the family home at night, and that the girls were of similar age and character, soft-spoken and shy. 1RP 40-42. The court concluded the evidence “does establish a common scheme or plan to have sexual contact with young girls. 1RP 40.

L.J. testified she spent the night with Thomas’ family when they were staying with Thomas’ father. The whole family was sleeping together in the living room. She was on the floor, while the other little girls were on a bed together. She awoke because she “felt something touch my bottom.” 4RP 136-38. She testified she felt “like a little poke” between the cheeks of her bottom. 4RP 139. She looked up to see Thomas jump over and lie down next to her. 4RP 136-38. She did not know what part of Thomas touched her, and she agreed someone could easily have stumbled with so many people sleeping on the floor. 5RP 13-14. LJ did not tell her mother at the time, but told her aunt. 9RP 11.

A.L. spent the night with Thomas’ family only one time. 8RP 10-11. As she did not sleep well, she was awake after the other girls. 8RP 15. She noticed a light go on and assumed Sarah had come in to check on them. 8RP 16. Next she felt pressure on the edge of the mattress she and the other girls were sleeping on. 8RP 13, 17. She did not feel anyone touch her. 8RP 32.

She testified the pressure on the mattress was near where D.G. was sleeping. 8RP 17. When she looked up, she saw Thomas, with no shirt, pulling up his shorts from his knees. 8RP 18. She could see the lower part of his bare bottom. 8RP 18. The next morning, she told A.G., who told Sarah. 8RP 22. Sarah called in Thomas and had the girl repeat her accusations to him. 8RP 24. He chuckled and said she was lying. 8RP 24-25.

Thomas testified on his own behalf. He explained he did not blame D.G. for his current situation. 10RP 128-29. He denied ever having sexual feelings for D.G. or touching her inappropriately. 10RP 133. He also denied ever pressuring D.G. or Sarah to lie. 10RP 133. Additional facts pertaining to closing argument are discussed in the relevant argument sections below.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING PRIOR BAD ACT EVIDENCE THAT DID NOT AMOUNT TO A COMMON SCHEME OR PLAN.

L.J. and A.L.'s testimony about their previous encounters with Thomas were highly prejudicial evidence of criminal propensity. The previous incidents did not show "marked similarities" to the charged offenses. State v. DeVincentis, 150 Wn.2d 11, 13, 74 P.3d 119 (2004). The undefined contact with L.J. one night and exposure to A.L. during the sleepover were not evidence of some overarching plan. They were not

admissible under the common scheme or plan exception to ER 404(b)'s general ban on criminal propensity evidence.<sup>6</sup>

- a. Courts Must Use Caution in Admitting Prior Bad Act Evidence to Show a Common Scheme or Plan and Should Err on the Side of Exclusion in Close Cases.

It is well settled a defendant must be tried only for those offenses actually charged. State v. Aho, 137 Wn.2d 736, 744, 975 P.2d 512 (1999). Consistent with this rule, evidence of other bad acts must be excluded unless relevant to a material issue and more probative than prejudicial. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P. 2d 697 (1982); State v. Wilson, 144 Wn. App. 166, 181 P.3d 887 (2008). The purpose of ER 404(b) is to prevent a jury from convicting a defendant based on character or propensity evidence. State v. Trickler, 106 Wn.App. 727, 734, 25 P.3d 445 (2001). That rule provides:

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

ER 404(b).

The State must meet a substantial burden before evidence is admitted under an exception such as to show a common scheme or plan.

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<sup>6</sup> The State acknowledged it failed to provide the notice required by RCW 10.58.090 and thus, L.J. and A.L.'s testimony was not admissible under that statute. 2RP 97.

DeVincentis, 150 Wn.2d at 17. Evidence of prior bad acts are only admissible to prove a common scheme or plan if the acts are: (1) proved by a preponderance of the evidence; (2) admitted for the purpose of proving a common scheme or plan; (3) relevant to prove an element of the crime charged or to rebut a defense; and (4), more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

Caution is called for in applying this exception. DeVincentis, 150 Wn.2d at 18. In exercising its discretion to admit or exclude prior bad acts evidence, “A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” Id. at 17. “The trial court must presume that evidence of prior bad acts are inadmissible and decide in favor of the accused when the case is close.” State v. Kennealy, 151 Wn. App. 861, 886, 214 P.3d 200 (2009); see also State v. Sutherby, 165 Wn.2d 870, 886-87, 204 P.3d 916 (2009) (“In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence.”)

Courts must err on the side of exclusion because of the extreme danger of unfair prejudice that arises from evidence of past crimes. Substantial prejudice is inherent in evidence of prior crimes, and sexual misconduct in particular must be examined very carefully in light of its great potential for prejudice. Lough, 125 Wn.2d at 863; State v. Saltarelli,

98 Wn.2d 358, 363, 655 P.2d 697 (1982). Evidence that a defendant previously committed crimes similar to the current charges is particularly likely to unfairly prejudice a defendant: “There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial.” State v. Smith, 103 Wash. 267, 268, 174 P. 9 (1918).

b. The Superficial Similarities in this Case Indicate only Spontaneous Acts or the Elements of the Crime; They Do Not Show a Common Scheme or Plan.

The requisite cautious approach to evidence of criminal propensity reveals the prior incidents L.J. and A.L. described were not part of a common scheme or plan with the current offenses. Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. DeVincentis, 150 Wn.2d at 21. “Random similarities are not enough.” Id. at 18. To be admissible, the prior bad acts must show a “pattern or plan with marked similarities to the facts in the case before it” such that the various acts are naturally to be explained as caused by a general plan. Id. at 13, 21.

For example, in Lough, the defendant’s prior acts were admitted to show a scheme or plan to drug and rape women. 125 Wn.2d at 847. In State v. Baker, 89 Wn. App. 726, 733-34, 950 P.2d 486, 490-91 (1997),

prior acts were admitted to show a common scheme or plan to sexually assault sleeping children after first rubbing their backs as they fell asleep.

In admitting the evidence under this exception, the trial court relied on State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009), where the court found a common scheme or plan on far less marked similarities than in previous cases such as Baker and Lough. 2RP 40. In Scherner, the court found sufficient evidence of a common scheme or plan because 1) “the girls were of similar prepubescent age and size,” 2) “in each instance Scherner was a trusted relative or friend of the girl,” 3) “in each instance he molested the girl in bed, sometimes after she had gone to sleep,” and 4) “in each case the abuse involved rubbing the girl’s genital area or performing oral sex.” Scherner, 153 Wn. App. at 657.

But the prior acts in this case are not even as similar as those in Scherner. First, the girls in this case were not of similar pre-pubescent age and size. While D.G. was only eight at the time of the charged incidents, in during the incident L.J. described, she was 11 and the incident with A.L. occurred when she was 14. 4RP 112; 6RP 34; 8RP 9.

Second, the court based its decision on a factual error when it concluded the children were all part of the extended family. While L.J. was the child of Thomas’ former wife, A.L. was merely a school friend of D.G.’s sister. 8RP 10. They went to school together for only one year, and she only

spent the night at Thomas' house one time. 8RP 10; see also pre-trial Ex. 8 at p.3. There is no indication she knew the family well. The court abused its discretion in finding a common scheme or plan because its decision rested on this factual error. See, e.g., Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 344-45, 858 P.2d 1054 (1993) (trial court abuses its discretion when its decision is based on facts unsupported by the evidence).

Third, the incidents described by D.G., L.J., and A.L. are entirely different in terms of the extent of the abuse. D.G. described incidents of both touching of the bottom over her pajamas and anal penetration by a penis. 6RP 45-57. L.J. described only one incident of arguably accidental touching over the clothing. 4RP 136-38. She could not say what part of Thomas' body touched her. 5RP 14. A.L. described only an incident of exposure with no contact whatsoever. 8RP 16-18. These disparate incidents do not appear to be "individual manifestations" of a single design or plan. See Kennealy, 151 Wn. App at 887.

The commonalities in this case are limited to the facts that two of the girls were under 12 and all the incidents occurred at night while the girls were in bed in Thomas' home. These similarities are not sufficient to show a common scheme or plan for two reasons. First, the fact that L.J. was also under 12 should not be considered because the age of the child is an element

of the crimes of rape of a child and child molestation. RCW 9A.44.073; RCW 9A.44.083. If the elements of the crime are sufficient to show a common scheme or plan, then every prior incidence of the same offense would be admissible as a common scheme or plan. This would defeat the purpose of the narrow exceptions to ER 404(b). In another context, it would be ridiculous to suggest that every robbery in which there was an unlawful taking was a common scheme or plan with every other robbery. The commonality must be a fact that is not already inherent in the crime.

The fact that each girl was sleeping, or presumed to be sleeping in Thomas' home at the time is also not sufficient similarity. The common scheme or plan exception contemplates a planned occurrence, not just a spontaneous act. Lough, 125 Wn.2d at 856, 860. The similarity must be "not merely coincidental, but indicates that the conduct was directed by design." Id. at 860. The common scheme or plan exception requires facts showing not simply a predisposition to molest children, but a design to gain access, a plan to intentionally interject oneself into children's lives with a plan or design to molest them. Kennealy, 151 Wn. App. at 888 (discussing State v. Sexsmith, 138 Wn. App. 497, 157 P.3d 901 (2007) and State v. Krause, 82 Wn. App. 688, 690-92, 919 P.2d 123 (1996)). This case shows no such design or plan. The fact that each girl was sleeping in Thomas' home at the time merely shows the opportunity for some sort of spontaneous

or even accidental conduct; it does not show a planned activity of any kind. Because it does not show a common scheme or plan, this evidence was also more unfairly prejudicial than probative.

The court abused its discretion in admitting this evidence under the common scheme or plan exception. “[D]iscretion does not mean immunity from accountability.” Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

“The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law.” State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The other conduct admitted in this case was not of a common scheme or plan with the charged offenses. The commonalities the court relied on were minimal, coincidental, and partially based on a

misunderstanding of the facts. This was classic propensity evidence and its admission denied Thomas a fair trial.

c. Admission of this Highly Inflammatory Evidence Prejudiced Thomas.

Thomas was prejudiced because jurors were presented with suggestive testimony of previous sexual misconduct, which they are naturally inclined to treat as evidence of criminal propensity. “A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.” State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). Evidentiary error is prejudicial when, within reasonable probabilities, the error materially affected the outcome of the trial. Neal, 144 Wn.2d at 611. Improper admission of evidence is harmless only “if the evidence is of minor significance in reference to the evidence as a whole.” Id.

Where violent crime is concerned, courts have been vigilant in insisting on marked similarities and in recognizing the prejudice that occurs when evidence of uncharged crimes is admitted. See e.g., State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987). There, the State charged Escalona with assaulting Phillipe Vela with a knife. Id. at 253. Vela violated a pre-trial order by testifying Escalona “already has a record and had stabbed someone.” Id. On appeal, this Court held Vela’s

testimony was so prejudicial, the lower court erred in denying Escalona's motion for a mistrial. Id. at 256. The court first noted there was "no question" the evidence of the prior stabbing was inherently prejudicial because it was likely to impress itself upon the minds of the jurors as logically relevant. Id. Therefore, the court concluded that

despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.

Escalona, 49 Wn. App. at 256 (emphasis added).

Where sex offenses are involved, however, courts and the Legislature have begun to assume that a propensity to commit these types of crimes is a legitimate inference. See, e.g., Kennealy, 151 Wn. App. at 888-889 (discussing cases finding prior sex abuse "generally very probative of a common scheme or plan"); RCW 10.58.090 (abrogating ER 404(b) and permitting evidence of prior sex offenses). Thomas urges this Court to follow the approach of Escalona.

Just as Escalona's prior assault was not legally relevant as to whether he assaulted Vela, Thomas' vague prior acts of sexual misconduct were not legally relevant to whether he committed the offenses against D.G. But as in Escalona, the logical relevance would necessarily impress

itself upon the jury despite the court's instruction. It was especially likely to impress itself upon the jury because the prosecutor relied on these incidents as evidence of Thomas' "sexual desire for children," i.e., his propensity or disposition to commit this type of crime. 11RP 41. Furthermore, she virtually urged the jury to convict Thomas for the uncharged offenses by admonishing him during closing argument to stop "picking on little girls." 11RP 89. Thomas was prejudiced by admission of this evidence not only because it was erroneously admitted, but also because the prosecutor used this evidence to argue in closing that the jury should find guilt based on a criminal propensity. See section C.3.a, infra.

It was prejudicial error to admit evidence of prior incidents involving both L.J. and A.L. However, if this Court should find the incident with L.J. sufficiently similar, admission of the incident with A.L. alone would require reversal. Her account of what occurred was in no way similar to the incidents recounted by D.G. and L.J. Yet its admission allowed the prosecutor to argue D.G.'s testimony was corroborated by an unbiased outsider. 10RP 156; 11RP 42-43. In a case without physical evidence, resting entirely on witness credibility, this error likely affected the jury's decision. The erroneous admission of the completely different incident recounted by A.L. requires reversal.

2. THE PROSECUTOR IMPROPERLY ENCOURAGED THE JURY TO PUNISH THOMAS FOR EXERCISING HIS RIGHT TO TESTIFY.

The prosecutor argued in closing that D.G. “listed to [Thomas] as he opined yesterday. He got the last word in, of course.” 11RP 38. On rebuttal, the prosecutor repeatedly referenced Thomas’ ability to have “the last word.” 11RP 80-81, 90-91. The prosecutor’s argument was flagrant misconduct and constitutional error because the prosecutor drew negative inferences from Thomas’ constitutional right to testify on his own behalf.

a. The Prosecutor’s Argument Was an Impermissible Comment on a Constitutional Right.

Due process prohibits the State from drawing adverse inferences from a defendant’s exercise of a constitutional right, such as the rights to silence and to a jury trial under the Fifth and Sixth Amendments and Const. art. 1, § 22. See, e.g., United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 581, 20 L. Ed. 2d 138 (1968) (capital punishment provision of Federal Kidnapping Act unconstitutionally chilled Fifth Amendment right to silence and Sixth Amendment right to demand jury trial); Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (drawing adverse inference from defendant’s failure to testify unconstitutionally infringed on defendant’s Fifth Amendment rights); State v. Frampton, 95 Wn.2d 469, 478-79, 627 P.2d 922 (1981) (previous Washington death penalty statute needlessly chilled defendant’s right to plead not guilty and demand a jury

trial). The right of an accused person to testify on his own behalf is equally protected as the counterpart to the right to silence. Rock v. Arkansas, 483 U.S. 44, 49-53, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

Drawing negative inferences from these basic rights amounts to a “penalty imposed . . . for exercising a constitutional privilege.” Griffin, 380 U.S. at 614. To protect the integrity of constitutional rights, the courts have held that the State may not draw adverse inferences from the exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (citing Jackson, 390 U.S. at 581; Griffin, 380 U.S. at 614; State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982); Frampton, 95 Wn.2d 469).

In reviewing comments on constitutional rights, courts consider whether the prosecutor “manifestly intended the remarks to be a comment on that right.” State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008) (citing State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). If the comment was “so subtle and brief that it did not naturally and necessarily emphasize” the defendant’s constitutional rights, it may be considered a mere reference, rather than an impermissible comment. Burke, 163 Wn.2d at 216 (internal quotes omitted). In distinguishing mere references from impermissible comments, courts focus on the purpose of the prosecutor’s remarks. Id. The question is whether the comments serve some permissible purpose other than

to invite the jury to penalize the defendant for exercising his constitutional rights.

For example, when the prosecutor invites the jury to infer a defendant is guilty because he exercised his right to silence, that is not a mere reference, but an impermissible comment on this right. Burke, 163 Wn.2d at 222. In Burke, the prosecutor noted Burke ended his interview with police and invited the jury to infer that “the guilty should keep quiet and talk to a lawyer.” Id. The import of the prosecutor’s argument was that “those who invoke their right to silence do so because they know they have done something wrong.” Id.

Here, the prosecutor similarly implied that, simply by exercising his right to testify, Thomas had done something wrong. The prosecutor improperly used Thomas’ exercise of his right to testify as a way to ignite the jurors’ passions against him. The prosecutor’s argument implied that by testifying, he was causing additional harm to a little child:

She told you about those four acts of sexual abuse. Four times. And she told you how that made her feel inside, those mixed emotions that she had, and let’s be clear, I mean, this man was a part of her life. She listened to him as he opined yesterday. He got the last word in, of course.

11RP 38. These comments were “manifestly intended” as a comment on the constitutional right to testify because they served no other logical purpose. They were not connected to any argument regarding the testimony, the

credibility of witnesses, or the law. They were manifestly intended to garner sympathy for D.G. at the expense of Thomas' constitutional right to testify on his own behalf.

The emotional cost of a trial for the complaining witness in a sex crime is undisputed. But Washington courts have laid down careful guidelines to prevent that cost from being used to penalize a defendant for exercising the constitutional rights to trial and to confront witnesses. Comments on the emotional cost of testifying are permissible if used to support a witness's credibility. State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006).

However, such comments go too far when they focus not on the credibility of the witness, but on the defendant's exercise of his constitutional rights. Id. For example, the right to confrontation was compromised in State v. Jones when the prosecutor focused the jury on the traumatic impact of the trial on the child witness and connected it to the defendant's exercise of his rights to jury trial and to confront witnesses. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993). During the child's testimony, the prosecutor stood so as to block her from Jones' view. Id. at 805. During a break, Jones brought this to the court's attention and was permitted to adjust his position so he could see. Id. The prosecutor cross-examined Jones about this, saying, "[W]eren't you frustrated because I was

blocking your view from her such that you could not stare at her as she was testifying?” Id. During closing argument, the prosecutor referred to this again, arguing that while society professes to care about children,

we still have a system that requires that child to have to walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups whom they don’t know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them.

Id. at 805-06. The prosecutor later returned to the point, saying that although Jones professed to care for the child,

he wants to have direct eye contact with her. Why? And what was the result of that direct eye contact that first day? She broke down and she cried and she told you she was afraid. She was afraid of who? Of [Jones]. And the CPS worker told you that outside how upset and how disturbed and how frightened she was so that she refused to walk through those two big doors again.

Id. at 806. The court held this questioning and argument was improper because it invited the jury to draw a negative inference from Jones’ exercise of a constitutional right. Id. at 811-12.

Just as the accused person may not be penalized for forcing the witness to testify at trial, he may similarly not be penalized for exercising his own right to testify on his own behalf. As in Jones, the prosecutor here committed misconduct in violation of Thomas’ constitutional rights because the closing argument emphasized the trauma to D.G., “she told you how that made her feel inside,” and directly connected that trauma to Thomas’

exercise of his right to testify and getting to “have the last word.” 11RP 38. As in Jones, the prosecutor’s argument invited the jury to blame Thomas not just for the crimes he was charged with, but also for traumatizing D.G. by exercising his constitutional rights.

Moreover, in this case, there was not even a logical credibility argument to be made. This case is not similar to Portuondo v. Agard, 529 U.S. 61, 65, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), where the Court held prosecutors may point out that the defendant has an opportunity to tailor or fabricate testimony because he hears all the other witnesses before testifying. Id. This type of argument is permitted because by testifying, the defendant subjects himself to impeachment on the same grounds as any other witness. Id. at 69. The argument merely invites the jury to do something it is entitled to do as part of the truth-seeking function of the adversary system – weigh the defendant’s opportunity to fabricate as it pertains to his credibility as a witness. Id. at 68.

But here, the prosecutor’s comments had no bearing on Thomas’ credibility as a witness. There was no connection between his testimony and the argument that D.G. was forced to listen to Thomas “opining” and “having the last word.” The prosecutor’s comments served only to point out (without any supporting evidence) that Thomas’ exercise of his constitutional right to testify was traumatic for D.G. or constituted yet

another instance of him overpowering her. The prosecutor's argument framed Thomas' constitutional right to testify as merely one more attempt to bully a child. The only possible effect was to encourage the jury to punish Thomas for exercising his right to testify. The prosecutor went too far.

b. The Flagrant Violation of Thomas' Constitutional Right to Testify Requires Reversal.

An impermissible comment on a constitutional right is constitutional error. Burke, 163 Wn.2d at 222. Reversal is required unless "the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error," and that "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Id. (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)). With no physical evidence, the jury was entitled to believe either D.G. or Thomas. It is far from certain beyond a reasonable doubt that the outcome would have been the same without the unconstitutional penalty on Thomas' exercise of his right to testify.

The State may argue Washington's Supreme Court has repeatedly declined to decide whether prosecutorial misconduct that directly impacts a constitutional right is subject to a more stringent harmless error analysis. State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008); Gregory, 158 Wn.2d at 808. However, even under the general standard requiring reversal

when prosecutorial misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction, Thomas' convictions should be reversed. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

First, the comment on Thomas' right to confront witnesses was flagrant and ill-intentioned because it was entirely unsupported by the evidence. No one forced D.G. to be present in court to listen to Thomas' testimony. Assuming she was there, the prosecutor's argument implied, with no supporting evidence, that she had to be there, that he brought her there so he could have the last word. The only possible purpose was to invite the jury to penalize him for exercising his right to testify. Second, it was flagrant because in addition to infringing on Thomas' constitutional right to testify, it also impermissibly urged the jury to decide the case on improper grounds of sympathy for D.G. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) (As a quasi-judicial officer, a prosecutor is duty bound to seek a decision based on reason rather than sympathy or prejudice).

The prejudice is incurable because the jury is unlikely to be able to erase from its mind the implication that poor little D.G. was yet again forced to listen as he "opined" and Thomas' insistence on testifying last gave him the "last word" yet again. 11RP 38. This was also not an isolated comment. The theme of the prosecutor's rebuttal was that Thomas "got the last word." 11RP 80-81, 90-91. Any objection by defense counsel would only have

drawn even more attention to the lamentable hardship the trial necessarily imposed on D.G. and could not have diminished the jury's desire to punish Thomas for it.

c. Alternatively, Reversal Is Required Because Thomas' Attorney Was Ineffective in Failing to Object to This Violation of His Constitutional Rights.

Alternatively, assuming the court finds this constitutional error could have been ameliorated by an instruction to the jury, counsel's failure to object and request such an instruction was ineffective. Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001). Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. Aho, 137 Wn.2d at 745. The

presumption of competent performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

There is “no sound trial strategy” in failing to object when the prosecutor draws adverse inferences from the constitutional right to confront witnesses in a jury trial. Burns, 260 F.3d at 897. In Burns, the prosecutor argued the defendant had humiliated a rape victim by requiring her to re-live the experience through testimony and cross-examination. Id. at 895. The court found the prosecutor’s argument infringed the rights to jury trial and to confront witnesses. Id. at 897. The argument “allowed, and in fact, invited the jury to punish Burns for exercising his constitutional rights.” Id. There could be no strategic reason for failing to object. Id. The failure to object was deficient in this case as well. The prosecutor’s argument here invited a similar penalty when it linked Thomas’ right to testify at trial to forcing D.G. to listen to him opine and him having the last word again.

The Burns court held the defendant was prejudiced by counsel's deficient performance for two main reasons, both of which are present here. First, Burns was prejudiced because the failure to object deprived him of a cautionary instruction that could have ameliorated or even eliminated the prejudice. Id. at 897. Second, the court noted that the failure to object prejudiced Burns on appeal because it left him in the unenviable position of arguing the prosecutor's misconduct was "plain error." Id. at 897-98. This was a more difficult standard to meet, analogous to Washington's requirement that when there is no objection, prosecutorial misconduct requires reversal only if it is so flagrant and ill-intentioned that no instruction could have cured the prejudice. The impact of the prosecutor's argument in this case was no different, and Thomas was also prejudiced when his attorney failed to object to argument that penalized him for exercising his constitutional rights. Thomas' convictions should be reversed either due to flagrant prosecutorial misconduct that directly violated his constitutional rights or due to ineffective assistance of counsel.

3. PROSECUTORIAL MISCONDUCT VIOLATED THOMAS' RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct during closing argument may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const., art. 1, § 22. State

v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); Belgarde, 110 Wn.2d at 508. When objected to, prosecutorial misconduct requires reversal if there is a substantial likelihood the misconduct affected the verdict. Reed, 102 Wn.2d at 145. Even absent an objection, prosecutorial misconduct requires reversal when the prosecutor's remarks were so flagrant and ill-intentioned that they produced an enduring prejudice which could not have been neutralized by a curative instruction to the jury. Belgarde, 110 Wn.2d at 507.

During closing argument the prosecutor committed misconduct by arguing facts not in evidence, appealing to the jury's passion and sympathy, unfairly aligning herself with the police officer and the jury, and espousing personal beliefs as to witness credibility. She argued, contrary to the evidence, that Thomas had "pinned" A.L. to the bed. 11RP 42. She vouched for the police officer's assessment of defense witness Sarah Thomas, stating, "he said what each and every one of us likely felt when Sarah Thomas took the stand." 11RP 22. She clearly indicated personal opinions as to Thomas' credibility by arguing his defense "smells of desperation" and that she was "making fun of [the defense] argument because it's ridiculous." 11RP 88-89. She appealed to the jury's passion and prejudice by arguing Thomas should "pick on someone your own size. Quit picking on little kids. . . . He's picking on little girls who are not going

to stand up for themselves. . . .What he needs to do is . . . man up.” 11RP 89. The argument also violated the court’s in limine ruling prohibiting use of the ER 404(b) evidence as propensity, a “show of sexual desire for children.” 11RP 40. She continued, arguing, “he’s either the most unlucky guy in King County when it comes to little girls under the age of 12, or he’s guilty.” 11RP 43. The pervasively inappropriate closing argument was misconduct that requires reversal in this case.

a. The Closing Argument Improperly Urged a Verdict on Propensity Grounds.

While prosecutors have wide latitude to argue reasonable inferences from the evidence, they may not argue inferences that have been specifically prohibited by the rules of evidence and the court’s in limine ruling. State v. Smith, 189 Wash. 422, 426-28, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993); State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987). In closing argument, “Prosecutors must also take care not to confuse juries about their function and purpose.” State v. Gaff, 90 Wn. App. 834, 844, 954 P.2d 943 (1998). Here, the prosecutor linked prior bad acts to criminal propensity in contravention of the court’s in limine ruling, likely confusing jurors already likely to see prior bad acts as evidence of criminal propensity.

When the State focuses on prior bad acts and emotional appeals to persuade the jury of the defendant's propensity for crime, prosecutorial misconduct requires reversal of the conviction. See State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). Fisher was accused of sexually molesting the daughter of his former wife. Id. at 732. Before trial, the court excluded evidence Fisher physically abused his biological child and his stepchildren unless the defense made delayed reporting an issue. Id. at 734. Despite this ruling, the prosecutor brought up the past abuse with the very first witness, and generated a theme throughout the trial that Fisher's molestation of the victim was consistent with this history. Id. at 747-48. In closing argument, the prosecutor focused on linking the molestation at issue to the past abuse. Id. at 748-49. The court held reversal was required because "In violation of the court's pretrial ruling and in spite of defense counsel's standing objection, the prosecuting attorney directed the jury to consider the evidence of physical abuse to prove Fisher's alleged propensity to commit sexual abuse." Id. at 748.

While the prosecutor in this case did not go as far as in Fisher, the crux of the issue is the same: in closing argument the prosecutor focused on linking the charged crimes to the prior incidents and tried to persuade the jury of Thomas' propensity for this type of crime. 11RP 42 ("that show of sexual desire for children"); 11RP 89 ("Quit picking on little kids"); 11RP

43 (“He’s either the most unlucky guy in King County when it comes to little girls under the age of 12, or he’s guilty”). As in Fisher, the prosecutor violated the court’s pre-trial ruling by directing the jury to consider evidence of past misconduct to prove Thomas’ “alleged propensity to commit sexual abuse.” 165 Wn.2d at 748.

b. The Prosecutor Falsely Told the Jury Thomas Pinned A.L. to the Mattress.

The prosecutor also misstated the evidence of these prior incidents, stating that in A.L.’s case there was “that pressure of pinning her to the mattress.” 11RP 42. “[A] prosecutor may not make statements that are unsupported by the record and prejudice the defendant.” State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993) (citing State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991)); see also Belgarde, 110 Wn.2d at 507 (conviction reversed where prosecutor “testified” during closing argument about a political organization he claimed was responsible for terrorist acts when no evidence supported that argument). When a prosecutor argues facts not in evidence, she becomes an unsworn witness against the defendant. Belgarde, 110 Wn.2d at 507. A.L. never said there was pressure pinning her body to the mattress. She felt a pressure on the side of the mattress as if someone were sitting, or more likely pressing with a hand or a foot, on the edge of the

mattress. 8RP 16-17, 32. This argument falsely portrayed Thomas as using force against A.L.

c. The Prosecutor Unfairly Aligned Herself with the Jury By Presenting Her Own Opinions and Beliefs and Attributing Them to the Jury.

Arguments calculated to align the jury with the prosecutor and against the defendant are improper. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). In Reed, the prosecutor denigrated the defense's expert witnesses as "city doctors who drove down here in their Mercedes Benz." Id. at 143. The court explained that the prosecutor's portrayal of the defense experts as outsiders was "calculated to align the jury with the prosecutor and against the petitioner." Id. at 147.

The prosecutor's closing argument was similarly calculated to align the jury with her and with the police against Thomas. Regarding D.G.'s relationship with L.J., the prosecutor argued, "And for those of us who have the great pleasure of being a big sister or having a big sister, we get it. Or maybe being a little brother or having a little brother, we get it." 11RP 33. She vouched for the police officer's assessment of defense witness Sarah Thomas, and expressly equated his reactions and her own to those of the jury, stating, "he said what each and every one of us likely felt when Sarah Thomas took the stand." 11RP 22. In discussing the jail calls she argued, "Did your mouth not drop open when he said, 'Kids don't matter'? and you

and I know [inaudible].” 11RP 44. She argued, “it’s got to make you a little mad. . . . It makes you just want to reach out and do something.” 11RP 44. Only after encouraging the jury’s desire to “reach out and do something” did she back away and acknowledge the jury’s decision should not be based on emotion. 11RP 44.

d. The Prosecutor Repeatedly Gave Personal Opinions on Witness Credibility and Appealed to the Jury’s Sympathy and Prejudice.

Appeals to passion and sympathy and direct opinions regarding the credibility of witnesses are also misconduct. Belgarde, 110 Wn.2d at 508; State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). When the evidence is disputed, the jury “may be inclined to give weight to the prosecutor’s opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled.” State v. Weatherspoon, 410 F.3d 1142, 1147 (9th Cir. 2005) (quoting United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985)).

Regarding L.J.’s encouragement of D.G.’s initial disclosure, the prosecutor gave direct approbation of the witness’s conduct: “And there’s not a darned thing wrong with that. And you know what there’s also not a darned thing wrong with? [L.J.] giving her the encouragement. . . . There’s nothing wrong with that.” 11RP 34. She also praised D.G.’s confidence saying repeatedly, “Good for her.” 11RP 40. She appealed to the jury’s

passion and prejudice by arguing Thomas should “pick on someone your own size. Quit picking on little kids. . . . He’s picking on little girls who are not going to stand up for themselves. . . .What he needs to do is . . . man up.” 11RP 89.

She also gave personal opinions on Thomas’ credibility and contrasted it with that of D.G.’s father, arguing “And this was a man who, unlike the Defendant, puts his faith in the court system and in his daughter. Unlike the Defendant, who has taken action after action after action to keep the truth from seeing the light of day in this courtroom.” 11RP 36-37. She argued, “The funny little thing about the truth is there’s no hemming and hawing, there’s no talking out of both sides of your mouth like Sarah Thomas did yesterday and the Defendant did.” 11RP 40.

She told the jury she expected Thomas to lie: “he admitted, much to my surprise, [L.J.] didn’t put [A.L.] up to it.” 11RP 42. Finally, she argued, “he’s either the most unlucky guy in King County when it comes to little girls under the age of 12, or he’s guilty.” 11RP 43. She clearly indicated personal opinions as to Thomas’ credibility by arguing his defense “smells of desperation” and that she was “making fun of [the defense] argument because it’s ridiculous.” 11RP 88-89.

The prosecutor also aligned herself with the jury and extolled the virtues of other State witnesses. Referring to D.G.’s counselor Claudia

Kirkland, the prosecutor argued, “I don’t know if it struck you as it did me, what kid wouldn’t open up to her?” 11RP 37. She continued to praise Kirkland, arguing D.G.’s confidence and clarity in testifying was thanks to Kirkland: “don’t you think that had anything to do with the good work that Kirkland was doing with her?” 11RP 37. Regarding Dr. Wiester, she stated, “makes you kind of breathe a sigh of relief knowing she’s dedicated her life to kids who need it, who need her help.” 11RP 46.

The touchstone of a prosecutorial misconduct analysis is the fairness of the trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). In analyzing the prejudice resulting from prosecutorial misconduct, appellate courts do not look at the conduct in isolation, but consider the cumulative effect of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Warren, 165 Wn.2d at 28 (citing State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2008)). By repeatedly couching her own thoughts and reactions as those the jury must be experiencing as well, the prosecutor both improperly relied on her own personal beliefs, appealed to the jury’s passion and prejudices, and improperly placed the jury in the position of already being in her corner, rather than as neutral arbiters of the facts. She additionally misrepresented the evidence and urged a verdict based on propensity. This was flagrant misconduct because the prosecutor disregarded the well-established principles of law prohibiting

these types of argument. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). The misconduct was so pervasive in the argument as to be both flagrant and incurable by instruction. The prosecutorial misconduct in this case requires reversal because it rendered Thomas' trial unfair.

4. CUMULATIVE ERROR REQUIRES REVERSAL.

Every defendant has the right to a fair trial. U.S. Const. amend. VI; Const. art. 1, § 22. Cumulative error may deprive a defendant of this right. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Even unpreserved errors may contribute to a finding of cumulative error. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Even if this Court concludes that the above errors do not individually require reversal, their combined effect does. The error of admitting the past instances of misconduct involving L.J. and A.L. was compounded when the prosecutor used closing argument to impermissibly argue guilt based on criminal propensity and urge the jury to punish Thomas for exercising his constitutional right to testify.

D. CONCLUSION

This Court should reverse Thomas' convictions because his trial was unfair. The jury was improperly exposed to prior acts of misconduct and was urged to punish Thomas for exercising his constitutional right to testify at his trial. Additionally, the prosecutor's theme throughout the closing argument was to align herself with the jury by couching her personal opinions as theirs. Alone or separately, these errors rendered the trial unfair.

DATED this 31<sup>st</sup> day of January, 2011.

Respectfully submitted,

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JENNIFER J. SWEIGERT

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Office ID No. 91051

Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65776-3-1
	)	
DAMION THOMAS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF JANUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAMION THOMAS  
DOC NO. 998703  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF JANUARY, 2011.

x Patrick Mayovsky

2011 JAN 31 PM 4:36  
COURT OF APPEALS  
STATE OF WASHINGTON