IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES EARL WRIGHT, Appellant.	No. 40295-5-II ORDER CORRECTING UNPUBLISHED OPINION

We make the following changes to our unpublished opinion filed in this case on August 23, 2011:

(1) In footnote one on page one, we delete the word "Weaver's" and replace it with "Wright's." We also delete the word "counsel's" and replace it with "counsel." Footnote one now reads:

> [1]During a pretrial hearing, Wright's trial counsel asserted that SNJ had made such statements during an out-of-court pretrial interview.

(2) On the fourth line of the last paragraph of page four, we delete the word "Weaver's" and replace it with "Wright's." That line now reads:

> through cross-examination of SNJ about statements which, according to Wright's trial counsel's . . . .

(3) On the first line of footnote four on page five, we delete the word "Weaver's" and replace it with "Wright's." On the fourth line in the same footnote, we delete "Weaver" and replace it with "Wright." Footnote four now reads:

> [4]Apparently reading from his notes during the pretrial hearing, Wright's trial counsel advised the trial court that during SNJ's pretrial interview, he "wrote . . .

down word for word" what SNJ said about her habit of lying, including, "'I lie a lot,'" and "'but I am not lying about this.'" I VRP at 27, 28. The parties did not include in the record on appeal a transcript of SNJ's pretrial interview. We further note that, because the trial court refused to allow Wright to cross-examine SNJ about these alleged statements, SNJ never actually testified at trial that she had made those statements during her pretrial interview.

IT IS SO ORDERED.

DATED this _____ day of _____, 2011.

_____
Hunt, J.

We concur:

_____
Worswick, A.C.J.

_____
Armstrong, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES EARL WRIGHT, Appellant.	No. 40295-5-II UNPUBLISHED OPINION

Hunt, J. — James Earl Wright appeals his convictions for one count of third degree child molestation and two counts of child rape. He argues that the trial court made several evidentiary errors that warrant reversal: (1) ruling inadmissible SNJ's mother's and grandmother's testimonies about SNJ's untruthful character because close family members are not a neutral or generalized community for purposes of reputation evidence under ER 608(a); (2) barring cross-examination of SNJ about pretrial interview[1] statements, "'I lie a lot'" and "'I'm not lying about this,'"[2] as irrelevant and lacking in the community foundation required for admission of reputation evidence; (3) allowing testimony about an uncharged incident of sexual abuse to show lustful

[1] During a pretrial hearing, Weaver's trial counsel's asserted that SNJ had made such statements during an out-of-court pretrial interview.

[2] I VRP at 28.

disposition or common plan; (4) ruling that the rape shield statute barred testimony about SNJ's consensual sexual contact with another young female; (5) barring as irrelevant cross-examination of SNJ about her friend's sexual abuse allegations against an uncle and the friend's resultant placement into foster care; and (6) barring as irrelevant hearsay cross-examination and/or admission of exhibits about SNJ's internet posts reflecting her age and mood. We affirm.

FACTS

I. Child Molestation and Rape of a Child

Fourteen-year-old SNJ lived with her mother and her mother's boyfriend, James Wright, at her grandmother's Kitsap County home. Wright, whom SNJ had known since she was about seven, had moved in with them just before SNJ began seventh grade in 2007. In February of SNJ's seventh grade year, Wright's friend, Richard Kelsey, inappropriately kissed SNJ; SNJ told Wright, who reprimanded Kelsey. After this incident, SNJ began having "sexual ed[ucation]" conversations with Wright. II Verbatim Report of Proceedings (VRP) at 120. Wright answered her questions by showing her diagrams on the computer and talking to her about sexually transmitted diseases; in March, he used the computer to show SNJ pornographic photos and videos of people engaged in sexual activity.

A. Seventh Grade

Sometime later, on a weekend evening, while SNJ's mother and grandmother were in their rooms, Wright and SNJ watched television together and discussed sexual topics. Wright reached down SNJ's pants and touched inside her vagina. Afterwards, SNJ went to her room; she did not tell anyone that Wright had touched her.

On another occasion, a friend from Tacoma asked Wright, a taxidermist, to help him skin a bear; Wright invited SNJ to come along. On the way back to Kitsap County, Wright pulled over to the road's shoulder, reached his fingers under SNJ's underwear, touched her vagina, stepped out of the vehicle for a couple of minutes, returned, and finished driving home. SNJ did not talk with anyone about what happened.

During the last weeks of seventh grade, SNJ and Wright were watching television and talking about sexual topics; again, Wright touched SNJ's vagina with his fingers under her sweat pants and underpants. After talking for awhile, SNJ performed oral sex on Wright. SNJ did not tell her mother or grandmother because "he was going out with my mom." II VRP at 145.

The next morning, while her mother was gone and her grandmother was still in her bedroom, SNJ went to Wright's room. Wright was lying in his bed and began to masturbate. After SNJ briefly performed oral sex on Wright, he directed SNJ to get hair conditioner for him to use while masturbating. While SNJ kept watch at the door for her grandmother, Wright continued masturbating until white liquid came out of his penis. SNJ did not tell her mother about these events because she believed that her mother would have moved out with Wright, leaving SNJ to live alone with her grandmother.

B. Eighth Grade

At the beginning of eighth grade in 2008, SNJ told her best friend, CH, about the incidents. CH went to the school counselor's office and put both their names on the list to speak with the counselor. Initially, SNJ did not want to talk. But after CH "spilled everything" to the counselor, Ted Fellin, SNJ told Fellin what had happened with Wright. II VRP at 154. Fellin

phoned Child Protective Services (CPS) and the sheriff's office.

Deputy Sheriff Bernard Paul Brown arranged for SNJ's mother to meet him and the CPS social worker at school to implement a safety plan for her daughter. SNJ's mother agreed to keep Wright and SNJ separated; she also told Brown that SNJ "lies a lot." Clerk's Papers (CP) at 7. That same day, Karen Sinclair, from the Kitsap County Prosecutor's Office, conducted a child interview with SNJ.

Later on that day, police drove to Wright's residence, explained why they were there, and read him his *Miranda*[3] rights. Wright denied ever having touched SNJ, but he did acknowledge having shown her pornographic and other websites. He stated that (1) when SNJ told him that his friend Kelsey had kissed her, he had become very angry and terminated his relationship with Kelsey; and (2) when SNJ told him about her physical relationship with a 16-year-old female friend, he showed her the websites to "explain things" to her. CP at 16.

II. Procedure

The State originally charged Wright with third degree child molestation, count I, and third degree child rape, counts II, III, IV, V. For jurisdictional reasons, the State amended the information, removing one count of third degree child rape because it involved an incident that had occurred while SNJ was driving home from Tacoma in Wright's car, and SNJ was unsure whether it had occurred in Pierce County or Kitsap County.

A. Motions in Limine

Both the State and Wright moved in limine for advance evidentiary rulings. The State

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

asked the trial court to prohibit Wright from presenting SNJ's character evidence and reputation for truthfulness *without first making an offer of proof and obtaining court approval* either (1) through cross-examination of SNJ about statements which, according to Weaver's trial counsel's pretrial evidentiary hearing assertions, she had allegedly made during a pretrial out-of-court interview, "'I lie a lot'" and "'but I'm not lying about this'"[4]; or (2) through her grandmother's testimony. The State noted that SNJ's earlier statements about her frequent lying referred only to matters unrelated to the rape and molestation incidents, such as taking cookies from the cookie jar or finishing her homework.

1. SNJ's reputation for truthfulness in community

Attempting to persuade the trial court that SNJ's grandmother and mother's testimonies were admissible to show her reputation in the community for truthfulness, Wright argued:

> I would expect to ask both the mother and the maternal grandmother, consistent with Evidence Rule [608], whether [SNJ] has a reputation in the community for being a truthful person. The rule explicitly allows me to ask that question, and I can tell the court that I expect the answer from both witnesses will be that she does not have a reputation in the community for being a truthful person.

I VRP at 28. Although the trial court granted the State's motion in limine, it did not foreclose Wright from offering evidence of SNJ's reputation for lying at trial after laying a proper foundation.

[4] Apparently reading from his notes during the pretrial hearing, Weaver's trial counsel advised the trial court that during SNJ's pretrial interview, he "wrote . . . down word for word" what SNJ said about her habit of lying, including, "'I lie a lot,'" and "'but I am not lying about this.'" I VRP at 27, 28. The parties did not include in the record on appeal a transcript of SNJ's pretrial interview. We further note that, because the trial court refused to allow Weaver to cross-examine SNJ about these alleged statements, SNJ never actually testified at trial that she had made those statements during her pretrial interview.

On the contrary, the trial court invited Wright to establish a sufficient "community" foundation for admissibility of the proffered "reputation" evidence, despite expressing concern about whether SNJ's mother and grandmother could actually meet these foundational requirements. I VRP at 34. The trial court noted, "I am not saying it does or does not," but "you will have an opportunity to lay [a] foundation if you wish to do so,"[5] at which point Wright would be entitled to have the court rule on whether he had met the foundational requirement and whether the reputation evidence was admissible. I VRP at 34.

[5] More specifically, the trial court noted:

> [U]nder Evidence Rule 608 there is a very strong foundational requirement, and that's to show that this person who is going to testify knows the reputation in the community, and the case law from the older times was the community of Kitsap County, and case law has chipped away at that to the size of the community . . . but what's been presented so far would not in my opinion meet the foundational requirements for showing that they know the reputation in the community, and also, they don't—they are not a generalized and neutral community. . . . [B]ut *you are entitled to attempt to lay foundation outside the presence of the jury, for me to rule on whether that meets the requirements that this is a generalized and neutral community,* but I can tell you, this would be—I mean, the mother and the grandmother don't attend the school of [SNJ] and wouldn't know her reputation in that community, which may—her reputation in the school community and her school may meet the community foundational requirement. *I'm not saying it does or does not,* but I don't think the mother and grandmother would meet that foundational requirement, *although you will have an opportunity to lay foundation if you wish to do so.*

I VRP at 33-34 (emphasis added).

The trial court then emphasized that the case law created a strict foundational requirement of community from an objective person in the community. RP at 37. Although Wright argued that SNJ's self-assessment was objective, the trial court disagreed:

> If you can find some other authority, case law authority . . . I will listen to it, but under 608, how I read the rule, it's generalized community, and the goal is to get somebody objective in the community. . . . It can't be your best friend or your mother or your grandmother.

I VRP at 37. Wright neither raised the issue again nor provided additional authority, not even at trial.

Wright then asked if he could cross-examine SNJ about her reputation for truthfulness in the community. The trial court also denied this request, noting that SNJ's testimony would not be proper reputation evidence admissible under ER 608 because (1) "she is not a neutral person in the community making an objective assessment of what her truthfulness is," and (2) "[i]t doesn't come under impeachment because she hasn't made inconsistent statements that we know of at this point." I VRP at 35-36.

2. SNJ's prior out-of-court statements

Wright also asked for permission to cross-examine SNJ about her interview statements to Karen Sinclair a child interviewer from the prosecutor's office. In denying Wright's request, the trial court noted that Wright was not seeking to impeach SNJ "for statements she has made regarding this case" and that her prior statements had been only about "sneaking things in the house or that type of thing," nothing "tied to this case." I VRP at 35.

3. SNJ's prior consensual sexual history

Next, Wright argued that evidence about SNJ's sexual relationship with a female friend was necessary to show that he was concerned about SNJ's becoming sexually active and that this concern is what prompted him to show her sexual websites and to engage her in lengthy conversations of a sexual nature. The trial court ruled that (1) Wright could testify he believed SNJ was becoming sexually active based on his extensive conversations with her; (2) the "Rape Shield Statute"[6] prevented him from discussing SNJ's relationship with her female friend, I VRP at 47; but (3) the Rape Shield Statute did not prevent him from testifying that he believed SNJ to

[6] RCW 9A.44.020(2).

be angry that she could neither move out of the home nor have her female friend move in with them.

4. Related uncharged incident—lustful disposition; common plan

The State asked the trial court to allow SNJ to testify about the Tacoma to Kitsap County driving incident, which it did not include among the charges against Wright for jurisdictional reasons.[7] The State argued that this testimony was admissible under ER 404(b) to show Wright's lustful disposition toward SNJ. Wright countered that the testimony was inadmissible propensity evidence.

The trial court found that, in its offer of proof, the State had shown by a preponderance of the evidence that the uncharged conduct had occurred. The trial court then ruled that (1) the testimony was admissible under ER 404(b) to show both lustful disposition and common plan or design; (2) evidence of Wright's lustful disposition was relevant to the charged incidents; and (3) the testimony was more probative than prejudicial.

B. Trial Testimony

On direct examination, SNJ described the first time that Wright had sexual contact with her. Proceeding chronologically, the State asked about the second incident she remembered, to which she replied, "I don't know. There was one when we went out to Tacoma. I think it was Tacoma." II VRP at 128. When Wright objected, the trial court held a side bar and, before allowing SNJ to answer the question, gave the jury the following limiting instruction:

> [Y]ou are going to hear evidence for the limited purpose of advising you of the totality of events between Mr. Wright and [SNJ] in the summer of 2008. You are not to consider this evidence you are about to hear as proof of the four charged crimes.

[7] As we previously noted, the State had amended the information, striking one count of third degree child rape that had occurred in Wright's truck because SNJ could not recall whether it had occurred before or after crossing from Pierce County into Kitsap County.

II VRP at 129.

On cross-examination, Wright asked SNJ whether her female friend had been in foster care. The State objected that this subject was irrelevant. Outside the jury's presence, Wright argued:

> [T]he defense theory of this case is that [SNJ] made these disclosures during a period of time when she was having problems with Mr. Wright, and I intend to get into the nature of those problems, and it is my theory that she was trying to get herself placed into foster care placement, and I think it's important for me to explore what she knew about foster care and what she believed—Really what she knows is irrelevant. What she believed to be true is more relevant. And it is our position that she knew that alleging sexual abuse was the fast track into foster care.

II VRP at 166-67. The State acknowledged that Wright could fairly pursue questions about whether SNJ was motivated to make these accusations to get into foster care but argued that questions about SNJ's female friend's experience with foster care were inappropriate and irrelevant even if Wright first laid a proper foundation. The trial court asked Wright for an offer of proof. Wright then asked SNJ whether her female friend had made allegations of sexual abuse against an uncle that had resulted in Child Protective Services (CPS) or the girl's parents becoming involved and preventing further contact with the uncle. SNJ replied, "I think she just didn't see him anymore. . . . I don't know. I didn't know much about her home life." II VRP at 171. The trial court sustained the State's objection to this line of questioning, ruling: "[T]his is not relevant, and that under [ER] 402, it would be confusing to the jury because this doesn't fit together, that [SNJ] knows anything about CPS and [her female friend]." II VRP at 172.

On further cross-examination, Wright explored whether SNJ was angry with Wright and

asked SNJ if she (SNJ) had told a woman that Wright was preventing SNJ from seeing her (SNJ's) young female friend. SNJ did not remember telling this woman that Wright was the reason she was not allowed to see her female friend. But SNJ affirmed that (1) she was angry with both her mother and Wright; (2) it was her mother, not Wright, who had refused to allow her friend to live with them; and (3) both her mother and Wright had refused to let her move out of the family home and to live with a friend. SNJ agreed with Wright's statement that she was "pretty upset" with the situation in the family house and "wanted out." II VRP at 178.

During a break in cross-examination, the trial court considered two proffered defense exhibits—print-outs from SNJ's "Myspace.com" website,[8] where she had posted her thoughts, including posts after her interviews with defense counsel and with the prosecutor. II VRP at 184. Noting that on her website, SNJ had misrepresented her age as 19, Wright argued,

> [F]rom my perspective, a person who has been lying for over a year is going to be tired of lying, they are going to be tired of being constantly asked the same questions about what is going on.
>
> . . . [The State] is free to argue that there are contrary interpretations, and I am not saying that there aren't, but it's my position that [SNJ] set into motion some things in September of 2008 that have had consequences in her life and she is tired of having to deal with the consequences of what her lies have been, and that's how I intend to argue it to the jury.

II VRP at 187. The trial court refused the proffered exhibits under ER 401, ruling:

> They are not relevant to the issues which the jury has to decide. They are not clear impeachment. And the argument that she has been lying for over a year, . . . there were a lot of delays . . . because of your motions in limine . . . but what she personally felt after an interview I don't think is relevant.

[8] Myspace.com is a "private community" on the Internet that allows users to "share photos, journals and interests with [a] growing network of mutual friends." *See* http://collect.myspace.com/index.cfm?fuseaction=misc.about (last visited August 5, 2011).

II VRP at 188-89.

The jury found Wright guilty as charged. Wright appeals.

ANALYSIS

Wright argues that several of the trial court's evidentiary rulings each warrant reversal. We disagree.

I. Standard of Review

We will not disturb a trial court's rulings on a motion in limine or on the admissibility of evidence absent a showing that the court abused its discretion. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). The trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Untenable grounds or untenable reasons exist where the trial court relied on facts unsupported in the record, applied the wrong legal standard, or adopted a view that "no reasonable person would take." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990)). We find no abuse of trial court discretion here.

II. Victim's Reputation in the Community

Wright argues that (1) the trial court erred by precluding SNJ's mother's and grandmother's testimonies that SNJ "lie[d] about everything," and (2) the trial court similarly violated his right to confront the witness against him by precluding SNJ's statement that "[s]he lied quite a bit." Br. of Appellant at 12 (citing CP at 26-28). The State responds that SNJ's family members did not constitute a neutral and general community for purposes of providing a

"reputation" evidence foundation and that SNJ's statement was inadmissible, irrelevant, prejudicial hearsay about other trivial matters. Br. of Resp't at 25. We agree with the State.

A. Neutral and Generalized Community

ER 608 provides that a party may attack or support a witness's credibility through evidence of the witness's reputation for untruthfulness in the community. "'To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general.'" *State v. Gregory*, 158 Wn.2d 759, 804, 147 P.3d 1201 (2006), (quoting *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993)). In determining whether the proffered "community is both neutral and general," the trial court considers factors such as "the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community." *Land*, 121 Wn.2d at 500. The determination of whether a party has established proper foundation for reputation testimony is within the trial court's discretion. *Land*, 121 Wn.2d at 500.

In *Gregory*, our Supreme Court held that the victim's family was neither neutral nor sufficiently generalized to constitute a community under ER 608. *Gregory*, 158 Wn.2d at 805. Wright attempts to distinguish *Gregory* by arguing that the *Gregory* family relative's testimony was based upon knowledge he obtained "'several years prior to the time of trial,'" but here SNJ's grandmother and mother based their testimonies on current information. Br. of Appellant at 14 (quoting *Gregory*, 158 Wn.2d at 805). Although Wright correctly notices that the basis for SNJ's relatives' proffered testimony was not stale, Wright ignores the more significant holding:

[T]he inherent nature of familial relationships often precludes family members from

> providing an unbiased and reliable evaluation of one another. In addition, the "community" with which Larson had discussed R.S.'s reputation included only two people, Larson and R.S.'s sister. Any community comprised of two individuals is too small to constitute a community for purposes of ER 608.

Gregory, 158 Wn.2d at 805 (citing *State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1991)). Here, as in *Gregory*, Wright's proffered reputation testimony from two persons within SNJ's tight immediate family circle meets neither the general community nor the neutrality requirements. *Gregory*, 158 Wn.2d at 805.

Furthermore, Wright made no offer of proof to lay the required foundation, despite the trial court's invitation "to attempt to lay foundation outside the presence of the jury." I VRP at 34. Nor does Wright offer additional supporting argument on appeal. Accordingly, his first exclusion of reputation evidence argument fails.

B. Confrontation of Witness; Victim's Character

Wright's next argument—that the trial court violated his right to confront the witness against him by denying admission of SNJ's relevant statement that she "lie[s] a lot"[9]—also fails. The same is true of Wright's bald argument (without further elaboration) that the trial court should have admitted SNJ's statement under ER 404(a)(2).

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution provide a criminal defendant with the right to confront and to cross-examine the witnesses against him.[10] Wash. Const. art. I, § 22; U.S. Const. amend VI. "Our

[9] Br. of Appellant at 15.

[10] The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). If an absent witness's statement is of a testimonial nature, the trial court may not admit that statement unless the witness is unavailable and the defendant had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Where cross-examination exposes untrustworthiness or inaccuracy, denial of confrontation "'would be constitutional error of the first magnitude.'" *State v. Ryan*, 103 Wn.2d 165, 175, 691 P.2d 197 (1984) (quoting *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)).

Wright's argument overlooks that SNJ did testify and that he did cross-examine her. "'[T]he principal means by which a criminal defendant tests the believability of a witness and the truth of her testimony is through cross-examination.'" *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998) (quoting *Kentucky v. Stincer*, 428 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)). Although, the trial court denied Wright's request to exam SNJ about her reputation in the community,[11] the trial court did not prevent him from exploring SNJ's general credibility on cross-examination. On the contrary, the trial court merely precluded admission of a statement that, according to Wright's trial counsel's assertions, SNJ had made to him during a pretrial out-of-court interview[12]; in so doing, it did not violate Wright's confrontation rights.

Article I, section 22 of the Washington Constitution provides:

> In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.

[11] The trial court held that SNJ was "not a neutral person in the community making an objective assessment of what her truthfulness is." I VRP at 35.

The trial court also relied on facts in the record and reasonable grounds to rule that (1) SNJ's "I lie a lot" statement was about "sneaking things in the house or that type of thing" and, thus, was "not tied to this case"; and (2) thus, she was "not being impeached for statements she has made regarding this case." I VRP at 35. Because the trial court reasonably relied on facts in the record, it did not abuse its discretion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

III. Uncharged Sexual Abuse

Wright next argues that the trial court abused its discretion when it allowed SNJ's testimony about uncharged sexual molestation to show a common plan and to show his lustful disposition because (1) the uncharged act was too unlike the charged incidents to be relevant, and (2) the trial court failed to address the unfair prejudice of this testimony. The State responds that the trial court properly admitted evidence of Wright's previous bad acts by (1) first requiring an offer of proof, (2) finding the evidence more probative than unfairly prejudicial, and (3) giving a limiting jury instruction. The record supports the State's argument.

A. ER 404(b) Prior Bad Acts

Evidence of prior bad acts is inadmissible to show conformity therewith but admissible to show other purposes such as intent or plan. ER 404(b); *State v. Kilgore*, 147 Wn.2d 288, 291-92, 53 P.3d 974 (2002). Before admitting evidence of prior bad acts, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred, (2) identify an admissible purpose for the evidence, (3) find the evidence materially relevant to that purpose, and

[12] "I lie a lot." I VRP at 28.

(4) balance the probative value of the evidence against any unfairly prejudicial effect on the fact-finder. *Kilgore*, 147 Wn.2d at 292 (citing *State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995), *cert. denied*, 539 U.S. 916 (2003)). Wright's arguments involve the last two factors: the identified purpose of common design and/or lustful disposition and being more probative than prejudicial.

1. Common Design

The trial court properly admits evidence of prior bad acts to show a common scheme or plan "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" or "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *State v. Lough*, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). Such is the case here.

Wright reasserts his trial court argument that the facts of the uncharged incident are too dissimilar to the charged incidents to provide a proper purpose or relevance and thus do not show a common plan or scheme. Wright bases this argument on the fact that the charged incidents all took place in the family home but that this uncharged incident took place in Wright's truck en route somewhere between Tacoma and Port Orchard. Wright argues that this is important because (1) the charged incidents occurred in a small house where other people were physically nearby; and (2) in contrast, the uncharged incident occurred "in a fairly remote area." Br. of Appellant at 18 (quoting I VRP at 71).

We have previously affirmed the trial court's exercise of discretion in admitting prior misconduct to show a common scheme or plan, despite that the acts occurred at different

locations, because the common features among the acts showed a plan or design to gain access to children to enable sexual abuse of them. *State v. Kennealy*, 151 Wn. App. 861, 889, 214 P.3d 200 (2009), *review denied*, 168 Wn.2d 1012 (2010). In *Kennealy*, the charged offenses involved several children who were not Kennealy's family members but who were staying in his apartment complex and to whom he gave gifts as enticements for interaction; the uncharged prior misconduct involved his daughter and three of his nieces, which occurred in different locations, did not involve gifts, and, involved a different type of touching in one of the prior incidents. *Kennealy*, 151 Wn. App. at 868-69, 888-89. Nevertheless, we held that, despite the differences, the prior misconduct showed the defendant's "design or pattern to gain the trust of children between the ages of 5 and 12 to allow him access to the children in order to sexually molest them." *Kennealy*, 151 Wn. App. at 889.

The trial court ruled that Wright's prior misconduct was relevant to show a common plan, reasoning:

> . . . [T]he molestation was preceded by talk which may be characterized as sex education, or discussion with [SNJ] about sexual activity, and also viewing pornographic materials on a computer . . . there was some grooming behavior here to make [SNJ] comfortable talking about sexual topics with Mr. Wright, and make her comfortable viewing pornographic images or sites on the computer, making her feel comfortable in his presence.
>
> Mr. Wright was a resident of this home and was aware of the patterns of persons residing in the home in terms of him being able to have [SNJ] isolated or be private with her, without other persons such as the grandmother being aware of the contact that was being made between [SNJ] and Mr. Wright . . . and this common plan or overarching kind of plan was that he would be able to have sexual contact with her, and I think there was a common plan here that is shown through the two prior incidents and this third incident, the third one, the uncharged one being he is able to pull over into a remote area and have sexual contact with her.

I VRP at 81-82.

Here, the uncharged incident fell within Wright's larger plan to groom SNJ by first talking with her about sex generally, then shifting and escalating his behavior by showing her pornographic images, and then exploiting his relationship with SNJ (whether in the house or in his truck) to have time alone with her in order to perpetrate very similar incidents of sexual abuse repeatedly. *See Lough*, 125 Wn.2d at 855 (common plan existed "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" or "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes."). Although Wright is correct that he did not physically isolate SNJ before sexually abusing her in the house, as the trial court noted, Wright used his knowledge "of the patterns of persons residing in the home" to "isolate[ ]" SNJ from household protections. I VRP at 82.

Wright also argues that the trial court erred by finding a purpose of common scheme or plan because we previously held:

> [T]he common features required by *Lough* to establish a plan must be features other than those common to most rapes. Otherwise, all evidence of other rapes would be admissible to show plan, and ER 404(b), which prohibits propensity evidence, would be meaningless.

Br. of Appellant at 21 (quoting *State v. Dewey*, 93 Wn. App. 50, 57-58, 966 P.2d 414 (1998), *review denied*, 137 Wn.2d 1024 (1999), *abrogated by State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003)). Wright's argument fails, however, because in *DeVincentis*, our Supreme Court rejected this portion of *Dewey*'s holding, clarifying that "*Lough* requires similarity of the acts, not uniqueness." *DeVincentis*, 150 Wn.2d at 21. We hold that Wright fails to show that the trial court abused its discretion in this evidentiary ruling.

2. Lustful Disposition

Washington "has consistently recognized that evidence of collateral sexual misconduct may be admitted under Rule 404(b) when it shows the defendant's lustful disposition directed toward the offended female." *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991) (internal citations omitted). To be admissible for this purpose, the misconduct must directly connect to the offended female,[13] not merely reveal the defendant's general sexual proclivities. *Ray*, 116 Wn.2d at 547.

Wright challenges the trial court's admission of evidence to show his lustful disposition toward SNJ, arguing that, unlike the facts in the relevant case law, which involved a lengthy time lapse, he had "extensive contact with SNJ." Br. of Appellant at 19. This argument fails because in neither of the cases to which he refers does the court find significant the time-lapse (or lack thereof) between the prior misconduct and the presently charged misconduct. *Ray*, 116 Wn.2d at 546-48; *State v. Guzman*, 119 Wn. App. 176, 183, 79 P.3d 990 (2003), *review denied*, 151 Wn.2d 1036 (2004).

In *Ray*, the defendant argued that the previous misconduct, which had occurred ten years earlier, was "too remote in time" to be relevant to the current charges. *Ray*, 116 Wn.2d at 547. Our Supreme Court, however, viewed this time-lapse to be insignificant, noting that during this time, the victim was in foster care and, thus, Ray "could not approach her." *Ray*, 116 Wn.2d at 547-48. In *Guzman*, the defendant distinguished his case from *Ray*, arguing that he (Guzman)

[13] "'The important thing is whether it can be said that it evidences a sexual desire for the particular female.'" *Ray*, 116 Wn.2d at 547 (quoting *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983)).

had had regular contact with the victim during the six years *between* the alleged incidents. *Guzman*, 119 Wn.2d at 183. Nevertheless, the court reiterated the sentiment that "'[t]he limits of time over which evidence may range lies within the discretion of the trial court.'" *Guzman*, 119 Wn. App. 183 (alteration in original) (quoting *Ray*, 116 Wn.2d at 547). In both cases, our Supreme Court noted that the evidence showed lustful disposition, despite time periods in which no sexual abuse occurred. *Ray*, 116 Wn.2d at 546-48; *Guzman*, 119 Wn. App. at 183. Here, Wright's argument—that his prior misconduct does not show a lustful disposition toward SNJ because he had "extensive contact" with her—is illogical. Br. of Appellant at 19. We again hold that Wright has not shown abuse of trial court discretion in allowing in this evidence.

3. Probative value versus unfair prejudice

ER 403 requires exclusion of evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). "Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984) (citing *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982)). But in cases where the only other evidence is the testimony of the child victim and there is very little other proof that sexual abuse has occurred, courts have generally found the probative value of prior misconduct to be substantial.[14] *State v. Sexsmith*, 138 Wn. App. 497,

[14] As we noted in *Kennealy*, 151 Wn. App. at 890 (citation omitted), for example:

> The evidence is strongly probative because of the secrecy surrounding child sex abuse, victim vulnerability, the frequent absence of physical evidence of sexual abuse, the public opprobrium connected to such an accusation, a victim's unwillingness to testify, and a lack of confidence in a jury's ability to determine a child witness's credibility.

506, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008). Reviewing courts give the trial court wide discretion to balance the probative value of evidence against its potentially prejudicial impact. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997).

Contrary to Wright's assertion, the trial court did address the potential prejudicial effect of admitting this evidence. The trial court weighed on the record the probative value of SNJ's testimony against its potential for prejudice. The trial court determined that, because the evidence showed both lustful disposition and a desire to have contact with SNJ when she was alone, its probative value outweighed unfair prejudice to Wright. Moreover, at Wright's request, before SNJ's testimony about Wright's prior sexual abuse of her, the trial court gave the jury a limiting instruction that did not use either the words "common scheme or plan" or the words "lustful disposition," I VRP at 84, but, instead, qualified the testimony as "for the limited purpose of advising you of the totality of events between Mr. Wright and [SNJ]." II VRP at 129. Nothing in the record demonstrates that the trial court abused its discretion or based its decision on untenable grounds or reasons in admitting this testimony, especially, as accompanied by an appropriate limiting instruction.

IV. Victim's Past Sexual History

Wright argues that the trial court erred when it precluded him from referencing SNJ's consensual sexual history because, he contends, that evidence rebutted the assertion that he had sexualized her and it showed that she had motivation to lie. He further argues that this error violated his Sixth Amendment right to cross-examine SNJ with specificity and prevented him from presenting his theory of the case. The State correctly responds that the trial court precluded only SNJ's sexual history, which did not prevent Wright from arguing his theory of the case. Br. of Resp't at 31.

The trial court properly denies evidence of past sexual behavior for the general purpose of

attacking a rape victim's credibility; and it properly admits such evidence to prove the victim's consent only in limited circumstances. *State v. Hudlow*, 99 Wn.2d 1, 8-11, 659 P.2d 514 (1983); RCW 9A.44.020(2) (the "Rape Shield" Statute). The Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution give criminal defendants (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Davis*, 415 U.S. at 315; U.S. Const. amend VI; Wash. Const. art. I, § 22. But a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. *Hudlow*, 99 Wn.2d at 15 (citing *Washington v. Texas*, 388 U.S. at 16).

Wright's argument misrepresents the scope of the trial court's ruling. For example, although precluding him from cross-examining SNJ about her sexual history, the trial court did permit him to introduce evidence to support his theory of the case:

> He can testify that he believed she was becoming sexually active based on conversations he had [with] her without going into [her female friend] and anybody else. That is out there under the Rape Shield Statute. He can say they had extensive conversations.

I VRP at 47. The trial court also permitted Wright to introduce evidence about his perception that SNJ was sexually active:

> [T]he fact that he believed she was sexually active, that's fine. The fact that she wanted to have [her female friend] move in and he disagreed, and then she wanted to move out with somebody else, [CH], that's fine. Obviously [her female friend] would have been a point of contention in that she wasn't allowed to move in when that's what [SNJ] wanted to have happen.

I VRP at 48-49.

Furthermore, SNJ admitted on the witness stand that she had come to Wright with

questions about sex. And, on cross-examination, Wright inquired, "[I]sn't it also true that at some point in the summer of 2008, that you actually asked if [your female friend] could move into the family home?" II VRP at 176. In response, SNJ clarified that this request had occurred during the school year, rather than the summer, but she readily admitted that the fact was true. When Wright then asked, "You were upset about that?" she replied, "Yes." II VRP at 176. The State did not object to this cross-examination; nor did the trial court hinder it.

The trial court precluded only the limited sexual aspect of SNJ's relationship with her female friend, which had no independent relevance to the charges against Wright or to SNJ's credibility. We hold, therefore, that Wright fails to show that the trial court abused its discretion or violated his confrontation rights.

V. Cross-Examination about Friend's Foster Care Placement

Wright next argues that the trial court erred by limiting his cross-examination of SNJ. Wright sought to explore SNJ's knowledge about her friend's foster care having resulted from the friend's allegations of sexual abuse, a topic allegedly part of his theory of the case; the trial court precluded this topic from SNJ's cross-examination. The State responds that at trial, Wright's offer of proof failed to show that SNJ had enough knowledge of her friend's situation to be relevant. We agree with the State.

Although a criminal defendant has a right to argue his theory of the case, he has no constitutional right to have irrelevant evidence admitted in his defense. *Gregory*, 158 Wn.2d at 790-91. Nevertheless, Wright argues that the trial court denied him his constitutional right to argue his theory of the case. But he overlooks that when the trial court gave him an opportunity

to offer proof supporting his theory, he provided no such proof. At trial, Wright asked to explore SNJ's knowledge of her female friend's foster care. Without the jury present, he asked SNJ:

> [Wright]: [SNJ], to the best of your knowledge, has [your female friend] ever been placed in foster care?
> [SNJ]: I don't know.
> [Wright]: To the best of your knowledge, has [your female friend] ever made allegations of sexual abuse against anyone?
> [SNJ]: Yes.
> [Wright]: Who has she made allegations of sexual abuse against?
> [SNJ]: One of her uncles.
> [Wright]: Did the two of you discuss that?
> [SNJ]: Yes.
> [Wright]: And as a result of her making allegations against her uncle, were there any—did Child Protective Services, CPS ever get involved?
> [SNJ]: I don't know.
> [Wright]: To the best of your knowledge, as a result of her making allegation against her uncle, was there anything ever put in place by any official body that prevented her from having contact with her uncle?
> [SNJ]: I don't know. I just—I don't think—I think she just didn't see him anymore.
> [Wright]: And, so were for instance her parents preventing her from seeing her uncle as a result of the allegations?
> [SNJ]: I don't know. I didn't know much about her home life.

II VRP at 170-71.

Here, the trial court acted within its discretion by finding this questioning irrelevant and confusing to the jury. Wright had opportunity to present his theory of the case but he failed to present any evidence to support his theory. In short, the trial court did not abuse its discretion in this evidentiary ruling; nor did it improperly constrain Wright's ability to present his defense.

VI. Refused Exhibits

Wright next argues that the trial court erred by refusing to admit exhibits of SNJ's internet postings about her mood after interviews with both parties' counsel because the postings showed

she was tired of lying about the allegations. The State responds that the internet postings were irrelevant hearsay. The State is correct.

A trial court properly admits hearsay statements to show the victim's then-existing state of mind when the victim's state of mind itself is relevant to any material issue before the jury and is not more prejudicial than probative. *State v. Cameron*, 100 Wn.2d 520, 531, 674 P.2d 650 (1983). Such evidence is inadmissible, however, where it bears only a remote or artificial relationship to the legal or factual issues actually raised. *Cameron*, 100 Wn.2d at 531.

Here, the trial court considered and rejected Wright's proffered exhibits comprising print outs of SNJ's "Myspace.com" website[15], where she posts her thoughts daily. After her interview with defense counsel, SNJ posted: "tired of all this f**king sh*t! and just want this all to go away!" Ex. 10. Similarly, after her interview with the prosecutor, SNJ posted: "i want it over i am so F**KIN tired of this sh*t just let it be done please i just want to get it over with. . .i hate him. . .and her. . .why did this happen." Ex. 11. Wright argues that these statements show SNJ's bias and motive to lie. The State responds that the exhibits "showed little more than that the victim was tired of, and frustrated by, the criminal process: a feeling that would come as no surprise to anyone, and by itself is no indicator of either truthfulness or fabrication." Br. of Resp't at 37.

The trial court refused the proffered exhibits, stating:

> They are not relevant to the issues which the jury has to decide. They are not clear impeachment. And the argument that she has been lying for over a year, . . . there were a lot of delays . . . because of your motions in limine . . . but what she personally felt after an interview I don't think is relevant.

[15] II VRP at 184.

II VRP at 188-89. Although, SNJ's internet posts indicated displeasure and impatience, they bore "only a remote or artificial relationship to the legal or factual issues actually raised." *Cameron*, 100 Wn.2d at 531. Therefore, we again hold that the trial court did not abuse its discretion in ruling that SNJ's internet postings lacked relevance and impeachment value.

VII. Harmless Error

Finally, Wright argues that the trial court's errors were not harmless because (1) the evidence was not overwhelming against him; (2) errors that violate the confrontation clause are subject to the stricter constitutional error analysis; and (3) the cumulative error doctrine applies to the trial court's multiple evidentiary errors, which insulated SNJ from impeachment. These arguments fail.

A trial court's evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Where an error violates a constitutional mandate, we apply the more stringent "'harmless error beyond a reasonable doubt'" standard. *Cunningham*, 93 Wn.2d at 831 (quoting *State v. Nist*, 77 Wn.2d 227, 234, 461 P.2d 322 (1970)). The cumulative error doctrine applies when the trial court has made several errors, none of which standing alone is sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

In arguing that the trial court made multiple evidentiary errors, Wright fails to show that

the trial court abused its discretion in any of these rulings. Instead, he essentially asks us to assess the evidence in his favor including: (1) that he confessed only to showing internet pornography to SNJ; (2) that his girlfriend (and SNJ's mother) testified Wright had distinguishing marks on his genitalia, but SNJ testified she noticed no marks on him; (3) that during her testimony, SNJ stated, "'I don't remember' at least 28 times and 'I don't know' at least 12 times"; and (4) that SNJ's testimony was unclear about the time line of the sexual assaults. Br. of Appellant at 34. Wright ignores that the jury considered all of this evidence, and he does not explain why or how different evidentiary rulings below would have altered the jury's decision.

As part of his cumulative error argument, Wright contends that the jury rendered its verdict without knowing that SNJ's mother and her grandmother considered SNJ to be a habitual liar. The record does not support this contention. On the contrary, the jury rendered its verdict after (1) observing SNJ personally take the stand and testify about her allegations against Wright; and (2) the trial court instructed the jury to judge "the credibility of each witness." CP at 41 (Jury Instruction No. 1). Thus, the jury could infer that SNJ's mother and grandmother did not believe SNJ from their general testimony on Wright's behalf and from SNJ's mother's declaration that she remained in a romantic relationship with Wright and intended to marry him.

Again, we discern no evidentiary errors demonstrating that the trial court abused its discretion. But even assuming, without deciding, that the trial court did err, Wright fails to show that within reasonable probabilities, the outcome of the trial would have been materially affected had the jury been able to hear SNJ's mother's and grandmother's assessments of her credibility when they testified.

VIII. Statement of Additional Grounds

In his Statement of Additional Grounds (SAG)[16], Wright asserts that (1) the trial court abused its discretion by excluding the testimony of potential defense witness, EM; and (2) there was insufficient evidence to support a verdict of guilty beyond a reasonable doubt. We disagree.

Wright argues that the trial court erred by ruling that EM's testimony had no relevance. SAG at 5. During cross-examination of SNJ, Wright's counsel asked:

> Q: Who is [EM]?
> A: Um, a friend of his daughter, I think. I don't know.
> Q: A friend of whose daughter? A friend of Mr. Wright's daughter?
> A: I think so.
> Q: Is she a 17-year old girl?
> A: I think so.
> Q: Do you recall [EM] and her mother being involved in a car accident in September of 2008?
> A: Yes.

II VRP at 216. At this point, the State objected and asked to address the issue outside of the presence of the jury and the witness. The State challenged the relevance of the car accident and whether it would lead to relevant material. Wright explained that EM could testify about having had a conversation with SNJ on September 9, 2008, in which SNJ had "bragged to [EM] that she was a virgin," and that at no time did SNJ disclose to EM that Wright had sexually molested her. II VRP at 220. The trial court excluded the testimony, ruling, "I think it's irrelevant and it's speculative that she would tell the daughter of a friend that she is not close to." II VRP at 222.

Wright argues that, when the trial court precluded cross-examination about SNJ's conversation with EM (especially where EM did not testify), it denied him the opportunity to

[16] RAP 10.10.

show that SNJ had a reputation for lying and getting other people into trouble. But the trial court did not exclude EM as a witness or prevent the jury from hearing this evidence. Rather, it appears that it was Wright who decided not to call EM, despite previously including her name on his witness list. Furthermore, the State agreed that Wright could ask SNJ if she had disclosed the sexual abuse to EM, but Wright did not do so. Given these facts, we hold that the trial court acted within its discretion because its view that the proposed cross-examination was speculative and irrelevant was not a view that "'no reasonable person would take.'" *Rohrich*, 149 Wn.2d at 654 (quoting *Lewis*, 115 Wn.2d at 298-99).

Next, Wright argues that the State's evidence was insufficient to support the jury's convicting him of third degree child molestation or third degree child rape. He does not indicate, however, that the State failed to prove an element of the crime; instead, he reiterates generally that the State offered insufficient evidence to meet the criminal standard of "beyond a reasonable doubt." SAG at 9. RAP 10.10(c) provides:

> Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Except as required in cases in which counsel files a motion to withdraw as set forth in RAP 18.3(a)(2), the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review.

Because Wright does not inform us of the nature and occurrence of his claim of insufficient evidence, his claim is too vague and, therefore, we do not further address it.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

I concur:

Worswick, A.C.J.

I concur in result:

Armstrong, J.