No. 84003-2

WIGGINS, J. (dissenting)—Alberto Perez-Valdez sought to introduce testimony about an arson committed by his accusers as evidence of motive to fabricate allegations against him. Because Perez-Valdez was erroneously prohibited from introducing admissible evidence to challenge the alleged victims' credibility, I dissent.

Rape of a child is a heinous offense. But it is also terrible to send Perez-Valdez to prison for life after depriving him of relevant evidence that the alleged victims had a motive to lie. The presumption of innocence and requirement of proof beyond a reasonable doubt compel us to allow defendants to present relevant evidence in their defense. This is particularly true where the case rests on the uncorroborated testimony of two alleged victims.

The alleged victims' testimony is highly questionable. S.V. testified that from ages 10 through 13, Perez-Valdez fully penetrated her with his penis over 500 times without a condom. In addition, S.V. stated that she had unprotected sex with her stepbrother, Jose, at least once a month over the same three year period. A.V. testified that starting at age eight, Perez-Valdez had unprotected sex with her six to seven times per month for a period of six years. A.V. also

had unprotected sex with Jose "pretty often." 1 Verbatim Report of Proceedings (VRP) (Oct. 23, 2007) at 112. Neither girl became pregnant despite the alleged frequency of the rapes. S.V.'s medical examination revealed that there was no evidence of scarring or disruption to her hymen. A.V. had a disruption to the back of her hymen at the 6:00 position. Expert medical testimony concluded that after the number of penetrations A.V. alleged, it was "unusual to have a single isolated disruption at 6:00." 2 VRP (Oct. 25, 2007) at 358.

A.V. had a reputation for being untruthful. With a straight face, A.V. would look school officials in the eye and tell them something that they knew was absolutely not true. S.V. testified that A.V. "didn't tell the truth a lot." 1 VRP at 62. Even A.V. stated that she "didn't have a good reputation [for being a truth-teller]. *Id*. at 90.

Both S.V. and A.V. knew that their younger sister, Ashley, was removed from the home because she alleged that Perez-Valdez had molested her.[1] After Ashley's removal, S.V. and A.V. repeatedly told authorities that Perez-Valdez had *not* sexually abused them.

Perez-Valdez's only defense at trial was that A.V. and S.V. were not telling the truth, a classic case of "he said, she said." Where a case stands or

[1] Testimony from Ashley's subsequent foster mom and aunt suggests that these allegations were fabricated. Ashley continued her behavior of lies, threats, and manipulations after being placed in this foster home.

falls on the jury's belief or disbelief of essentially two witnesses, those witnesses' "credibility or *motive* must be subject to close scrutiny." *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (emphasis added).

The theory of the defense was that S.V. and A.V., having seen that allegations of sexual abuse resulted in their younger sister's removal from the Perez-Valdez house, fabricated these allegations so that they too would be removed. On at least one occasion, A.V. stated "that she would do whatever she needed to do to be out of the home, that she wanted to be returned to her, reunited with her birth mom." 1 VRP at 229. As further proof of this motive, Perez-Valdez sought to introduce evidence under ER 404(b) that S.V. and A.V. set fire to their subsequent foster mother's home.

Outside the presence of the jury, defense counsel offered proof of the connection between the arson and the allegations against Perez-Valdez. To assist in explaining the circumstances, defense counsel read excerpts from a previous interview he had had with A.V.:

> Question: "Okay, what is it you did?"
> Answer: "Arson, First Degree."
> Question: "And you didn't think that was bad trouble."
> Answer: "No. I don't think it is bad. Shouldn't have done it, but I don't think it is bad."
> Question: "Why did you do it?"
> Answer: "Because I volunteered to do it for my sister because I asked her, um, if she would clean the car for me, clean the car for me, that I would help her."
> Question: "Was cleaning the car one of the chores that [subsequent foster mother] Ginger had for you?"
> Answer: "Yeah, because we just got from, we went to some kind of ocean, I don't know, in Seattle or something, some

> ocean, and I picked up some crabs and everything and it smells like crabs, and I wanted her to clean it because it was all stuffed of everything inside of there, so yeah."
> Question: "So you volunteered to set the house on fire if she would clean the car for you?"
> Answer: "I just put gas. She is the one who set it on fire."
> Question: "Why did you do that?"
> Answer: "I just told you."
> Question: "Well, okay. All right. I understand that, but you know, I guess not everybody would set fire or help somebody set a fire just to something just to get somebody to clean a car."
> Answer: "I would. I do stupid things."
> Question: "All right. But you liked being there?"
> Answer: "Yeah. Um some, sometimes, and sometimes I didn't like it."
> Question: "Well, did you want to leave Ginger's house?"
> Answer: "Um, yeah I did."
> Question: "Why did you want to leave Ginger's home?"
> Answer: "Because they would make me have to go to church with her all the time. And she was too much of a Christian."

1 VRP at 109-10.

Evidence of other bad acts is "not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). Such evidence is admissible, however, for other purposes "such as proof of motive . . . ." *Id*. ER 404(b) rulings are reviewed under an abuse of discretion standard. *Id*. "The discretion conferred upon the trial judge is not arbitrary" and "is to be used with great caution to avoid prejudicing defendants." *State v. Lough*, 70 Wn. App. 302, 313 n.5, 853 P.2d 920 (1993). If the "trial court applied the law incorrectly, then it abused its discretion, and its decision will be overturned." *Id*. Here, the trial judge abused his discretion when he withheld the

arson evidence from the jury, concluding that it was a collateral issue and unfairly prejudicial. Finding that the arson was character evidence is an incorrect application of the law and consequently an abuse of discretion.

I. The Arson Evidence Was Relevant

ER 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 89, 549 P.2d 483 (1976). ER 402 provides, "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state." Reading these two rules together, if evidence has any tendency to make a fact of consequence more or less probable, it is admissible absent some rule of exclusion.

Jurors in child sex abuse cases naturally wonder, "[W]hy would the child lie?" The arson was relevant to show a motive for accusing Perez-Valdez of sexual abuse. Perez-Valdez reasoned that S.V. and A.V. would go to extreme measures to be removed from a living situation that they did not like. The alleged victims testified that they observed Ashley's removal from the home after Ashley accused Perez-Valdez of rape. There was also evidence that S.V.

and A.V. set an arson fire in a subsequent foster home that resulted in their removal from that home. If they set fire to a home because they did not like going to church, they could just as easily fabricate allegations of rape to escape from onerous chores and restrictions on dating. The arson evidence was relevant to show motive, which casts doubt on S.V.'s and A.V.'s credibility as witnesses and makes their accounts less probable.

The trial judge concluded that the arson evidence was not relevant, deeming it a "collateral matter." 1 VRP at 194.

> We are not going into the burning of the house. Number one, you haven't really shown that she just hated this house. Was she unhappy? She is unhappy as half the teenaged kids in any house are. Everybody is unhappy with the parents. They don't like the rules, they don't like this or that, but we don't put in evidence of burning a house down. The link just isn't there. And it is just so prejudicial. And it's prejudicial to the fact-finding process, not just to her. You put in there that she is an arsonist. That's, it's just unfair.

Id. at 108. Requiring the defense to prove that the alleged victims "hated this house" imposed an unreasonably heavy burden on the defense. The arson itself was an extreme act that resulted in removal. The prior accusation of sexual abuse also resulted in removal. The arson evidence rendered the accusations against Perez-Valdez less probable and was accordingly relevant. The judge abused his discretion in finding the arson irrelevant.

The majority concludes that the defendant failed to "establish excessive hatred by the girls of their subsequent foster home . . . ." Majority at 8. The

extent of the girls' discontent with the subsequent placement is a matter for argument by the parties; it is not a requisite foundation to admit the evidence.

The trial judge also excluded the evidence of arson because it was "so prejudicial." 1 VRP at 108. ER 403 states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." In determining whether there is prejudice, the linchpin word is "unfair." "Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another." *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (citing 5 Karl B. Tegland, Washington Practice, Evidence § 106, at 249 (2d ed. 1982)). In order to exclude relevant evidence, it must be *unfairly* prejudicial. "'[T]he burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

ER 403 does not operate to exclude crucial evidence relative to a party's central contention. Here, the only possible "unfair" prejudice is that the arson evidence exposes that S.V. and A.V. committed a bad act in order to be removed from a subsequent foster home. This is exactly why it is so probative. This "prejudice" is not "unfair" but squarely on point. And to the extent that the arson does have some unfairly prejudicial effect, it does not "substantially"

outweigh the probative value.

In balancing evidence under ER 403, courts must be careful not to violate the right of a criminal defendant to a fair trial. A defendant has a constitutional right to defend against criminal charges. We have previously reversed the kidnap-murder conviction of a defendant when the trial judge rejected a key piece of the defendant's evidence as irrelevant. *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996). There the defendant offered the testimony of a witness who saw the victim, still alive, being carried away by a third person. The trial judge excluded the witness from testifying. We unanimously held that the trial court violated the defendant's constitutional right to call witnesses in his defense because the evidence cast "substantial doubt on the State's version of the crime." *Id.* at 930.

The Court of Appeals similarly reversed a conviction of vehicular homicide after the trial court excluded key defense evidence under ER 403. *State v. Young*, 48 Wn. App. 406, 739 P.2d 1170 (1987). Young was convicted of vehicular homicide when he lost control of his pickup truck and the truck overturned, resulting in the deaths of his two passengers, Setzer and Pelham. Young's defense was that Setzer, who was seated next to Young, reached over and grabbed the steering wheel, causing Young's loss of control. Young offered the testimony of three witnesses who had observed Setzer do the same thing on four other occasions in the prior year and a half. The trial

court excluded the evidence under ER 403 and the appellate court reversed:

> Weighing the probative value of evidence under ER 403 against the dangers of confusion or prejudice, the general rule requires the balance be struck in favor of admissibility. *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980). ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense. 5 [Karl B. Tegland, Washington Practice, Evidence § 105 (2d ed. 1982)]; *United States v. Wasman*, 641 F.2d 326 (5th Cir. 1981). Here, evidence of Mr. Setzer's conduct on the night of the accident was highly probative and crucial to Mr. Young's theory of defense, that it was Mr. Setzer and not he that caused the accident. Nor is its probative value "substantially outweighed" by the dangers enumerated in ER 403. The balance should have been struck in favor of admissibility. Under these circumstances the court's failure to do so was an abuse of discretion.

Young, 48 Wn. App. at 413.

This ruling here was made in the heat of trial by an experienced trial judge. But I conclude that the judge misapplied ER 403 when he struck the balance against allowing Perez-Valdez to present evidence to support his theory.

II. Labeling the Arson as Character Evidence Was an Abuse of Discretion

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." ER 404(a). Labeling someone as an arsonist would indeed violate ER 404(a) because it is an argument based on character. The judge appears to have had ER 404(a) in mind when he stated, "You put in there that she is an arsonist. That's, it's just unfair." 1 VRP at 108. But the

evidence was not offered to label A.V. as an arsonist; rather it was offered to prove that she was willing to resort to extreme measures to escape what she regarded as unacceptable foster home placement. The arson is evidence of motive and admissible under ER 404(b).

III. Harmless Error

Evidentiary errors under ER 404 are judged by the harmless error test. *Young*, 48 Wn. App. at 410. "'A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" *In re Det. of Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). If a reasonable possibility exists that in the absence of the error the verdict might have been more favorable to the accused, it cannot be harmless.

The State's case was weak; it was based solely on the credibility of S.V. and A.V. S.V. and A.V. had been impeached throughout the trial and had been shown to have reputations for untruthfulness. There were no physical signs to corroborate their testimony about the alleged rapes. The majority asserts that "the defense was still able to argue its theory of the case, including presenting substantial evidence about S.V.'s and A.V.'s reputations for untruthfulness." Majority at 8. But the defense was unable to present one of its strongest facts: that the girls had committed arson in a subsequent foster home in order to be

moved.

The majority also highlights that Perez-Valdez was permitted to show "that the girls did something serious enough that caused the State to remove them from [the Burnette] home." *Id.* at 9. However, the subsequent foster mother minimized this evidence by testifying that "[e]very time the State moves a child they think it's a serious reason. . . . It's always serious." *Id*. (quoting 1 VRP at 196-97). Thus, the subsequent removal of the girls was reduced to the lowest common denominator—even the most minor reason for removing a child was labeled as "serious." Setting the arson fire was unfairly equated with the most minor reason for moving a child.

The jury was entitled to evaluate the alleged victims' credibility with full knowledge of possible motive. I cannot conclude that the exclusion of the arson was trivial or formal. If Perez-Valdez had been able to show that S.V. and A.V. were willing to set a house on fire to be removed from a living situation that they did not like, there is every reason to believe that the outcome of the trial might have been different. Consequently, I would hold that exclusion of the arson evidence was prejudicial to Perez-Valdez and that the error was not harmless.

I dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Charles W. Johnson

Justice Tom Chambers