IN THE

# COURT OF APPEALS OF INDIANA

CAUSE NO: 31A01-0902-CR-00088

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Lawrence E. NUNLEY

Appellant (Defendant Below)

vs.

STATE of Indiana

Appellee (Plaintiff Below)

Appeal from the Harrison Superior Court

Case No.: 31D01-0805-FA-389

The Honorable Roger D. Davis, Judge

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## BRIEF OF APPELLANT

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES:

**OTHER AUTHORITIES:**

## ISSUES PRESENTED FOR APPELLATE REVIEW

I. WHETHER THE TRIAL COURT VIOLATED MR. NUNLEY'S RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED IMPEACHMENT EVIDENCE AND WHETHER THE STATE OPENED THE DOOR TO THIS EVIDENCE?

II. WHETHER THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS BY MAKING CLAIMS DIRECTLY CONTRADICTED BY MR. NUNELY'S EXCLUDED EVIDENCE?

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT THE DRUMBEAT OF HEARSAY STATEMENTS INTO EVIDENCE?

IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT A MISTRIAL AFTER A STATE'S WITNESS VIOLATED A MOTION IN LIMINE AND REFERRED TO OTHER ALLEGATIONS OF CHILD MOLESTING?

## STATEMENT OF THE CASE

On May 19, 2008, the State of Indiana charged Lawrence E. Nunley by way of information with Counts I-III, Child Molesting, Class A Felonies,[1] Count IV, Child Molesting, a Class C Felony,[2] and Count V, Dissemination of Matters Harmful to Minors, a Class D Felony.[3] *(Appellant's App. 9-13).* The information alleged that the offenses took place on April 13, 2007. *(Appellant's App. 9-13).* On October 7, 2008, the State filed a notice of intent to introduce extrinsic act evidence at trial, and notice of intent to introduce the victim's prior recorded statement into evidence pursuant to Indiana Code Section 35-37-4-6. *(Appellant's App. 49).* The trial court held a hearing on these issues on November 14, 2008, and took the matter under advisement. *(Appellant's App. 4).*

Trial by jury was held from November 18, 2008, through November 21, 2008. *(Appellant's App. 4-5).* At trial, the trial court denied the State's request to introduce extrinsic acts evidence, but granted its motion to introduce the victim's pretrial recorded statement. *(Tr. 174-77, 363-64).* On November 21, 2008, the jury found Mr. Nunley guilty on all counts as charged. *(Appellant's App. 71-75).*

The trial court held the sentencing hearing on January 15, 2009. The trial court sentenced Mr. Nunley on counts I-III, to 35 years each, on count IV, to 4 years and 8 months, and count V, to 21 months. The trial court ordered counts I, II, IV, and V to run consecutively and count III to run concurrently with counts I and II, for an aggregate sentence of 76 years and 5 months.

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[1] *Ind. Code § 35–42-4-3(a)(1)*

[2] *Ind. Code § 35-42-4-3(b)*

[3] *Ind. Code § 35-49-3-3*

*(Appellant's App. 83).*

Mr. Nunley filed his notice of appeal from this judgment on February 16, 2009. *(Appellant's App. 88).* The Clerk of the Harrison Superior Court filed the notice of completion of transcript on May 26, 2009. *(Appellant's App. 111).* This appeal ensued.

## STATEMENT OF THE FACTS

Ed Nunley lived with his teenage son, Kyle. *(Tr. 426, 535).* On April 13, 2007, Tonya and Richard Caves along with their six year-old daughter, A.Y., visited Mr. Nunley at his home. *(Tr. 459, 506-08, 532).* Kiki, Kyle's teenage girlfriend, was also at the home. *(Tr. 459, 535).* A.Y. would sometimes "hang out" with Kiki, and she visited with her that night. *(Tr. 426, 459).* Following the visit, A.Y. received permission to stay the night and to have Kiki watch her. *(Tr. 427, 459, 461, 534).* A.Y. left to get her clothes and returned later. *(Tr. 459).* When her mother brought her back, Kiki was not at the home, but her mother nevertheless left her at the house upon Mr. Nunley's promise that Kiki would return. *(Tr. 427, 457, 459-61, 535, 554-55).* A.Y. never saw Kiki return home. *(Tr. 427, 457).*

At some point, A.Y. went into Mr. Nunley's bedroom and watched television. *(Tr. 430, 464).* According to A.Y., Mr. Nunley showed her a pornographic movie. *(Tr. 432, 469-70).* A.Y. testified that during the movie, Mr. Nunley made her "suck on his weenie bob[,]" and "licked [her] pee pee." *(Tr. 450, 472, 497).* A.Y. testified that a "pee pee" was a girl's private parts and that a "weenie bob" was a boy's private parts. *(Tr. 424).* A.Y. stated that Mr. Nunley threatened to hurt her parents if she did not suck his penis. *(Tr. 499).*

When her parents picked her up the next day, A.Y. told her that she and Mr. Nunley had a secret. *(Tr. 436, 477-78, 508, 537).* A.Y. told her parents that if she told the secret, Mr. Nunley threatened to call the police. *(Tr. 436-37, 487).* A.Y. would not tell her parents the secret, but she wrote it on an envelope and handed it to her parents. *(Tr. 437, 450-51, 477-78, 508, 538, 558).* When her mother read the note, she returned to Mr. Nunley's home to confront him with a baseball bat. *(Tr. 540).* A.Y.'s mother beat Mr. Nunley's motorcycle and truck with the bat and

beat on his door. *(Tr. 542).* When Mr. Nunley answered his door and was confronted with the molestation accusations, Mr. Nunley repeatedly denied the accusations. *(Tr. 543).*

Thereafter, they went to the police and handed over A.Y.'s written statement on the envelope to Trooper Kevin Bowling with the Indiana State Police. *(Tr. 452, 481, 511-12, 626, 635).* The envelope was misplaced, but Trooper Bowling recalled that it stated that "I was sucking his weenie-bob and he was licking my pee-pee." *(Tr. 626-27, 693).* Trooper Bowling interviewed A.Y. in the presence of her mother *(Tr. 512, 545-46, 627-28).* He later interviewed Mr. Nunley. *(Tr. 633).* The trial court would not allow defense counsel to ask whether Mr. Nunley denied the allegations, but when she asked Trooper Bowling whether he would have arrested Mr. Nunley if he had confessed, Trooper Bowling indicated that he would have done so. *(Tr. 642).* Mr. Nunley was not arrested over one year later. *(Appellant's App. 2, 113).*

A.Y.'s mother dropped the case for a significant amount of time. *(Tr. 548-49, 568, 705, 711).* A.Y. was later interviewed on her own at a child advocacy center over one year later on April 18, 2008. *(Tr. 550, 588, 590).* Donna Black, the executive director of the center, conducted and recorded this interview. *(Tr. 586, 686).* In this interview, A.Y. reiterated that Mr. Nunley touched her in her private parts, and also stated that Mr. Nunley touched her "pee-pee" with his "weenie-bob," and that he touched her "pee-pee" both on the outside and the inside. *(Tr. 688-89); (Supp. Tr. 14-16, 21, 23).*

At trial, the State played the recorded interview of A.Y. at the child advocacy center over defense counsel's objection. *(Tr. 596, 598).* In an effort to establish the charge of dissemination of material harmful to children, the parties and the trial court had the jury watch the five-hour pornographic movie allegedly shown to A.Y. *(Tr. 662-63).* However, part way through the

movie, the jury wrote a note to the trial court asking "Can we stop now? We've all decided this is inappropriate for children." *(Tr. 666)*. All parties agreed to stop the video, and instead, the State called a law enforcement witness who watched the video to recount several of the gory details contained in the video. *(Tr. 680-682)*. Also during trial, defense counsel sought to introduce evidence that A.Y. lied falsely accused her mother's boyfriend of physical assault. *(Tr. 378-385, 716)*. The trial court did not allow defense counsel to ask A.Y. about this false accusation. *(Tr. 717)*. Nevertheless in closing, the State stated that A.Y. did not lie and likely did not know how to lie. *(Tr. 797)*.

In the course of its investigation, the State did not attempt to collect any DNA or forensic evidence to implicate Mr. Nunley. *(Tr. 697, 708)*. The State also failed to have A.Y. examined physically to determine if she had been sexually assaulted. *(Tr. 698, 708-09)*. At trial, Mr. Nunley vehemently denied each of the allegations against him. *(Tr. 727-28)*. He testified that A.Y.'s mother was upset with him when she picked upon A.Y. because Mr. Nunley would not let her move in with him. *(Tr. 731)*.

## SUMMARY OF THE ARGUMENT

Mr. Nunley presents this Court with four issues for review:

I. The trial court violated Mr. Nunley's right to present a defense when it refused his request to admit evidence that A.Y. had falsely accused another adult male of physically assaulting her. The trial court's refusal to admit the evidence based upon a blanket application of Indiana Evidence Rule 608 could not override Mr. Nunley's right to present a defense. Moreover, the State opened the door to this evidence when it commented in closing arguments that A.Y. was telling the truth, had not motive to lie, and did not even know how to lie.

Defense counsel preserved this issue with proper objections, and regardless, these errors constitute fundamental error. Finally the errors were not harmless as the excluded evidence went to the credibility of A.Y., the heart of the State's case.

II. The State committed prosecutorial misconduct when it commented in closing arguments that A.Y. did not know how to lie after it sought and obtained exclusion of Mr. Nunley's evidence that A.Y. had, in fact, lied about another accusation. This misconduct placed Mr. Nunley in grave peril as it reflected on A.Y.'s credibility.

III. The trial court abused its discretion when it permitted the State to introduce several hearsay statements reiterating A.Y.'s prior accusations. First, the statements were not admissible under the "Protected Persons Statute" because the statements were unreliable. Second, the statements were inadmissible because they constituted the drumbeat repetition of the same accusation in violation of Evidence Rule 403. Third, the evidence violated Mr. Nunley's right of confrontation.

Defense counsel's objections to this evidence were sufficient, and regardless the errors

constituted fundamental error. Moreover, the errors were not harmless. Again, the State's entire case rested upon A.Y.'s credibility and her thirteen-word accusation against Mr. Nunley. The drumbeat repetition of this accusation and Mr. Nunley's inability to effectively cross-examine these statements likely had a substantial effect on the jury's deliberations.

IV. The trial court abused its discretion when it denied defense counsel's request for a mistrial after A.Y.'s mother referenced other allegations of child molesting. This evidence violated Evidence Rule 403 and 404 as it was improper misconduct evidence and highly prejudicial. The trial court's admonishment was also insufficient to cure this improper reference. Finally, the error was not harmless. Other allegations of child molesting unquestionably enhanced A.Y.'s credibility, and A.Y.'s testimony constituted the only evidence against Mr. Nunley.

For all of these reasons, this Court should reverse Mr. Nunley's convictions and remand this cause for a new trial.

## ARGUMENT

### I. THE TRIAL COURT VIOLATED MR. NUNLEY'S RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED IMPEACHMENT EVIDENCE

At trial, defense counsel made an offer of proof regarding A.Y.'s false accusation against her step-father. *(Tr. 715-17).* Specifically, A.Y. lied to the police on another occasion, accusing her step-father of hurting her. *(Tr. 716); (Appellant's App. 202-03).* She requested permission to use this evidence to impeach A.Y. *(Tr. 377-85).* The trial court overruled defense counsel's request and excluded this evidence. *(Tr. 385, 717-18).* Thereafter, the State commented in closing arguments that A.Y. did not lie and, in fact, did not know how to lie. *(Tr. 797).* Defense counsel requested an instruction containing a stipulation regarding the excluded evidence of A.Y.'s false allegation against another adult, which request was denied. *(Tr. 816-17).* The trial court abused its discretion when denied Mr. Nunely relief. Based upon these errors, this Court should reverse Mr. Nunley's convictions and remand this cause for a new trial.

#### A. The Exclusion of A.Y.'s Prior Accusation Under Evidence Rule 608(b) Was Arbitrary and Denied Mr. Nunley's Right to Present a Defense

It is well-settled that he admission or exclusion of evidence is committed to the sound discretion of the trial court; however, this Court will reverse the trial court's decision when the trial court abuses that discretion and thereby denies the defendant a fair trial. *Mishler v. State, 894 N.E.2d 1095, 1099 (Ind. Ct. App. 2008).* The trial court abuses its discretion when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id.*

In this case, the State and the trial court based the exclusion on Indiana Evidence Rule 608. *(Tr. 378-79).* This rule states in pertinent part as follows:

> For the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided in Rule 609, specific instances may not be inquired into or proven by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

*Ind. Evid. R. 608(b).* However, rules of evidence must yield to a defendant's right to present a defense and his right of confrontation. Our Supreme Court has explicated the reach of a defendant's right to present a defense as follows:

> [W]hen the defendant's Sixth Amendment right to present a defense collides with the State's interest in promulgating rules of evidence to govern the conduct of its trials, the merits of the respective positions must be weighed, [and] the State's interest must give way to the defendant's rights if its rules are "mechanistically" applied to deprive the defendant of a fair trial.

*Hubbard v. State, 742 N.E.2d 919, 922 (Ind. 2001), quoting Huffman v. State, 543 N.E.2d 360, 375 (Ind . 1998).* Whether a defendants' rights are abridged by a rule of evidence often turns on the reliability of the proffered evidence.

In *Hubbard*, for example, the defendant offered unstipulated polygraph results of a third person indicating that this person was not completely truthful about the underlying murders. *Hubbard, 742 N.E.2d at 922.* The trial court excluded this evidence, and on the defendant's appeal, he argued that the application of the rule that unstipulated polygraph results are inadmissible violated his right to present a defense under the Sixth Amendment. *Id.* This Court upheld the trial court's ruling. This Court noted that the defendant's right to present relevant evidence is not unlimited, but rather may be subject to reasonable restrictions. *Id. at 923.* Thus, this Court has held that rulemakers have broad latitude under the Constitution to establish rules

excluding evidence from criminal trials, but only so long as the rules are not arbitrary or disproportionate to the purposes they are designed to serve. *Id.* This Court further noted that "we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id.*

Applying these principles to the defendant's claim, this Court noted that polygraph tests are inherently unreliable, and therefore, the *per se* exclusion of such evidence was not arbitrary or capricious. *Id. at 923-24.*

The reliability of the excluded evidence was also dispositive in this Court's opinion in *Griffin v. State, 763 N.E.2d 450 (Ind. 2001), Boehm, J., dissenting.* In *Griffin*, the defendant complained that he was denied due process when the trial court refused to allow him to present testimony that a witness made a confession to the defendant's former attorney. *Griffin, 763 N.E.2d at 451.* This Court determined that the trial court properly excluded the defendant's evidence. Again, this Court held that the hearsay evidence was not reliable. *Id.*

In this case, the exclusion of Mr. Nunley's evidence had nothing to do with a lack of reliability. Instead, the exclusion was based upon a blanket application of Rule 608(b). Mr. Nunley offered the evidence to impeach A.Y. regarding her accusations against Mr. Nunley. The excluded evidence went to the heart of the State's case. The only evidence against Mr. Nunley was the very brief testimony of A.Y. regarding one instance of molestation. Mr. Nunley consistently and vehemently denied this accusation. There was no forensic evidence and no other witnesses to the alleged molestation. *(Tr. 697-98, 708-09).* Thus, the State's entire case came down to a credibility contest. This Court has held that when the defendant is denied the opportunity to cross-examine a crucial witness on credibility with proffered evidence, then he has

raised a legitimate claim under the Sixth Amendment. *Saunders v. State, 848 N.E.2d 1117, 1124, n.5 (Ind. Ct. App. 2006).* Because the trial court excluded crucial evidence that would have dramatically impeached a crucial witness on her credibility based upon a blanket application of Rule 608(b), this Court should conclude that the trial court violated Mr. Nunley's right to present a defense.

**B. The State Opened the Door to This Evidence**

During closing arguments, the Prosecution stated as follows:

> So, I'm gonna talk about a few reasons as to why you should believe [A.Y.]. First of all, she has no reason to lie. She's six years old. I submit she hasn't even been taught how to lie. She knows what's the truth and what's a lie. When you tell the truth, you don't get into trouble. When you tell a lie, you get into trouble she said. Her and [Mr. Nunley] were friends. She wanted to go spend the night at his house. She liked going over there and playing with the Nintendo. She liked hanging out with Kiki. She has no reason to lie.

*(Tr. 797).* Defense counsel objected to this statement, arguing that the this blatantly false comment opened the door to Mr. Nunley's proffered evidence of A.Y.'s other false accusation. *(Tr. 799, 816).* She requested an instruction containing a stipulation of A.Y.'s prior false accusation. *(Tr. 816-17).* The trial court denied this request. *(Tr. 817).* It abused its discretion when it did so.

A witness opens the door to otherwise inadmissible evidence if that witness injects an issue into the trial and leaves the jury with a mistaken or misleading impression of the facts related. *See Carroll v. State, 740 N.E.2d 1225, 1230, n.1 (Ind. Ct. App. 2000), trans. denied.* The State's assertion was patently false and left the jury with the impression that A.Y. was not only telling the truth and was not only incapable of lying, but *that she did not know how to lie.* This Court should conclude that the State threw the door wide open to A.Y.'s other false

allegation. Indeed, even the trial court warned the State as trial began that "[i]f they keep pounding on that, 'Are you telling the truth?', [sic] and I think that opens the door to [defense counsel] saying, 'Isn't is [sic] true that you have lied before?'" *(Tr. 385).*

### C. Defense Counsel Preserved This Issue, and The Issue Constitutes Fundamental Error

"An objection is sufficient to preserve an issue for appeal where it 'alert[s] the trial judge fully to the legal issue being raised.'" *Jones v. State, 708 N.E.2d 37, 39 (Ind. Ct. App. 1999).*

#### *1. Defense Counsel Preserved Her Argument that the Evidence Should Have Been Admissible to Impeach A.Y. and that the Exclusion of this Evidence Violated Mr. Nunley's Right to Present a Defense*

A defendant preserves his argument that the trial court erred by excluding evidence if "the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked." *Lashbrook v. State, 762 N.E.2d 756, 758 (Ind .2002).*

Defense counsel made two offers of proof. *(Tr. 377-85, 715-17).* She repeatedly argued that she had to use the evidence that A.Y. had falsely accused another adult male in her life in order to impeach A.Y.'s accusations against Mr. Nunley. *(Tr. 377-380).* She pleaded with the trial court, asking "[w]ell the problem is, how the heck are you gonna attack the credibility of a kid who admits she lied if you can't ask her if she lied?" *(Tr. 380).* Defense counsel also objected, asking "[w]ell, then I would like to know how you can establish that somebody lied if you can't ask them when they're testifying if they've lied. ***I mean that's the whole issue of credibility here."*** *(Tr. 381-82) (emphasis added).* In her second request to admit the evidence, defense counsel reiterated this argument. *(Tr. 715).* These arguments placed the issue of Mr.

Nunley's right to present a defense and cross-examine and confront A.Y. squarely before the trial court.

*2. Defense Counsel Preserved Her Argument that the State Opened the Door to This Evidence*

With regard to the State opening the door, defense counsel articulated her objection and requested that a stipulated instruction detailing A.Y.'s false accusation be submitted to the jury. This objection and request clearly informed the trial court that the excluded evidence should be given to the jury based upon the State's injection of the issue during closing arguments.

*3. Even if these Objections Were Insufficient, Both Error Constitute Fundamental Error*

Even if the objections were not sufficient, the errors constituted fundamental error. Fundamental error is an error that constitutes a substantial, blatant violation of basic principles, rendering the trial unfair, and thereby depriving the defendant of fundamental due process. *Borders v. State, 688 N.E.2d 874, 882 (Ind. 1997).* The error must be so prejudicial to the rights of the defendant so as to make a fair trial impossible. *Oldham v. State, 779 N.E.2d 1162, 1173 (Ind. Ct. App. 2002).* Again, the excluded evidence went to the heart of the State's case, as Mr. Nunley's conviction rests entirely upon a single accusation made by a single witness. Evidence that A.Y. falsely accused another individual about a physical assault and made this accusation to the police would have decimated the State's case.

**D. These Errors Were Not Harmless**

The improper admission or exclusion of evidence is harmless only if this court can be certain that there is no substantial likelihood that the evidence contributed to the jury's verdict. *Ground v. State, 702 N.E.2d 728, 732 (Ind. Ct. App. 1998).* Concurrently, reversal is warranted

if the erroneously admitted evidence likely had a prejudicial impact on the jury. *Id.* In other words, "reversal is mandated when the record reveals that the improperly admitted evidence likely had a prejudicial impact on the average juror such that it contributed to the verdict." *Udarbe v. State, 749 N.E.2d 562, 567 (Ind. Ct. App. 2001).* Our Supreme Court has clarified the harmless error doctrine on more than one occasion to emphasize that the rationale of the doctrine is not to innoculate error merely because the State has provided substantial, independent evidence of guilt. *See Stwalley v. State, 534 N.E.2d 229, 232 (Ind. 1989), abrogated on other grounds by Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).* Rather, the focus of an appellate court is to be on the effect of the error on the jury, not on whether the outcome of the trial is otherwise justifiable given the evidence. *Id.* Specifically, our Supreme Court stated:

> [I]f one cannot say, with fair assurance, *after pondering all that happened* without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result,* apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

*Id., quoting Miller v. State, 436 N.E.2d 1113, 1114 (Ind. 1982) (emphases in original).*

In this case, there was no evidence besides A.Y.'s accusation. Her testimony was reluctant and made well over one year following the alleged molestation. As noted above, evidence that A.Y. had also accused another male figure in her life of physical assault and that she had made this accusation to the police was essential to Mr. Nunley's defense. The lack of this evidence in the record more than certainly affected the jury's deliberations. As noted by this Court on previous occasions, when the State's case comes down to a credibility contest, a trial court's error throwing the balance in the State's direction cannot be deemed harmless. *See e.g.*

*Craun v. State, 762 N.E.2d 230, 238-39 (Ind. Ct. App. 2002); Rafferty v. State, 610 N.E.2d 880, 884 (Ind. Ct. App. 1993).*

## II. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS

As articulated above, the State commented that A.Y. was telling the truth and did not know how to lie and had no motive to lie after advocating for and obtaining an exclusion of evidence establishing the contrary. *(Tr. 797).* Again, A.Y. falsely accused another male figure in her life of physically assaulting her, and she made this accusation to the police.

When reviewing a claim of prosecutorial misconduct, reviewing courts begin evaluating the claim by asking whether misconduct in fact occurred. *Brown v. State, 746 N.E.2d 63, 69-70 (Ind. 2001).* If the reviewing court determines that misconduct occurred, it then considers whether the misconduct placed the accused in a position of grave peril. *Id.* Whether the accused was placed in grave peril depends on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety. *Id.* The State is also subject to rules of professional conduct that would prohibit the State's actions in this case. *See Ind. Professional Conduct Rule 3.3(a) ("A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false.); see also Ind. Professional Conduct Rule 3.8, cmt. (A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.).*

In this case, the State committed misconduct by making claims that were not only false but that were directly contrary to Mr. Nunley's evidence that it sought to exclude. This evidence

placed Mr. Nunley in a position of grave peril. The State's entire case rested upon A.Y.'s credibility. In closing arguments the State made a false claim on this central issue and did so after successfully excluding evidence that would have contradicted the State's false claim. Concurrently, this evidence was not harmless for the same reasons noted above. *See supra, Argument I(B).*

Finally, defense counsel preserved this issue. She specifically requested the ability to present the contrary evidence to the jury the State's false claim could be rebutted. *See Gamble v. State, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005) (holding that requesting an admonishment or cure to the prosecutorial misconduct is necessary to preserve issue of prosecutorial misconduct).* The trial court refused to allow this presentation.

Finally, even if this requested cure was not sufficient, the trial court's refusal to address the prosecutorial misconduct constituted fundamental error. As the prosecutorial misconduct issue concerns the same evidence that is the subject of Mr. Nunley's first assignment of error, the fundamental error argument is identical for both. *See supra, Argument I(C)(3).* For this reason, this Court should reverse Mr. Nunley's convictions and remand for a new trial.

## III. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. NUNLEY'S RIGHT OF CONFRONTATION WHEN IT PERMITTED THE DRUMBEAT REPETITION OF HEARSAY STATEMENTS

At trial, the State introduced several hearsay statements. First, it played a video recording of A.Y.'s accusations made prior the filing of charges. *(Tr. 598).* Second, it introduced the testimony of an officer restating the allegations made on this video recording without objection. *(Tr. 688).* Third, it offered the testimony of three witnesses regarding the contents of accusations written by A.Y. on an envelope. *(Tr. 508, 538-39, 626).* Fourth, the State introduced several

exhibits related to these accusations. The State offered and the trial court admitted the evidence under the "Protected Persons Statute" (hereinafter referred to as "the PPS"). *(Tr. 7, 174-77); (Appellant's App. 49).* The trial court abused its discretion when it permitted these witnesses to offer these hearsay statements under the PPS for three reasons: (1) the statements were not admissible under the "Protected Persons Statute", (2) the statements were cumulative and violated Indiana Evidence Rule 403; and (3) the admission of these statements violated Mr. Nunley's right of confrontation under both the Indiana and federal constitutions.

Again, the admission or exclusion of evidence is committed to the sound discretion of the trial court; however, this Court will reverse the trial court's decision when the trial court abuses that discretion and thereby denies the defendant a fair trial. *Mishler, supra, 894 N.E.2d at 1099.* The trial court abuses its discretion when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id.*

### A. A.Y.'s Pretrial Accusations Were Not Admissible Under the Protected Persons Statute

The PPS is codified at Indiana Code § 35-37-4-6, and states in pertinent part as follows:

> (c) As used in this section, "protected person" means:
> (1) a child who is less than fourteen (14) years of age;
> ...
> (d) A statement or videotape that:
>
> (1) is made by a person who at the time of trial is a protected person;
>
> (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
>
> (3) is not otherwise admissible in evidence;
>
> is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:
(A) conducted outside the presence of the jury; and
(B) attended by the protected person; that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:
(A) testifies at the trial; or
(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:
(I) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.
(ii) The protected person cannot participate in the trial for medical reasons.
(iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

(f) If a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:
(1) at the hearing described in subsection (e)(1); or
(2) when the statement or videotape was made.

*Ind. Code § 35-37-4-6.* The State, like all other parties, is generally prohibited from introducing hearsay evidence against a defendant because "its admission defeats the criminal defendant's right to confront and cross-examine witnesses against him." *Carpenter v. State, 786 N.E.2d 696, 698 (Ind. Ct. App. 2003), quoting Williams v. State, 544 N.E.2d 161, 162 (Ind.1989).* The PPA's allowance of such hearsay evidence may meet an exception to this prohibition insofar as

Evidence Rule 802 prohibits the admission of hearsay "except as provided by law," and the PPS constitutes a law under this exception. *Tyler v. State, 903 N.E.2d 463, 467 (Ind. 2009).* However, before hearsay evidence under the PPA will be admissible, it must meet several prerequisites that the hearsay evidence in this case does not meet.

*1 The hearsay evidence was not sufficiently reliable*

As made evident by the PPA, "the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability" before hearsay evidence will be admissible thereunder. *Ind. Code § 35-37-4-6(e)(1)(B).* "Considerations in making the reliability determination under the statute include the time and circumstances of the statement, whether there was significant opportunity for coaching, the nature of the questioning, whether there was a motive to fabricate, use of age appropriate terminology, and spontaneity and repetition." *Pierce v. State, 677 N.E.2d 39, 44 (Ind. 1997).*

The trial court determined that the pretrial statements in this case "provide[] sufficient indications of reliability." *(Tr. 175).* The trial court's conclusion is not supported by the evidence.

*a. A.Y.'s written accusations*

A.Y.'s written statement was made the morning following the alleged molestation. *(Tr. 437, 450-51).* When she got into the car with her parents, she informed them that she had a secret. She would not vocalize the accusations and instead wrote them on the back of an envelope. *(Tr. 437, 450-51).* A.Y.'s parents handed this envelope to Trooper Kevin Bowling. *(Tr. 693).* At the time of trial, none of the witnesses knew the location of this envelope, so the State introduced the cumulative testimony of both parents and Trooper Bowling as to the

contents of the written statement. Several of the concerns enumerated in *Pierce* render this statement unreliable: (1) A.Y.'s statement was made reluctantly, in fact, she refused to vocalize them; *(tr. 437, 450-51, 477-78, 508, 538, 558));* (2) it was only after intense coaxing that she wrote the accusations on paper and handed them to her father; (3) the written statement disappeared prior to trial, so no witness could testify as to its exact contents; (4) A.Y.'s father helped her write the statement by spelling one or more words; *(tr. 479-80);* (5) the parents did not proceed directly to the police station, but instead, A.Y.'s mother went back to Mr. Nunley's home and destroyed his property; *(tr. 540);* and (6) despite this apparent anger with Mr. Nunley and her daughter's missing written statement, the mother dropped the matter and would not return law enforcement's phone calls for over one year. *(Tr. 548-49, 568, 705, 711).*

Under the *Pierce* reliability standards, A.Y.'s statement should be suspect. A.Y.'s refusal to vocalize her accusations, her father's assistance with writing the accusations, the disappearance of this statement, and the mother's refusal to pursue these allegations should all be considered suspect circumstances and timing. Moreover, these factors indicate a substantial period of time within which to coach A.Y. While A.Y.'s parents went to the police on the day they learned of the accusations, they first turned back around to destroy Mr. Nunley's property and create a potentially dangerous situation with their daughter in the car. *(Tr. 540-42).* This action was a crime and delayed the report of the alleged molestation to the police. This circumstance also gives rise to a motive. Mr. Nunley called the police to report this attack. *(Tr. 758).* The molestation charges likely resulted in the matter being dropped by the police and the prosecutor's office. *(Tr. 764).*

Finally, A.Y. refused to recount her accusations when brought to the police, and at trial

she very reluctantly recounted her accusations and by cross examination, she refused to expressly recount the accusations. These circumstances are further indications that the initial written statement was either coached or coerced. While there may certainly be other reasons behind her hesitation and inability to recount her accusations, these circumstances nevertheless fail to establish reliability. Cases precedent on this issue buttress this conclusion. *See infra, heading I(A)(1)(c).*

*b. A.Y.'s accusations on the video recording and the Officer Wibbles' restatement of these accusations*

A.Y. accused Mr. Nunley of child molesting at a child advocacy center. This statement was recorded. In the video, A.Y. accused Mr. Nunley of touching her "wee-wee," and of making her suck his "weedy bob." *(Supp. Tr. 14-16, 21, 23); (tr. 688).* She also accused him of touching her "wee-wee" on the inside and the outside. *(Supp. Tr. 23); (tr. 709).* As with her written statements, the circumstances surrounding the video statement should render it suspect. First, as noted above, this statement was made over one year after the accusations. The mother dropped the matter until that time and would not pursue it any further. This circumstance should raise concerns that there was significant time for coaching. Again, the parents had a significant motive to fabricate the accusations through their daughter. Mr. Nunley testified that the mother was angry with him because he would not let her live in his home. *(Tr. 730-31).* It is undisputed that the mother acted on intense anger by taking a baseball bat to Mr. Nunley's property on the day in question. *(Tr. 540).* Furthermore, A.Y. included accusations in her videotaped statement that were never raised in the year between the accusations and the statement by claiming in the recorded statement that Mr. Nunley touched her on the outside and the inside of her "wee-wee."

*(Supp. Tr. 23); (tr. 709).*

c. *Case Law Establishes that the State showed insufficient indicia of reliability*

Three cases should demonstrate a lack of indicia of reliability: *Pierce v. State, 677 N.E.2d 39 (Ind. 1997), Carpenter v. State, 783 N.E.2d 696 (Ind. Ct. App. 2003), and Surber v .State, 884 N.E.2d 856 (Ind. Ct. App. 2009).*

In *Pierce*, as in this case, the State introduced into evidence a child witness' accusations made to her mother and the police shortly after the molestation occurred and a videotaped statement under the PPS. *Pierce, 677 N.E.2d at 44-46.* On the defendant's appeal of his resulting child molesting convictions, the defendant complained, in part, that the statements were not sufficiently reliable to fall with the ambit of the PPS. *Id. at 44.* Our Supreme Court disagreed, but in explaining its holding, it pointed to indicia of reliability that are not present in the case at bar. Our Supreme Court noted that the child victim's statement was spontaneous, and therefore, that there was little time for coaching. *Id. at 45.* The child victim's initial spontaneous accusation was made to a law enforcement officer, and thereafter, the child repeated consistent accusations to her mother and another officer. *Id.*

Our Supreme Court found that the videotaped statement was "a different matter." *Id. at 45.* The Court noted that this interview was conducted "several hours," and that the passage of these hours "tend[ed] to diminish spontaneity and increas[ed] the likelihood of suggestion." *Id.* Of note, as well, was the mother's tendency in the interview to ask leading questions. *Id.* Our Supreme Court did not decide whether the videotape should have been admitted, concluding only that the videotape was merely cumulative of the admissible statements to the officers and her

mother. *Id.*

In *Carpenter*, however, this Court found a child witness' pretrial statement unreliable and inadmissible under the PPS. In *Carpenter*, as in *Pierce*, the defendant complained that a child victim's pretrial statements were not sufficiently reliable. This Court determined that they were not. Unlike in the case at bar, this Court was concerned that the child witness did not indicate an understanding of the difference between the truth and a lie. *Carpenter, 786 N.E.2d at 703-04.* However, this Court was also concerned regarding the lack of evidence of the time between the statements and the molestation. *Id.* This Court noted the *Pierce* Court's concern that a passage of "several hours" between an accusation and the time of molestation, noting that the "reason for concern was that intervening delay created the potential for an adult to plant a story or cleanse one." *Carpenter, 786 N.E.2d at 704.* This Court found the pretrial statements unreliable, and expressed concern that one of the statements occurred "at least one day" after an accusation to her mother and videotaped accusations. *Id.*

This Court confronted the same issue in *Surber*. The defendant in *Surber* cited *Carpenter* for authority that the child witness' statements were unreliable. This Court disagreed, noting that while the date of molestation was unclear, the child's statements were made close in time and many of the statements were spontaneous. *Surber, 884 N.E.2d at 863.* This Court further noted that the child understood the difference between the truth and a lie. *Id.* This Court distinguished *Carpenter* on these bases. *Id. at 863.*

In the case at bar, many of the indications of reliability in *Pierce* and *Surber* are absent. Unlike in *Pierce* and *Surber*, A.Y.'s accusations were not spontaneous. While A.Y. volunteered that she had a secret, she would not vocalize the accusations, and wrote them down with her

father's help only after intense coaxing from her mother. *(Tr. 518, 537-38).* Furthermore, the written statement was memorialized at approximately noon, and A.Y.'s parents dropped her off the previous day at between 6-7pm, making this initial statement "several hours" after the alleged molestation. *(Tr. 552, 536).* The *Pierce* Court's concern that a pretrial statement was made after such a span of time is present in this case. *See Pierce, 677 N.E.2d 45.* A.Y.'s subsequent videotaped statement was not made until over one year following this time. These factors bring this case within the parameters of the *Carpenter* holding.

As noted above, there are additional indications of unreliability. A.Y.'s mother had a motive to fabricate the allegations after committing several crimes against Mr. Nunley, A.Y. reluctantly made the accusations in writing with her father's help and would not repeat them to anyone until over one year later, and A.Y. reluctantly testified on direct examination and by cross examination outrightly refused to expressly recount her accusations. For these reasons, this Court should conclude that the pretrial statements were not sufficiently reliable to come in under the PPS, and therefore, that they did not meet any exceptions to the hearsay rule.

### B. The Statements Constituted the Cumulative Drumbeat Repetition of the Same Accusation and Therefore Were Inadmissible Under Rule 403

At trial, defense counsel objected to all of the above hearsay statements on the grounds that they constituted the "drum beat [sic] repetition" of a single accusation. *(Tr. 171).* The trial court nevertheless permitted the introduction of this cumulative evidence. It abused its discretion when it did so.

In 1975, our Supreme Court held that prior out-of-court statements made by a witness who is in court and available for cross-examination are not objectionable as hearsay. *Patterson*

*v. State, 263 Ind. 55, 324 N.E.2d 482 (1975).* The *Patterson* Rule persisted with some exceptions until our Supreme Court abrogated it in *Modesitt v. State, 578 N.E.2d 649 (Ind. 1991).* In its place, the Court recognized federal rule 801(d)(1), which enumerates the out-of-court statements that are not considered hearsay evidence. *Modesitt, 578 N.E.2d at 653.* Indiana's counterpart is currently also codified as Indiana Evidence Rule 801(d)(1). In addition to rule 801(d), Indiana Evidence Rule 403 was adopted by our Supreme Court. Rule 403 specifically limits the introduction of drumbeat repetitious evidence by prohibiting the admission of evidence if its probative value is substantially outweighed by considerations of "needless presentation of cumulative evidence." *Ind. Evid. R. 403.* The PPS is subject to Evidence Rule 403, and accordingly, relevant and otherwise admissible evidence under the PPS may nevertheless by inadmissible under Rule 403. *See Tyler, supra, 903 N.E.2d at 463.*

In *Modesitt*, the Supreme Court reversed the defendant's convictions for child molesting and criminal deviate conduct. At trial, the State's first three witnesses testified as to the victim's accusations, and the State thereafter presented the testimony of the victim, herself. *Modesitt, 578 N.E.2d at 651.* Overturning the *Patterson* Rule, the Court held that by first calling the three witnesses to testify about the victim's allegations prior to presenting the victim's testimony, the State "effectively precluded [the defendant] from effective cross examination of these charges."

In this case, the State theorized that it could circumvent the *Modesitt* holding by presenting A.Y.'s testimony *first, (tr. 173),* apparently believing that doing so would innoculate itself against the *Modesitt* Court's concern that presenting the victim's testimony after the drumbeat repetition would "effectively preclude[] [the defendant] from effective cross-examination of [the] charges." However, *Modesitt* is not distinguishable on this basis. Again,

the *Modesitt* Court was concerned with the ability of the defendant to cross examine the accusations effectively and not so much the order in which the witnesses testified. In this case, the order of the testimony did not offer the defendant a more meaningful opportunity to cross-examine and confront the accusations. At trial, A.Y. vocalized her child molestation accusations on only one occasion and thusly:

> "He made me suck on his weenie-bob."
>
> ...
>
> "He licked my pee-pee."

*(Tr. 450).* Prior to this thirteen-word accusation, the State required three breaks before it could persuade A.Y. to write down and then read this accusation in front of the jury. *(Tr. 434, 439, 441, 443-44, 450).* In fact, A.Y. wrote down the accusations before one break, and had to break again for lunch before reading the accusation to the jury. *(Tr. 449-450).* Under cross-examination, A.Y. indicated that she would not write down nor read the accusations any further and only answered defense counsel's questions about the circumstances surrounding the specific allegations, and defense counsel's leading questions about the sequence of the acts of molestation. *See e.g. (tr. 488).* However, when asked whether she could explicate the accusations, A.Y. responded "Uhm, yes. But I don't want to write it and then read it." *(Tr. 496).* She made this refusal after only being able to write the accusations during direct examination and being able to read the accusations after a trial break.

After this reluctant testimony and the defendant's limited ability to cross-examine A.Y., the State was permitted to present the following ten pieces of evidence: Joint Exhibits 1, 2, and State's Exhibit 5, all A.Y.'s written accusations from which A.Y. read as her testimony on direct

examination, *(Appellant's App. 308-310); (Tr. 444, 454),* testimony of A.Y.'s mother, father, and Trooper Bowling, all restating A.Y.'s accusations that she wrote on the missing envelope, *(Tr. 508, 538-39, 626),* the testimony of the director of the child advocacy center who testified regarding A.Y.'s drawing of a "weedy-bob" and the word "suck" during the director's videotaped interview, *(Tr. 599),* State's Exhibit 6, the drawing itself, *(Appellant's App. 311),* A.Y.'s videotaped statement, *(Supplemental Transcript)*, and the testimony of Detective William Wibbles, who was present during the videotaped interview, regarding the A.Y.'s allegations therein. *(Tr. 688).* In all, the State presented 10 (ten) pieces of evidence that restated A.Y.'s single accusation that Mr. Nunley licked her "pee-pee" and made her suck his "weedy-bob."

This overwhelming drumbeat repetition should be considered highly prejudicial. These ten pieces of evidence were simply restatements of A.Y.'s thirteen-word accusation. *See (Tr. 450).* As in *Modesitt*, in which the State presented three restatements of the same accusations, this Court in *Stone v. State* reversed the defendant's conviction where the State presented seven pieces of evidence related to the same accusation. *Stone v. State, 536 N.E.2d 534, 538 (Ind. Ct. App. 1989).* The *Stone* Court noted that such cumulative evidence was the "prosecutorial equivalent of a self-serving declaration." *Id. at 538.* The Court was concerned that such evidence was highly inflammatory and lent more credibility to a child witnesses' testimony. The Court so held as follows:

> It is well settled that evidence is unfairly prejudicial only if it "will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented...." (citation omitted) Evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case." (cite omitted) This is the type of evidence that [Federal Rules of Evidence] Rule 403 excludes as

being unfairly prejudicial.

*Id. at 539, quoting United States v. Zeuli, 725 F.2d 813, 817 (1st Cir.1984).*

> This class of prejudice is particularly great and is particularly susceptible to abuse in cases such as the present one: here, the evidence of guilt consisted almost entirely of the testimony of an unsophisticated and relatively inarticulate child; her prior statements were presented to the jury through a series of articulate adult witnesses, whose ranks included credentialed professionals with extensive experience in dealing with sexual assault cases. It is notable that the prosecution in this case did in fact emphasize this aspect of the prior consistent statements evidence.

*Id., quoting Nitz v. State, 720 P.2d 55, 71 (Ak. App. 1986).* These concerns and the Court's reference to Federal Evidence Rule 403 invoke the rule in Indiana Evidence Rule 403 that highly prejudicial and cumulative evidence is inadmissible. Moreover, these concerns have nothing to do with the order in which the witnesses testify or the exhibits are offered.

### C. The Presentation of this Evidence Violated Mr. Nunley's Right of Confrontation

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *U.S. Const. Amend. VI.* The United States Supreme Court revisited its analysis of the right of confrontation under the Sixth Amendment in *Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).* In so doing, the Court expanded the scope of the Sixth Amendment. The *Crawford* Court held that the right of confrontation applies to all testimonial statements whether these statements were sworn or unsworn. *Crawford, 541 U.S. at 51-52.* Further, the Court concluded that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id. at 53-54.* The Court noted that "the text of the Sixth Amendment does not

suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id. at 54.* Instead, the Court held that the right of confrontation may only admit those exceptions established at the time of the founding. *Id.*

The right of confrontation under the Sixth Amendment is generally co-extensive with Indiana's right of confrontation guaranteed under Article I, Section 13 of the Indiana Constitution. Both guarantees focus on the right of the defendant to cross-examine the witness. However, the right of confrontation under the Indiana Constitution also *"places a premium upon live testimony* of the Prosecution's witnesses in the courtroom during trial, as well as upon the ability of the defendant and his counsel to fully and effectively probe and challenge those witnesses *during trial before the trier of fact* through cross-examination." *State v. Owings, 622 N.E.2d 948, 950-51 (Ind. 1993) (emphasis added).*

While A.Y. testified at trial, as noted above, defense counsel's ability to cross-examine her was extremely limited, and therefore, in contravention of Indiana's right of confrontation, Mr. Nunley was unable to meaningfully cross-examine A.Y. in front of the jury. Whether a witness is available for cross-examination is a question of law. Indeed, a witness' presence at trial and her partial testimony will not suffice to satisfy the constitutional right of confrontation. *Fowler v. State, 829 N.E.2d 459, 465-66 (Ind. 2005).* Ordinarily, a defendant's failure to request that the trial court compel an answer will waive the issue; *id. at 470;* however, in child cases, the defendant's right of confrontation is subject to the PPS. *See Howard v. State, 853 N.E.2d 461, 466 (Ind. 2006).* If the State fails to satisfy the provisions of the PPS, then the victim's failure to answer questions cannot be excused unless there is a finding of unavailability under the PPS. *Id. at 467-68.* Here, there was no finding of unavailability, and as noted above, the statements were

not properly admitted under the PPS. Without an adequate ability to confront A.Y.'s accusations on cross-examination at trial, the State violated Mr. Nunley's right of confrontation by admitting into evidence the drumbeat repetition of A.Y.'s accusations.

### D. Defense Counsel Preserved This Issue, and the Trial Court's Error Constitutes Fundamental Error

At trial, defense counsel objected to each of the above errors. She objected to the introduction of the videotaped interview and the related exhibits at the beginning of trial and when they were offered. *(Tr. 596, 600).* At the beginning of trial, she objected to any testimony regarding the accusations written on the missing envelope on the basis that recollections concerning the statement were unreliable. *(Tr. 164, 173).* She also argued that the hearsay evidence violated Mr. Nunley's right of confrontation as outlined *Crawford*. *(Tr. 166-71).* She also objected to the statements at the beginning of trial on the basis that they constituted the "drum beat [sic] of repetition." *(Tr. 171).* Defense counsel also objected to Trooper Bowlings testimony regarding A.Y.'s accusations. *(Tr. 625).* Despite these arguments, the trial court permitted the introduction of this evidence. *(Tr. 174-77).*

If this Court finds that these objections were insufficient to preserve these errors, this Court should still reach the merits of Mr. Nunley's arguments because the errors constitute fundamental error. The standard of review is set forth above. *See supra, Argument I(B).*

The admission of evidence under the PPS and the drumbeat repetition of a thirteen-word accusation with ten (10) pieces of evidence was highly inflammatory and should have been excluded under Evidence Rule 403. As noted by this Court in *Stone*, this form of prejudice is "particularly great." *Stone, supra, 536 N.E.2d at 540. "Such rampant repetition probably*

*[builds] [a defendant's] credibility to such a height Stone's presumption of innocence was overcome long before he got to the stand to deny the charges against him."* Id. *(emphasis added).* This Court should conclude that the trial court's error and the State's attempt to hammer the same, highly inflammatory accusation ten times effectively denied Mr. Nunley a fair trial. This fundamental error is in addition to the violation of Mr. Nunley's right of confrontation. As noted above, he was unable to counter this drumbeat repetition with a thorough examination of A.Y.'s accusations.

### E. The Errors Were Not Harmless

The standard of review for harmless error is set out above. *See supra, Argument I(C).* Again, in this case, A.Y.'s made a thirteen-word accusation. Her testimony was reluctant and made well over one year following the alleged molestation. On top of this evidence, the State piled on witness after witness and exhibit after exhibit restating this accusation in different forms. Aside from this evidence, the State was unable to present any other witnesses to the event and no forensic evidence. *See e.g. (tr. 697, 708).* Additionally, Mr. Nunley vehemently and consistently denied the accusations. *(Tr. 727-28).* Based upon the State's limited evidence and its highly inflammatory repetition of this evidence, this Court should conclude that the error was not harmless and should reverse Mr. Nunley's convictions and remand for a new trial.

## IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO DECLARE A MISTRIAL AFTER A STATE'S WITNESS REFERENCED OTHER ACCUSATIONS OF MOLESTATION

The State proffered evidence of other witnesses who were allegedly molested by Mr. Nunley. *(Tr. 42-73).* The trial court refused to allow this testimony into evidence. *(Tr. 363-64).* Before A.Y.'s mother testified, the trial court specifically warned her as follows: "No discussion

about alcohol or drugs unless I say so. No discussion about other girls, no discussion about [Mr. Nunley] uh, he's in jail or ought to be in jail or anything of the kind." *(Tr. 530)*. A.Y.'s mother responded, "Okay." *(Tr. 530)*. Nevertheless, the following colloquy was had upon a jury's question about the length of time it took to pursue the charges against Mr. Nunley:

> Q: Okay. So uh, the next question is, what made you continue to think about it? What, was it brought up by [A.Y.]? A year is a long time.
>
> A: No, it wasn't brought up by [A.Y.]. It was brought up by other people. Uhm, there were other allegations that I heard about.

*(Tr. 569)*. Defense counsel interjected an immediate objection and requested a mistrial. *(Tr. 569, 570)*. She argued that an admonishment would simply reinforce in the minds of jurors the improper comment. *(Tr. 570)*. The trial court denied this motion, and instead, defense counsel requested an admonishment. *(Tr. 572)*. The trial court issued the following admonishment: "Ladies and gentlemen of the jury, the last answer, uh, given by the witness is stricken from the record. You're ordered to disregard that and not consider it." *(Tr. 576)*. The trial court abused its discretion when it denied defense counsel's motion for a mistrial and issued instead this insufficient admonishment.

While decisions whether to grant motions for a mistrial are left to the sound discretion of the trial court, this Court will reverse a trial court's decision upon abuse of that discretion. *Lehman v. State, 777 N.E.2d 69, 72 (Ind. Ct. App. 2003)*. A mistrial is an extreme remedy appropriate when no other remedy is sufficient to cure the prejudice stemming from an error. *Id.* In order to establish that he is entitled to a mistrial, Mr. Nunley must demonstrate that the statement in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *Id.* Often, an admonishment by the trial

court to the jury to disregard a prejudicial statement will cure an error and render a mistrial unnecessary; however, this Court will reverse a trial court's refusal to grant a mistrial when the admonishment is insufficient to cure the error giving rise to it. *Id. at 73.*

In this case, the mistrial should have been granted as the offending evidence was highly inflammatory and violated Indiana Evidence Rule 404. Evidence Rule 404(a) states in pertinent part: "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, except . . . [exceptions listed]." *Ind. Evid. R. 404(a).* Concomitantly, Evidence Rule 404(b) bars the admission of evidence of crimes or other bad acts that may be used to infer that the defendant acted in conformity with a criminal propensity. *Ind. Evid. R. 404(b); Oldham v. State, 779 N.E.2d 1162, 1173 (Ind. Ct. App. 2002).* Evidence Rule 404(b) states in pertinent part:

> 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, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

*Ind. Evid. R. 404(b).* As well, Rule 403 excludes evidence when its probative value is substantially outweighed by the danger of unfair prejudice.

Accusations of child molestation are as prejudicial as evidence can get. Indeed, this Court has often held that other accusations of child molesting are so prejudicial that reversal is warranted. *See e.g. Krumm v. State, 793 N.E.2d 1170, 1182-83 (Ind. 2003).* In *Krumm*, this Court noted several cases in which this Court has reversed a defendant's conviction based upon the erroneous admission of other acts of child molesting. *See Greenboam v. State, 766 N.E.2d 1247, 1257 (Ind. Ct. App.2002) (holding that the admission of evidence regarding the*

*defendant's prior molestations was reversible error), trans. denied;* Craun v. State, *762 N.E.2d 230, 239 (Ind. Ct. App.2002) (holding that evidence of prior alleged child molestation required reversal because the evidence prejudicially impacted the jury and contributed to the guilty verdict), trans. denied;* Udarbe v. State, *749 N.E.2d 562, 567 (Ind. Ct. App.2001) (holding that the admission of defendant's prior sexual misconduct was not harmless error);* Sundling v. State, *679 N.E.2d 988, 994 (Ind. Ct. App.1997) (holding that the admission of evidence that the defendant had molested three other children required reversal of the defendant's convictions).* Furthermore, admonishments are unlikely to lessen the impact of such highly charged evidence upon the jury. *See* Greenboam, *supra, 766 N.E.2d at 1256;* Sundling, *supra, 679 N.E.2d at 994.*

Moreover, the error was not harmless. As noted above, the State's entire case rested upon the credibility of A.Y. *See* Udarbe, *supra, 749 N.E.2d at 567 (holding that other allegations likely swayed the jury where the only evidence against the defendant was the victim's testimony.).* Moreover, the reference to other allegations unquestionably lent more credibility to A.Y. *See* Greenboam, *supra, 766 N.E.2d at 1256 (holding that in molestation cases, the State's case generally hinges on the victim's testimony, and other acts of molestation give more credibility to the victim's charges).*

Finally the State's assertion that the jury would not have surmised that A.Y.'s mother's comment referred to other acts of child molestation defies credulity. A.Y.'s mother very clearly stated that she pursued her the underlying prosecution based upon what other people said to her and "other allegations." *(Tr. 569).* This statement very clearly communicated to the jury that multiple other allegations of child molesting had been made by other victims. For this reason, in addition to all of the other assigned errors, this Court should remand this cause for a new trial.

## CONCLUSION

In summary, this Court should remand this cause for a new trial for the following reasons: (1) Mr. Nunley was denied the right to present a defense when the trial court refused to allow him to present evidence to the effect that A.Y. had falsely accused another adult of assaulting her. This error is particularly egregious because the State opened the door to this evidence by commenting on A.Y.'s veracity; (2) the State committed misconduct by opening the door to this evidence and deliberately commenting on A.Y.'s credibility in a way that was directly contradicted by Mr. Nunley's proffered but excluded evidence; (3) the trial court erroneously admitted several hearsay statements that constituted the drumbeat repetition of a single accusation, and the admission of these statement violated Mr. Nunley's right of confrontation; and (4) the trial court erred when it refused Mr. Nunley's request for a mistrial after a State's witness referred to other acts of child molesting.

Respectfully Submitted,

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## WORD COUNT CERTIFICATE

I verify that this brief contains no more than fourteen thousand (14,000) words.

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STATE OF INDIANA

IN THE HARRISON SUPERIOR COURT

STATE OF INDIANA

VS.

LAWRENCE E. NUNLEY CAUSE NO. 31D01-0805-FA-389

**JURY TRIAL ORDER FOR NOVEMBER 21, 2008**

The State of Indiana appears by Julie Flanigan and Lauren Wheatley, Deputy Prosecuting Attorneys; the defendant appears in person, and by counsel, Susan Schultz. The duly sworn jury appears and the trial of this cause resumes.

The State of Indiana, by its Deputy Prosecuting Attorney, continues its case in chief and rests.

During the State's case in chief, the defendant, by his attorney, moves for mistrial. The Court denies said motion.

The defendant, by his attorney, presents his case in chief and rests.

The State of Indiana, by its Deputy Prosecuting Attorney, presents its rebuttal evidence and rests. The defendant, by his attorney, informs the Court that they have no surrebuttal evidence.

The Court gives to the parties, in writing, its Final Instructions which will be read to the jury. The State tenders one Final Instruction and ask that it be read to the jury. The Court refuses State's requested instruction. The defendant, by his attorney, requests no final instruction. Neither the State nor the defendant have any objections to the Court's proposed Final Instructions.

The State appears by its Deputy Prosecuting Attorneys; the defendant appears in person and by his attorney; the duly sworn jury appears and the parties make Closing

Arguments to the jury. The Court reads its Final Instructions to the jury and said instructions are filed with the Clerk and ordered made a part of the record in this cause.

The Bailiff, Sharon Carpenter, is sworn and the jury retires to the jury room to deliberate upon its verdict.

The State of Indiana appears by its Deputy Prosecuting Attorneys; the defendant appears in person and by his attorneys; the duly sworn jury appears and returns in open Court the following verdicts:

Count 1, Child Molesting, a Class A Felony – Guilty;

Count 2, Child Molesting, a Class A Felony – Guilty;

Count 3, Child Molesting, a Class A Felony – Guilty;

Count 4, Child Molesting, a Class C Felony – Guilty; and

Count 5, Dissemination of Matter Harmful to Minors, a Class D Felony – Guilty.

The defendant, by his attorney, requests the Court to poll the jury. The Court polls each juror, who indicates that the verdicts are his or her own verdicts.

The Court accepts the verdicts and are filed and made a part of the record in this cause, and Judgement of Conviction on each count is entered against the defendant.

The Court orders the Probation Office to prepare and file Presentence Investigation Report and sets sentencing hearing for January 15, 2009 at 9:00 A.M.

Jury is discharged.

So ORDERED this 21st day of November, 2008.

ROGER D. DAVIS, JUDGE
HARRISON SUPERIOR COURT

STATE OF INDIANA

HARRISON SUPERIOR COURT

STATE OF INDIANA

VS.

LAWRENCE NUNLEY CAUSE NO. 31D01-0805-FA-389

# SENTENCING ORDER

Comes now the State of Indiana by its Deputy Prosecuting Attorney, Julie Flanigan, and comes now the Defendant, in person, and by counsel, Susan Schultz.

The defendant, after having previously been found guilty by a jury on all counts, and the Court, after having considered the Presentence Investigation Report filed by the Probation Office, now sentences the defendant as follows:

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant, for the offenses by him committed, is hereby sentenced as follows:

**Indiana Department of Correction**
**Count 1, 35 years; Count 2, 35 years; Count 3, 35 years;**
**Count 4, 4 years and 8 months; Count 5, 21 months.**
**Counts 1, 2, 4 and 5 are to be served consecutive;**
**Count 3 to be concurrent with Counts 1 and 2.**
**All time to be served (-0- suspended).**
**Defendant to receive credit for time served of 232 actual days.**

**FINE**:

Defendant shall pay:
(X) $164.00 Court costs
(X) $250.00 Sexual Assault Victim's Assistance Fee.

**OTHER PROVISIONS:**

(X) No bond, payment stayed for 90 days after release from incarceration.

(X) Defendant to have no contact with the victim in this cause.

(X) Defendant to undergo H.I.V. testing.

(X) Defendant is ordered to register as sex offender for life.

(X) Defendant is found to be a sexually violent predator per 35-38-1-7.5(b)(1)(c).

(X) Defendant is ordered not to reside within 1,000 feet of school property.

(X) Defendant is ordered not to reside within one (1) mile of the victim's residence.

(X) The Court appoints Melissa Albertson as the victim's representative.

The defendant is advised of his right to appeal. The Court further finds that the defendant is indigent and appoints Matthew McGovern to represent him for appeal purposes.

**SO ORDERED** this 15th day of January, 2009.

HON. ROGER D. DAVIS, JUDGE
HARRISON SUPERIOR COURT

cc: Harrison County Sheriff

## CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2009, the foregoing was served upon the following counsel of record by first class United States Mail, postage prepaid: Office of the Indiana Attorney General, Indiana Government Center South, Fifth Floor, 402 West Washington Street, Indianapolis, IN 46204.

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