



Supreme Court of Vermont.
 STATE of Vermont
 v.
 Robert LAWTON.
 No. 93-098.

Sept. 1, 1995.

Father was charged with three counts of sexual assault on his three sons. At close of evidence, he moved in District Court, Unit No. 2, Chittenden Circuit, George T. Costes, J., for acquittal as to charge involving his youngest son. Motion was denied, and father was convicted. He appealed. The Supreme Court, Johnson, J., held that: (1) admission of alleged prior bad acts and improper prosecutorial commentary deprived father of fair trial; (2) child's hearsay statement was admissible; and (3) evidence at trial was sufficient to support denial of father's motion for acquittal.

Affirmed in part, reversed in part; remanded for new trial.

West Headnotes

[1] Criminal Law 110 700(1)

110 Criminal Law

110XX Trial

110XX(E) Arguments and Conduct of Counsel

110k700 Rights and Duties of Prosecuting

Attorney

110k700(1) k. In General; Misconduct in General. Most Cited Cases

Prosecutors have duty in criminal cases to obtain convictions earnestly and vigorously through legitimate means and methods, and to refrain from improper methods calculated to produce wrongful conviction, and to guard against conduct unintentionally trespassing bounds of propriety.

[2] Criminal Law 110 706(1)

110 Criminal Law

110XX Trial

110XX(E) Arguments and Conduct of Counsel

110k705 Presentation of Evidence

110k706 For Prosecution

110k706(1) k. In General. Most Cited

Cases

Prosecutor in criminal case must, at minimum, make good faith effort to comply with Rules of Evidence.

[3] Criminal Law 110 369.2(1)

110 Criminal Law

110XVII Evidence

110XVII(F) Other Offenses

110k369 Other Offenses as Evidence of Offense Charged in General

110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General

110k369.2(1) k. In General. Most

Cited Cases

Evidence of prior bad acts of criminal defendant may be introduced only if relevant to some other legitimate issue in case, such as motive, plan or identity. Rules of Evid., Rule 404(b).

[4] Criminal Law 110 369.2(1)

110 Criminal Law

110XVII Evidence

110XVII(F) Other Offenses

110k369 Other Offenses as Evidence of Offense Charged in General

110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General

110k369.2(1) k. In General. Most

Cited Cases

Evidence of prior bad acts of criminal defendant may be excluded even if relevant, if probative value is substantially outweighed by danger of unfair prejudice. Rules of Evid., Rules 403, 404(b).

[5] Criminal Law 110 1169.11

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.11 k. Evidence of Other Offenses and Misconduct. Most Cited Cases

Appellate court will reverse decision of trial court to admit evidence of prior bad acts of defendant only if court withheld or abused its discretion and the error was not harmless.

[6] Criminal Law 110 372(1)

[110](#) Criminal Law
[110XVII](#) Evidence
[110XVII\(F\)](#) Other Offenses
[110k372](#) Acts Part of Series Showing System or Habit
[110k372\(1\)](#) k. In General. [Most Cited Cases](#)
Evidence of prior bad acts of defendant introduced to prove method of commission of crime charged must be so distinctive, in effect, as to constitute defendant's signature.

[171](#) Criminal Law [110k372\(7\)](#)

[110](#) Criminal Law
[110XVII](#) Evidence
[110XVII\(F\)](#) Other Offenses
[110k372](#) Acts Part of Series Showing System or Habit
[110k372\(7\)](#) k. Incest, Rape, and Other Sex Offenses. [Most Cited Cases](#)
Evidence regarding defendant's anal intercourse with his wife was not so distinctive as to constitute defendant's signature, and was thus not admissible in prosecution for child sexual abuse.

[181](#) Criminal Law [110k706\(4\)](#)

[110](#) Criminal Law
[110XX](#) Trial
[110XX\(E\)](#) Arguments and Conduct of Counsel
[110k705](#) Presentation of Evidence
[110k706](#) For Prosecution
[110k706\(4\)](#) k. Cross-Examination and Impeachment of Accused. [Most Cited Cases](#)

Criminal Law [110k1171.8\(2\)](#)

[110](#) Criminal Law
[110XXIV](#) Review
[110XXIV\(O\)](#) Harmless and Reversible Error
[110k1171](#) Arguments and Conduct of Counsel
[110k1171.8](#) Presentation of Evidence
[110k1171.8\(2\)](#) k. Cross-Examination. [Most Cited Cases](#)

Withdrawn question by prosecutor in sexual abuse prosecution implying allegation of homosexuality was prejudicial to defendant, where defendant did not have opportunity to respond, jury was not instructed to disregard question, and question, which was asked during cross-examination of defendant, was intended solely to place improper matter before jury.

[191](#) Criminal Law [110k396\(1\)](#)

[110](#) Criminal Law
[110XVII](#) Evidence
[110XVII\(I\)](#) Competency in General
[110k396](#) Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party
[110k396\(1\)](#) k. In General. [Most Cited Cases](#)

Witnesses [410k406](#)

[410](#) Witnesses
[410IV](#) Credibility and Impeachment
[410IV\(E\)](#) Contradiction
[410k406](#) k. Competency of Contradictory Evidence. [Most Cited Cases](#)
Statement by defendant in sexual abuse prosecution that he and his wife had lived "California lifestyle" which included use of alcohol and drugs did not give prosecution license to admit evidence of defendant's extramarital affairs and alcohol and drug use, unless intended to contradict or rebut defendant's testimony. [Rules of Evid., Rule 404\(b\)](#).

[1101](#) Criminal Law [110k369.8](#)

[110](#) Criminal Law
[110XVII](#) Evidence
[110XVII\(F\)](#) Other Offenses
[110k369](#) Other Offenses as Evidence of Offense Charged in General
[110k369.8](#) k. In Prosecutions for Rape and Incest. [Most Cited Cases](#)
Evidence of defendant's extramarital affairs and alcohol and drug use was inadmissible in sexual abuse prosecution, where prosecution used prior bad acts as cumulative evidence of defendant's propensities.

[1111](#) Criminal Law [110k720.5](#)

[110](#) Criminal Law
[110XX](#) Trial
[110XX\(E\)](#) Arguments and Conduct of Counsel
[110k712](#) Statements as to Facts, Comments, and Arguments
[110k720.5](#) k. Expression of Opinion as to Guilt of Accused. [Most Cited Cases](#)
(Formerly 110k7201/2)

Prosecutors may not indicate personal belief that defendant is guilty because there is great risk that jury will give special weight to their opinion. [Code](#)

[of Prof.Resp., DR 7-106\(C\)\(4\).](#)

[12] Criminal Law 110  **1171.1(2.1)**

[110 Criminal Law](#)
[110XXIV Review](#)
[110XXIV\(Q\) Harmless and Reversible Error](#)
[110k1171 Arguments and Conduct of Counsel](#)
[110k1171.1 In General](#)
[110k1171.1\(2\) Statements as to Facts, Comments, and Arguments](#)
[110k1171.1\(2.1\) k. In General.](#)

Most Cited Cases


Factors determining whether prosecutorial commentary requires reversal of conviction include: blatancy of expression; impact on theory of defense; persistence and frequency of expression; opportunity of court to minimize prejudicial impact; and motivation for making remarks.

[13] Criminal Law 110  **720(5)**

[110 Criminal Law](#)
[110XX Trial](#)
[110XX\(E\) Arguments and Conduct of Counsel](#)
[110k712 Statements as to Facts, Comments, and Arguments](#)
[110k720 Comments on Evidence or Witnesses](#)
[110k720\(5\) k. Credibility and Character of Witnesses.](#) **Most Cited Cases**

Criminal Law 110  **722.3**

[110 Criminal Law](#)
[110XX Trial](#)
[110XX\(E\) Arguments and Conduct of Counsel](#)
[110k722 Comments on Character or Conduct](#)
[110k722.3 k. Character, Conduct, or Appearance in General.](#) **Most Cited Cases**

Criminal Law 110  **1171.6**

[110 Criminal Law](#)
[110XXIV Review](#)
[110XXIV\(Q\) Harmless and Reversible Error](#)
[110k1171 Arguments and Conduct of Counsel](#)
[110k1171.6 k. Comments on Character or Conduct of Accused or Prosecutor.](#) **Most Cited Cases**
Prosecutorial commentary in sexual abuse

prosecution, interjecting personal opinion of defendant's character and credibility, required reversal, where statements were blatant, persistent, and uncorrected by trial court, and where particularly prejudicial comment was made at close of cross-examination of defendant, when jury was in best position to judge his credibility, and was not a spontaneous and inadvertent slip by prosecutor but rather had a studied purpose.

[14] Criminal Law 110  **1030(1)**

[110 Criminal Law](#)
[110XXIV Review](#)
[110XXIV\(E\) Presentation and Reservation in Lower Court of Grounds of Review](#)
[110XXIV\(E\)1 In General](#)
[110k1030 Necessity of Objections in General](#)

[110k1030\(1\) k. In General.](#) **Most Cited Cases**

Appellate court will find plain error to warrant reversal of criminal conviction, absent preservation of issue at trial, only in rare and extraordinary cases where error so affects substantial rights of defendant that appellate court cannot find trial overall to be fair. [Rules Crim.Proc., Rule 52\(b\).](#)

[15] Criminal Law 110  **1037.1(2)**

[110 Criminal Law](#)
[110XXIV Review](#)
[110XXIV\(E\) Presentation and Reservation in Lower Court of Grounds of Review](#)
[110XXIV\(E\)1 In General](#)
[110k1037 Arguments and Conduct of Counsel](#)

[110k1037.1 In General](#)
[110k1037.1\(2\) k. Particular Statements, Arguments, and Comments.](#) **Most Cited Cases**

Plain error justified reversal of conviction for sexual abuse where evidence of defendant's prior bad acts was improperly admitted and blatant and persistent prosecutorial commentary was not corrected by trial court. [Rules Crim.Proc., Rule 52\(b\).](#)

[16] Criminal Law 110  **369.8**

[110 Criminal Law](#)
[110XVII Evidence](#)
[110XVII\(F\) Other Offenses](#)
[110k369 Other Offenses as Evidence of Offense Charged in General](#)

[110k369.8](#) k. In Prosecutions for Rape and Incest. [Most Cited Cases](#)
Prejudicial effect of testimony by counselor as to report by mother of alleged sex abuse victims of alleged sexual activity involving defendant and other minor children and witnessed by her brother-in-law substantially outweighed its probative value, despite state's contention that testimony was necessary to show why counselor intended to report defendant to Social and Rehabilitation Services, leading to report by mother, where defendant did not dispute that counselor was behind mother's report. [Rules of Evid., Rules 403, 404\(b\)](#).

[17] Criminal Law 110  **369.1**

[110](#) Criminal Law
[110XVII](#) Evidence
[110XVII\(F\)](#) Other Offenses
[110k369](#) Other Offenses as Evidence of Offense Charged in General
[110k369.1](#) k. In General. [Most Cited Cases](#)

Evidence is highly prejudicial if it reflects uncharged conduct similar to allegations being tried, and invites jury to convict on alleged crimes for which defendant had escaped punishment. [Rules of Evid., Rules 403, 404\(b\)](#).

[18] Witnesses 410  **277(4)**


[410](#) Witnesses
[410III](#) Examination
[410III\(B\)](#) Cross-Examination
[410k277](#) Cross-Examination of Accused in Criminal Prosecutions
[410k277\(2\)](#) Particular Subjects of Inquiry

[410k277\(4\)](#) k. Limitation to Subjects of Direct Examination. [Most Cited Cases](#)
Questions regarding contents of temporary restraining order were outside proper scope of cross-examination, where direct examination of defendant only extended to number of incidents of child sexual abuse alleged.

[19] Criminal Law 110  **783(1)**

[110](#) Criminal Law
[110XX](#) Trial
[110XX\(G\)](#) Instructions: Necessity, Requisites, and Sufficiency
[110k783](#) Purpose and Effect of Evidence
[110k783\(1\)](#) k. In General. [Most Cited](#)

[Cases](#)

Criminal Law 110  **1169.11**

[110](#) Criminal Law
[110XXIV](#) Review
[110XXIV\(Q\)](#) Harmless and Reversible Error
[110k1169](#) Admission of Evidence
[110k1169.11](#) k. Evidence of Other Offenses and Misconduct. [Most Cited Cases](#)
Trial court's admission of testimony by counselor as to report by mother of alleged sexual abuse victims of alleged sexual activity involving defendant and other minor children and witnessed by her brother-in-law was prejudicial, particularly where testimony was also repeated for improper reason during cross-examination of defendant and gratuitously referred to in prosecution's closing argument, even though trial court issued limiting instruction, when evidence was originally offered, that evidence was offered as basis for further testimony and was not to be taken as true. [Rules of Evid., Rules 403, 404\(b\)](#).

[20] Criminal Law 110  **372(7)**

[110](#) Criminal Law
[110XVII](#) Evidence
[110XVII\(F\)](#) Other Offenses
[110k372](#) Acts Part of Series Showing System or Habit
[110k372\(7\)](#) k. Incest, Rape, and Other Sex Offenses. [Most Cited Cases](#)
Testimony by counselor as to report by mother of alleged sexual abuse victims of alleged sexual activity involving defendant and other minor children and witnessed by her brother-in-law was not admissible as establishing scheme or plan of sexual molestation, where such testimony was offered at trial only to establish basis for further testimony and on cross-examination to correct defendant's testimony as to number of incidents of molestation alleged in request for temporary restraining order.

[21] Infants 211  **20**

[211](#) Infants
[211II](#) Protection
[211k20](#) k. Criminal Prosecutions Under Laws for Protection of Children. [Most Cited Cases](#)
Hearsay statements by child ten years of age or younger are admissible at trial if: child is putative victim of sexual assault and statements relate to crime; statements were not taken in preparation for legal proceeding, and if criminal proceeding has been

initiated, statements were made prior to defendant's initial appearance before judicial officer; child is available to testify; and time, content and circumstances of statements provide substantial indicia of trustworthiness. [Rules of Evid., Rule 804a\(a\)\(1-4\)](#).

[22] Infants 211 

211 Infants

211II Protection

211k20 k. Criminal Prosecutions Under Laws for Protection of Children. [Most Cited Cases](#)
Statement by putative victim of child sexual abuse is not taken "in preparation for legal proceeding" so as to preclude admissibility under hearsay exception if objective view of totality of circumstances indicates that statements were gathered primarily for reasons other than preparation for legal proceeding, such as parent's initial, concerned questioning of child. [Rules of Evid., Rule 804a\(a\)\(2\)](#).

[23] Infants 211 

211 Infants

211II Protection

211k20 k. Criminal Prosecutions Under Laws for Protection of Children. [Most Cited Cases](#)
Statements by putative child sexual abuse victim to his mother made in response to her suspicions of abuse and prior to involvement of investigators were not taken in preparation for litigation, for purposes of admissibility under hearsay exception, and existence of outstanding relief-from-abuse order did not render all subsequent conversations preparation for litigation. [Rules of Evid., Rule 804a\(a\)\(2\)](#).

[24] Infants 211 

211 Infants

211II Protection

211k20 k. Criminal Prosecutions Under Laws for Protection of Children. [Most Cited Cases](#)
Limited testimony of putative child sexual abuse victim does not render child unavailable to testify for purposes of hearsay exception for child's statements relating to abuse. [Rules of Evid., Rule 804a\(a\)\(3\)](#).

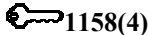
[25] Infants 211 

211 Infants

211II Protection

211k20 k. Criminal Prosecutions Under Laws for Protection of Children. [Most Cited Cases](#)

Putative child sexual abuse victim's refusal to discuss specifics of abuse on direct examination did not render him unavailable to testify for purposes of hearsay exception for child's statements as to abuse, where he did state that something had happened to him involving his father which he did not like to talk about, and where he was available for cross-examination, even though defense chose not to cross-examine. [Rules of Evid., Rule 804a\(a\)\(3\)](#).

[26] Criminal Law 110 

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158 In General

110k1158(4) k. Reception of Evidence.

[Most Cited Cases](#)

Appellate court will not reverse trial court's determination on trustworthiness of particular statements of alleged child abuse victim, for purposes of hearsay exception, where findings are supported by credible evidence, absent clear error by trial court. [Rules of Evid., Rule 804a\(a\)\(4\)](#).

[27] Infants 211 

211 Infants

211II Protection

211k20 k. Criminal Prosecutions Under Laws for Protection of Children. [Most Cited Cases](#)
Statement by putative child sexual abuse victim to his mother concerning abuse was trustworthy, for purposes of hearsay exception, where made in response to mother's first questioning of child about incidents involving child's father, and not in response to repeated interviewing, or as result of coercion or manipulation. [Rules of Evid., Rule 804a\(a\)\(4\)](#).

[28] Infants 211 

211 Infants

211II Protection

211k20 k. Criminal Prosecutions Under Laws for Protection of Children. [Most Cited Cases](#)
Mere mention by trial court of corroboration of child witnesses' statements by medical doctor was not clearly erroneous, where mention was made at end of court's findings on trustworthiness of hearsay statements and after noting other indicia of trustworthiness, and mere mention of medical evidence thus did not constitute impermissible "bootstrapping" of children's testimony. [Rules of Evid., Rule 804a\(a\)\(4\)](#).

[\[29\]](#) **Criminal Law 110**  [753.2\(6\)](#)

[110](#) Criminal Law

[110XX](#) Trial


[110XX\(F\)](#) Province of Court and Jury in General

[110k753](#) Direction of Verdict

[110k753.2](#) Of Acquittal

[110k753.2\(3\)](#) Insufficiency of Evidence

[110k753.2\(6\)](#) k. Suspicion or Conjecture; Reasonable Doubt. [Most Cited Cases](#)

Criminal Law 110  [753.2\(8\)](#)

[110](#) Criminal Law

[110XX](#) Trial

[110XX\(F\)](#) Province of Court and Jury in General

[110k753](#) Direction of Verdict

[110k753.2](#) Of Acquittal

[110k753.2\(8\)](#) k. Hearing and Determination. [Most Cited Cases](#)

Motion for judgment of acquittal is properly denied by trial court if evidence, viewed in light most favorable to state, fairly and reasonably tends to show defendant guilty beyond reasonable doubt.

[\[30\]](#) **Criminal Law 110**  [552\(1\)](#)

[110](#) Criminal Law

[110XVII](#) Evidence

[110XVII\(V\)](#) Weight and Sufficiency

[110k552](#) Circumstantial Evidence

[110k552\(1\)](#) k. In General. [Most Cited Cases](#)

Criminal case may be proved by circumstantial evidence alone, and direct evidence of guilt is not required.

[\[31\]](#) **Infants 211**  [20](#)

[211](#) Infants

[211II](#) Protection

[211k20](#) k. Criminal Prosecutions Under Laws for Protection of Children. [Most Cited Cases](#)

Evidence was sufficient for jury to find necessary element of contact, in prosecution for child sexual abuse, where child testified that his father did something to him that was hard to talk about, and where child's mother testified that child had told her that his father had touched his private parts, rubbed his leg against child's leg, touched his penis and

bitten his "butt," and that child remembered time when he woke up and father was biting his butt and child's pajamas were wet, and that child complained of sore bottom, and where pediatrician testified that child's physical condition was consistent with history of rectal penetration by adult penis. [13 V.S.A. § 3251\(1\)](#).

****53 *180** Jeffrey L. Amestoy, Attorney General, and [Susan R. Harritt](#), Assistant Attorney General, Montpelier, appellate counsel for plaintiff-appellee. [James W. Murdoch](#), [Kurt M. Hughes](#) and Heather Rylant, Legal Assistant (On the Brief), of Murdoch & Hughes, Burlington, for defendant-appellant.

Before ALLEN, C.J., and [GIBSON](#), [DOOLEY](#), [MORSE](#) and [JOHNSON](#), JJ.

***181** [JOHNSON](#), Justice.

Rarely are we compelled to reverse a verdict of guilty because the trial judge failed to control an overzealous prosecutor, but this is such a case. The improper admission of numerous bad acts allegedly committed by defendant, punctuated with improper prosecutorial comments about defendant's character, were potentially so damaging that we cannot conclude that the verdict against defendant was untainted by such evidence.

Defendant was charged with three counts of sexual assault on his three sons, G.L., aged seven years, D.L., aged five years, and B.L., aged three years. The State alleged the offenses took place between January 1990 and February 1991 while defendant lived with his family in Williston, Vermont. All three boys testified at trial, but B.L., the youngest, was unwilling to talk about what had happened to him. B.L.'s story was told through his mother and the police officer who interviewed him. Although B.L.'s story was less specific than the older children's description, the gist of the children's stories was that defendant had sodomized them on several occasions.

The children's description of the sexual conduct was consistent with the findings of Dr. Paul Young, the State's medical expert, who had examined the boys and found physical ****54** abnormalities consistent with a history of rectal penetration by an object the size of an adult penis. Although the physical examination of the boys revealed a difference in severity of abnormality, Dr. Young concluded that the most likely explanation for the rectal injuries in all three boys was "sexual abuse, repeated sodomy, anal intercourse."

Defendant testified in his own defense. His theory of the case was that his wife had accused him of sexual abuse of the children in retaliation for an affair he was conducting with another woman, and that his wife had coerced the children to testify. He presented expert testimony contending that the children had been improperly manipulated by various interviewers. His explanation for the physical evidence found by Dr. Young was that the children were engaging in sexualized play with each other and with children in the neighborhood.

The central issues for the jury, then, should have been the children's credibility and the reliability of B.L.'s account of the abuse, as related through his mother and the police officer, the persuasiveness of the medical and other expert testimony, and defendant's credibility. The State, however, shifted the focus of the trial to defendant's character. Thus, we first discuss defendant's two related assignments of error, that the admission of numerous bad acts *182 combined with improper prosecutorial commentary deprived him of a fair trial.

I.

[1] In criminal cases, prosecutors have a duty to obtain convictions "earnestly and vigorously through legitimate means and methods." [State v. Verrinder](#), 161 Vt. 250, 261, 637 A.2d 1382, 1389 (1993). They also have a "corresponding duty to refrain from improper methods calculated to produce a wrongful conviction and to guard against conduct unintentionally trespassing the bounds of propriety." [State v. Lapham](#), 135 Vt. 393, 406, 377 A.2d 249, 257 (1977). A prosecutor must avoid appealing to the prejudices of the jury or relying on improperly drawn inferences. *Id.*

[2][3][4][5] Prosecutors are not without guidelines as to what is fair play in the context of a criminal trial. At a minimum, they must make a good faith effort to comply with the Vermont Rules of Evidence. The Rules provide that evidence of prior bad acts may not be admitted "to prove the character of a person in order to show that he acted in conformity therewith." [V.R.E. 404\(b\)](#); [State v. Jones](#), 160 Vt. 440, 444, 631 A.2d 840, 844 (1993). When used to show character, admission of prior bad acts presents a significant danger of unfair prejudice and confusion, creating the distinct possibility that the jury will convict a defendant of the charged crime solely because he has committed other crimes or acts. [State v. Bruyette](#), 158 Vt. 21, 27, 604 A.2d 1270, 1272

(1992). Such evidence may be introduced only if it is relevant to some other legitimate issue in the case, such as motive, plan or identity. [V.R.E. 404\(b\)](#); [State v. Winter](#), 162 Vt. 388, ---, 648 A.2d 624, 626 (1994). Even if relevant, however, the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. [V.R.E. 403](#); [State v. Ashley](#), 160 Vt. 125, 126, 623 A.2d 984, 985 (1993). On appeal, we will reverse the trial court's decision to admit this evidence only if the court withheld or abused its discretion and the error was not harmless. [State v. Kelley](#), 163 Vt. 325, ---, 664 A.2d 708, 710 (1995).

A.

The principal ground for reversal in this case lies in the prosecutor's cross-examination of defendant. It is replete with prior bad acts and improper commentary designed to compel the jury's conclusion that defendant was a person of bad character. The intended inference *183 was that a person of such character is likely to have committed the acts charged and should be convicted. All of the acts introduced were highly prejudicial and of marginal or no relevance to the factual issues before the jury.

The prosecutor questioned defendant about having anal intercourse with his wife, and asked whether he enjoyed anal intercourse. She asked him if he had been caught in a compromising position with another man, **55 which she described, implying that defendant had engaged in homosexual acts. She then questioned defendant about how much he liked to have sex and proceeded through a laundry list of names of adults with whom he had allegedly had sexual relations. She asked if defendant had been drunk and on drugs when his daughter was born, implying that he was unable to go to his daughter's birth because he was under the influence. She asked whether defendant was in bed with another woman when his wife returned home from the hospital after the birth.

[6][7] The State makes various attempts to justify the admission of these incidents. It argues that evidence regarding anal intercourse with defendant's wife should be admitted because it is probative of defendant's specific method of performing anal sexual penetration as a prelude to anal intercourse-to identify defendant as the children's abuser. Such evidence, however, "must be so distinctive, in effect, [as] to constitute the defendant's signature." [Bruyette](#), 158 Vt. at 27, 604 A.2d at 1273. We do

not believe that the evidence in this case satisfies the high threshold established in *Bruyette*, and the evidence was relevant to no other purpose.

[8] In the same vein, the prosecutor attempted to ask defendant about whether he had been caught engaging in anal intercourse with an adult male friend. Although the prosecutor then withdrew the question, the damage was done. The judge did not instruct the jury to disregard the question. The implication was before the jury and, because defendant did not have the opportunity to answer the question and there was no instruction to disregard the question, there was potential prejudice to defendant by implying an allegation of homosexuality. See *United States v. Schwab*, 886 F.2d 509, 513 (2d Cir.1989) (questions themselves may be prejudicial if intended solely to place improper matters before jury), *cert. denied*, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990).

[9][10] The State argues that defendant opened the door on the evidence about defendant's many extramarital affairs and defendant's *184 alcohol and drug use because, in his opening statement, he mentioned that the couple had lived the "California lifestyle," which included the use of alcohol and drugs. The State argues an overly broad position on the open door policy. See *State v. Recor*, 150 Vt. 40, 44, 549 A.2d 1382, 1386 (1988) (Rule 404(b) not license "for the prosecutor to engage in 'overkill' nominally justified by the defendant's actions in raising a line of questions"). While we agree that defendant initially raised these issues, this did not give the State license to introduce additional evidence on the same matters unless it was intended to contradict or rebut the testimony of defendant. See *id.* at 44, 549 A.2d at 1386 (evidence of prior assault on same victim properly admitted after defendant tried to impeach victim with incomplete picture of unwarranted bias); *United States v. Beverly*, 5 F.3d 633, 640 (2d Cir.1993) (evidence of prior shootings properly admitted to rebut defendant's testimony that he was unfamiliar with use of guns); *United States v. Carter*, 953 F.2d 1449, 1456-57 (5th Cir.), *cert. denied*, 504 U.S. 990, 112 S.Ct. 2980, 119 L.Ed.2d 598 (1992) (defendant's prior conviction and time served admissible to rebut defendant's claim of continuous employment). Instead, the State improperly used the prior bad acts as cumulative evidence of defendant's propensities.

The prosecutor also made inappropriate comments during the cross-examination by interjecting her personal opinion of defendant's character and

credibility. She commented that defendant "had a lot of practice lying." She stated, "Funny how everywhere you go, children, especially young boys, start sexually acting out." When defendant stated he did not have time for extramarital affairs, she retorted that he was meeting his sexual needs at home. Finally, the prosecutor ended her questioning with the statement, "I think that there's one statement that you made that's true, that even if you were guilty, you'd deny it until your dying day."

[11][12] Prosecutors may not indicate a personal belief that defendant is guilty because there is a great risk that the jury will give special weight to their opinion. **56*State v. Ayers*, 148 Vt. 421, 425, 535 A.2d 330, 333 (1987); see also *Code of Professional Responsibility DR 7-106(C)(4)* (lawyer shall not assert personal opinion as to witness's credibility or defendant's guilt). Whether improper comment by the prosecutor requires reversal depends on such factors as the blatancy of the expression, the impact on the theory of the defense, persistence and frequency of expression, the opportunity and potential for the court to minimize prejudicial impact, and the motivation for making *185 the remarks. *State v. Francis*, 151 Vt. 296, 299, 561 A.2d 392, 394 (1989).

[13] Here, the prosecutor went far beyond the bounds of propriety. The statements were blatant, persistent, and uncorrected by the court. In particular, the prosecutor's closing comment at the end of the cross-examination came at a critical moment in the trial when the jury, having just heard defendant's testimony, was in the best position to judge his credibility. It was not a "spontaneous and inadvertent slip." *State v. Hamlin*, 146 Vt. 97, 103, 499 A.2d 45, 50 (1985). The comment had a "studied purpose," *Lapham*, 135 Vt. at 407, 377 A.2d at 257, intending to inject a highly prejudicial remark at a crucial point of the trial.

[14][15] Defendant objected to some, but not all, of the acts and commentary discussed. Even where defendant has failed to preserve an issue, we may still reverse if the error is plain. "[W]e will find plain error to warrant reversal of a criminal conviction, absent preservation, only in rare and extraordinary cases where the error so affects the substantial rights of the defendant that we cannot find the trial overall to be fair." *State v. McCarthy*, 156 Vt. 148, 154, 589 A.2d 869, 873 (1991); see *V.R.Cr.P. 52(b)*. Taken together, the errors discussed are sufficient to support a finding of plain error.

B.

[16] One particularly prejudicial prior bad act, first presented in the State's direct case, and reappearing on cross-examination and closing argument, deserves discussion. It was an incident that was brought to light by the testimony of the mother's counselor, Mark Williams, in which he related that the mother had told him that her brother-in-law had walked into defendant's house in California and had seen him sitting in a circle of children with an exposed erection. When Williams heard this, he advised the mother that, if it were true, he had an obligation to report the matter to the Department of Social and Rehabilitation Services (SRS). The mother then notified SRS herself and obtained a relief-from-abuse order. The evidence was admitted over defendant's objection because the court found that it was not admitted for the truth of the matter asserted, but to form a basis for the witness's further testimony. The court then gave a limiting instruction to the jury.

The State argues that the evidence was necessary to rebut defendant's theory of the case, that the mother had fabricated the *186 charges against him after the discovery of his affair with another woman. It contends that the mother acted to avoid having a third party report the information; therefore, it was necessary to show why the counselor intended to act.

The basis of the counselor's testimony was a thin reed upon which to admit the evidence. Defendant did not dispute that the counselor was behind the mother's report to SRS. Indeed, it was part of defendant's theory of the case that the alleged abuse was a figment of the counselor's imagination, so the evidence was not critical to the State's case. When viewed in light of [Rule 403](#) considerations, the prejudicial value of the evidence substantially outweighed its probative value.^{FN1}

[FN1. Vermont Rule of Evidence 403](#) states: "Although 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[17] The evidence was highly prejudicial because it reflected uncharged conduct similar to the allegations being tried, and invited the jury to convict on alleged

crimes for which defendant had escaped punishment, precisely the result that [Rule 404\(b\)](#) is designed to prevent. See [United States v. Williams, 985 F.2d 634, 637-38 \(1st Cir.1993\)](#) **57 (evidence of uncharged, unrelated murder was not relevant to plan of intimidation or modus operandi and was improperly admitted solely to show propensity). The record is devoid of an effort by the trial judge to balance the probative value versus prejudicial effect of this evidence. It was an abuse of discretion to admit it, even with the limiting instruction that it was not to be considered as true.

[18] The prosecutor then confronted defendant with the incident on cross-examination for an improper reason. Defendant was asked on direct examination to relate when he first became aware that his wife had accused him of sexually abusing the children. His response was that he became aware of it when he read "three mild accusations" in the temporary restraining order (TRO). He did not state what the accusations were. The State then confronted defendant with the "fourth" allegation, and read a description of the incident from the TRO.

The State argues that it was entitled to correct the impression created by defendant in his direct testimony that there were only three allegations of child abuse in the TRO, rather than four. But the issue on direct was not the contents of the TRO. It was the time at *187 which defendant first became aware of his wife's accusations. In this context, the number of accusations or the exact nature of those accusations was irrelevant. Even if clarification were required on the number of accusations, it was not required on content.

[19][20] In her closing argument, the prosecutor gratuitously referred to the incident in the context of discussing defendant's opportunities to commit child sexual abuse in California because the family's house was in a remote location. The incident related by the brother-in-law was presented as proof of opportunity. Again, the evidence had no relation to the charges before the court other than to prove that defendant had a propensity to commit child sexual abuse.^{FN2}

[FN2.](#) To the extent the State argues, in its brief, that this evidence is admissible to establish a scheme or plan of sexual molestation, [State v. Catsam, 148 Vt. 366, 382, 534 A.2d 184, 194 \(1987\)](#), we disagree. The evidence was not offered at trial for that purpose. It was offered to show the basis of

the counselor's recommendation and to correct the number of accusations in the TRO.

By the end of the trial, the jury had heard three references to a highly damaging piece of evidence that defendant had not been asked to admit or deny, and which was subject to a limiting instruction that the jury was not to consider the incident as having happened. When it was presented as fact by the prosecutor in closing argument, it is difficult to believe that any jury could have understood what use it should make of the evidence, creating the danger that it was used for an improper purpose.

C.

Although the prosecutor intentionally engaged in conduct that diverted the jury's attention from the issues before the court, she was not able to accomplish this without the assistance of the trial judge. It is ultimately the trial court's responsibility to ensure that defendant is tried on the crime charged, not on his character or his alleged propensity to engage in criminal conduct. Here, the court's repeated failure to exclude prior bad acts, to curtail the use of character evidence for improper purposes, and to curb the prosecutor's comments was an abuse of discretion. We cannot say that the cumulative effect of the errors was harmless. See [Winter](#), 162 Vt. at ---, 648 A.2d at 632 (admission of single, uncharged sexual assault in subsequent sexual assault prosecution was not harmless).

II.

We must also address defendant's claim that the trial court erred in denying his motion for judgment of acquittal on the charge involving *188 B.L., his youngest son. B.L.'s testimony at trial was limited, and his story was told by his hearsay statements to his mother and to state police detective, Dane Shortsleeve.

Defendant first argues that B.L.'s hearsay statements were inadmissible for failure of the court to comply with [V.R.E. 804\(a\)](#), leaving no testimony in the record on the elements of the offense other than B.L.'s statement**58 that his father did something to him that he did not like to talk about. Second, defendant contends that even if B.L.'s statements are admissible, there is no evidence to support an essential element of the crime charged, that is,

contact between defendant's penis and the child's anus. See [13 V.S.A. § 3251\(1\)](#) (defining sexual act as conduct consisting of contact between penis and anus).

A.

[\[21\]](#) Hearsay statements by a child ten years of age or younger may be admitted at trial if (1) the child is a putative victim of sexual assault and the statement relates to the crime; (2) the statements were not taken in preparation for a legal proceeding, and if a criminal proceeding has been initiated, the statements were made prior to the defendant's initial appearance before a judicial officer under [V.R.Cr.P. 5](#); (3) the child is available to testify; and (4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness. [V.R.E. 804a\(a\)\(1\)-\(4\)](#). Defendant does not contest that B.L. qualifies as a putative victim of sexual assault, but he does claim the court erred in its determination of the remaining three criteria under [Rule 804a\(a\)\(2\)-\(4\)](#).

The hearsay statements admitted at trial arise from several different occasions, but we consider only B.L.'s statements to his mother because B.L.'s later disclosure to a police officer was no more revealing on the central issue than those already made. On February 11, 1991, mother first spoke with B.L. about inappropriate contact with his father. She testified that B.L. told her D.L. and his father had touched his private parts and played "peepee races." B.L. also told her that his father had bitten his butt and that one night he had woken up to find his father biting his butt and his pajamas wet.

[\[22\]\[23\]](#) First, the court correctly found that the statements to the putative victim's mother were in response to her suspicions of abuse and not taken in preparation for legal proceedings. B.L.'s disclosure was made within a few days of the issuance of a relief-from-abuse order. No other legal proceeding was pending at the time of the disclosure. *189 Persons investigating the child abuse allegations were not involved with B.L. until after he had made disclosures to his mother. We concur with the trial court's rejection of defendant's argument that because he was subject to a temporary relief-from-abuse order, all subsequent conversations were conducted in preparation for litigation.

We have previously held that "statements made by putative victims during SRS's initial investigation into allegations of sexual abuse are not necessarily

taken in preparation for a legal proceeding.” [State v. Duffv](#), 158 Vt. 170, 173, 605 A.2d 533, 535 (1992). More recently, we held that a child's statements to a police officer, videotaped at a police station in the presence of an SRS caseworker, “were not ‘taken in preparation for a legal proceeding.’ ” [State v. Blackburn](#), 162 Vt. 21, 25, 643 A.2d 224, 226 (1993). In [Blackburn](#), we noted that interpreting [Rule 804a\(a\)\(2\)](#) too broadly would require “every factual inquiry” to be considered in preparation of litigation. *Id.* at 24, 643 A.2d at 226. We held that the proper inquiry under the Rule “is whether an objective view of the totality of the circumstances indicates that the statements were gathered primarily for reasons other than preparation for a legal proceeding.” *Id.* at 25, 643 A.2d at 226. The statements made by B.L. to his mother were the result of the mother's first inquiries about sexual abuse. [Rule 804a\(a\)\(2\)](#) embodies the concern that repeated interviews will be conducted by investigators until “nothing [is] left to do in preparation for trial.” *Id.* A parent's initial, concerned questioning of a child is simply not the type of statement which [Rule 804a\(a\)\(2\)](#) is intended to exclude.

[24][25] Defendant next argues that B.L.'s refusal to discuss the incident on direct examination rendered him unavailable to testify, thereby violating [Rule 804a\(a\)\(3\)](#). Although B.L. did not give detailed testimony concerning the alleged abuse, he did state that something had happened to him, involving his father, and that he did not like to talk about it. In addition, he gave a detailed description of the Lawton house and the location of his bedroom. He was available **59 for cross-examination, though the defense chose not to exercise that right.

In cases of child sexual abuse, limited testimony does not equal unavailability. See [In re M.B.](#), 158 Vt. 63, 69, 605 A.2d 515, 518 (1992) (child sex abuse victim was available at CHINS hearing though she testified she could not remember what the person who had abused her had done). Indeed, we noted in [State v. Gallagher](#) the likelihood that child victims of sexual crimes will be unable to deliver live testimony effectively. 150 Vt. 341, 347, 554 A.2d 221, 225, cert. denied, 488 U.S. 995, 109 S.Ct. 563, 102 L.Ed.2d 588 (1988). B.L.'s performance merely demonstrates the necessity for *190 the [Rule 804a](#) hearsay exception. Consequently, B.L. was available for purposes of [Rule 804a\(a\)\(3\)](#).

[26] The final requirement imposed by [Rule 804a\(a\)](#) is that the hearsay statements have substantial indicia of trustworthiness. Unless clearly erroneous, we will

not reverse a court's determination on the trustworthiness of particular statements where the findings are supported by credible evidence. [Gallagher](#), 150 Vt. at 348, 554 A.2d at 225 (court found professionalism of interviews, internal consistency and detail of child's story, and child's affect, intelligence, memory and concern for truth supported trustworthiness of child victim's hearsay statements).

[27] The court's conclusions with respect to B.L.'s statement to his mother were not clearly erroneous because the disclosure was made in response to the first time the mother asked B.L. about any incidents involving his father. See Reporter's Notes, [V.R.E. 804a](#) (“child-victim's early communications are often highly trustworthy”). Thus, B.L.'s statement was not the product of repeated interviewing, nor was any evidence of coercion or manipulation present. Given the circumstances, the statement was trustworthy.

[28] Finally, defendant alleges the trial court impermissibly relied on corroborating medical evidence in determining that the children's hearsay statements, including B.L.'s, were trustworthy. He asserts that because hearsay statements are presumptively unreliable, the United States Supreme Court barred bootstrapping on the trustworthiness of corroborating medical evidence. See [Idaho v. Wright](#), 497 U.S. 805, 823-24, 110 S.Ct. 3139, 3150-51, 111 L.Ed.2d 638 (1990) (rejecting admission of two-and-a-half-year old's hearsay statements through pediatrician). While it is true the court alluded to the fact the children's statements were corroborated by a medical doctor, the court did so at the end of its findings and only after noting other indicia of trustworthiness. We do not deem mere mention of corroboration clearly erroneous.

B.

The question remaining is whether B.L.'s hearsay statements were sufficient to establish the element of contact beyond a reasonable doubt.

[29][30] In reviewing a motion for judgment of acquittal, the issue is whether the evidence, viewed in the light most favorable to the State, fairly and reasonably tends to show the defendant guilty beyond a reasonable doubt. [Jones](#), 160 Vt. at 442-43, 631 A.2d at 843. It is not necessary to show guilt by direct evidence, and a criminal case may be *191 proved wholly by circumstantial evidence alone. [State v. Messier](#), 146 Vt. 145, 150, 499 A.2d 32, 37

(1985). In *Messier*, we upheld a conviction of sexual assault even though no direct evidence of the sexual acts was adduced through testimony. The eyewitness in *Messier* could testify only to the position of the bodies, from which the jury could draw the inference that the required contact had occurred. *Id.*, at 150, 499 A.2d at 37. In *Jones*, we affirmed a conviction for sexual assault on the basis of the testimony of a thirteen-year-old girl who testified to an attempt at penetration that hurt her. *Jones*, 160 Vt. at 443, 631 A.2d at 843.

[31] Under *Jones* and *Messier*, we conclude that there was sufficient evidence from which a jury could determine the element of contact beyond a reasonable doubt. B.L. testified that his father did something to him that was hard to talk about, that he had talked about it with a police officer, and that it happened at home. His mother testified that B.L. had told her that his father had touched his private parts, had rubbed his leg **60 against B.L.'s leg, had touched his penis and bitten his "butt." B.L. told her that he remembered a time when he woke up and his father was biting his butt and B.L.'s pajamas were wet. She also related that B.L. complained to her that he had a sore bottom.

Dr. Young, the pediatrician who examined all three boys, testified that B.L.'s physical condition was consistent with a history of rectal penetration, and that the best explanation for the physical condition of all three boys was that they had been the victims of sexual abuse. He based his opinion in part on his discussion with the two older boys, who related some of the sexual events to them. Dr. Young also testified that the physical findings were consistent with a penetrating object the size of an adult's, not a child's, penis.

Defendant relies on two cases where the court found insufficient evidence of sexual assault. See *State v. Prime*, 137 Vt. 340, 342, 403 A.2d 270, 271 (1979) (element of contact not established); *State v. O'Neill*, 134 N.H. 182, 589 A.2d 999, 1002-03 (1991) (testimony that defendant "stuck his fingers in my bum" insufficient to support penetration of anus.) The decision in *Prime* does not detail the testimony found to be insufficient and does not aid our analysis. The decision from New Hampshire is not persuasive authority in light of our own decisions in *Jones* and *Messier*, and does not take into account that criminal cases *192 may be proved by circumstantial evidence. The motion for judgment of acquittal was properly denied. ^{FN3}

FN3. Although defendant raised numerous errors on appeal, we decline to reach the remaining issues and leave them for decision in the context of a new trial, in the event the State chooses to retry defendant.

Reversed and remanded for a new trial; denial of motion for judgment of acquittal affirmed.

Vt., 1995.
State v. Lawton
164 Vt. 179, 667 A.2d 50

END OF DOCUMENT