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SUPREME

NO. 82927-1-I

101586-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK GLENN,

Petitioner.

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

The Honorable Andrea Darvas, Judge

PETITION FOR REVIEW

ERIN MOODY
Attorney for Petitioner
NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Mark Glenn seeks review of the Court of Appeals' decision in State v. Glenn, 82927-1-I (Op.), filed October 31, 2022, which is appended to this petition. The panel denied reconsideration on December 13, 2022.

B. INTRODUCTION

Mr. Glenn faced trial for four sex offense charges, involving three different students at the high school where he worked: O.G., J.O., and L.C. After hearing testimony by all three accusers, including extensive cross-examination discrediting O.G.'s allegations, the jury hung on every count and the court declared a mistrial.

The State tried Mr. Glenn again about two months later, this time for only one count of second-degree sexual misconduct with a minor. O.G. and L.C. declined to participate, and the trial court ruled in limine that the State could not elicit any testimony indicating that these absent, non-testifying students had accused Mr. Glenn.

The prosecutor violated this ruling in limine when he elicited testimony, from an investigating police officer, to the

effect that O.G. made serious and concerning allegations against Mr. Glenn and then participated in the investigation of J.O.'s allegations. Defense counsel moved for a mistrial immediately after the violation, but the trial court denied the motion.

Mr. Glenn appealed, arguing that the trial court abused its discretion by denying the mistrial motion, and that this error was of constitutional magnitude because the improper testimony violated his right of confrontation. The Court of Appeals held that any confrontation clause claim was waived for appeal, under State v. Burns, 193 Wn.2d 190, 438 P.3d 1183 (2019), because trial counsel had not used the phrase, "confrontation clause," when he successfully objected to the testimonial hearsay.

C. ISSUES PRESENTED FOR REVIEW

1. Where defense counsel objects to testimonial hearsay on the ground that, since the declarant would not be testifying, the defendant would not be able to defend against the declarant's allegations, does counsel waive a confrontation clause claim for appeal simply because he does not utter the phrase, "confrontation clause?" (No. Division One's holding to this effect raises a significant question of law under the state and

federal constitutions. It therefore merits review under RAP 13.4(b)(3).)

2. Did the trial court err by denying the motion for a mistrial? (Yes.)

3. Was defense counsel ineffective for failing to properly argue the motion for a mistrial? (Yes.)

D. STATEMENT OF THE CASE

Mark Glenn was an Army medic, a veteran of the war in Afghanistan, a husband, and a father. RP 1965-66. After leaving the military in 2012, he worked in various clinics and eventually took a job as a traveling nurse with the Federal Way School District. RP 1965-67, 1877-78.

In January of 2020, the State charged Mr. Glenn with three sex offenses involving three different students, O.G., L.C. and J.O., at one of the schools where Mr. Glenn was employed. CP 1-11; RP 31-32. In October of that year, the State amended the information to add one count of communicating with a minor for immoral purposes. CP 25-26. Mr. Glenn went to trial on those charges in March of 2021. See RP 1095, 1101, 1150.

At the first trial, the jury could not reach a verdict on any count

At that trial, L.C. testified that she went to the nurse's office in September of 2019 because she had a headache, nausea, and a skinned knee. RP 1262-64, 1293. She said that Mr. Glenn touched her leg in a way that made her uncomfortable, while he applied a bandage to her knee, and that he made sexually suggestive comments to her. RP 1273-83.

O.G. testified that he[1] and Mr. Glenn had a sexually inappropriate relationship for a few months in early 2019, before O.G. called things off. RP 1550-84. He said this relationship consisted mainly of flirtatious encounters in the nurse's office and over the messaging app, Kik, but also included one incident of intercourse that occurred off campus. RP 1557-81. O.G. testified that, when he returned from summer break to begin the following schoolyear, he disclosed the relationship to another school nurse and then gave a formal statement to the school's resource officer, Officer Ricardo Cuellar. RP 1199-1200, 1589-91.

[1] O.G. testified that he was assigned the female gender at birth but began using male pronouns about a year before the alleged misconduct underlying Mr. Glenn's prosecution. RP 1543.

Finally, J.O. testified that on one occasion, in the school nurse's office, Mr. Glenn told her she was "hot," asked her to lift her shirt when there was no medical reason to do so, asked her if she had a ride home that day, and then forcibly put his hand inside her pants as she was trying to leave. RP 1418-29. She did not report this to anyone until the following school year, after she was contacted by the assistant principal and Officer Cuellar. RP 1471-74. J.O. initially denied any improper conduct, but then provided three subsequent statements with evolving and increasingly serious allegations. RP 1471-74.

A significant amount of testimony focused on communications between O.G. and J.O., who were close friends when they first made allegations against Mr. Glenn, and the role those communications played in J.O.'s evolving accusations. See RP 1411-12, 1606-07, 1644.

Officer Cuellar testified that he "ha[d] contact with [J.O.] based on information [he] got from [O.G.]" RP 1201. O.G. testified that he did not remember telling Officer Cuellar anything about J.O., but that it was possible he gave Officer Cuellar J.O.'s name. RP 1594-95, 1647-48.

O.G. also testified that, at some point after he reported his allegations to Officer Cuellar, he and J.O. spoke "about everything going on with Mark" and "bonded over that." RP 1595-96. O.G. said he became "desperate[e]" not to be "'alone with this,'" and that he therefore convinced J.O. to report her own allegations against Mr. Glenn. RP 1597-1600. He said he escorted her, "kicking and screaming, basically," to the school's administrative office to make the report. RP 1599-1600.

J.O. testified that Officer Cuellar contacted her around the beginning of the 2019 schoolyear and questioned her about Mr. Glenn. RP 1438, 1447, 1203-05. During that interview, she denied any misconduct, but later the same day she gave the officer a note describing Mr. Glenn's alleged inappropriate comments. RP 1438-39. J.O. testified that she did not disclose the touching because she did not want her parents to know about it. RP 1439-40.

After writing the note, J.O. gave a statement to forensic interviewer Alyssa Layne. RP 1440-41. Like the note, this statement said nothing about Mr. Glenn reaching inside J.O.'s pants. RP 1440-41, 1472. J.O. testified that, after this interview,

she spoke with O.G. and "told him that I did not share the whole story with the . . . person who interviewed me." RP 1441-44. She said that O.G. then told her about "what had happened between him and Mark," and threatened, "If I didn't go tell them everything that he would." RP 1444, 1449.

O.G. and J.O. then went together to the assistant principal's office, where J.O. told the assistant principal and Officer Cuellar that Mr. Glenn had reached inside her pants and touched her vagina. RP 1450-53. J.O. subsequently gave a second interview to Ms. Layne, in which she included this additional allegation. RP 1449, 1452, 1529, 1532. She told Ms. Layne she was amending her statement because "[O.G.] just started crying, like, broke down in front of me and asked me to tell the whole truth and everything because he didn't want to be alone in this situation." RP 1473-74.

Through cross examination and forensic evidence, the defense highlighted numerous discrepancies in L.C.'s and O.G.'s accounts. RP 1308-10, 1314-15, 1350-53, 1571-73, 1585-87, 1620-30, 1637-38, 1663-64, 1676-77, 1741-94, 1807, 1979-80, 2120-21. After hearing testimony by 16 witnesses for the State, as well as from Mr. Glenn and one other witness for the defense, the

jury hung on all four charges and the court declared a mistrial. RP 1198-2031, 2159-62.

At the second trial, the court ruled in limine that the State could not elicit testimony about other students' allegations against Mr. Glenn

Less than two months later, the State tried Mr. Glenn a second time, this time for only one count of second-degree sexual misconduct with a minor, based on J.O.'s allegations. RP 2359-60. L.C. and O.G. declined to participate. RP 2834.

Although O.G. would not be testifying at the second trial, the State sought to elicit testimony that he had made allegations of sexual misconduct against Mr. Glenn. RP 2692-97. It argued the jury should hear both that O.G. had made allegations against Mr. Glenn to Officer Cuellar, and that O.G. had subsequently shared those allegations with J.O. RP 2692-97. The prosecutor maintained this was crucial to bolster J.O.'s credibility and explain why she made her allegations incrementally. RP 2692-97.

The defense argued it would be extremely unfair to "leave hanging, this unexplained allegation" that Mr. Glenn could not refute, as he had done in the first trial, through cross examination and exculpatory forensic evidence. RP 2698. Defense counsel

agreed that the State should be able to elicit J.O.'s testimony that "a friend" insisted she supplement her initial report, but he "absolutely object[ed] to anything related to [O.G.'s] allegations of sexual misconduct" against Mr. Glenn. RP 2699-2701. He pointed out that "[w]e're not going to hear any testimony about . . . [those allegations], the investigation that was done into it and have [O.G.] tell the jury himself." RP 2698.

After clarifying that O.G. would not be testifying in the second trial, the court ruled in favor of the defense. RP 2698, 2833-36. It concluded that the testimony had to be limited so that it "doesn't bring up the evidence or inference that other students were making accusations against Mr. Glenn." RP 2701.

Ultimately, the parties agreed that "Officer Cuellar would be permitted to say something along the lines of, 'Another student expressed concerns about Mr. Glenn and . . . [i]ndicated that I should reach to [J.O.].,'" and that J.O. would later be permitted to testify that

> [a] friend . . . shared that he had been the victim of sexual assault in the past, which led [J.O.] to be more comfortable sharing . . . detail[s], and when she provided those additional details, this friend insisted that she report it to an adult.

RP 2835-36.

Despite this agreement, the prosecutor went well beyond this line of questioning when Officer Cuellar took the stand. The prosecutor first asked the officer whether, "in October of 2019, . . . [he] recall[ed] talking to a student who came to you and disclosed that they had some concerns about the school nurse named Mark Glenn?" RP 2900. After the officer confirmed this, the prosecutor asked, "Was . . . this a serious conversation? Was there concern from the student?" RP 2903. Officer Cuellar confirmed that "[i]t was a very serious conversation; there was concern." RP 2903. The prosecutor then asked:

> And without telling us the details or what the other student said, did you ask that student if there were any *other students* at the school that you should talk to about *additional or different incidents*?

RP 2903 (emphases added). Officer Cuellar answered, "Yes, sir," and explained that the other student named was J.O. RP 2903-04.

Then the following exchange took place:

> Q. After this conversation that you had with this student, did you talk to [J.O.]?
>
> A. Yes.

> Q. And can you tell us how that happened? How did you approach her or how did she approach you?
>
> A. We pulled her out of the classroom so we were able to speak with her.
>
> Q. And she was in the middle of class at the time?
>
> A. Correct.
>
> Q. So why is this something that you need to speak to her about right away? Why not just wait till the end of the day?
>
> A. It was a very serious issue and we wanted to make sure that she was safe and she was okay.

RP 2904.

Officer Cuellar then testified that J.O. reported no misconduct when he first asked her about Mr. Glenn, but that later that day she approached him and handed him a note. RP 2906-08. The officer went on to testify that he provided this note to the assistant principal, and that about two weeks later, he met with "[J.O.], the assistant principal[,] *and the previous student*," at which point J.O. provided additional information in a formal statement. RP 2908-10 (emphasis added).

When Officer Cuellar completed his testimony, defense counsel moved for a mistrial. RP 2916-17. He explained that the prosecutor had violated the ruling in limine in two ways: first, by eliciting Officer Cuellar's testimony that he pulled J.O. out of class because he was concerned for her immediate safety; second, by eliciting the officer's testimony that the same student gave him J.O.'s name and subsequently accompanied J.O. to make her second report. RP 2916-18.

Defense counsel argued the first violation vastly exaggerated the nature of J.O.'s allegations. RP 2917. And he argued the second violation ensured the jury would ultimately conclude that O.G. had also made allegations against Mr. Glenn. RP 2917-18.

The prosecutor responded that, to the extent Officer Cuellar exaggerated the seriousness of the situation, this would become clear when J.O. testified and would ultimately prejudice only the State. RP 2919, 2923. Defense counsel conceded the other was "more serious." RP 2925.

With respect to the other issue—the testimony indicating that the same student initially gave J.O.'s name to Officer Cuellar

and later accompanied J.O. to make her second report—the prosecutor acknowledged it violated the ruling in limine, but he argued it was not sufficiently serious to warrant mistrial. RP 2920.

The trial court agreed. RP 2925-27. Defense counsel declined a limiting instruction, reasoning that it would only draw more attention to the problem. RP 2927. Instead, he asked the court to preclude J.O. from testifying that O.G. told her he had also been the victim of sexual abuse. RP 2931-32. The prosecutor opposed that remedy, arguing the jury needed more context for J.O.'s incremental allegations. RP 2932-33.

Ultimately, the State proposed a "carefully scripted question" for J.O., which would elicit only her testimony that O.G. told her he was "sexually abused sometime in his past when he was younger." RP 2983. The court ruled this was a reasonable remedy, because it would "break the potential link . . . between [O.G.] and Mr. Glenn." RP 2983. The defense maintained that, in the absence of a mistrial, "not having any reference to [O.G.]'s prior sexual abuses is appropriate." RP 2931-32, 2983.

When J.O. took the stand, she described the incident in which Mr. Glenn allegedly told her she was hot, asked her to lift

up her shirt, asked her if she had a ride home, and finally grabbed her and put his hand inside her pants. RP 2998-3019. She said she told no one about this incident until she was called into the assistant principal's office the following schoolyear. 3025-26.

J.O. testified that she initially denied any misconduct, but then reported Mr. Glenn's inappropriate comments in the letter she gave to Officer Cuellar and then in subsequent statements she made to the assistant principal, her mother, and forensic interviewer Layne. RP 3028-33. She said that she spoke with O.G. immediately after this interview with Ms. Layne. RP 3035.

J.O. testified that she left class for the interview with Ms. Layne, and that afterwards O.G. asked her where she had been. RP 3035. She told him, and he asked her for more details about what had happened to her. RP 3036. At this point in J.O.'s testimony, the prosecutor asked:

> During this conversation with [O.G.], you were telling him some of these specifics, did [O.G.] tell you about having been sexually abused some time in the past when he was younger?

RP 3036. J.O. said that he did, and that this prompted her to tell O.G. more details about her experience with Mr. Glenn. RP 3036.

J.O. testified that, at this point, O.G. gave her an ultimatum: either she "come forward and tell the rest of what happened" or he would do it. RP 3038. J.O. and O.G. then went together to the principal's office, and J.O. reported that Mr. Glenn had touched her vagina. RP 3038, 3041-43. Two weeks later, she made the same allegation in a second interview with Ms. Layne. RP 3044.

On cross examination, J.O. testified that she had an after-school job on Tuesdays and Thursdays, that she participated in an after-school club on Tuesdays, and that on the day of the alleged incident involving Mr. Glenn she went to her job but not to the club. RP 3049-51. She also testified that the incident definitely took place in June of 2019, within the last two weeks of the school year. RP 3047-48, 3064.

J.O. also testified that during her first forensic interview, Ms. Layne specifically asked her whether Mr. Glenn had tried to touch her under any clothing, and that she had said no. RP 3052.

The jury also heard testimony from Ms. Layne, who said that she was a "child interview specialist" for the King County Prosecutor's Office. RP 3077-78. Ms. Layne testified that, in her experience, it was common for children to delay reporting abuse,

or to report incrementally. RP 3094-96. She said she had often conducted follow-up interviews with subjects after new information came to light. RP 3093-94.

The State also offered testimony by Sheryl Sullivan, the assistant principal who talked with J.O. about her allegations, and Michelle Shilley, the primary nurse at Todd Beamer High School while Mr. Glenn worked there. RP 3113-15, 3123-24. Ms. Sullivan described the general timeline of J.O.'s evolving allegations, explaining that she received J.O.'s note on October 2, 2019, talked with J.O. the following day, and then had a conversation with J.O. and another student on October 15, 2019. RP 2937-43. Ms. Shilley said she got along well with Mr. Glenn and had no concerns about his job performance. RP 3131-32.

The defense presented Federal Way Public School employment logs, which showed that Mr. Glenn did not work at Todd Beamer High School on any Thursday in either May or June of 2019 (when J.O. would have gone to her after-school job). RP 3205-07.

Mr. Glenn did not testify at the second trial, but the State read into the record some of his testimony from the first trial. RP

2966-73. This included Mr. Glenn's denials of any inappropriate conduct whatsoever. RP 2972-73.

The jury found Mr. Glen guilty as charged. RP 3221. The trial court imposed a jail term of 364 days. CP 193.

Mr. Glenn appealed, arguing that (1) the prosecutor elicited improper testimony in violation of confrontation clause protections; (2) the court erred by denying Mr. Glenn's motion for a mistrial; and (3) defense counsel was ineffective in presenting the argument for a mistrial.

Court of Appeals Decision

The Court of Appeals acknowledged that defense counsel objected to any evidence of an allegation against which Mr. Glenn could not "defend himself." Op. at 8. It quoted counsel arguing that it would be unfair to introduce such evidence when

> [w]e're not going to hear any testimony about . . . the investigation that was done into it and have [O.G.] tell the jury himself, to introduce forensic evidence that we found to be exculpatory in this matter, to explain the absence of text messages, to just leave it hanging that there was this unsolved allegation of sexual misconduct out there that [Glenn] can't defend himself against his highly prejudicial.

Op. at 8 (quoting RP 2698). But Division One declined to address Mr. Glenn's confrontation claim on appeal, finding that defense counsel "fail[ed] to object to the testimony at trial as a violation of his confrontation rights" and that the issue was therefore waived under Burns, 193 Wn.2d at 207. Op. at 7-9.

E. REASONS REVIEW SHOULD BE ACCEPTED

Division One's decision merits review under RAP 13.4(b)(3) because it raises a significant question of law under the Washington Constitution and the United States Constitution.

Both our state and federal constitutions guarantee accused persons the right to confront the government's witnesses at trial. U.S. Const. amend. VI; Const. art. I § 22. The Sixth Amendment confrontation clause aims to prevent substitutes for live testimony that deny defendants the opportunity to test an accuser's claims "in the crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

Consistent with confrontation clause protections, "an out-of-court statement by a declarant who does not testify at trial [is inadmissible if] . . . the statement was testimonial . . . unless the

witness is unavailable . . . and the defendant had a prior opportunity for cross-examination." State v. Scanlan, 193 Wn.2d 753, 761-62, 445 P.3d 960 (2019) (quoting Crawford, 541 U.S. at 59). The party seeking to admit the testimonial statement bears the burden of proving the declarant is unavailable. State v. Beadle, 173 Wn.2d 97, 112, 265 P.3d 863 (2011).

Violations of confrontation clause protections are reviewed de novo and subject to constitutional harmless error analysis. State v. Jasper, 174 Wn.2d 96, 108, 117, 271 P.3d 876 (2012).

Like most trial errors, the improper admission of evidence generally cannot be raised for the first time on appeal. ER 103; RAP 2.5(a). Instead, a party must preserve the error with a timely and specific objection. ER 103. To preserve a confrontation clause claim for appeal, trial counsel must object on that specific basis—a hearsay objection does not preserve the constitutional issue. See State v. Martinez, noted at 197 Wn. App. 1034, 2017 WL 176655, at *3;[2] Flowers v. State, 456 P.3d

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[2] Mr. Glenn cites this unpublished decision for whatever persuasive value this Court deems appropriate under GR 14.1.

1037, 1047 (Nev. 2020) (explaining why, post-Crawford, a hearsay objection is insufficient to preserve a confrontation clause claim).

Normally, RAP 2.5(a)(3) provides a limited exception to the error-preservation rule, making unpreserved constitutional errors reviewable on appeal if they are "manifest" (i.e., obvious) in the record. In Burns, 193 Wn.2d at 208-11, however, a five-justice majority held that a violation of the defendant's confrontation clause rights can never be raised for the first time on appeal, because applying RAP 2.5(a)(3) to confrontation clause claims would violate the Sixth Amendment as interpreted by the United States Supreme Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

The Burns decision is not implicated here because trial counsel specifically preserved the confrontation clause claim. The entire premise of counsel's objection was that, because O.G. would not be testifying at the second trial, Mr. Glenn would not be able to cross-examine O.G. on his allegations. RP 2698. The trial court agreed with this analysis, ruling that, "*since [O.G.] is*

not testifying," no witness could be asked about his allegations against Mr. Glenn. RP 2692-2701, 2833-34 (emphasis added). It is abundantly clear from this exchange that the trial court recognized the constitutional interest at stake: the right to confront an adverse witness. Compare RP 2692-2701, 2833-34 with Crawford, 541 U.S. at 59 n.9 ("[t]he [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it").

Because defense counsel's objection apprised the trial court that the right of confrontation was at stake, it was sufficient to preserve a claim to that right on appeal. United States v. Meises, 645 F.3d 5, 19-20 (1st Cir. 2011) (to determine whether defendant preserved "a Crawford challenge," appellate court "look[s] to the full context of counsel's colloquy with the court"; challenge preserved where it was "obvious that counsel was objecting to defendant's inability to confront the declarant") (internal quotations and alterations omitted). Contrary to the Court of Appeals' decision, a party does not waive a claim by successfully asserting it.

The Court of Appeals' reading of Burns is extreme to the point of absurdity. It reads the decision as a requirement that counsel use magic words to preserve a confrontation clause claim. That interpretation of Burns would be unreasonable and unjust in any case. It is absurd where, as here, trial counsel's timely objection actually succeeded at the first trial.

Mr. Glenn also seeks review of his claims that the trial court erred by denying the motion for a mistrial and that defense counsel was ineffective for failing to properly argue that motion.

F. CONCLUSION

Division One's decision merits review because it adopts an extreme reading of this Court's decision in Burns, 193 Wn.2d 190, which elevates form over substance and needlessly forecloses worthy appeals. This Court should grant review, clarify that Burns does require counsel to utter magic words, and reverse Mr. Glenn's conviction.

I certify that this document was prepared using word processing software and contains 4,136 words excluding the parts exempted by RAP 18.17.

DATED this 30th day of December, 2022.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

ERIN MOODY, WSBA No. 45570
Office ID No. 91051
Attorneys for Appellant

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10/31/2022
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Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. MARK DAVID GLENN, Appellant.	No. 82927-1-I UNPUBLISHED OPINION

BOWMAN, J. — Mark David Glenn appeals his jury conviction for one count of second degree sexual misconduct with a minor. For the first time on appeal, he argues the State improperly elicited testimony in violation of the confrontation clause.[1] Glenn also claims that the trial court erred when it denied his motion for a mistrial and that he received ineffective assistance of counsel. We conclude that Glenn waived his challenge under the confrontation clause, that the trial court did not abuse its discretion by denying his motion for a mistrial, and that he fails to show ineffective assistance of counsel. We affirm.

FACTS

In 2019, 50-year-old Glenn worked as a contract nurse at Todd Beamer High School, where sophomores J.O., O.G., and L.C. were students. J.O. first met Glenn in early 2019 through her friend O.G., who often spent time in the nurse's office.

[1] U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.

Around March or April of 2019, J.O. visited the nurse's office with a headache. During the visit, Glenn stared at her chest, told her she was "hot," commented on how her "butt" looked, and asked her to lift her shirt without a medical reason. She refused. He then asked if she had a ride home. J.O. said yes and turned to leave the office. Glenn came up behind her, grabbed her by the hips, turned her around, pushed his hand underneath her clothes, and touched her vagina. J.O. froze for a moment then pushed him away, punched him in the face, and left. J.O. told no one about the assault.

In early September 2019, L.C. reported to the school that Glenn inappropriately touched her leg and made sexually suggestive comments. On October 2, 2019, O.G. reported to the high school resource officer, Federal Way Police Officer Ricardo Cuellar, that Glenn had made sexually suggestive comments and sexually abused him in early September, too. O.G. testified that the abuse included "flirtatious" encounters, inappropriate comments, sexually explicit text messages and photos, as well as an incident of sexual assault. Officer Cuellar asked O.G. if there were other students he should contact with similar concerns. O.G. told him he should contact J.O.

Officer Cuellar pulled J.O. out of class that same day and questioned her about Glenn. But J.O. denied any misconduct because she "didn't want [her] parents to know." Still, at the end of the school day, J.O. delivered a letter to Officer Cuellar disclosing Glenn's sexual comments to her but not the sexual assault. J.O. then participated in a child forensic interview. J.O. repeated the

same allegations in more detail but again did not disclose that Glenn touched her.

J.O. shared the details of the forensic interview with O.G and explained that she did not tell the interviewer that Glenn touched her. O.G. became upset. He said that Glenn also sexually abused him and insisted that "if [J.O.] didn't go tell them everything that he would."

On October 15, 2019, J.O. and O.G. went to see Officer Cuellar and the assistant principal. J.O. disclosed that Glenn had sexually assaulted her and gave a written statement. She then fully disclosed to her parents and participated in a second child forensic interview. She told the interviewer she decided to disclose the assault because O.G. " 'just started crying, like, broke down in front of me and asked me to tell the whole truth and everything because he didn't want to be alone in this situation.' "

The State charged Glenn with rape of a child in the third degree as to O.G., sexual misconduct with a minor in the second degree as to J.O., and two counts of communication with a minor for immoral purposes as to O.G. and L.C. The case went to trial in March 2021. But the jury could not reach a unanimous verdict, and the court declared a mistrial.

The court scheduled a new trial for May 2021. But only J.O. agreed to testify at the second trial. So the State amended the complaint, alleging one count of sexual misconduct with a minor in the second degree based on J.O.'s allegations.

Before trial, the State sought to introduce evidence of O.G.'s allegations against Glenn.[2] It asserted that the allegations were necessary to explain why Officer Cuellar first contacted J.O. and why "it took her several weeks to disclose all the facts of Mr. Glenn's misconduct." Glenn disagreed. He argued that since O.G. was not testifying, Glenn could not defend himself against the allegations. So the court asked Glenn how they could "put things into context for the jury without having the jury hear about that." Glenn objected to "anything related to allegations of sexual misconduct."

Ultimately, all agreed that Officer Cuellar could testify that " '[a]nother student expressed concerns about Mr. Glenn and encouraged [him] to reach out to [J.O.].' " Defense counsel stated, "I think that's as sanitized as it can be, Your Honor." The prosecutor further clarified:

> And then [J.O.] would be permitted to testify that a friend — it's something along the lines of, "A friend at school had asked her why she had to leave class." She explains to that friend, "I had to go do a forensic interview or give an interview about some sexual misconduct that happened to me." That friend insisted on details and himself shared that he had been the victim of sexual assault in the past, which led [J.O.] to be more comfortable sharing this ultimate detail, and when she provided those additional details, this friend insisted that she report it to an adult.

The court agreed that "[y]es, I think that works." Defense counsel did not object.

At trial, the prosecutor questioned Officer Cuellar about why he first approached J.O.:

> Q. Okay. Near in the beginning of that school year, in October of 2019, do you recall talking to a student who came to you and

[2] At the first trial, the court permitted O.G. to testify that Glenn assaulted him, that he directed Officer Cuellar to J.O., and that he urged J.O. to fully disclose Glenn's conduct. The court ruled the testimony was cross-admissible under ER 404(b) to show Glenn acted under a common scheme or plan.

> disclosed that they had some concerns about the school nurse named Mark Glenn?
> A. Yes, sir.
> . . . .
> [PROSECUTOR]: Do you remember the demeanor of this student when you were talking to them about this disclosure?
> A. They seemed a little embarrassed.
> Q. Okay. Was the student — was this a serious conversation? Was there a concern from the student?
> A. It was a very serious conversation; there was concern.
> Q. And without telling us the details or what the other student said, did you ask that student if there were any other students at the school that you should talk to . . . about additional or different incidents?
> A. Yes, sir.
> Q. And did that student give you any names of other students to talk to?
> A. Yes, sir.
> Q. What name, if any, do you remember?
> A. [J.O.].

The State asked Officer Cuellar what he did after the student directed him to J.O. Officer Cuellar explained that he immediately pulled J.O. out of class to speak with her. Then the State asked:

> Q. So why is this something that you need to speak to her about right away? Why not just wait till the end of the day?
> A. It was a very serious issue and we wanted to make sure that she was safe and she was okay.
>
> And later in Officer Cuellar's testimony, the State asked:
>
> Q. About two weeks after this day, October 2nd 2019, do you remember if you spoke again with [J.O.]?
> A. I did.
> Q. And do you remember who was present this time?
> A. It was myself, [J.O.], the assistant principal and the previous student.

Glenn did not object to the testimony but moved for a mistrial at the next break. He argued that Officer Cuellar's testimony about immediately contacting J.O. created an unfair sense of urgency. And he claimed Officer Cuellar's

testimony that the student who first disclosed concerns to him was present at the later meeting on October 15 would ultimately lead the jury to conclude that O.G. was that student. He explained that the jury would later hear from J.O. that O.G. persuaded her to disclose because he, too, experienced abuse. According to Glenn, this would suggest that he also abused O.G.

The court ruled that Officer Cuellar's testimony about contacting J.O. did not create "incurable prejudice that will prevent this jury from having a fair trial." Still, it offered to issue a curative instruction. Glenn declined. The court denied the motion for a mistrial.

Still, the trial court wanted to address Glenn's concern that the jury could ultimately link O.G.'s abuse to Glenn. As a result, Glenn moved to exclude any testimony that O.G. urged J.O. to disclose because he was also a victim of sexual abuse. The State argued it should still be allowed to elicit the testimony and suggested that any potential prejudice could be removed by asking J.O., " 'During this conversation with [O.G.], did he tell you about having been sexually abused sometime in his past when he was younger.' " Glenn maintained his original position but agreed, "That's better." The court agreed that the question as phrased would "break the potential link the jury might draw between [O.G.] and Mr. Glenn."

The jury convicted Glenn on one count of sexual misconduct with a minor in the second degree. Glenn appeals.

ANALYSIS

Confrontation Clause

Glenn claims for the first time on appeal that Officer Cuellar's "improper testimony violated Mr. Glenn's state and federal constitutional right to confront adverse witnesses." The State asserts that Glenn failed to preserve this claim of error. We agree with the State.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses. Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); State v. Burns, 193 Wn.2d 190, 207, 438 P.3d 1183 (2019). The confrontation clause bars admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior chance to cross-examine the witness. Crawford, 541 U.S. at 59.

But a defendant's failure to assert the right to confrontation at trial operates as a waiver. Burns, 193 Wn.2d at 210-11. And the waiver is not subject to a manifest constitutional error analysis under RAP 2.5(a)(3). Id. This furthers the interests of judicial efficiency and clarity and provides a basis for appellate courts to review a trial judge's decision. Id. at 211.

Before trial, the State argued that "there has to be some sort of, however sanitized, reference to the fact that . . . [O.G.] had made an allegation of sexual misconduct against . . . Glenn." According to the State, the evidence was

necessary to show "how these charges came about in the first place." In response, Glenn argued:

> So, Your Honor, I understand where the State is coming from about wanting to explain that [J.O.] and [O.G.] were friends, that [J.O.] and [O.G.] had conversations about this. But then to insert the extraneous fact that it was all based on [O.G.] alleging sexual misconduct against Mr. Glenn, when Mr. Glenn is not going to have an opportunity to defend himself against that allegation, to leave it to the jury to say, "Why isn't [O.G.] here?"
>
> . . . .
>
> So to leave hanging, this unexplained allegation of sexual misconduct against Mr. Glenn, is extremely unfair. We're not going to hear any testimony about what that is, the investigation that was done into it and have [O.G.] tell the jury himself, to introduce forensic evidence that we found to be exculpatory in this matter, to explain the absence of text messages, to just leave it hanging that there was this unsolved allegation of sexual misconduct out there that [Glenn] can't defend himself against is highly prejudicial.

Ultimately, the State suggested Officer Cuellar could testify that " '[a]nother student expressed concerns about Mr. Glenn and encouraged me to reach out to her.' " The court then asked Glenn's attorney, "[D]o you want to weigh in on that." The attorney responded, "I think that's as sanitized as it can be, Your Honor."

At trial, the State asked Officer Cuellar whether a student "disclosed that they had some concerns about" Glenn and whether that student pointed him to other students that he "should talk to . . . about additional or different incidents." Glenn objected to neither question.

Glenn's agreement to the State's proffered question and his failure to object to the testimony at trial as a violation of his confrontation rights deprived the trial court of the opportunity to assess the admissibility of the testimony and

prevent or cure the alleged error at trial. As a result, Glenn waived his right to challenge Officer Cuellar's testimony under the confrontation clause on appeal.

Motion for Mistrial

Glenn argues that the trial court erred when it denied his motion for a mistrial. We disagree.

We review a trial court's denial of a motion for mistrial for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. State v. Barry, 184 Wn. App. 790, 797, 339 P.3d 200 (2014). We will reverse the trial court only if there is a substantial likelihood that the trial irregularity prompting the motion affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). Generally, violating a ruling in limine amounts to a serious trial irregularity. State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998).

A trial court has broad discretion to rule on irregularities during trial because it is in the best position to determine whether the irregularity caused prejudice. State v. Wade, 186 Wn. App. 749, 773, 346 P.3d 838 (2015); State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). We consider three factors to determine whether an irregularity warrants a new trial: (1) the seriousness of the irregularity, (2) whether the statement was cumulative of other properly admitted evidence, and

(3) whether an instruction could cure the irregularity. State v. Perez-Valdez, 172 Wn.2d 808, 818, 265 P.3d 853 (2011).

Before trial, the court ruled in limine that the State could not offer evidence of O.G.'s allegations against Glenn. Still, the court conferred with the parties and all agreed that Officer Cuellar could testify that " '[a]nother student expressed concerns about Mr. Glenn and encouraged [him] to reach out to [J.O.].' "

At trial, Officer Cuellar explained how he first approached J.O.:

> Q. Okay. Near in the beginning of that school year, in October of 2019, do you recall talking to a student who came to you and disclosed that they had some concerns about the school nurse named Mark Glenn?
> A. Yes, sir.
> . . . .
> [PROSECUTOR]: Do you remember the demeanor of this student when you were talking to them about this disclosure?
> A. They seemed a little embarrassed.
> Q. Okay. Was the student — was this a serious conversation? Was there a concern from the student?
> A. It was a very serious conversation; there was concern.

He then described immediately pulling J.O. out of class to speak with her. The prosecutor asked Officer Cuellar why he needed to talk to J.O. right away. He explained, "It was a very serious issue and we wanted to make sure that she was safe and she was okay." Later, the State asked:

> Q. About two weeks after this day, October 2nd 2019, do you remember if you spoke again with [J.O.]?
> A. I did.
> Q. And do you remember who was present this time?
> A. It was myself, [J.O.], the assistant principal and the previous student.

Glenn argues the testimony about Officer Cuellar having a serious conversation with a student and then immediately approaching J.O. amounts to a

serious irregularity because "the prosecutor departed substantially from the agreed line of questioning," and it created the impression that Glenn's conduct was "so serious that the investigating officer became immediately concerned for [J.O.'s] health and safety." But the court did not rule in limine that Officer Cuellar could not testify about why he immediately contacted J.O. And Glenn fails to show how he was prejudiced by testimony that a school resource officer took allegations of misconduct by an employee toward a student seriously. Even so, a curative instruction could have alleviated any prejudice caused by the testimony. The court offered such an instruction but Glenn declined.

Glenn also contends Officer Cuellar's testimony that the student who first disclosed concerns about Glenn also accompanied J.O. to the principal's office when she revealed the sexual assault warranted a mistrial. But the court cured any potential prejudice that could flow from that testimony by limiting O.G.'s disclosure to " 'having been sexually abused sometime in his past when he was younger.' " This distanced O.G.'s abuse from J.O.'s allegations and sufficiently avoided the connection between O.G. and Glenn. The court did not abuse its discretion by denying Glenn's motion for a mistrial.

<u>Ineffective Assistance of Counsel</u>

Glenn argues he received ineffective assistance of counsel because his attorney did not also move for a mistrial based on the prosecutor's question suggesting that there were "additional or different incidents" of sexual abuse by Glenn. We disagree.

We review ineffective assistance of counsel claims de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To succeed on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. Strickland, 466 U.S. at 687.

Representation is deficient when it falls below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when there is a reasonable probability that but for counsel's error, the result of the trial would have been different. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). We need not "address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." Id.

Glenn argues the prosecutor's question "revealed the fact of a second accuser," and his attorney's failure to include the inappropriate question as grounds for mistrial "understated the prejudicial effect of the improper testimony." According to Glenn, the argument would have compelled the court to grant his motion for a mistrial.

Citing State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), Glenn argues the prosecutor's question was inadmissible ER 404(b) evidence because it "told the jury that, in addition to the alleged victim whose testimony they would soon hear, Mr. Glenn had also victimized another student." In Escalona, the State charged the defendant with second degree assault for threatening the victim with a knife. Id. at 252. At trial, the victim testified that Escalona " 'already has a record and had stabbed someone.' " Id. at 253. We held this testimony was inappropriate propensity evidence because a jury could conclude that Escalona "acted on this occasion in conformity with the assaultive character he demonstrated in the past." Id. at 255-56.

Unlike Escalona, no witness here testified that Glenn sexually assaulted other students. And as much as the prosecutor's question suggested that there may have been other "incidents" with Glenn, this was not new information for the jury. Consistent with the order in limine, the prosecutor's previous question was whether a student "had some concerns" about Glenn. Even so, an instruction to the jury could have cured any prejudice from the question. Glenn fails to show a reasonable probability that "[h]ad defense counsel explained [how the prosecutor's question prejudiced him], the court would likely have granted the motion for a mistrial."

Because Glenn waived his challenge under the confrontation clause, the trial court did not abuse its discretion by denying his motion for a mistrial, and he fails to show ineffective assistance of counsel, we affirm.

Bowman, J.

WE CONCUR:

Chung, J.

Coburn, J.

FILED
12/13/2022
Court of Appeals
Division I
State of Washington

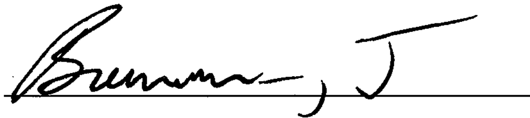
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. MARK DAVID GLENN, Appellant.	No. 82927-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Mark David Glenn filed a motion for reconsideration of the opinion filed on October 31, 2022. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

NIELSEN KOCH, PLLC

December 30, 2022 - 9:11 AM

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