68759-0

68759-0

NO. 68759-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL S. CATES,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

CHARLES F. BLACKMAN
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. An out-of-state witness (a police detective who had interviewed the defendant) flew to Washington but could not stay when the trial was delayed for one week due to inclement weather. The parties agreed to his testifying the following week from Missouri via a 2-way video link. Testimony was conducted before the defendant and the jury, with opportunity for full cross-examination. The officer testified the defendant denied allegations of child sex abuse but was nervous and shaking. On cross-examination he agreed that in his experience people who have done nothing wrong are often still nervous when talking to police.

Did testimony by 2-way video link violate the defendant's right of confrontation?

Can the defendant be heard to complain, when he agreed to the procedure?

Can the defendant raise this for the first time on appeal, when he cannot show any error was "manifest"?

Was any error constitutionally harmless, when it did not contribute to the verdict, given the child victim's graphic testimony of repeated rapes and abnormal "non-specific" findings from a forensic exam?

2. A condition of community custody requires the defendant consent to DOC home visits, including access to any computers. Is this matter ripe for review, when the defendant has not yet been subjected to an allegedly improper search?

II. STATEMENT OF THE CASE

A. THE DEFENDANT'S REPEATED RAPES OF SIX- AND SEVEN-YEAR-OLD M.S.

Jon S., the father of the victim, M.S., had known the defendant, Michael Shane Cates, when they were both in Job Corps together in New Mexico. 2 Trial RP 206; 3 Trial RP 322. When the defendant called in January 2001 and said he was down on his luck, Jon S. agreed to let the defendant come stay with him and his family in their new home in Lake Stevens. 2 Trial RP 206, 209, 211-13, 215; 3 Trial RP 322, 325-27. Jon S's. family comprised himself, his wife Tracy S., and their then two children, M.S. (the victim), and K.S., a younger daughter. Id. The defendant was 29 years old at the time. Ex. 11 (driver's license, showing the defendant was born in November 1971).

While the defendant first slept on the living room couch, after a few weeks Jon and Tracy S. let him move to the back of the house's three bedrooms, and moved their daughter K.S. – who was 2 or 3 at the time – into their own bedroom. 2 Trial RP 152, 213-15;

3 Trial RP 327-29, 364. Meanwhile their son M.S., who was 6 and 7 during the period of time in question,[1] kept his own room. 2 Trial RP 99-100, 215; 3 Trial RP 331.

The defendant held a job for part of the some nine months he stayed with the family. 2 Trial RP 237; 3 Trial RP 332, 368, 395. When he wasn't working, however, he drank heavily. 2 Trial RP 218, 234; 3 Trial RP 330, 393, 395.

M.S. and the defendant appeared to get along. They rode bikes and went to a nearby store together, and played video games. 2 Trial RP 103-05, 216-17, 237-40, 248; 3 Trial RP 335. Neither Jon nor Tracy S. observed anything untoward or suspicious in M.S.'s and their son's interactions during the time the defendant lived with them. 2 Trial RP 240-42; 3 Trial RP 341, 358-59, 388-91.

In the fall of 2001 the S. family went to New Mexico for two weeks. 3 Trial RP 337, 370-71. Jon S. told the defendant he needed to be moved out by the time they got back. 2 Trial RP 220, 243, 245. When they returned to the Lake Stevens home, they found the defendant gone but the house in disarray, with damage from garbage, broken crockery, and cigarette burns. 2 Trial RP 146, 220-21, 245; 3 Trial RP 337, 396.

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[1] M.S. was born in October 1994. 2 Trial RP 97, 215; 3 Trial RP 321.

Tracy S. and her children did not see the defendant again until these proceedings commenced in early 2012. 2 Trial RP 144; 3 Trial RP 340-41. Jon S. did encounter the defendant some three years later (in 2004 or 2005) in New Mexico. He punched him for how he'd left the house. 2 Trial RP 223-26, 235; 3 Trial RP 341.

Unbeknownst for years to anyone except the perpetrator and the victim, the defendant had been repeatedly anally raping six- and seven-year-old M.S. during the nine months he was living with the S. family. 2 Trial RP 105, 110-123, 149.

M.S. recalled how it began: About a month or so after the defendant moved in, he and the defendant went to a nearby park. 2 Trial RP 105, 107; see 2 Trial RP 182-83. M.S. had to go to the bathroom, and fearing he could not make it back in time to the house, he "pooped" in the park. 2 Trial RP 107-08. The defendant saw this and told M.S. he wouldn't tell M.S.'s parents as long as M.S. wouldn't tell about what was going to happen that night. 2 Trial RP 108-09.

That night, when everyone was asleep, the defendant came into M.S.'s room and raped him anally (penile-anal intercourse). 2 Trial RP 111-114. He told M.S. to "just go along with it." 2 Trial RP 111. Thereafter he frequently came into M.S.'s room at night and

did the same thing. 2 Trial RP 110-111 ('multiple times"), 113, 115-16 ("every other day"), 122-23, 131 ("every other night"), 138 ("multiple incidents"). He would pull down M.S.'s underpants and pajama bottoms. 2 Trial RP 110-12. He typically would say in M.S.'s ear, "It's Shane." 2 Trial RP 113, 123, 176. He would rape M.S. from behind, 2 Trial RP 173, with M.S. on hands and knees, although the first time, M.S. was on his stomach. 2 Trial RP 110, 122-23. M.S. could feel the defendant against him. 2 Trial RP 113. It hurt, a lot. 2 Trial RP 113, 116, 121. It would still hurt the next day. 2 Trial RP 116. And it hurt each time. 2 Trial RP 121. When it was over, the defendant would pull up his pants and leave. 2 Trial RP 114. M.S. would pull his own pants back up, and go back to sleep. 2 Trial RP 114.

After this had happened the first few times M.S. told the defendant to stop. The defendant left, then came back into the bedroom, angry, and forcibly raped M.S. 2 Trial RP 115. He said he would tell M.S.'s parents that M.S. had done bad things if he didn't cooperate. 2 Trial RP 110, 115-16.

M.S. also recalled one or two occasions involving oral sex. These were separate from the many instances of anal rape. 2 Trial RP 118-20, 139.

The abuse only ended when the defendant moved out during the time the S. family had gone to New Mexico. 2 Trial RP 122.

M.S. did not understand at the time, but when older realized the defendant had ejaculated when he was raping him. 2 Trial RP 116-17. As a child he would see something odd in his stool; in hindsight, he realized it was the defendant's semen. 2 Trial RP 116-17. He once pointed it out to his mother. 2 Trial RP 116-17. She remembered M.S. telling her this, and recalled that his stool looked "mucously." 3 Trial RP 354, 366-67. But this meant nothing to her at the time. 3 Trial RP 354. She told him to tell her if this happened again. 3 Trial RP 354, 367-68. M.S. never told her again even though he observed it again. 2 Trial RP 117; 3 Trial RP 354, 367-68.

In the ensuing eight years, M.S. never said anything because he was afraid and ashamed. He feared his family and friends would look at him and his sexuality differently if they found out what had happened. 2 Trial RP 106-07, 121, 192, 228. He had become active in sports, and didn't want teammates to know. Id.

In late 2009, when M.S. was 15, his sister K.S., then 12, revealed she had been molested by a cousin. This cousin had molested others, too. 3 Trial RP 342-45. K.S. was reluctant to

report it to the police. 2 Trial RP 246; 3 Trial RP 342. While discussing this with the family, Tracy S. asked her son if the cousin had ever done anything like this to him. 3 Trial RP 345-47. M.S. said no. 3 Trial RP 347. Asked if anyone else ever had, M.S. answered, "Shane." 2 Trial RP 133; 3 Trial RP 347. "Shane" was the name of another "little cousin," so this disclosure made no sense to Tracy S. 3 Trial RP 348. It was only upon further discussion she realized who it was her son was talking about. 3 Trial RP 348, 373. That it could be the defendant had never crossed her mind. 2 Trial RP 139; 3 Trial RP 348, 373.

M.S. explained he disclosed because he was tired of holding this in for so long; that the emotion was building up; and that it was too much to handle. 2 Trial RP 123, 140. He also wanted to be supportive of his sister, by letting her know that something like this had happened to him too, and he could now talk about it. 2 Trial RP 123-24, 144-45, 164; 3 Trial RP 404. Although initially reluctant, M.S. ultimately went to the police and gave a statement. 2 Trial RP 72-79, 81-82, 88-89, 125-26, 130, 155, 158, 229-30, 247, 250; 3 Trial RP 351-52, 373-74, 398-99.

Local police ultimately determined that the defendant was living in Springfield, Missouri. They contacted authorities there. 2

Trial RP 80-81, 84, 92-93; 3 Trial RP 299-300. Springfield detectives interviewed the defendant. 3 Trial RP 263-64, 300. The defendant denied the allegations. 3 Trial RP 273, 279, 281-82, 290, 293; Ex. 8B at 7-9, 11. (He did recall being "clobbered" by J.S. Ex. 8B at 10.) At the start of the interview the defendant was nervous, sweating and shaking. He relaxed as the interview turned to his having stayed with the S. family in Washington State. But when questioning focused on whether he had ever been alone with the S. family children, he became nervous and started sweating and shaking again. 3 Trial RP 266-67, 271-76, 285, 288, 291-92, 294.

Local police initially thought there was no need for a physical examination, given the lapse of time. 3 Trial RP 312-14. In the end, however, M.S. was seen by Barbara Haner, a nurse practitioner and the clinical coordinator of the Providence Intervention Center for Assault and Abuse. 3 Trial RP 406, 408-09, 4 Trial RP 423. Haner's focus is primarily on sexual assault cases. 3 Trial RP 411. In the course of her work she has examined some 8,000 patients. 3 Trial RP 412.

She explained that when examining a male patient reporting a history of anal intercourse, she would look at the "rugae" or folds,

the "little puckers all around" the anus, to see if they were symmetrical, and whether they exhibited "winking" – the normal reflex of opening and closing – or whether the anus instead dilated and stay dilated. 4 Trial RP 420-21, 456. She would also look for any fissure, that is, a rip or tear in the rugae. 4 Trial RP 422. She expected that being able to observe injuries from 8 years ago was not very likely, although the very acts of passing stool and wiping could retard healing: one could conceivably have a chronic injury that never quite heals. 4 Trial RP 422. (This distinguishes anal from vaginal injuries; the latter tend to heal much more quickly. 4 Trial RP 451.)

When she examined M.S. and had him bend over the examination table, she observed that the anus dilated and stayed dilated. Haner could clearly see into the vault. 4 Trial RP 432-33, 457. Dilation occurred immediately, as soon as the gluteal structures were spread. 4 Trial RP 434, 457. The rugae also had a "cuff-like" appearance, raised out against the observer, and a fissure, or tear, with erythema (redness, or irritation). Trial RP 432-33, 457. The immediate dilation (that is, the absence of the normal reflex of "winking"), the cuffing, and the fissure were all abnormal.

4 Trial RP 435, 439-40, 457.[2] She assessed her exam of M.S. as "non-specific," that is, abnormal for any number of possible reasons, including sexual abuse. 4 Trial RP 436-37, 440, 450, 453. She explained that "non-specific" means that while one cannot make a conclusive statement, one cannot discount or exclude sexual assault, either. 4 Trial RP 440.

The parties stipulated to the admissibility of the defendant's statements to detectives in Missouri. 1 Trial RP 12-16; 1 CP 88-90. The parties also agreed, after some discussion, to admission of a redacted transcript of the Missouri interview. 3 Trial RP 253-58, 276-77; 4 Trial RP 467-70, 472; Ex. 8B. As discussed more fully below, Missouri detective Robert McPhail had flown out to Everett for trial but ended up testifying the following week by video link from back in Missouri after inclement weather delayed the proceedings. 1 Trial 56-59 (settling on this option); 3 Trial RP 261-95 (testimony).

The defendant did not testify. 4 Trial RP 464-65, 503.

The defendant was charged by amended information with two counts of first-degree rape of a child and two counts of first-degree child molestation. 1 CP 86-87. He was convicted on all

[2] Haner agreed that the fissure alone was not likely related to an eight-year-old injury. 4 Trial RP 443.

four counts, 1 CP 62-65, and sentenced within the standard range. 1 CP 3-18.

B. DELAY IN START OF TRIAL BECAUSE OF SNOW; IMPACT ON STATE'S OUT-OF-TOWN WITNESSES; LIVE VIDEO-LINK TESTIMONY.

Trial had been continued in December 2011 to Friday, January 13, 2012, "subject to the availability of the State's witnesses." 2 CP __ (sub 32, agreed trial continuance). Monday, January 16, 2012, was Martin Luther King day. ER 201. When the parties appeared before the assigned trial judge on Tuesday, January 17, 2012 to begin trial, the judge discussed likely delays because of inclement weather impacting the available jury pool. 1 Trial RP 2-4. Defense counsel noted she and the prosecutor had been discussing the weather situation for the past three days. 1 Trial RP 4. The prosecution noted it had two out-of-state witnesses, J.S. (now back living in New Mexico) and Springfield, Missouri detective Robert McPhail, who were both flying in that day. 1 Trial RP 2-4, 6. It was snowing during the proceedings. 1 Trial RP 45, 47, 49, 51. The court and parties agreed not to try to do anything either that day (Tuesday) or the following day (Wednesday), but instead to try again on Thursday, January 18, with a new jury pool.

1 Trial RP 4-8, 54-55. The court noted that with 8" – 10" predicted, the trial might not get started on Thursday either. 1 Trial RP 8-9.

On Thursday, January 19, Springfield detective McPhail was present in court. Unfortunately he had to be back in Missouri by Friday evening because of a child care issue. 1 Trial RP 57. (There was no problem with J.S., who could stay in Washington longer. 1 Trial RP 60.) To deal with this, the prosecutor suggested three options: a videotaped deposition of McPhail; videotaped testimony in the courtroom, with the judge there to rule on objections; or, as a third option, live video-linked testimony from Missouri, by way of "Skype" or something similar, in front of the jury. 1 Trial RP 57-58. The defense agreed to the third option. 1 Trial RP 59. Meanwhile defense counsel asked for an opportunity to interview detective McPhail while he was still here, which the State agreed to facilitate. 1 Trial RP 62. It was still snowing. 1 Trial RP 61. The court and parties decided to start anew on Monday. 1 Trial RP 61-63. (1 Trial RP 56-63 are attached hereto.)

On Tuesday, January 24, 2012 (after voir dire on Monday), the prosecutor confirmed that McPhail would be testifying by video link on Wednesday morning. 2 Trial RP 70, 138. The court indicating it would have a technician and equipment there. 2 Trial

RP 138, 251-52. On Wednesday morning, before McPhail testified, the parties discussed admission of an ultimately agreed transcript of the Springfield interview, that would be referred to in McPhail's testimony. 3 Trial RP 253-58; Ex. 8B (admitted at 3 Trial RP 276-77); see also 4 Trial RP 467-69, 472 (final wording of stipulation). The parties had previously agreed to the admissibility of the defendant's statements. 1 Trial RP 12-16; 1 CP 88-90. The court, parties, and technician also discussed the logistics of the video hookup. 3 Trial RP 259 (use of split screen; where parties should stand; witness in view of jury). Prior to McPhail's testimony, the court explained to the jury that the reason for this procedure was caused by snow the previous week, when the witness had been here. 3 Trial RP 260. McPhail testified as recounted above. 3 Trial RP 261-95.

III. ARGUMENT

A. THE DEFENDANT'S RIGHT OF CONFRONTATION WAS NOT COMPROMISED BY THE AGREED PROCEDURE EMPLOYED HERE.

For the first time on appeal, the defendant argues that having detective McPhail testify by video link was error. Yet he agreed to the procedure below. 1 Trial RP 59 (see Appendix). And

the procedure used afforded meaningful, adversary examination. Nor is any alleged error "manifest."

1. General Rule.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Article I, section 22 of the Washington Constitution similarly provides, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face."

The primary guarantee of the confrontation clause is the right to effective cross-examination of adverse witnesses. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998); Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). This includes "ensur[ing] that the witness's statements are given under oath, [forcing] the witness to submit to cross-examination, and [permitting] the jury to observe the witness's demeanor." State v. Price, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006).

The United States Supreme Court has held that while face-to-face confrontation is preferred, a defendant does not have an

absolute right of in-person confrontation, provided he or she is given a full and fair opportunity to probe and expose testimonial infirmities through cross-examination, and where denial of face-to-face confrontation is necessary to further an important public policy goal. Maryland v. Craig, 497 U.S. 836, 844, 847-48, 450-51,110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

The Washington Supreme Court has held the Confrontation Clause represents a "preference for live testimony," including the right to subject a witness to cross-examination. State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002). An indispensable component of the Confrontation Clause's preference for live testimony is cross examination because of its central role in ascertaining the truth. State v. Rohrich, 132 Wn.2d 472, 477-78, 939 P.2d 697 (1997).

The constitutional preference for live testimony may be disregarded when live testimony is not possible because the declarant is unavailable. Rohrich, 132 Wn.2d at 480. A witness is unavailable if the relevant party has made good faith efforts to obtain the witness's presence at trial. State v. Whisler, 61 Wn. App. 126, 138, 810 P.2d 540 (1991). Good faith efforts to secure the witness's presence at trial require the State use all reasonable and available means to do so. See State v. Goddard, 38 Wn. App. 509,

514, 685 P.2d 674 (1984). Reasonable and available means can include considering live closed-circuit TV testimony in front of the jury. State v. Smith, 148 Wn.2d at 131.

An alleged violation of the Confrontation Clause is reviewed de novo. Typically this occurs in the context of admission of hearsay evidence.[3] But at least one case holds the use of live, closed-circuit TV for a child-victim's testimony to the same standard of review. Danner v. Motley, 448 F.3d 372, 376 (6th Cir., 2006). On the other hand, whether a sufficient showing of good faith effort to procure a witness has been made is a case-by-case determination within the trial court's discretion. State v. Aaron, 49 Wn. App. 735, 740, 745 P.2d 1316 (1987).

2. The Defendant Relies On Cases Where The Accused *Objected* To Video Testimony.

The defendant argues that permitting detective McPhail to testify by 2-way video link was error. Because the witness was able to fly out to and remain in Washington for at least some period of time, the defendant argues he was not "unavailable;" nor, he

[3] E.g., State v. Price, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006) (child's out-of-court statements to mother and detective); State v. Hurtado, __ Wn. App. __, 294 P.3d 838, 842 (2013) (statements to ER nurse); State v. Fleming, 155 Wn. App. 489, 502, 228 P.3d 804 (2010) (business records); State v. Sanchez-Guillen, 135 Wn. App. 636, 644, 145 P.3d 406 (2006) (statement of co-conspirator); State v. Chambers, 134 Wn. App. 853, 858, 142 P.3d 668 (2006) (admission of party-opponent).

adds, did the trial court make requisite policy findings, as Craig requires it to do; nor, he asserts, would the record have supported the entry of such findings.

The rule in Craig is that 1-way closed-circuit TV testimony – where the child witness does not see the defendant – can be offered "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Craig, 497 US at 850. The federal Circuits are not in agreement on whether this limiting rule should extend to 2-way video conferencing, that is, where the witness sees the defendant. Compare United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (admission of 2-way video-link testimony of witnesses in Australia in fraud case subject to Craig rule, and violated right of confrontation) with United States v. Gigante, 166 F.3d 75, 79-82 (2d Cir. 1999) (admission of ill witness' testimony via 2-way link did not violate right of confrontation, and afforded more protection than a deposition would have; Craig applies only to one-way closed-circuit TV testimony, where witness does not see the defendant).

The defendant argues this Court should follow Yates. But in Yates, the defendant *objected* to the procedure. Yates, 438 F.3d at

1310. This was the case in Craig as well. Craig, 497 U.S. at 842. What happened here was different.

3. Because The Defendant *Agreed* To The Procedure, Any Error Was Waived, Leaving Nothing To Review Or Correct.

In contrast to the defendants in Yates or Craig, here the defendant *agreed* to the procedure.

After the prosecutor presented the three options of videotaped deposition, videotaped testimony in the courtroom in front of the judge, and 2-way video link in front of the jury, the court inquired:

> THE COURT: Ms, Dingledy [defense counsel], have you had a chance to discuss any of this with your client? If you haven't, we'll give you a chance.
>
> Ms. DINGLEDY: We've discussed it and we're discussing it at present.
>
> THE COURT: If you need an opportunity to discuss it without all of us overhearing the conversation.
>
> Ms. DINGLEDY: Quite frankly, what I would love is a recess.

1 Trial RP 58 (attached). The court took a recess, apparently with both the judge and the prosecutor leaving the courtroom. Id. When the parties returned, the Court inquired:

> THE COURT: Please be seated. And so let me start here. Any chance you've agreed on an approach to Detective McPhail's testimony?

> Ms. DINGLEDY: I think we have, Your Honor. I think that it would be wiser to try to do this by video link or if all else fails –
>
> THE COURT: I don't have any problem with that idea. We at least have some notice so I can talk to Mr. Shambro in our administrative office about how to set it up. We have done it before in the courtroom with a Skype.
>
> Mr. OKOLOKO [prosecutor]: That's the defense's preference. The State will be going with that. . . .

1 Trial RP 59. Because the defendant agreed to this procedure, he cannot complain of it now.

It is well-settled law that even constitutional rights can be waived. State v. Humphries, 170 Wn. App. 777, 789, 285 P.3d 917 (2012); State v. Bennett, 42 Wn. App. 125, 128, 708 P.2d 1232 (1985) (citing State v. Myers, 86 Wn.2d 419, 426, 545 P.2d 538 (1976) (constitutional rights can be waived by conduct)). Waiver of a constitutional right must be voluntary, knowing, and intelligent. In re Matter of James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). This was.

In State v. Valladares, 99 Wn.2d 663, 671–72, 664 P.2d 508 (1983), the defendant moved pretrial to exclude evidence obtained during a warrantless search, but then affirmatively withdrew the motion. The defendant appealed his conviction, assigning error to the trial court's refusal to exclude the evidence. The Supreme Court

declined to review the issue, holding that the constitutional issue had been "waived or abandoned." State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983); see also State v. Mierz, 72 Wn. App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994), aff'd, 127 Wn.2d 460, 901 P.2d 286 (1995).

Valladares relied on Johnson v. United States. There, the Court found constitutional error but held reversal unwarranted because the defendant "affirmatively withdrew a Fifth Amendment objection to a prosecution[.]" Johnson v. United States, 318 U.S. 189, 200, 63 S. Ct. 549, 87 L. Ed. 704 (1943). If error can be waived by conduct, or by withdrawing a objection, then it surely can be waived all the more when by express agreement, as happened here.

As a result there is, in fact, no error at all. A waiver of error extinguishes appellate review because there is technically no "error" to correct. United States v. Olano, 507 U.S. 725, 732-33, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993); United States v. Tichenor, 683 F.3d 358, 363 (7th Cir. 2012). Analysis need go no further.

4. The Use Of A Two-Way Video Link Protected The Defendant's Right Of Confrontation By Insuring Meaningful Cross-Examination.

Although not physically present in the courtroom, Detective McPhail testified by 2-way video link in front of the defendant and the jury, during trial, in real time. See 3 Trial RP 261-95. The record confirms he was available for, and subjected to, meaningful cross-examination. 3 Trial RP 280-90, 294. The defendant was able to lodge timely and pertinent objections, 3 Trial RP 272, 278, 291, 293. Nor is this a case where a child-witness testifies by closed-circuit TV in such a way that, while the defendant and jury can see the witness, the child victim does not see the defendant. See RCW 9A.44.150 (authorizing such a procedure); State v. Foster, 135 Wn.2d 441, 444, 468-70, 957 P.2d 712 (1998) (procedure does not violate Confrontation Clause); Maryland v. Craig, 497 U.S. at 840-41, 860 (substantially similar Maryland statute does not violate Confrontation Clause).

Nor had the State been dilatory in procuring McPhail's presence. The State had flown him out to Washington on Tuesday for a trial that week. 1 Trial RP 2-4, 6. He then appeared in court. 1 Trial RP 57. But he had to be back by Friday evening to care for a child. Id. Meanwhile the trial was being delayed an entire week

because of snow. 1 Trial RP 2-9, 45, 47, 49, 51, 54-55, 61-63. The prosecutor considered reasonable alternatives (as caselaw requires him to do, State v. Smith, 148 Wn.2d at 131) and ultimately settled on the best option, a real-time 2-way video link in front of the jury the following week. 1 Trial RP 57-59. The defendant's right of confrontation was not compromised. See 3 Trial RP 261-95 (testimony); United States v. Gigante, 166 F.3d at 79-82 (use of 2-way link did not violate right of confrontation, actually affording more protection than a deposition); State v. Hobson, 61 Wn App 330, 333-38, 810 P.2d 70 (1991) (videotaped deposition, in defendant's presence and opportunity to cross-examine, did not violate right of confrontation); State v. Hewett, 86 Wn.2d 487, 491-94, 545 P.2d 1201 (1976) (same).

5. The Defendant Cannot Raise This Matter For The First Time On Appeal, Because It Does Not Comprise "Manifest" Constitutional Error.

Assuming this claim of error has not been waived, it nonetheless is raised for the first time on appeal. As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). Only a "manifest error affecting a constitutional right" can be raised for the first time on appeal. State v. Lynn, 67 Wn. App. 339, 345-46, 835 P.2d 251 (1992); RAP 2.5(a)(3). The

mere allegation of a violation of a constitutional right does not mandate review. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Rather, inquiry involves a two-part test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. State v. Lynn, 67 Wn. App. at 354; State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). "An error is manifest when it has practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn .2d 236, 240, 27 P.3d 184 (2001). "'Manifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed;" the defendant must make a plausible showing that the error had "practical and identifiable consequences in the trial," resulting in actual prejudice. Lynn, 67 Wn. App. at 345-46; Stein, 144 Wn.2d at 240; accord, State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002); State v. McFarland, 127 Wn.2d at 333-34. An error whose impact is abstract and theoretical will not be considered for the first time on appeal. Lynn at 354.

The defendant presents McPhail's 2-way video testimony, recounting McPhail's interview of the defendant, as central and critical to the case. But he ignores the fact of his having also stipulated to the admission of a redacted transcript of that same

interview. 3 Trial RP 253-58, 276-77; 4 Trial RP 467-70, 472; Ex. 8B. Doing so helped him, for during that interview the defendant denied the allegations. Ex. 8B at 7-9, 11 (admitted transcript); 3 Trial RP 273, 279, 281-82, 290, 293 (detective's recounting the same). The admission of his statements to McPhail allowed the defendant's denials to go to the jury without his having actually to testify. See 4 Trial RP 464-65, 503. The only thing the detective's testimony added to all this was that the defendant had been nervous, shaking and sweating during part of the interview, including when the allegations were discussed. 3 Trial RP 266-67, 271-76, 285, 288, 291-92, 294. On cross-examination, however, the defendant's counsel successfully elicited that, even in the detective's own experience, it is not uncommon for people who have done nothing wrong to behave nervously when questioned by police, in some cases even bolting in panic when they had no reason to do so. 3 Trial RP 283, 285.

Contrast this to the explicit testimony of M.S., of what had repeatedly been inflicted upon him, 2 Trial RP 105, 110-123, 149, as well as the "non-specific" abnormal findings from the physical exam, 4 Trial RP 432-37, 439-40, 450, 453, 457. (At sentencing, the trial judge recalled M.S.'s testimony as "rather compelling." 5

RP 610.) On this record the defendant cannot show that admission of McPhail's 2-way video testimony was such "unmistakable, evident or indisputable" error that it had "practical and identifiable consequences in the trial" that actually prejudiced him. Lynn, 67 Wn. App. at 345-46; Stein, 144 Wn.2d at 240.

Moreover, any claim of error based upon ambiguities in the record of how the video link actually worked fails as well, for a reviewing court will not address an argument raised for the first time on appeal if the record is unclear. State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

In Lynn the State sought to introduce hearsay evidence – specifically, statements against interest – of a witness it argued was unavailable because he would likely assert his Fifth Amendment right against self incrimination. The defendant did not object and the trial court admitted the evidence. When the defendant appealed, arguing the hearsay evidence violated his confrontation rights, this Court determined any claimed constitutional error was not manifest because had the defendant objected, the State could have called the witness who most certainly would have asserted his Fifth Amendment rights. Lynn, 67 Wn. App. at 346.

Lynn found no "manifest" error in a situation where by definition there was no opportunity to cross-examine. Here, by contrast, the witness was subject to, and counsel engaged in, meaningful cross examination in front of the jury. The defendant cannot show any error was "manifest."

6. Any Error Was Constitutionally Harmless.

Assuming that error was not waived, and, further, that error was "manifest," it remained constitutionally harmless.

A confrontation-clause violation is subject to constitutional harmless error analysis. State v. Turnipseed, 162 Wn. App. 60, 70, 255 P.3d 843 (2011) (finding error harmless); State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006); Harrington v. California, 395 U.S. 250, 251–52, 89 S. Ct. 1726, 23 L. Ed .2d 284 (1969). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The test for determining whether a constitutional error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). "If there is no 'reasonable probability that the outcome

of the trial would have been different had the error not occurred,' the error is harmless." State v. Mason, 160 Wn.2d 910, 927, 162 P.3d 396 (2007) (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

The same factual analysis applied in the previous section governs here as well, the only difference being that in a constitutional-harmless-error inquiry the State bears the burden, whereas the defendant must show any error was "manifest." But the outcome is the same. Any Confrontation Clause error was harmless in this case. There was M.S.'s "compelling" testimony recounting how he was repeatedly raped. 2 Trial RP 105, 110-123, 149. There were the abnormal "non-specific" findings from the physical exam conducted by nurse-practitioner Haner. 4 Trial RP 432-37, 439-40, 450, 453, 457. There was even Tracy S.'s corroboration of what M.S. saw in his stool, although neither the child nor the mother understood the significance at the time. 2 Trial RP 116-17; 3 Trial RP 354, 366-68. The circumstances of disclosure were benign – that is, they had nothing to do with the defendant. And unlike, for example, a child caught in a custody fight, M.S. had no motive to lie. There is no reasonable probability

that the outcome of the trial would have been different without McPhail's testimony.

B. THE DEFENDANT'S CHALLENGE TO A CONDITION OF SUPERVISION IS NOT RIPE FOR REVIEW. AND THE CONDITION WAS WITHIN THE COURT'S AUTHORITY TO IMPOSE.

At sentencing, the defendant objected to three proposed conditions of community custody: #7, prohibiting possession of sexually explicit materials, or frequenting establishments whose primary business pertains to such material, as overbroad; to #10, prohibiting possession or consumption of alcohol, as unrelated to the crime; and #13, prohibiting possession of computers or computer parts. 5 RP 608, 614; see 1 CP 17-18 (conditions appended to judgment and sentence). The Court imposed #10, given the testimony of alcohol use, and on its own struck condition #2 (restitution), as requiring a separate order. 5 RP 614. It agreed with the defendant and struck #13 (prohibiting possession of computers), as not reflecting the facts of the case. 5 RP 615. However, it added consenting to access to any computers to condition #19, requiring the defendant consent to DOC home visits. 5 RP 615. The defendant had not objected to #19 before, but did so when computer access was added to it. 5 CP 616. As for #7

(sexually explicit materials), both parties cited State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). The court found that while "pornography" was found overbroad, "sexual explicit materials" is not, and imposed this condition, in particular as it is treatment-related. 5 RP 616-17.

On appeal the defendant appears only to object to #19, as amended – that is, to the condition requiring consent to DOC home visits to monitor compliance, as including requiring consent to access to computers.

However, unlike an overbroad condition of supervision that places an immediate restriction on a supervisee's conduct without the necessity of any state action (as in prohibiting "pornography"), the objected-to home-visit provisions at #19 are not ripe for review until Cates is actually subjected to an allegedly improper search. State v. Massey, 81 Wn. App. 198, 200-01, 913 P.2d 424 (1996). This is because the validity of such conditions depends on the particular circumstances of the attempted enforcement. Id.

In Massey, the defendant challenged a very similar sentencing court order (albeit without the access-to-computers language) that required that he submit to searches by a community corrections officer as a condition to community placement, but

which, like here, did not state that searches must be based on reasonable suspicion. Massey, 81 Wn. App. at 199. This Court held that Massey's claim is premature until he is subjected to a search that he deems unreasonable. Massey, 81 Wn. App. at 200. That case controls here and renders Cates' challenge to his community custody condition not ripe for review.

As to the merits, community corrections officers have liberal authority to search the home and possessions of those under their supervision based upon a reasonable or well-founded suspicion. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); State v. McKague, 143 Wn. App. 531, 544, 178 P.3d 1035 (2008); RCW 9.94A.631. Here the trial court, not DOC, imposed a condition that the defendant, as a condition of supervision, pre-consent to "home visit" visual inspections (something less than a full search), and pre-consent to access to any computers. 1 CP 17-18. The court had authority to require a defendant "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" Former RCW 9.94A.712 (applying to sex offenses). This was a crime committed in secret. Computers are not readily subject to cursory visual inspection. They can, moreover, contain

sexually explicit materials. Requiring pre-consent to home visits, and to accessing any computers found therein, was reasonably related to monitoring the offender's risk of reoffending and/or to insuring the safety of the community. Assuming this claim of error is even ripe for review, it fails.

IV. CONCLUSION

The judgment and sentence should be *affirmed*.

Respectfully submitted on May 2, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: /Kathleen Webber 16040 for
CHARLES FRANKLIN BLACKMAN, WSBA # 19354
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL CATES, Defendant.	Cause No. 10-1-02208-7 COA No. 68759-0-1

VERBATIM REPORT OF PROCEEDINGS

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THE HONORABLE LINDA C. KRESE

Department 11

Snohomish County Courthouse

January 17, 19, 23, 2012

For the Plaintiff: Mr. Edirin Okoloko, Snohomish County Prosecutor's Office

For the Defendant: Ms. Mary Beth Dingledy, Snohomish County Public Defender's Office

Reported by: Dennis W. Erickson, CSR #2294

THE COURT: Please be seated. Mr. Okoloko, if you want to put the case on the record.

MR. OKOLOKO: Thank you. Good afternoon. We're present in the matter of State of Washington vs. Michael Shane Cates, Cause No. 10-1-02208-7. Edirin Okoloko appearing in behalf of the State. The defendant is present in custody, represented by Counsel Mary Beth Dingledy. Seated with me at counsel table is Detective Robert McPhail of the Springfield Police Department in Springfield, Missouri.

THE COURT: Must be a thrill to have come to our fine state. We only have these kinds of events every two or three years. Then we get paralyzed.

We're back on the record to address how we're going to get this case back on track. So I'm going to tell you that I will hear from you both. Frankly, I know you've got an issue about another case. I don't know how that's going out right now, anyway. I frankly think the best plan would be to pick a jury on Monday. These jurors have been through a lot already this week. Snow is going to continue for a couple more hours, then we're going to have rain early tomorrow morning, which would make another mess.

I know there was some discussion of having Detective McPhail testify by video deposition. Is that still a

possibility?

MR. OKOLOKO: The most pressing issue for the State is Mr. McPhail's testimony. As I sit here today and on my e-mail, he has to be back in Missouri by Friday evening due to a child care issue that he's got going on in Missouri. What I have discussed with Mr. McPhail and counsel, Ms. Dingledy, are two options. Some time this afternoon we can do a video deposition of the Detective, and have that admitted during the trial and published to the jury. The second is that we could call Detective McPhail out of order today, have him take the stand and testify based on a stipulation between the parties.

THE COURT: We don't have a jury today.

MR. OKOLOKO: That's what I'm saying. He would be testifying outside the presence of the jury. It will be videotaped in an open courtroom with a court reporter in here.

THE COURT: So what you are suggesting is that -- the other way of doing the video deposition would be actually in session?

MR. OKOLOKO: In session. That way you can make rulings on objections. The third option would be Detective McPhail returns back to Missouri and we can have him in the trial by way of either Skype or like we've done I have done in a different trial in Judge Castleberry's

department, the witness participated by conference call. Obviously, that was based on a stipulation of the parties agreeing to have the witness phone in and the defendant waiving his right to have the witness present in the courtroom. Those are three options.

THE COURT: Ms. Dingeldy, have you had a chance to discuss any of this with your client? If you haven't, we'll give you a chance.

MS. DINGLEDY: We've discussed it and we're discussing it at present.

THE COURT: If you need an opportunity to discuss it without all of us overhearing the conversation.

MS. DINGLEDY: Quite frankly, what I would love is a recess.

THE COURT: I would start it all over, too, if I had that option and it would go a little differently.

MS. DINGLEDY: How about this. Can you give me a couple seconds to discuss that?

THE COURT: I don't mind leaving. If you wanted, Mr. Okoloko can leave, which might be the easiest way if you want some privacy.

MR. OKOLOKO: Yes. We'll have to recess before we have that happen, anyway.

THE COURT: Yes, I understand.

(Recess taken.)

THE COURT: Please be seated. And so let me start here. Any chance you've agreed on an approach to Detective McPhail's testimony?

MS. DINGLEDY: I think we have, Your Honor. I think that it would be wiser to try to do this by video link or if all else fails --

THE COURT: I don't have any problem with that idea. We at least have some notice so I can talk to Mr. Shambro in our administrative office about how to set it up. We have done it before in the courthouse with a Skype.

MR. OKOLOKO: That's the defense's preference. The State will be going with that. At this point in time, I will have a stipulation that we'll file in court to show that the parties agreed to proceed by this medium. I think we settled on Detective McPhail's testimony.

THE COURT: Does that mean he can leave? Do you have any chance of getting out of here tonight?

DETECTIVE MCPHAIL: No, Judge, it will be tomorrow morning.

THE COURT: I'm sorry. The airport is closed down.

MR. OKOLOKO: Your Honor, I believe 201 might be more equipped for this type of hearing.

THE COURT: Anyway, this will give me time. I can talk with Mr. Shambro, get him in touch with the two of you and you can tell me when you anticipate resuming, if we start

picking a jury Monday morning.

MR. OKOLOKO: I would be calling Detective McPhail to testify in the afternoon on Tuesday.

THE COURT: Okay.

THE COURT: Then I can talk to Mr. Shambro about when we need to set it up and what we need to do. I'll do that. What about your other witness?

MR. OKOLOKO: Mr. John Salyards, I haven't heard anything that would create an issue with him being available for next week.

THE COURT: He's a relative, I take it, of the alleged --

MR. OKOLOKO: He's the biological father of the victim, Your Honor. So we were more concerned about Detective McPhail's availability as opposed to Mr. Salyard's. Obviously, I'll try to get him to testify as quickly as I can next week and send him on his way.

With regard to the Court's earlier comments about jury selection and the preference to begin on Monday, as opposed to tomorrow, I would just defer to the wisdom of the Court on that issue. I have nothing to add.

THE COURT: The Court has shown not as much wisdom, I should have gone with my instinct on Tuesday.

MR. OKOLOKO: That's precisely why I'm not making any comments, Your Honor.

THE COURT: Unfortunately, the weather is not something we can control, so I know that both of you have personal reasons to desire to get this case going, but I'm concerned that it is still snowing, it is supposed to start raining some time early morning. I don't know what kind of mess that could make of the commute. The jurors we call in, they shouldn't think this, but they will think they're done with their week, and having drug some of them in here a couple times already, we'll then be telling them to come back next week. I think that everyone would be better served by a fresh pool next week. They expected to be here all week, by which time -- the forecast seems to be rain for the foreseeable future. We shouldn't have any problem getting to the courthouse. I realize it's an inconvenience. I think the best thing to do is start picking our jury Monday morning. We've dealt with motions in limine. We could start quickly, might have a jury by noon or so. I know both of you have personal scheduling things, if that doesn't make it very convenient, but I think that's the best way to go. The most you would save is a day off of that schedule next week because we only have one day, tomorrow.

MS. DINGLEDY: I'll defer to whatever the Court wants to do.

THE COURT: That's what I think. And hearing from my

jury people, I think they think that would be the best plan as well. Is there anything else we can do today?

MR. OKOLOKO: I don't believe so.

MS. DINGLEDY: Your Honor, the only thing I would like to do, I would like to an opportunity to briefly interview Detective McPhail here at the Prosecutor's Office or at my office with my investigator. Shouldn't take long, just a few questions.

THE COURT: He probably has some time this afternoon. Can you accommodate that, Mr. Okoloko?

MR. OKOLOKO: I believe I can.

THE COURT: Since Detective McPhail has been so kind as to come here, at least you'll have stories to tell people back in Missouri. I lived in Missouri for a year. They didn't necessarily deal with snow all that well, either, do they?

DETECTIVE MCPHAIL: We do okay.

THE COURT: I lived in Columbia once a long time ago. We'll be in recess.

MS. DINGLEDY: Your Honor, Mr. Cates does not need to come to trial call tomorrow since he's already been assigned out?

THE COURT: He does not. I don't expect it to be on the calendar tomorrow. But I will make sure that Presiding knows, the calendar administrator that we'll be

doing this on Monday, and that the jury folks know. Okay?

MR. OKOLOKO: Okay.

MS. DINGLEDY: 9:00 o'clock?

THE COURT: Let me check. I actually have a 9:00 o'clock hearing. Why don't we say 9:30, but I do appear to be available next week. I hadn't really checked that out yet, figuring whatever was there would have to be rescheduled, if need be. I'll see everyone on Monday and Mr. Cates does not need to be transported tomorrow.

Thank you.

MR. OKOLOKO: Thank you.

(Recess taken.)