NO. 44453-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN HOLLOWAY,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **Brian Holloway's constitutional rights to a fair trial, to present a defense, and to confront witnesses were denied by the court's exclusion of evidence highly probative of the complaining witness's credibility.**

In violation of Mr. Holloway's right to a fair trial, right to present a defense and right to confront witnesses and contrary to the Rules of Evidence, the trial court excluded all evidence and discussion of G.S.R.'s prior false allegation of sexual abuse. *See* RP 35-37, 153-54, 169, 216-17, 220-22, 230-31, 512-16; Op. Br. at 8-14. The evidence Mr. Holloway sought to admit to impugn G.S.R.'s credibility was reliable and relevant; Mr. Holloway secured records that verified that G.S.R. had previously reported sexual abuse that was similar to the allegations here, that a law enforcement investigation had ensued, that G.S.R. subsequently recanted her allegation; that a social services case work and law enforcement relied on the recantation; and that the investigation was closed as a result. RP 14-27, 91-119, 124-39, 148-52, 169-82, 186, 188-92, 195, 203; CP 29-35, 41-45, 58-63; CP 379 (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)); CP 233-34 (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report)).

In response, the State repeatedly argues that Mr. Holloway was only entitled to admit the evidence of G.S.R.'s prior allegation of sexual abuse if that allegation was false. Resp. Br. at 9-11 (citing *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999); *State v. Demos*, 94 Wn.2d 733, 736-37, 619 P.2d 968 (1980) and foreign cases). The State proves Mr. Holloway's argument. Mr. Holloway produced credible evidence that G.S.R.'s prior allegation against "Uncle Mike" was false because G.S.R. later recanted the allegation and, based on that recantation, law enforcement closed its investigation. CP 379 (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)); CP 233-34 (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report)). The evidence that Mr. Holloway sought to admit was not that G.S.R. had been sexually abused by someone else or even that she had reported being sexually abused by someone else but that she had falsely reported being sexually abused by someone else. It was ultimately for the jury to determine whether it believed G.S.R.'s prior accusation was false and whether that bore on her credibility as a witness against Mr. Holloway. *See also* Resp. Br. at 12-13 (attempting to discredit recantation). But with the police report stating precisely that G.S.R. had previously recanted a false report, the trial court

violated Mr. Holloway's rights and abused its discretion under the evidentiary rules by preventing Mr. Holloway from putting that issue before the factfinder.

In *Demos*, our Supreme Court affirmed the exclusion of prior rape allegations by the complaining witness. 94 Wn.2d at 736-37. The defendant challenged the exclusion only as contrary to the rape shield statute and relevance. *Id.* at 736. The Court did not reach the scope of the rape shield statute because it found the evidence irrelevant because the defendant could not prove the falsity of the prior allegations. *Id.* at 736-37. The first police report Mr. Demos relied on provided no evidence that the allegation was false, unlike the police report at issue here. *Id.* at 737. Because the second police report depended on an unreliable and inadmissible polygraph examination of the complaining witness to conclude her allegation was unfounded, that report also did not show the falsity of the prior allegation. *Id.* Unlike that report, the report Mr. Holloway relied on depended on G.S.R.'s own statement recanting her previous allegation. Unlike in *Demos*, Mr. Holloway presented evidence of the prior allegation's falsity.

The State seeks to align this case with *Harris*, but *Harris* supports Mr. Holloway's argument. *See* Resp. Br. at 14. Like the first

report at issue in *Demos*, "Mr. Harris offered no proof that he knew of the prior statement on the night of the rape, that M.T. denied making it or that it was false." 97 Wn. App. at 872. In fact in *Harris*, The complaining witness did not recant a prior accusation, she "utterly denied" even making the accusation. *Id.* at 872-73. The evidence Mr. Harris sought to admit stands in stark contrast to that which Mr. Holloway presented.

Likewise, in *State v. Mendez*, another case relied upon (but not analyzed) by the State, defense counsel had not even spoken with an uncle who might have testified to the falsity of the prior accusation. 29 Wn. App. 610, 611-12, 630 P.2d 476 (1981). Moreover, the uncle was hardly an independent witness, he was the perpetrator the complaining witness previously accused. *Id.* at 611. In another case the State discusses, *State v. Williams*, the defendant claimed the prior allegation was false only because the prosecutor never filed a charge on the claim. *State v. Williams*, 9 Wn. App. 622, 623, 513 P.2d 854 (1973). Meanwhile in *Williams*, the State submitted an offer of proof that "although the complaint had not been filed by the prosecuting attorney, it had not been false." *Id.* Again, the facts of *Mendez* and *Williams* are obviously distinguishable from those presented here where G.S.R.

actually recanted and where a social services case worker and law enforcement relied on that recantation.[1]

The State also tries to make much of the fact that the falsity of G.S.R.'s prior allegation is reflected in only "one statement" or "one line" of the reports reviewed in camera by the trial court. Resp. Br. at 3, 11. First, the State is wrong that only "one statement included in a police report" shows the falsity. In fact, there are at least three paragraphs that are relevant to this falsity. It is not only the police report's note that G.S.R. recanted but it is also relevant that the police spoke with the case worker to whom G.S.R. recanted, the recounting of that conversation (caseworker had "re-interviewed [G.S.R.] and she had recanted her disclosure she had made to the authorities in Oregon"), and that the police then closed its investigation based on this new information. CP 233-34 (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report)). But even more significantly, it is entirely irrelevant how much space the recantation, or falsity, occupied in the documents Mr. Holloway obtained to investigate his defense. What is

[1] The State asserts at page 15 that "another party later claimed [G.S.R.] recanted." But law enforcement and the case worker are not simply "another party." Unlike the biased uncle in *Mendez*, law enforcement and social services are at least impartial or neutral and, furthermore, are tasked to assist and protect G.S.R. Thus, their determination that G.S.R. had recanted, and the closing of the case, is substantial.

important is that it is there at all. A "not guilty" verdict occupies only a single line, or a single docket entry, in a large trial case file, but its diminutive size cannot outweigh its importance. Furthermore, the State's argument about the context in which G.S.R. recanted goes to its weight not its admissibility. Mr. Holloway had the right to put this evidence before the jury for it to determine its weight. The trial court's ruling precluded that right and a new trial should be held.

The State baldly claims G.S.R. "would have denied fabricating a prior sex abuse allegation." Resp. Br. at 12. But the State cannot know that, Mr. Holloway never had the opportunity to confront G.S.R. with her prior recantation. In fact, he was not even allowed to see the report. Thus, the State's accusation that Mr. "Holloway never showed and never produced an offer of proof to the trial court" is inapposite. Resp. Br. at 12. The documents Mr. Holloway subpoenaed were received and reviewed by the court in camera. Mr. Holloway did not have the materials to submit an offer of proof.

Notably, the State does not even attempt to argue that the exclusion of this evidence, if improper, was harmless. Harmlessness beyond a reasonable doubt is the State's burden here. Its lack of argument should be treated as a concession. *State v. Ward*, 125 Wn.

App. 138, 144, 104 P.3d 61 (2005) (State concedes issue by failing to respond to it). Even if the State had made an argument, it would fail. As set forth in Mr. Holloway's opening brief, the exclusion of evidence impugning the credibility of the State's key witness on the precise topic at issue in the case and where the case came down to a credibility contest cannot be harmless. *See* Op. Br. at 13-14.

2. Counts four and eight should be reversed and dismissed with prejudice because the State failed to prove the essential element of sexual intercourse.

The State elected to charge Mr. Holloway with rape in counts four and eight instead of child molestation. But the State failed to prove the essential element that distinguishes those offenses. To satisfy its burden on rape of a child the State had to prove beyond a reasonable doubt that Mr. Holloway's finger or hand penetrated G.S.R.'s "vagina." RCW 9A.44.076(1); RCW 9A.44.079(1); RCW 9A.44.010(1)(b). At most, the State showed that Mr. Holloway petted or "penetrated" G.S.R.'s labia.

If the statute is unambiguous, then this Court must rely on the plain meaning of the term "vagina." *State v. Roden*, 179 Wn.2d 893, 908, 321 P.3d 1183 (2014); *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) ("If the plain language of the statute is

unambiguous, then this court's inquiry is at an end. The statute is to be enforced in accordance with its plain meaning." (internal citations omitted)). The vagina is an internal organ, "a canal that leads from the uterus of a female mammal to the external orifice of the genital canal." *Webster's Third New Int'l Dictionary* 2528 (1993).[2] The labia majora and labia minora are a part of the vulva, which is external to the vaginal canal.[3] There is no ambiguity, and, the State failed to satisfy its burden to show penetration of the vagina on counts four and eight.

To be clear, it is not that the petting of a minor's labia is not a crime. It is. It constitutes the offense of child molestation. *E.g.*, RCW 9A.44.086(1); RCW 9A.44.089(1); RCW 9A.44.010(2) (defining "sexual contact"). Thus, interpreting the specific statutory language, "vagina," according to its plain language does not "lead to a strained and absurd result." The legislature codified two different crimes. The State must be held to its burden when it charges the more intrusive crime.

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[2] *Accord* Web MD, "Your Guide to the Female Reproductive System," http://www.webmd.com/sex-relationships /guide/your-guide-female-reproductive-system (last visited Sept. 27, 2013); "Human female reproductive system," Wikipedia, http://en.wikipedia.org/wiki/Human_female_reproductive _system#Vagina (updated Sept. 24, 2013). Copies of these webpages are attached as Appendix B to the opening brief.

[3] Web MD, "Your Guide to the Female Reproductive System"; Web MD, "Picture of the Vagina," http://women.webmd.com/picture-of-the-vagina (last visited Sept. 27, 2013); "The Vulva," http://www.3dvulva.com/ (2006).

The State skips a plain language analysis altogether. *See* Resp. Br. at 18. Presumably that is because a plain reading of the statute does not support its preferred interpretation.

Moreover, to obfuscate the insufficiency of its evidence, the State relies on the interpretation of another statute that did not contain the word "vagina." In RCW 9A.44.076 and .079, the statutes at issue here, the legislature did not criminalize penetration of "the female sexual organ" or "the body of the female." *See* Resp. Br. at 21 (claiming the labia "are a component of the female sexual organ"). Thus the *Snyder* court's interpretation of "sexual penetration" under Rem. Rev. Stat. § 2437 does not control this Court's interpretation of "sexual intercourse" that is defined as "any penetration of the vagina or anus." *Compare State v. Snyder*, 199 Wash. 298, 299-301, 91 P.2d 570 (1939) *with* RCW 9A.44.010(1), .076 & .079. The State's attempt to shoehorn this case into a 1930s statute is unpersuasive.

The State also relies on *State v. Delgado*, 109 Wn. App. 61, 33 P.3d 753 (2001), *rev'd on other grounds by* 148 Wn.2d 723, 63 P.3d 792 (2003). Like the State, that opinion does not undertake a plain meaning analysis of the statute. *Compare* 109 Wn. App. at 65 *with* Resp. Br. at 18. Instead, *Delgado* recites principles of statutory

interpretation and, without applying them or providing further analysis, simply states "These principles of statutory construction militate against Delgado's suggested reading of the child rape statute." 109 Wn. App. at 65. Beyond that conclusory statement, *Delgado* cites to cases previously discussed and harmonized by Mr. Holloway to hold the issue is settled by case law. *Id.* at 65-66; Op. Br. at 23-26.

Even if the Court finds it necessary to look beyond the plain definition of "vagina" to interpret "sexual intercourse," the State's evidence is insufficient on these two counts. As discussed, the legislature codified distinct categories of sexual offenses: those involving sexual intercourse, rape, and those involving sexual contact. Collapsing these offenses would run contrary to legislative intent.

Based on the analysis presented here and in Mr. Holloway's opening brief, this Court should hold the State to its burden and give meaning to the words the legislature specifically selected and the distinction it made among the offenses of rape and molestation.

3. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge and the prosecutor's argument in closing diluted the State's burden of proof in violation of Mr. Holloway's due process right to a fair trial.

Mr. Holloway relies on the argument in his opening brief to support the denial of his right to a fair trial by the court's erroneous "abiding belief in the truth" instruction language and the prosecutor's misconduct in urging the jury to rely on its hearts, minds and guts, and not the evidence, to get to an abiding belief in the truth. *See* Op. Br. at 27-33.

4. The State concedes that, in the alternative, the sentence for counts two, three and ten must be corrected because the term of confinement plus the term of community custody exceeds the statutory maximum.

As set forth in Mr. Holloway's opening brief and in the State's response, the combined terms of confinement plus community custody on counts two, three and ten exceed the statutory maximum. Op. Br. at 34-36; Resp. Br. at 33-34. The sentence exceeds the trial court's statutory authority. RCW 9A.20.021; RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012). The parties agree that, if the Court does not reverse Mr. Holloway's convictions, the

sentence on these three counts should be remanded for correction. Op. Br. at 34-36; Resp. Br. at 33-34.

B. CONCLUSION

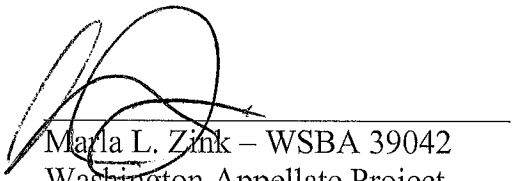
In a case that largely came down to credibility, the trial court improperly excluded critical evidence relating to the complaining witness's credibility in violation of Mr. Holloway's constitutional rights to present a defense, to confront witnesses, and to a fair trial. Mr. Holloway was also denied a fair trial because instruction number three diluted the burden of proof and, cumulatively or independently, because the prosecutor seized on that erroneous language and also urged the jury to convict based on what was in their guts, hearts and minds instead of the evidence. These errors require reversal and remand for a new trial.

Additionally, two counts should be reversed and the charges dismissed with prejudice because the State failed to prove penetration of the vagina, as the statute requires.

Alternatively, the sentence should be remanded on several counts for resentencing within the statutory maximum.

DATED this 12th day of May, 2014.

Respectfully submitted,



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DIVISION TWO

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