NO. 70799-0-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

CHARLES V. LEE,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court err when it found sufficient indicia of reliability to admit certain evidence pursuant to the child hearsay statute?

2. If the court erred in admitting child hearsay evidence, was it harmless where the defendant was acquitted of the charges relating to those hearsay statements?

3. The defendant proffered evidence that the principal of an elementary school instituted a policy barring staff from being alone with a child who was alleged to be the victim of a sexual assault.

a. Did the trial court properly exercise its discretion when it excluded this evidence?

b. If the trial court abused its discretion was any error harmless where there was other evidence that the victim had made false allegations that others had sexually assaulted her?

4. Was the reasonable doubt instruction a correct statement of the law?

5. Did the prosecutor commit misconduct by vouching for the victim's credibility and shifting the burden of proof in closing argument?

6. If the prosecutor committed misconduct was the defendant prejudiced?

7. Should the defendant be granted a new trial under the cumulative error doctrine?

8. Was there sufficient evidence to support the jury's finding that the defendant and the victim were not married in a prosecution for first degree rape of a child?

10. When use of the internet was not related to the circumstances of the crime, should the court strike a community custody condition relating to internet use?

11. When the defendant has been ordered to participate in sex offender and crime related treatment, was it permissible for the court to order the defendant submit to plethysmograph testing at the direction of his community corrections officer if the treatment provider approved that testing?

12. May the court constitutionally order plethysmograph testing where it will further the State's interest in protecting the public and offering the defendant an opportunity to improve himself?

II. STATEMENT OF THE CASE

In 2010 and 2011 M.N., born December 22, 2000, lived with her mother R.N. and her younger sister A.L. in an apartment in Mill Creek. The defendant, Charles Lee, born June 18, 1961, was A.L.'s father. A.L. was born November 11, 2008. 7/10/13 RP 100, 113-114, 122; 7/11/13 RP 10, 104; 7/12/13 RP 65.

The defendant and R.N. had known each other since 2008. They primarily had a sexual relationship. M.N. and the defendant got along some times, but other times they did not get along. M.N. liked when the defendant cooked for them, or helped her with her homework. Sometimes M.N. fought with the defendant. M.N. did not like the defendant telling her mother what to do in regard to parenting M.N. 7/10/13 RP 141-143, 174-176; 7/11/13 RP 103, 131-136.

After A.L. was born the defendant began to have sexual intercourse with M.N. The first time that the defendant had intercourse with M.N. occurred on November 10, 2010. M.N.'s mother was asleep when the defendant went into M.N.'s bedroom and told her to go into the living room and put on a dress. There the defendant engaged in oral sex as well as vaginal and anal intercourse with M.N. He also fondled her breasts. M.N. told her

mother about the assault. She also spoke Amanda Harpell-Franz, a child interview specialist. 7/12/13 RP 15, 23-26. M.N. was examined by Nurse Practitioner Skomski. M.N. told Nurse Skomski that the defendant put his penis in her rectum and made her suck on his penis. She also reported that the defendant sucked on her breasts. M.N. reported having diarrhea and discomfort urinating. Both of those symptoms were consistent with M.N.'s report of abuse. A physical examination did not reveal any clear evidence of trauma. 7/10/13 RP 143; 7/11/13 RP 142-148; 7/15/13 RP 40-43, 65-70, 78-84.

After the assault in November 2010 the defendant continued to have contact with M.N. when he came over to her apartment to visit A.L. On July 2, 2011 M.N. and her mother were asleep in R.N.'s bedroom when the defendant came in and woke M.N. up by putting his hands in her pants and touching her vagina. M.N. then rolled away from the defendant. R.N. then woke up and went to the bathroom. When she returned and fell back to sleep the defendant directed M.N. to get up and go into the living room. The defendant made M.N. lean over the couch with her face down in the couch cushions. The defendant then raped M.N. by putting his penis in

her vagina. The rape stopped when R.N. walked in on the defendant and M.N. 7/10/13 RP 123-130; 7/11/13 RP 149-150.

R.N. walked out into the living and saw M.N. with her face in the couch and her knees on the floor in a position that R.N. described as "doggy style." The defendant was behind M.N. on his hands and knees with his hands down his pants playing with himself. M.N. looked at her mother; she appeared to be crying or just about to start crying. R.N. went numb when she saw the defendant and M.N. She told the defendant to get out. R.N. went back to her bedroom and the defendant followed her. The defendant denied raping M.N., telling R.N. that it was not what it looked like. The defendant said he was showing M.N. what it would be like if he was actually raping M.N. He told R.N. that M.N. asked him how sexual intercourse was done and he was showing her because "she needs to know." 7/10/13 RP 131; 7/11/13 RP 154-158.

R.N. took M.N. to the store for a few hours to talk to her about what happened and to collect her thoughts. They returned to the apartment and R.N. called the police. Nurse Skomski examined M.N. on July 2, 2011. M.N. told the nurse that her sister's dad raped her. M.N. clarified that the defendant put his private in both

her front private and back private. She reported that when she told the defendant that it hurt that he responded that it would stop hurting in a couple of minutes. M.N. reported the defendant raped her every Saturday when her mother was sleeping. M.N. reported the defendant had ejaculated in her mouth on one occasion a few months before the most recent assault. Nurse Skomski noted two small abrasions with redness on M.N.'s vagina which was painful when touched with a Q-tip. She expected those abrasions would heal within two to three days. She also found a tag with a notch next to M.N.'s hymen which could have been consistent with injury or a genital anomaly. M.N.'s rectum showed a small area of redness and tenderness. In the nurse's opinion the injuries she observed were consistent with M.N.'s report of sexual assault. 7/11/13 RP 158-159; 7/12/13 RP 33; 7/15/13 RP 106-109, 114-126.

M.N. had previously falsely accused Donnie Knowlton of sexually assaulting her. M.N. explained that she did so because Mr. Knowlton had assaulted a friend of hers, and she wanted Mr. Knowlton to go to jail for a longer period of time. M.N. also alleged that Michael Stowers and Matthew Condit sexually assaulted her. Although M.N. did not remember accusing either man of sexually assaulting her she admitted that did not happen. R.N. had told the

defendant that M.N. had made a prior false allegation of sexual assault in the past. When police interviewed the defendant after the November 2010 incident the defendant admitted he knew that M.N. had made a prior false allegation of sexual assault. M.N. had also been sexually assaulted by her brother and another man. When she was asked by several officials if she has been sexually assaulted by anyone she denied it because she did not want people to know that happened to her. 7/10/13 RP 147-150, 158-159, 186-187; 7/11/13 RP 140, 189-190; 7/12/13 RP 50-51.

The defendant was initially charged with two counts of rape of a child in the first degree. 1 CP 228. The charges were amended several times. Finally the defendant was charged with two counts of rape of a child first degree (count I, date of violation July 2, 2011, count II November 9, 2010) and two counts of child molestation first degree (count III June 2010 through November 8, 2010, count IV June 18, 2011 through July 1, 2011). 1 CP 88-89. The jury convicted the defendant on count I and acquitted him of all other charges. 1 CP 56-59.

III. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED CHILD HEARSAY. ALTERNATIVELY, ERROR IN ADMITTING THAT EVIDENCE WAS HARMLESS.

1. The Record Supports The Trial Court's Factual Findings. Those Findings Support the Conclusion That On Balance M.N.'s Statements Were Reliable.

Prior to trial the court held a hearing pursuant to RCW 9A.44.120 to determine whether to admit three statements M.N. made regarding sexual contact by the defendant on her. The court identified those statements as (1) a statement to child interview specialist Amanda Harpell-Franz on November 16, 2010 that the defendant had touched M.N. inappropriately, (2) a statement on November 11, 2010 to Sandy Grant that the defendant had touched M.N. inappropriately, and (3) a statement on November 10 or 11, 2010 to R.N. describing an incident of oral sex. 7/5/13 RP 106-108. At the conclusion of the hearing the court weighed the evidence pursuant to State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). The court found, on balance, the evidence supported finding the statements were reliable, and accordingly ruled those statements were admissible. 7/5/13 RP 111-119. The defendant contends the trial court abused its discretion when it admitted this evidence.

A statement made by a child under 10 that describes any act or attempted act of sexual contact performed with or on the child by another is admissible in criminal proceedings if the court finds the time, content, and circumstances of the statement provide sufficient indicia of reliability and the child testifies. RCW 9A.44.120(1), (2)(a).

Nine factors are relevant when determining whether the statement is reliable:

> (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contains any express assertion about a past fact; (7) whether cross-examination could not show the declarant's lack of knowledge; (8) the possibility of the declarant's faulty recollection is remote; and (9) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

Ryan, 103 Wn.2d at 175-176.

A trial court has considerable discretion when evaluating the indicia of reliability. State v. Swan, 114 Wn.2d 613, 628, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). "The trial court is in the best position to make

the determination of reliability as it is the only court to see the child and the other witnesses." State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002 (1995). Not every Ryan factor must be met. State v. Justiniano, 48 Wn. App. 572, 580, 740 P.2d 872 (1987). It is sufficient if the factors are substantially met. State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005), Swan, 114 Wn.2d at 652.

A finding that the statements at issue fall within the exception set out in the child hearsay statute should not be reversed absent a showing of manifest abuse of discretion. Woods, 154 Wn.2d at 623-24, State v. Jackson, 42 Wn. App. 393, 396, 711 P.2d 1086 (1985). An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Id. at 47.

The court found factors one, two, and nine did not support finding M.N's statements were reliable. The court relied on evidence from R.N. that M.N. did not always have a good relationship with the defendant, a relationship R.N. described as "love-hate." 7/5/13 RP 16-17. R.N. testified that M.N. would make up stories about someone if M.N. did not like that person. 7/5/13 RP 10,12. There was also evidence that M.N.'s initial disclosure to R.N. was in the context of M.N. possibly getting into trouble with R.N.; M.N. had been acting up and things had been disappearing around the apartment. R.N. asked M.N. point blank whether the defendant had done something to M.N. 7/5/13 RP 61. The court found these circumstances suggested M.N. had a motive to divert attention away from her activities. Both R.N. and Sandy Grant testified that M.N. was sometimes truthful and sometimes not truthful, depending on the circumstances. 7/3/13 RP 200-202; 7/5/13 RP 10, 12. Thus the record supported the court's conclusions as to those factors that favored finding M.N.'s 2010 statements were not reliable.

However there was also evidence in the record that supports the court findings that four other factors favored finding the statements were reliable. M.N.'s statements were heard by three

different people. As the trial court reasoned, M.N.'s use of the term "inappropriate" when discussing the defendant's sexual contact with her was made to two different people. Although the term was not precise, it came after of a more detailed statement to R.N. describing an act of oral sex and molestation. M.N. also told Ms. Grant that the defendant had molested her. That occurred after M.N.'s disclosure to her mother. 7/3/13 RP 193-194, 196-197; 7/5/13 RP 14-15; 2 CP 234, Ex. 3, page 6-7.

The defendant concedes that when a child makes the same statement to more than one person on different occasions this factor supports finding the statements were reliable. State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). The defendant argues however this factor should be discounted because M.N. had made other claims of sexual abuse which she retracted or later denied making. BOA at 17-18. He presents no authority for the position that this particular factor is affected by other claims of sexual contact with other persons on other occasions. The evidence showed that M.N. consistently reported the defendant had sexual contact with her in November 2010 and that she had not retracted that statement. The court did not abuse its discretion when it concluded this factor had been satisfied.

The record also supports the court's conclusion that M.N.'s statements were spontaneous. Statements are spontaneous for purposes of child hearsay analysis if they are made in response to non-leading, non-suggestive questions. State v. Young, 62 Wn. App. 895, 901, 802 P.2d 829 (1991). Questions asked by the child interview specialist were not leading or suggestive. 2 CP 234, Ex. 3. Ms. Grant did not know who the defendant was at the time M.N. made statements to her. She therefore did not suggest to M.N. that the defendant had molested her. 7/3/13 RP 195. The second time M.N. discussed the defendant with her Ms. Grant still did not know what exactly happened. M.N.'s statements were made in the context of a discussion about school. 7/3/13 RP 196-197. These circumstances support the court's conclusion that the statements to Ms. Grant were spontaneous for child hearsay analysis.

Although R.N. asked M.N. specifically if the defendant did something to her, R.N. did not suggest that the "something" involved sexual contact. The court put great weight on evidence that R.N. did not suspect any sexual impropriety between the defendant and M.N. at the time M.N. made those statements. R.N. was shocked when she first heard M.N.'s allegations. She testified that she did not tell M.N. what to say regarding the allegation.

7/5/13 RP 14, 19-20, 115. Since R.N. had no prior suspicion that the defendant sexually abused M.N. it is highly unlikely that R.N. would suggest to M.N. that he had done so. Thus this factor supported the court's conclusion that the statement was reliable.

The defendant argues this factor does not support reliability for two reasons. First he argues the circumstances surrounding the statement suggest they were not spontaneous. This is the ninth factor, which is a completely separate inquiry from the question of whether the statements were spontaneous. Second he argues Ms. Grant said M.N.'s statements were not spontaneous. Ms. Grant's answer reflected the common understanding of the word spontaneous, and not the meaning courts have given that term in the context of a child hearsay analysis.

The fifth factor also supported the conclusion that the statement was reliable. M.N. testified that the defendant raped her when she was eight, nine, and ten years old. M.N. was born December 22, 2000. 7/3/13 RP 48. She was therefore nine when she made the statements. The defense conceded that if the court found R.N. credible then M.N. was reporting an incident that happened one and one-half days earlier. 7/5/13 RP 87. Credibility determinations are not reviewed on appeal. State v. Camarillo, 115

Wn.2d 60, 71, 794 P.2d 850 (1990). The court clearly found R.N. credible on this point, and therefore was justified in finding the possibility that M.N.'s memory was faulty was remote.

The record also supports the court's conclusion that the eighth factor supported finding the statements were reliable. The child interview specialist had no relationship with M.N. and presented as a neutral witness. M.N. did have a close relationship with her mother and Ms. Grant. But as the court noted neither was predisposed to believing the defendant has sexually abused M.N. Notably even after M.N. reported what the defendant had done R.N. told Ms. Grant that she was taking M.N. to the hospital "to see if it's true." 7/3/13 RP 191. R.N. testified she only really believed M.N.'s statements about the November 2010 incident because she later walked in on the defendant molesting M.N. 7/5/13 RP 44. M.N. was aware that she had made other allegations in the past that had not been believed. That was significant enough for M.N. to mention to Ms. Grant when she was telling Ms. Grant about the defendant touching her. 7/3/13 RP 197. These factors suggest that M.N.'s relationship with her mother and Ms. Grant favored finding that they were reliable.

The defendant argues the timing of the statements and the relationship of the child to the witness did not favor finding reliability. Again he relies on facts that relate to other factors, not this specific factor. This factor is not supported when the witness is predisposed to believe the child has been sexually abused, and where a parent-child relationship may make the witness's objectivity difficult. In re Dependency of S.S., 61 Wn. App. 488, 498, 814 P.2d 204, review denied, 117 Wn.2d 1011 (1991). As the court noted, neither R.N. nor Ms. Grant were predisposed to believe M.N.

The court found the remaining two factors neutral. On balance there was evidence in the record that supported the court's factual findings. It reasonably applied those facts to the Ryan factors. It did not abuse its discretion when it concluded that, on balance, those factors favored a finding that M.N.'s statements regarding the November 2010 incident to those three witnesses was reliable.

2. If The Trial Court Erred In Admitting Child Hearsay Evidence It Was Harmless.

If the court concludes that the trial court abused its discretion when it admitted the child hearsay statements, then it was

harmless. Because M.N. testified at trial, any error did not affect the defendant's constitutional rights to confrontation. State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006). An error that is not of constitutional magnitude is harmless if, within reasonable probabilities the outcome of the trial would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here the statements related to count II, an incident alleged to have occurred on November 9, 2010. 1 CP 88. The defendant was acquitted of that charge. 1 CP 58. Admission of those statements as it related to that count, or the other two counts where the defendant was acquitted, could not have prejudiced the defendant.

The defendant argues that he was prejudiced because without those statements the jury would have also acquitted him on count I. The jury's verdicts as to counts II-IV indicate that the jury did not find M.N.'s testimony that the defendant sexually assaulted her was credible absent some corroboration. Count I was the only charge for which there was some corroborating evidence, i.e. R.N.'s observations of a portion of the assault and some physical evidence that M.N. was injured. Thus, M.N.'s statements on their

own, made eight months before the assault which was the basis for count I, had no impact on the jury's verdict as to count I.

The defendant seems to argue that it was the nature of the witnesses who testified to those statements that shore up the otherwise incredible testimony from M.N. resulting in his conviction on count I. He particularly points to Ms. Harpell-Franz's testimony. Ms. Harpell-Franz testified to the foundation for Exhibit 8, the DVD of her November 16, 2010 interview with M.N. In that interview M.N. said relatively little about any sexual contact with the defendant. Ms. Harpell-Franz did not testify about statements M.N. made regarding the July 2011 rape. However she did testify that she had interviewed M.N. in 2008 regarding Donnie Knowlton. Despite agreeing to tell the truth in that interview, just as she had in the 2010 interview, M.K. admitted at trial that had lied about Knowlton sexually abusing her. 7/10/13 RP 149-150; 7/12/13 RP 27-28. Whatever aura of credibility Ms. Harpell-Franz had, her testimony actually benefitted the defendant.

In addition, the evidence was cumulative of other evidence the defendant does not challenge. Nurse Skomski testified to the history M.N. gave when she was examined on November 11, 2010. 7/15/13 RP 35,40-42. That evidence was admitted pursuant to ER

803(4), statements made for purposes of medical diagnosis or treatment. 7/10/13 RP 53-58. When evidence that has been improperly admitted is cumulative of evidence that has been properly admitted, any error is harmless. State v. Flores, 164 Wn.2d 1, 19, 186 P.3d 1039 (2008), State v. Perez-Valdez, 172 Wn.2d 808, 818-819, 265 P.3d 853 (2011).

B. EVIDENCE REGARDING ANY SCHOOL POLICY RELATING TO M.N. WAS PROPELRY EXCLUDED.

The defendant called Shelley Shanks-Petillo as a witness to testify regarding M.N.'s reputation for honesty. Ms. Shanks-Petillo was the principal of Penny Creek Elementary when M.N. attended that school as a fourth-grader. Ms. Petillo also testified to M.N.'s conduct during two interviews Ms. Petillo had with her wherein M.N. reported she had been abused. 7/15/13 RP 152-161. The defense sought to also elicit testimony that Ms. Petillo had instituted a policy that staff were not allowed to be alone with M.N. 7/15/13 RP 163. The court sustained the State's objection to that evidence on the basis that it was an improper comment on M.N.'s veracity. 7/15/13 RP 162-163.

The defendant argues the trial court abused its discretion when it disallowed this testimony because the evidence was

relevant. BOA at 24. A decision to exclude evidence is reviewed for an abuse of discretion. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004).

Even if the evidence met the standard for relevance set out in ER 401, it may nonetheless be inadmissible if excluded by some other court rule. ER 402. The proffered evidence amounted to Ms. Petillo's opinion that M.N. made a habit of falsely accusing people of sexually abusing her. A witness may not offer an opinion regarding the credibility of another witness. State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). The trial court did not abuse its discretion by excluding evidence of Ms. Petillo's policy.

Alternatively, even if the court should have admitted the testimony, it was harmless. The point of that evidence was to cast doubt on M.N.'s credibility. Substantial evidence was introduced that M.N. had made false allegations of sexual abuse in the past. Ms. Petillo's personal opinion added nothing to that evidence. The court's decision to exclude that evidence had no bearing on the outcome of the case.

C. THE REASONABLE DOUBT INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW.

The court gave the standard jury instruction defining reasonable doubt. 1 CP 67; WPIC 4.01. The defense objected to the portion of the instruction that read "if, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt. 7/16/13 RP 180; 7/17/RP 27, 29.

The defendant argues that the court erred when it included this language in the reasonable doubt instruction. The instruction that the court gave has been repeatedly approved by courts as a correct statement of the law. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert denied, 518 U.S. 1026 (1996), State v. Price, 33 Wn. App. 472, 475-76, 655 P.2d 1191 (1982) review denied, 99 Wn.2d 1010 (1983), State v. Lane, 56 Wn. App. 286, 299-300, 786 P.2d 277 (1989), State v. Tanzymore, 54 Wn.2d 290, 291, 786 P.2d 277 (1959). In one case this Court recommended the language the defendant here takes issue with. State v. Olson, 19 Wn. App. 881, 884-85, 578 P.2d 866 (1978), reversed on other grounds, 92 Wn.2d 134 (1979). The Supreme Court approved WPIC 4.01 and specifically directed trial courts to use that

instruction when instructing jurors on the State's burden of proof. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). WPIC 4.01 includes the challenged abiding belief language used by the trial court here.

The defendant argues that these cases do not support the conclusion that the "abiding belief" language is an accurate statement of the law anymore. Instead, he relies on an argument that the court held was improper in State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). There the prosecutor's argument equated the burden of proof with a jury's duty to "speak the truth" or determine what happened.

This court recently considered that same argument in State v. Fedorov, __ Wn. App. __, 324 P.3d 784 (2014). This court concluded that the abiding belief language was not the equivalent of the argument rejected by the court in Emery. Rather, taken in the context of the entire instructions it informed the jury that its job was to determine whether the State had proved the charge beyond a reasonable doubt. Id. at 790. The court should continue to find the reasonable doubt instruction, including the abiding belief language, is a correct statement of the law, and that it does not lower the State's burden of proof.

D. ARGUMENTS MADE BY THE PROSECUTOR IN REBUTTAL CLOSING WERE NOT IMPROPER. THE DEFENDANT HAS NOT ESTABLISHED PREJUDICE RESULTING FROM THOSE ARGUMENTS.

The defendant claims that two arguments made by the prosecutor in his rebuttal closing constituted prosecutor misconduct which entitles him to a new trial. He bears the burden to show that the prosecutor's conduct was both improper and that it prejudiced him. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

An allegedly improper argument is considered in the context of the total argument, the issues involved in the case, the evidence addressed in the argument, and the court's instructions to the jury. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Even where the prosecutor's arguments are improper, they do not provide a basis for reversal where they arguments were invited or provoked by defense counsel and are in reply to her acts and statements unless the remarks are not a pertinent reply or they are so prejudicial that a curative instruction would be ineffective. Id. Arguments are prejudicial only when "there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

1. The Prosecutor Did Not Vouch For the Victim's Credibility.

The defendant first challenges the argument that the prosecutor did not choose the victim in this case.

> I don't pick the folks who come here and talk about the things that have been done to them. I don't go to central casting and try to find cute seven-year-old kids who have no trauma—who have no previous trauma in their lives. I don't go to central casting.

7/17/13 RP 119-120.

The defendant claims this argument vouched for M.N.'s credibility. He argues that it was a statement of the prosecutor's personal opinion that M.N. was telling the truth.

It is improper for a prosecutor to personally vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). A prosecutor improperly vouches for a witness when he expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). Taken in context of the entire argument the prosecutor was not vouching for M.N.'s credibility. Rather the argument was no more than an acknowledgment that M.N. had a difficult life and therefore had

some personal problems, but that should not preclude the jury from believing her testimony that the defendant sexually assaulted her.

The prosecutor began his argument by conceding that the trial showed "many unflattering things about" M.N. The prosecutor referred to M.N. as "the product of an unfit parent." He noted that M.N. admitted she had been diagnosed with oppositional defiance disorder and PTSD. She admitted that she harmed herself and her younger sister. The prosecutor talked about M.N. admitting that she had lied about Knowlton sexually abusing her. He pointed out that M.N. admitted that if she had accused others besides the defendant of sexually abusing her that was also a lie. The prosecutor argued this evidence showed two things. First M.N.'s testimony about the defendant was credible, because she honestly admitted the bad things she had done. Second, the defendant knew about these bad things, which made M.N. an easy target for the defendant. 7/17/13 RP 40, 46.

The main issue at trial was whether M.N.'s testimony regarding incidents of rape and molestation was credible. The prosecutor's argument drew reasonable inferences from the facts showing M.N. had difficulties and failings to draw an inference that as to the allegations against the defendant she should be believed.

A prosecutor may properly argue reasonable inferences from the facts concerning witness credibility. State v. Warren, 165 Wn.2d 17, 31, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009). Taken in context the prosecutor's argument that M.N. did not come from "central casting" was a continuation of the arguments made in his earlier closing remarks. Thus it was a proper argument.

It was also proper because it was pertinent response to defense counsel's closing argument. Defense counsel's argument focused almost exclusively on M.N.'s credibility. She began by quoting Shakespeare to develop a theme that M.N. and woven a "tangled web" by her deceit. Counsel discussed at length M.N.'s prior accusations against others that were not true. She discussed M.N.'s self-harm. Counsel argued "[a]s much as Mr. Cornell would like you to believe that all of her acting out was a result of some abuse by Mr. Lee, it predated him." 7/17/13 RP 66-116. The prosecutor's "central casting" argument responded to these arguments because it acknowledged that M.N. had a lot of problems, but those problems were not a reason to disbelieve her.

Nor did this argument prejudice the defendant. No prejudicial error from an allegedly improper argument occurs unless it is "clear and unmistakable" that the prosecutor is expressing a

personal opinion. Brett, 126 Wn.2d at 175. An argument that "I believe" a particular witness meets this standard. State v. Sargent, 40 Wn. App. 340, 343-344, 698 P.2d 598 (1995). An argument that the witness's testimony had "the ring of truth" made in the context of discussing facts supporting the conclusion the witness was credible did not constitute prejudicial misconduct. Warren, 165 Wn.2d at 30. This Court recently held that an argument that the defendant was "just trying to pull the wool over your eyes" was an argument explaining the evidence and not a "clear and unmistakable expression of personal opinion. State v. Calvin, 176 Wn. App. 1, 19, 316 P.3d 496 (2013). Here the challenged argument is more like those that were found to not constitute prejudicial misconduct than the one in Sargent that did meet that standard. The defendant should not be granted a new trial on the basis that the prosecutor argued M.N. was a less than perfect victim.[1]

[1] The defendant argues that reversal is required where personal opinion and vouching occurs in a trial where the conviction hinged on whether or not the jury found the victim was credible, citing State v. Fitzgerald, 39 Wn. App. 642, 657, 694 P.2d 1117 (1985). The issue there was the propriety of an expert witness opinion on the veracity of another witness. It had nothing to do with allegedly improper argument, and therefore does not alter the standard for prejudice articulated in cases that do address that particular issue.

2. The Prosecutor Permissibly Responded To Arguments Made By Defense Counsel.

In rebuttal closing the prosecutor went through the various arguments defense counsel made regarding why M.N.'s testimony was not credible. The prosecutor then stated:

> What was not discussed in closing argument, what we didn't hear about was what the defendant did. We didn't hear an explanation about what the defendant...

7/17/13 RP 129.

The prosecutor did not finish the argument before defense counsel objected. The court sustained the objection to "that last portion." It instructed the jury to disregard the argument and the prosecutor to start over that portion of his argument. Id. In the context of the evidence presented and the entire argument this was not misconduct.

The evidence showed that on the last occasion R.N. walked in the living room to see M.N. on her hands and knees with her head in a sofa cushion. The defendant was behind her on his hands and knees with his hands down his pants "playing with himself." R.N. confronted the defendant about what he was doing. The defendant explained to R.N. that he was showing M.N. how they had sex. R.N. challenged that explanation in light of M.N.'s

earlier allegation. The defendant told R.N. "it's not what it looks like." 7/11/13 RP 155-158.

In closing defense counsel touched on this last incident. She argued the discrepancies between R.N. and M.N.'s account of what happened. She also argued the reasonableness of R.N.'s actions in light of what R.N. reported she saw. What she did not discuss was the defendant's response to R.N. when she caught him in that position with her daughter. 7/17/13 RP 99-102. The defendant's response to R.N. was incriminating and yet the defense completely ignored that piece of evidence. Pointing out this omission was a fair response to the defense closing argument.

The defendant argues that this argument was misconduct because it was a comment on the defendant's right to remain silent. It is a violation of the defendant's due process right to comment on the defendant's post arrest silence in closing argument. State v. Fricks, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979), Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Similarly a prosecutor may not comment on the defendant's failure to testify. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Thus, it was improper for the prosecutor to argue the defendant refused to talk to police when he knew that he was being

investigated for an assault on his former girlfriend to infer that he was guilty of the assault. State v. Thomas, 142 Wn. App. 589, 597, 174 P.3d 1264, review denied, 164 Wn.2d 1026 (2008).

The challenged argument specifically referenced the defense attorney's closing argument. It did not refer to the defendant's failure to testify, or his post arrest silence, either directly or indirectly. It was therefore not an improper comment on the defendant's right to remain silent.

The defendant also claims this argument shifted the burden of proof. A prosecutor may not argue that the defendant bears the burden of proof. Thorgerson, 172 Wn.2d at 453. For that reason he generally may not comment on the defendant's failure to present evidence because the defendant has no duty to present evidence. Id.

In Thorgerson the defendant argued the prosecutor improperly shifted the burden of proof by arguing that the defense failed to produce evidence that the victim of a sexual assault ever told an inconsistent account of what happened. Id. The court rejected that argument because whether the victim had ever been inconsistent had been explored by the defense. Id. Under the circumstances the argument did not suggest that the defendant had

a burden to produce evidence that there were inconsistencies. Rather it was a permissible argument based on the evidence. Id.

Although the prosecutor was not able to complete his argument, it is clear from what was said that he was not suggesting the defendant failed to produce evidence. Rather the argument faulted the defense with failing to address evidence that had been presented. Like Thorgerson, this argument was a proper discussion of the evidence that had been presented. The argument was therefore not misconduct.

Finally the defendant does not show that there was a substantial likelihood that the argument affected the verdict. As noted, the prosecutor did not complete the argument. An objection was sustained and the court immediately directed the jury to disregard it. 7/17/13 RP 129. Jurors are presumed to follow the court's instructions. State v. Keend, 140 Wn App. 858, 868, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041 (2008). The jury convicted on the only count for which there was evidence that corroborated M.N.'s testimony. It is not likely under these circumstances that the prosecutor's argument, even if improper, affected the verdict.

E. THE CUMULATIVE ERROR DOCTRINE DOES NOT REQUIRE A NEW TRIAL.

The defendant argues that he is entitled to a new trial under the cumulative error doctrine. That doctrine applies when there are several trial errors which standing alone does not require reversal, but when combined may deprive the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). That doctrine does not warrant a new trial even when the court determines there are few errors when those errors had little or no effect on the trial. Id. Here either no error was committed or the errors did not affect the verdict.

First, the reasonable doubt instruction was a correct statement of the law. The decision to include the "abiding belief" language was not a trial error that factors into the cumulative error doctrine. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004).

Second, even if admission of the child hearsay statements relating to the November 2010 incident was error, it had virtually no effect on the outcome of the case. The jury's verdict demonstrated that absent some corroboration it did not find M.N.'s testimony credible. The child hearsay related to a count for which there was

no corroboration. And it was cumulative of other evidence that has not been challenged.

Third the court's decision to exclude evidence that the principal of Penny Creek Elementary had a policy specific to M.N. had no effect on the outcome of the case. The only purpose for that evidence was to inform the jury that at least one official thought that M.N. made up false sexual abuse allegations against innocent people. Since M.N. admitted that she had done that in the past Ms. Petrillo's opinion added nothing to the case. Ms. Petillo's opinion did not discredit R.N.'s testimony that she caught the defendant during the July 2011 assault for which he was convicted. Nor did it discredit the physical evidence that Nurse Skomski testified to. The decision to exclude Ms. Petillo's testimony on this point had no effect on the verdict.

Fourth, if the prosecutor's arguments were improper, they were brief and were abandoned when objected to. There is nothing about those arguments that shore up the corroborating evidence that the jury clearly relied on to find the defendant guilty of count I.

To support his argument the defendant asserts that the case against him was weak. He points to testimony that no DNA evidence was located, and the physical findings from the July 2011

examination could have been the result of self-harm. He then points to evidence which challenged M.N.'s credibility. None of this evidence has any effect on the strength of evidence that R.N. caught the defendant with M.N. during an assault, or the physical evidence from the physical examination done a few hours later.

F. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL TRIER OF FACT TO CONCLUDE THAT M.N. WAS NOT MARRIED TO THE DEFENDANT.

To convict the defendant of rape of a child in the first degree the State was required to prove that M.N. was not married to the defendant. 1 CP 79, RCW 9A.44.073. The defendant contends the evidence was insufficient to prove this element of the offense.

Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). When evaluating the sufficiency of the evidence a reviewing court will treat circumstantial evidence as probative as direct evidence. Id.

Circumstantial evidence is evidence from which jurors may reasonably infer something that is at issue in the case based on their common sense and experience. 1 CP 70. When a defendant challenges the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here the evidence showed that M.N. was 10 years old and the defendant was 50 years old at the time of the offense charged in count I. The offense was alleged to have occurred on July 2, 2011. 1 CP 88. M.N. was born on December 22, 2000. 7/10/13 RP 100. The defendant was born on June 18, 1961. 7/12/13 RP 65. Common sense and experience shows a 10 year old child who is not of marriageable age would not be married to a 50 year old man.

The nature of the defendant's relationship with the victim and her family, and the amount of time he spent with the victim and her family can also provide circumstantial evidence that the defendant and the victim were not married. State v. Bailey, 52 Wn. App. 42, 51, 757 P.2d 541 (1988), affirmed, 114 Wn.2d 340 (1990). Here the defendant was R.N.'s "friend with benefits." The defendant's

daughter, A.L., was M.N.'s sister. The defendant did not live with R.N. and M.N. Instead he came over when he wanted to for a few hours at a time, usually in the mornings. The defendant did not interact with M.N. much, and when he did they often did not get along. R.N. was not sure if the defendant ever spent the night at her apartment. 7/10/13 RP 113; 7/11/13 RP 132-139. Taking this evidence and the evidence of M.N.'s age at the time of the rape in the light most favorable to the State, the evidence was sufficient to prove that the defendant and M.N. were not married.

G. COMMUNITY CUSTODY CONDITIONS.

The trial court may only impose a sentence that is authorized by statute. State v. Miller, 159 Wn. App. 911, 930, 247 P.3d 457, review denied, 172 Wn.2d 1010 (2011). Accordingly, the defendant was sentenced to a minimum and maximum term pursuant to RCW 9.94A.507. 1 CP 21. The defendant was sentenced to a period of community custody for any period of time after he is released from total confinement before the expiration of the maximum sentence. RCW 9.94A.507(5). 1 CP 22. And the court imposed conditions of community custody as provided by RCW 9.94A.703. 1 CP 29-30.

The defendant challenges following two of the community custody conditions that the court imposed at sentencing:

> 11. Do not access the Internet on any computer in any location, unless such access is approved in advance by the supervising Community Corrections Officer and your treatment provider. Any computer to which you have access is subject to search.
>
> 16. Participate in plethysmograph and polygraph examinations as directed by the supervising Community Corrections Officer to ensure conditions of community custody. Plethysmographs should only be administered with approval of Defendant's sexual deviancy therapist.

1 CP 29-30.

1. The Internet Condition.

RCW 9.94A.703 sets out conditions that the court must order, may waive, or may order within its discretion. The internet prohibition ordered by the court is neither a mandatory condition nor a condition that is imposed unless waived. Thus the court had authority to impose it only if it was justified as a discretionary condition. Only one discretionary condition could authorize the court to order the internet prohibition, i.e. to comply with crime related prohibitions. RCW 9.94A.703(3)(f).

A crime related prohibition is one that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). There need not be a causal link between the prohibition imposed and the crime committee so long

as the condition relates to the circumstances of the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

Here there is no evidence that the defendant used a computer or accessed the internet in order to facilitate the rape of M.N. For that reason the internet prohibition cannot be justified as a crime related prohibition. Since the condition is not authorized by any other statutory provision the court should remand to the trial court to strike that condition.

2. The Plethysmograph Condition.

The defendant argues the plethysmograph condition is invalid on two bases. First, as written, it is not authorized by statute. Second, it violates his fundamental right to privacy.

The court has upheld plethysmograph testing as a valid condition when it is ordered incident to crime related treatment. State v. Castro, 141 Wn. App. 485, 494, 170 P.3d 78 (2007), State v. Riles, 135 Wn.2d 326, 345, 957 P.2d 655 (1998), abrogated on other grounds State v. Valencia, 169 Wn.2d 782, 239 P.2d 1059 (2010). This court recently held that plethysmograph testing may be imposed incident to treatment by a qualified treatment provider, but "it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer." State v. Land,

172 Wn. App. 593, 605-606, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013).

The plethysmograph condition at issue here does not suffer from the same kind of defect that existed in Land. The trial court noted that kind of test has been recognized as a useful treatment tool. 8/16/13 RP 43. It had ordered that the defendant participate in sexual deviancy treatment and crime related treatment. 1 CP 30. In order to ensure that a community corrections officer did not direct that test outside the context of treatment the court ordered that the condition state that plethysmograph examinations occur only with the approval of the defendant's sexual deviancy therapist. 8/16/13 RP 43-44. Thus the condition allowed that test only with the approval of the treatment provider. 1 CP 30. As written the condition is authorized by statute because it is part of the crime related treatment that was also ordered as a condition of community custody. RCW 9.94A.703(3)(c), Riles, 135 Wn.2d at 345.

The defendant also argues that the plethysmograph condition violates his constitutional right to be free form bodily invasion which he asserts is a fundamental right. BOA at 46. Plethysmograph testing does implicate a significant liberty interest.

United States v. Weber, 451 F.3d 552, 564 (9th Cir. 2006). But the court does have discretion to impose community custody conditions even if those conditions infringe on a fundamental right. Id. at 557. A restriction on a fundamental right is constitutional if it is "reasonably necessary to accomplish the essential needs of the state." State v. Ancira, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001), quoting, Riles, 135 Wn.2d at 350.

Here the State has an interest in protecting the public and offering the offender an opportunity to improve himself. RCW 9.94A.010(4), (5). Consistent with that interest the legislature has permitted courts to order crime related treatment RCW 9.94A.703(3)(c). Sex offender treatment promotes the interest in protecting the public and offering the offender an opportunity to improve himself because it is designed to assist the offender in avoiding future offense behavior. Plethysmograph testing has been recognized as useful when treating sex offenders. United States v. Dotson, 324 F.3d 256, 261 (4th Cir. 2003). Thus, when sex offender treatment was ordered it was permissible to also order plethysmograph testing. Riles, 135 Wn.2d at 344-346. Because an order for plethysmograph testing does further the State's interests it is a permissible infringement on the defendant's liberty interest.

IV. CONCLUSION

For the foregoing reasons the State asks the court to affirm the defendant's conviction. The State further asks the court to affirm the community custody condition requiring the defendant to participate in plethysmograph testing with the approval of the treating sexual deviancy therapist. The court should remand the case to the trial court to strike the community custody condition that prohibits internet use.

Respectfully submitted on July 31, 2014.

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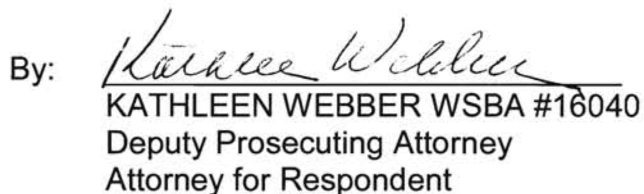
By: 
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