71520-8 71520-8

NO. 71520-8-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

CHAD CHENOWETH,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

RESPONDENT'S BRIEF

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ORIGINAL

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I. SUMMARY OF ARGUMENT

Chad Chenoweth was convicted by a jury for incest of his mentally-slow adult son. He claims errors relating to admission of his wife's testimony under marital privilege, testimony regarding his son's complaint and the use of a non-corroboration instruction.

The trial court properly admitted the testimony of his wife because a narrow construction of the marital privilege shows that child is meant to apply not only to minors but also adult children. Where the witnesses testified as to the fact of the timing of the son's complaint without any detail, there was no admission of inappropriate hearsay. And finally, the use of the non-corroboration instruction was proper in the charge of incest since repeal of the corroboration statute in 1913.

For the foregoing reasons, Chenoweth's conviction must be affirmed.

II. ISSUES

1. Is the application of the marital privilege construed narrowly?
2. Where the privilege statute uses the term "child" in the marital privilege section, and "minor child" in another section, was it clear the term "child" did not apply only to minors?

3. Where a witness testifies to the fact of the victim complaint, but not detail, is the admission of the evidence hearsay offered for the truth of the matter asserted?
4. Where there is a reason for the other testimony based upon the fact of the complaint is there a valid non-hearsay purpose for admission of the fact of complaint?
5. Where witnesses testify as to the mental ability of the victim, is that testimony germane if it is clear it pertains to the fact of complaint?
6. Is corroboration required for the offense of incest?
7. Is it error to instruct the jury that incest does not require corroboration and that they are the sole judges of credibility of the witnesses?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On January 16, 2013, Chad Chenoweth was charged with Rape in the Second Degree and Incest in the First Degree alleged to have occurred in November of 2011. CP 1-2. Both charges included a special allegation that the victim suffered from diminished capacity. CP 1-2. The alleged victim was Chenoweth's twenty-year-old mentally disabled son. CP 4. The offenses were alleged to have occurred while the son was living with

Chenoweth in Skagit County. CP 4. The incident occurred when Chenoweth was alleged to have anally raped his son at the house when no one else was present. CP 5. The son said Chenoweth threatened him and therefore he did not disclose the incident until November of 2012, when he told his mother. CP 4-6.

On November 25, 2013, the information was amended to change the counts to Incest in the First Degree and the Rape in the Third Degree by lack of consent. CP 26-7. The State removed the diminished capacity enhancement, instead filing a notice of intent to seek an exceptional sentence under RCW 9.94A.535(2)(c), (3)(b) and (3)(o). CP 25

On December 3, 2013, the State amended the information to increase the time frame of both counts by one month, to include October of 2011. CP 47-8, 12/4/13 RP 2. [1]

On December 9, 2013, the case proceeded to trial. 12/9/13 RP 3. At the close of the testimony, the trial court dismissed count 2, Rape in the Third Degree, finding insufficient evidence to show the son expressed a lack of consent. 12/11/13 RP 46.

[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

12/4/13 RP	Arraignment on Amended Information and ER 804(b) Motion
12/9/13 RP	Trial – Day 1 – In volume with 12/10/13
12/10/13 RP	Trial – Day 2 – In volume with 12/9/13
12/11/13 RP	Trial – Day 3 – in volume with 1/23/14
12/12/14 RP	Trial – Day 4- Verdicts
1/23/14 RP	Sentencing – in volume with 12/11/13.

On December 12, 2013, the jury returned a verdict of guilty of Incest in the First Degree. CP 94, 12/12/13 RP 5. The jury returned special verdicts finding Chenoweth knew or should have known the victim was particularly vulnerable or incapable of resistance and that Chenoweth used his position of trust, confidence or fiduciary responsibility to facilitate commission of the offense. CP 95, 12/12/13 RP 5-6.

On January 23, 2014, Chenoweth was sentenced to 102 months, the top of the standard range. CP 160-1.

On January 28, 2014, Chenoweth timely filed a notice of appeal. CP 174-90.

2. Summary of Trial Testimony

Jainni Chenoweth was married to the defendant, Chad Chenoweth, in 1991. 12/10/13 RP 65-6. Jainni had a daughter, Laura Lind, prior to marriage to Chenoweth. 12/10/13 RP 66. After Jainni married Chad, they had a son, C.C., who was born in January 1992 in Washington State. 12/10/13 RP 67. Chad Chenoweth was C.C.'s biological father. 12/10/13 RP 67. After C.C. was born, they moved to Idaho and Chad quit living with the family. 12/10/13 RP 67. Chenoweth moved back in and started living with Jainni and C.C. when C.C. was about 7 or 8 years old. 12/10/13 RP 68.

Jainni described that C.C. was disabled and mentally slow. 12/10/13 RP 69. When he was age twelve, he would act as if he were a five year old. 12/10/13 RP 69. C.C. was placed in a special education program in school. 12/10/13 RP 70. C.C. attended counseling and was also on medication for a period of time for ADHD. 12/10/13 RP 70-1.

When C.C. was twelve, he was placed in a state school and hospital in Idaho. 12/10/13 RP 71. The placement was for people with mental disorders. 12/10/13 RP 71. C.C. remained in that placement until age eighteen. 12/10/13 RP 71. Jainni would visit him three times a week when she lived in Idaho. 12/10/13 RP 71. Jainni moved to Sedro Woolley when C.C. was about sixteen or seventeen. 12/10/13 RP 72. Chenoweth was residing with Jainni at that time. 12/10/13 RP 72.

Jainni was living at a residence in Bow, Washington when C.C. moved back home in 2010. 12/10/13 RP 73. C.C. stayed in a downstairs room which was like a den and had no doors. 12/10/13 RP 86-7. C.C. spent much of his time playing video games. 12/10/13 RP 76. C.C. did not cook for himself and had to be reminded to shower and dress properly. 12/10/13 RP 73-4. C.C. was unable to hold a job and was getting SSI benefits. 12/10/13 RP 74.

When C.C. returned home, Chenoweth was working at an auto repair shop in Marysville. 12/10/13 RP 76. Jainni was hospitalized from

October 8, 2011, to October 13, 2011. 12/10/13 RP 80-1. C.C. resided at the residence in Bow at the time. 12/10/13 RP 81.

In April, 2012, Chenoweth moved out of the home and did not return back. 12/10/13 RP 82. C.C. also moved out in late summer, 2012 to live with his sister, Laura. 12/10/13 RP 82. After Chenoweth moved out, C.C. told his mother what had occurred with Chenoweth. 12/10/13 RP 82. At the time of disclosure, C.C. was down but matter-of-fact, when he described what occurred. 12/10/13 RP 83. C.C. contacted adult protective services after he said what occurred. 12/10/13 RP 84.

On cross-examination, defense questioned Jainni about whether C.C. had told her he was raped after Jainni returned home after being hospitalized in October, 2011. 12/10/13 RP 85. Jainni was also questioned about whether she saw any change in the relationship between C.C. and Chenoweth after she returned from the hospital. 12/10/13 RP 86. She said there was no change. 12/10/13 RP 86.

On re-direct examination, Jainni testified there was little relationship between C.C. and Chenoweth and it was unusual for them to spend time together. 12/10/13 RP 88.

C.C. was 21 at the time of trial. 12/10/13 RP 90. He testified that Jainni was his mother and the defendant was his father. 12/10/13 RP 91. C.C. lived in a group home from about age 13 until age 16 before moving

to Idaho State School and Hospital. 12/10/13 RP 92. He stayed there until he was almost nineteen. 12/10/13 RP 92-3. C.C. was aware of his behavioral problems and disabilities. 12/10/13 RP 93. C.C. did not graduate from high school or get a GED. 12/10/13 RP 94. C.C. did not work, but got Social Security Disability. 12/10/13 RP 95.

C.C. recalled that when his mother was hospitalized in 2011, he went to work with his dad, because his mother was in the hospital. 12/10/13 RP 96. C.C. went to work with his father because he was not allowed to be alone. 12/10/13 RP 97. C.C. did this for a couple of weeks. 12/10/13 RP 97. When he was at his father's work, C.C. would sweep the floors and hang out, talking to the manager. 12/10/13 RP 97.

During that period of time, one day at the house, C.C. was in his room playing video games. 12/10/13 RP 98. Chenoweth came into the room and put C.C. face down on the bed. 12/10/13 RP 98. The defendant pulled C.C.'s pants down. 12/10/13 RP 98. The defendant then anally penetrated C.C.'s anus with his penis. 12/10/13 RP 99. C.C. did not do anything and just let it happen. 12/10/13 RP 99, 108. C.C. said he usually did not have any interaction with his father. 12/10/13 RP 99. C.C. thought it was his fault and did not say anything. 12/10/13 RP 100. C.C. felt something warm as if the defendant had ejaculated. 12/10/13 RP 100, 106. When the defendant was done, he pulled his pants up and went out

of the room. 12/10/13 RP 100. C.C. did not recall Chenoweth saying anything during or after the rape. 12/10/13 RP 107.

C.C. laid there a while before pulling his pants up. 12/10/13 RP 100-1. C.C. went back to playing his video games. 12/10/13 RP 101. Months later, C.C. told his mother what had happened. 12/10/13 RP 101. The defendant was not living in the house at the time. 12/10/13 RP 101. After he disclosed what occurred, he went to adult protective services. 12/10/13 RP 102. C.C. did tell a deputy that Chenoweth had said that if C.C. told anyone, the house would never be the same. 12/10/13 RP 107.

Cross-examination of C.C. began with him being asked about schizophrenia, hallucinations, imaginary friends, and hearing voices. 12/10/13 RP 103-5. C.C. was also asked if he told his mother about what happened when he saw her about three days later. 12/10/13 RP 109. C.C. acknowledged he did not tell her. 12/10/13 RP 109. He was also asked if he told his younger sister or little brother, who were living there. 12/10/13 RP 109. He said he did not tell either of them. 12/10/13 RP 109. C.C. confirmed that the first person he told was his mother and shortly thereafter, the deputy and a lady from Adult Protective Service. 12/10/13 RP 109-10.

Kim Tyler of adult protective services testified. 12/10/13 RP 118. Tyler has a sociology degree and had worked for child protective service

for seventeen years. 12/10/13 RP 119-20. The complaint regarding C.C. was received November 2, 2012. 12/10/13 RP 120. Tyler was assigned the case and interviewed C.C. 12/10/13 RP 121. The interview occurred November 8, 2012, with Deputy Holmes of the sheriff's office present. 12/10/13 RP 121. Tyler said that C.C. explained the nature of the allegation. 12/10/13 RP 122. Tyler did not go into the detail of what C.C. had said. 12/10/13 RP 122. Tyler made the determination that C.C. was a vulnerable adult. 12/10/13 RP 122-3.

Tyler described that C.C. presented as being autistic, slow and had trouble finding some words. 12/10/13 RP 123. She said he did not appear to be psychotic, delusional or showed evidence of hallucinations. 12/10/13 RP 123. Tyler also assisted C.C. with an application for food assistance, for which C.C. did not qualify. 12/10/13 RP 124-5, 130.

Deputy Holmes was the deputy with the Skagit County Sheriff's Office that took the initial report. 12/10/13 RP 134-5. He responded to the DSHS office on November 8, 2012. 12/10/13 RP 135. He spoke with C.C. and with Tyler. 12/10/13 RP 135-6. It was apparent to Holmes that C.C. was slow and not normal for his age. 12/10/13 RP 136-7. He came across to Holmes as being more like a five-year-old. 12/10/13 RP 137. Holmes described that C.C. was distracted, had a stutter in his speech and appeared to have some type of mental delay. 12/10/13 RP 137. Holmes

was with C.C. for about forty-five minutes to an hour. 12/10/13 RP 137. C.C. came across as dry and non-emotional. 12/10/13 RP 137-8. Holmes had met with C.C. three times since the first report and found him to be a little friendlier and happier at the time of trial, but with the same matter of fact demeanor. 12/10/13 RP 138. Holmes never observed any sort of psychotic symptoms, delusions or hallucinations. 12/10/13 RP 138-9.

Defense counsel asked Holmes if standard procedure included a sexual assault if the alleged rape is reported close in time to the incident. 12/10/13 RP 139. Holmes said that was correct. 12/10/13 RP 140.

Bonnie Edwards is a therapist and assessor at Compass Mental Health. 12/10/13 RP 143. Edwards has a Bachelor's and Master's Degree in Counseling Psychology. 12/10/13 RP 144. She worked there for nineteen years at the time of trial. 12/10/13 RP 143. She had a specialty in geriatric mental health services and had been doing mental health eligibility assessments for six years on adults over age eighteen. 12/10/13 RP 143. .

In September 2012, she conducted an evaluation on C.C. 12/10/13 RP 144, 146. C.C. had a flat affect. 12/10/13 RP 149-50. Based upon the evaluation, Edwards believed that C.C. would have great difficulty in holding a job or being able to interact with others. 12/10/13 RP 150-1.

The global assessment of function (GAF) of C.C. scored him at a relatively low 38 on a scale of 0 to 100. 12/10/13 RP 156.

Edwards said that C.C. disclosed the abuse by Chenoweth but said that the incident had occurred since his birthday in January 2012. 12/10/13 RP 153-4. C.C. did not appear to be suffering from psychosis or delusions. 12/10/13 RP 157.

John Wilbur was the owner and manager of Automotive Diagnostic Center. 12/10/13 RP 164-5. Wilber employed Chenoweth from the fall of 2011, until May or April of 2012. 12/10/13 RP 166. Chenoweth normally worked Monday through Friday. 12/10/13 RP 166-7. Wilber identified the time cards for Chenoweth from October through December of 2011. 12/10/13 RP 168-9.

Wilber recalled meeting Chenoweth's son, C.C. 12/10/13 RP 170-1. He had seen C.C. three or four times in the fall of 2011, when Chenoweth brought C.C. to work with him. 12/10/13 RP 171-2. Chenoweth had asked Wilber to let C.C. come to work in order to keep an eye on him and keep him busy. 12/10/13 RP 172.

Ryan Hulbert is a psychologist in Idaho. 12/11/13 RP 4. Hulbert had been a psychologist for twenty-five years at the time of trial. 12/11/13 RP 4. He has a doctorate degree from the University of Nebraska and had been the clinical administrator for the Idaho Department of Juvenile

Corrections from 2001 to 2010. 12/11/13 RP 5. He also contracted for testing of individuals at the Idaho State School. 12/11/13 RP 5.

Hulbert evaluated C.C. on September 2, 2010. 12/11/13 RP 5-6. Hulbert performed an intelligence test on C.C. 12/11/13 RP 7. C.C. tested as having a borderline range for mental retardation for verbal comprehension. 12/11/13 RP 8. For perceptual reasoning, he scored in the average range. 12/11/13 RP 9. For working memory and processing speed index he scored in the extremely low range which former terms would have indicated mild mental retardation in both categories. 12/11/13 RP 9-11. His overall IQ score of 74 was in the borderline range. 12/11/13 RP 10-1. His global assessment of function was also scored quite low at twenty-five. 12/11/13 RP 13.

C.C. had prior diagnosis from a psychiatrist of a psychotic disorder not otherwise specified, with some indication of schizophrenia, post-traumatic stress disorder, Asperger's Syndrome and Obsessive Compulsive behaviors. 12/11/13 RP 12, 16. During the evaluation, C.C. did not show any delusions, or hallucinations and was lucid during the evaluation. 12/11/13 RP 15.

Laura Lind was the step-daughter of Chenoweth. 12/11/13 RP 24-5. C.C. did not reside with the family at about age thirteen or fourteen, when he moved to a state run school for people with disabilities. 12/11/13

RP 26. Lind described that C.C. was more of a child than an adult. 12/11/13 RP 27. Lind moved to Washington and was residing in the State when C.C. got out of the state school and moved in with their mother and Chenoweth. 12/11/13 RP 27-9. Lind saw C.C. once or twice a week from that point. 12/11/13 RP 29. C.C. began asking to visit in January or February of 2012, and eventually asked to stay with her. 12/11/13 RP 29-30. After C.C. began to live with Lind, she was made aware of the allegation. 12/11/13 RP 32-3. Lind had to instruct him like a child to deal with his nutrition, showering and clothes. 12/11/13 RP 33-4. Lind acted like a mother to C.C. 12/11/13 RP 34.

Chenoweth did not call any witnesses for the defense. 12/11/13 RP 41-2.

IV. ARGUMENT

1. Spousal privilege does not preclude a mother from testifying in the case where her child is the victim, regardless of the age of the child at the time of the offense.

Privileges are disfavored and to be construed narrowly. *State v. Sanders*, 66 Wn. App. 878, 883, 833 P.2d 452 (1992) *citing*, *State v. Maxon*, 110 Wn.2d 564, 756 P.2d 1297 (1988), *State v. Wood*, 52 Wn. App. 159, 758 P.2d 530 (1988). Interpreting the term "child" in the marital privilege statute to apply regardless of the age of the child is consistent with interpreting the statute narrowly.

Chenoweth moved to preclude his wife from testifying pursuant to spousal privilege because their son, the victim, was over age eighteen at the time of the offense. 12/9/13 RP 22, RCW 5.60.060.

After considering the argument of counsel, the trial court denied the defense motion to preclude the defendant's wife from testifying under spousal privilege regardless of the age of the child. 12/9/13 RP 28

The statute provides:

> RCW 5.60.060. Who is disqualified — Privileged communications.
> (1) **A spouse** or domestic partner **shall not be examined for or against his or her spouse** or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. **But this exception shall not apply to** a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, **nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian**, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

RCW 5.60.060 (bold emphasis added).

The language of the statute applies to "any child of who said spouse… is the parent." By that plain language, C.C. was the child of Jainni Chenoweth. 12/10/13 RP 67. Chenoweth conceded that at trial. 12/9/13 RP 22. Regardless of age, C.C. will always be her child.

Washington statutes do not specifically define whether a child refers only to an individual under age eighteen. There is no definition of child or minor under RCW 9A.04.110. The incest statute does not use the term child. It defines the offense based upon the alleged victim being either an ancestor or descendant. RCW 9A.64.020. The sex offense definitions of RCW 9A.44.010 does not define child or minor. However, the legislature provided a definition of "minor child" in RCW 9.94.030(31).

> "Minor child" means a biological or adopted child of the offender who is under age eighteen at the time of the offender's current offense.

RCW 9.94A.030(31). The privilege statute itself also uses the term "minor child" in the attorney-client section of the statute.

> (2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.
> (b) **A parent or guardian of a minor child** arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent

> or guardian. This privilege does not extend to communications made prior to the arrest.

RCW 5.60.020(2) (bold emphasis added). Since the legislature in the same statute made a specific reference to the term minor child in the statute, it is apparent that the legislature was aware of the distinction. Thus, by not using the term "minor child" and instead using the term "child" in RCW 5.60.060(1), the legislature was intending that portion of the statute to apply regardless of the age of the victim.

Application of the term "child" to apply regardless of the age of the victim is consistent with the limitations of the marital privilege.

> The basic goal of all statutory construction is to carry out the intent of the legislature. *Dominick v. Christensen*, 87 Wn.2d 25, 584 P.2d 541 (1976). In order toaccomplish this goal we must examine the privileges contained in RCW 5.60.060(1) and the origins of the "guardian" exception contained therein.
>
> RCW 5.60.060(1) provides:
>
> > (1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, *nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian.*
>
> (Italics ours.)

> The husband-wife privileges are not highly favored by legal commentators. *See* E. Cleary, *McCormick's Handbook of the Law of Evidence* §§ 66 and 86 (2d ed. 1972); 8 J. Wigmore, *Evidence in Trials at Common Law* §§ 2228 and 2332 (McNaughton rev. 1961). In *State v. Thompson*, 88 Wn.2d 518, 564 P.2d 315 (1977),we recognized that these privileges often promote the suppression of truth, and that in some situations principles of public policy make it more important that the witness'-spouse's testimony be available. We think the present case is one of those situations.

State v. Waleczek, 90 Wn.2d 746, 749, 585 P.2d 797 (1978). In *Waleczek*, the Court of Appeals upheld the trial court's admission of the wife's testimony in the case against a husband, where the wife and defendant both had been acting as a custodial guardian of the victim.

In *State v. Modest*, 88 Wn. App. 239, 944 P.2d 417 (1997), the Court of Appeals evaluated a case where a wife was allowed to be examined in charges which involved prostituting teenagers who the defendant permitted to stay with his wife. The defendant approved or disapproved any teenagers, directed them to pay his wife for living there, requested their attendance at jail visiting hours or demanded pictures of them so he could judge their appearance, ordered punishment performed while he listened by phone, and required them to follow strict rules while living with his wife. The court upheld the trial court's determination the wife could testify finding that liberal construction of the term "guardian" did apply. *State v. Modest*, 88 Wn. App. at 248, 944 P.2d 417 (1997)

In *State v. Sanders*, 66 Wn. App. 878, 833 P.2d 452 (1992), the Court of Appeals held that spousal privilege did not apply to require severance of a charge of witness tampering which was related to an underlying charge of first degree statutory rape of a child of the spouses. In so holding, the court explained the limitations on privileges.

> Testimonial privileges are creatures of statute, and should therefore be strictly construed. *State v. Wood*, 52 Wn. App. 159, 163, 758 P.2d 530 (1988). In *State v. Maxon*, 110 Wn.2d 564, 576, 756 P.2d 1297 (1988), for example, our Supreme Court recognized that concern over the loss of valuable evidence and the suppression of truth that may result from testimonial privileges sometimes outweighs the policies underlying the creation of the privilege. In considering a parent-child testimonial privilege, the *Maxon* court stated:
>
> > We agree with the United States Supreme Court that excluding relevant evidence by creating a privilege is warranted only if the resulting public good transcends the normally predominant principle of using all rationalmeans for ascertaining the truth.
>
> *Maxon*, 110 Wn.2d at 576 (citing *Trammel v. United States*, 445 U.S. 40, 50, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980)).

State v. Sanders, 66 Wn. App. 878, 883, 833 P.2d 452 (1992). Application of the spousal privilege because the alleged child is over eighteen does not transcend the public good from pursuit of the charge.

The same logic was applied by the court in *People v. McGraw*, 141 Cal. App. 3d 618, 190 Cal. Rptr. 461 (1983), where the defendant made the same challenge based upon the term "child" in the California evidence code.

> Statutes must be given a reasonable and common sense construction that leads to a wise policy and avoids absurd results. Realistically, the word "child" connotes a family relationship without any age limitations. A person remains a child of one's parents throughout life, not simply until the age of majority is reached. (Cf. *Succession of Quartararo* (La. 1962) 139 So.2d 277, 279; *In re Moran's Estate* (1899) 151 Mo. 555 [52 S.W. 377, 378]; *Gaydos* v. *Domabyl* (1930) 301 Pa. 523 [152 A. 549, 551].)
>
> A contrary interpretation would produce the absurd result that the Legislature intended to provide greater protection for the property of the other spouse than for the children of either spouse. Section 985, subdivision (a) provides that there is no privilege in a criminal proceeding in which one spouse is charged with, "A crime committed at any time against the person *or property* of the other spouse or of a child of either." (Italics added.)
>
> Our interpretation accords with the basic purpose of the marital communications privilege which is to preserve confidence and marital harmony between the spouses. (*People* v. *Worthington* (1974) 38 Cal.App.3d 359, 365[113 Cal.Rptr. 322];*People* v. *Carter* (1973) 34 Cal.App.3d 748, 752 [110 Cal.Rptr. 324], cert. den. 419 U.S. 846 [42 L.Ed.2d 75, 95 S.Ct. 81]; McCormick, *supra*, § 88, pp. 161-162.) Section 985, subdivision (a) is grounded on the self-evident premise that marital harmony would be nonexistent in criminal actions where a child of either spouse is the victim of a crime committed by one of the spouses. A parent is no less outraged, and marital harmony is no less obliterated because the child who was murdered was past his 18th birthday.

People v. McGraw, 141 Cal. App. 3d 618, 622, 190 Cal. Rptr. 461 (1983).

C.C. was the child of Jainni Chenoweth. The spousal privilege statute did not prevent her from testifying.

2. The trial court did not abuse its discretion in admitting the fact the victim complained where there was no substance of

the complaint admitted and the evidence was not offered to prove the truth of the complaint, but for what the witnesses did thereafter.

i. **There was valid non-hearsay basis for admission of C.C. disclosing because witnesses were testifying about C.C. being vulnerable.**

The State is permitted to show how the case came before the jury. The testimony about when an alleged sex offense was revealed without any detail presented in the allegation is not evidence of the crime and the trial court properly admitted the testimony.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* An evidentiary error is grounds for reversal only if it results in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An error is prejudicial if, within reasonable probabilities, it materially affected the outcome of the trial. *Id.*

The defense sought to exclude the fact that C.C. had told about the allegation. 12/9/13 RP 5. The trial court permitted to allow the State to present testimony about when the allegation was revealed, but not any substance of the allegation.

> Well, without going into any actual statement: Did you tell someone, yes or no? Is that hearsay? I'm trying to

> obviously balance it, but I do believe the State is entitled - - and let me back up a bit. A year or approximately a year is certainly what I would not consider timely in that sense. But I don't believe that prevents the State from presenting or the jury from hearing how these matters came to be where they are. So without allowing any detail of the incidents alleged or the identification of the perpetrator, the fact that he told someone and someone then encouraged him to do something else I believe is admissible. And it will stay absolutely generic simply to explain to the jury how we get here, nothing more, or how the case came to light.

12/9/13 RP 7-8.

Despite no detail about the substance of C.C.'s complaints to others being revealed, Chenoweth complains on appeal, that the admission of when the offense was revealed was improper admission of hearsay.

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c). Where no substantive statement is admitted, there is nothing for which to assert truth. Here, the fact that C.C. raised the allegation, were not offered for the truth of the allegation, but for what the witnesses did next. His mother told him to report it. The initial social worker and the officer said there was complaint so they referred the case and evaluated C.C.'s mental status. The second social worker was also evaluating C.C.'s mental status. Thus, the fact that C.C. made an allegation was not being offered for the truth of the allegation, but for

what the other witnesses did next. Given there was no substance of the allegation, even to the extent of not disclosing who the perpetrator was, was not an abuse of the trial court's discretion in admission of evidence.

C.C.'s mental status and his status as a particularly vulnerable victim were significant issues in the case. It would have been illogical to have the witnesses testifying as to why they were relating information as to the victim's mental status without the witnesses being able to say why they were considering the information.

Contrary to Chenoweth's assertions, officers, and by implication other witnesses, can relate some information they received when it is used to explain what the witnesses did next.

In *State v. Iverson*, 126 Wn. App. 329, 108 P.3d 799 (2005), officers in a case involving a protection order testified that a person who answered the door gave an identity. The admission of the statement was proper.

> The statement was nevertheless relevant to explain why the officers, who were by then aware of the protection order and its contents, then conducted further investigation. When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible. *See, e.g.*, *State v. Williams*, 85 Wn. App. 271, 280, 932 P.2d 665 (1997) (holding that officer's statement to another that he smelled alcohol on the breath of the defendant was not offered to prove the truth of the matter, but to show why the officer then requested the defendant to perform a

> Breathalyzer test, and was not inadmissible hearsay). Thus, the court did not err inadmitting the woman's self-identification for the limited purpose of showing that she did so and to help explain the officers' subsequent investigation.

State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005). Similarly here, the officers, family and social workers were able to give proper context to their evaluation of the vulnerability of the victim only after they were able to reveal the context in which they giving that information.

ii. The timing of the complaint does not preclude the admission of the fact a complaint occurred.

Chenoweth contends that the limitation of "hue and cry" evidence is only admissible if the complaint is made timely. Brief of Appellant at pages 8, 10-11. Chenoweth relies upon *State v. Ferguson*, 100 Wn.2d 131, 667 P.2d 68 (1983) to contend that a complaint by a victim of a sex offense is inadmissible as a "hue and cry" exception to the hearsay rule when the complaint is made timely. In *Ferguson*, the trial court permitted the teacher of the child victim to testify the child said the incident "concerned her father" and concerned "some sexual advances." *State v. Ferguson*, 100 Wn.2d at 135, 667 P.2d 68 (1983). The court noted:

> Thegeneral rule in this state is that in criminal trials for sex offenses the prosecution may present evidence that the victim complained to someone after the assault. *State v. Goebel*, 40 Wn.2d 18, 25, 240 P.2d 251 (1952). The rule admits only such evidence as will establish that the

> complaint was timely made. Excluded is evidence of the details of the complaint, including the identity of the offender and the nature of the act. *State v. Murley*, 35 Wn.2d 233, 237, 212 P.2d 801 (1949) and cases cited therein.

State v. Ferguson, 100 Wn.2d 131, 135-36, 667 P.2d 68 (1983). But the court went on to note a counterpart to the rule that the reference to the offender's identity may be too slight to constitute reversible error citing *State v. Conklin*, 37 Wn.2d 389, 223 P.2d 1065 (1950). The court in *Ferguson* held that the identity of the offender was never an issue in that case, so there was no risk the testimony bolstered a disputed identification and there was no reversible error.

In addition, the two cases relied upon by the court in *Ferguson* for the "general rule" need to be individually examined.

In *State v. Goebel*, a witness testified that the complaining witness had told her she was "followed by a man in a truck" and had been "choked and raped." *State v. Goebel*, 40 Wn.2d at 24, 240 P.2d 251 (1952). The court went on to find the statements were permissible.

> This testimony was admitted to prove that thecomplaining witness properly and promptly made hue and cry. The general rule is that, in cases of this kind, a witness may testify that the prosecutrix made complaint after the assault, but such witness may not tell what the prosecutrix said concerning the circumstances and details of the assault. *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *State v. Griffin*, 43 Wash. 591, 86 Pac. 951. Enough must

> be given, however, to identify the nature of the offense of which complaint was made.

State v. Goebel, 40 Wn.2d at 25, 240 P.2d 251, 255 (1952).

The court in *State v. Murley* examined the hue and cry doctrine in more detail.

> An exception to these exclusionary rules is that, in criminal trials for sex offenses, the credibility of the complaining witness, irrespective of whether it is assailed or unassailed, may be supported by evidence of her timely prior out-of-court complaint. This exception stems from the feudal doctrine of hue and cry. This doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person and that, on trial, an offended female complainant's *omission of any showing* as to *when* she first complained raises the inference that, since there is no showing that she complained timely, it is more likely that she did not complain at all, and therefore that it is more likely that the liberties upon her person,if any, were not offensive and that consequently her present charge is fabricated. Thus, formerly, to overcome the inference, it became essential to the state's case-in-chief to prove affirmatively that she made timely hue and cry. 3 Wigmore, *op. cit.*, § 1042; 4 Wigmore, *op. cit.*, § 1134 *et seq.*; 140 A. L. R. 174-6; 41 L. R. A. (N.S.) 857 at 886-9; O'Neill, Previous Consistent Statements, 6 Wash. L. Rev. 112.
>
> Modernly, the inference affects the woman's credibility generally, and the truth of her present complaint specifically, and consequently, we permit the state to show in its case-in-chief *when* the woman first made a complaint consistent with the charge.

State v. Murley, 35 Wn.2d at 236-7, 212 P.2d 801 (1949) (italics reference in original). Thus, the court in *Murley* noted that even as of 1949, modern practice permitted the admission of the fact of when the woman first made

a complaint regardless of timing. The court went on to note that under the ancient doctrine, the details of the prior complaint were admissible, but that modern practice excludes such detail and "admits only such evidence as will establish **whether or not a complaint was made timely**." *State v. Murley*, 35 Wn.2d at 237, 212 P.2d 801 (1949) (bold emphasis added). The court went on to hold that under the particular facts of the case, the details where properly admitted since there had been an issue raised of recent fabrication.

Taken together, *Goebel* and *Murley,* did not require a complaint be made timely and recognize that the fact of when a complaint is made is admissible.

Division I of the Court of Appeals *State v. Alexander*, 64 Wn. App. 147, 151-53, 822 P.2d 1250 (1992) noted the *Murley* court had recognized that under the modern rule, when the victim made a complaint is admissible.

> In *Murley*, the court held that "the credibility of the complaining witness, irrespective of whether it is assailed or unassailed, may be supported by evidence of her timely prior out-of-court complaint." 35 Wn.2d at 236-37. The court explained the history behind the "hue and cry" doctrine, as it was formerly known. When the State made no showing as to when the victim first complained, the omission raised the inference that she did not complain at all and that she therefore fabricated her allegations. The existence of this inference required the State to prove affirmatively in its case in chief that the victim timely

> complained. While the State no longer bears such a burden, the *Murley* court acknowledged that, if the State were to remain silent as to when the victim complained, the inference of fabrication could still exist. **Thus, the court ruled that, because the inference "affects [her] credibilitygenerally," evidence of when the victim first complained is admissible.** 35 Wn.2d at 237; *see also State v. Fleming*, 27 Wn. App. 952, 957, 621 P.2d 779 (1980), *review denied*, 95 Wn.2d 1013 (1981). Applying that rule to this case, the fact of M's prior disclosure was admissible even though the defendant did not expressly raise as an issue the timeliness of her complaint.

State v. Alexander, 64 Wn. App. 147, 151-52, 822 P.2d 1250, 1253 (1992)

Chenoweth asks this Court to apply the language of *Ferguson* which was predicated upon *Murley*, despite *Murley* providing a different rule. *Alexander* recognized the proper rule which was followed in this case.

The fact of complaint was properly admitted.

3. The instruction pertaining to corroboration was permissible.

> **We review de novo whether the instruction was legally correct.** *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). Article IV, section 16 of the Washington Constitution provides that " '[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law'. A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting WASH. CONST. art. IV, § 16). However, the comment violates the constitution only if those attitudes are

> " 'reasonably inferable from the nature or manner of the court's statements.' " *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999) (quoting *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)). **A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law.** *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986).

State v. Johnson, 152 Wn. App. 924, 935, 219 P.3d 958 (2009) (bold emphasis added).

The court provided an instruction which read as follows:

> In order to convict a person of Incest it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

CP 89. The instruction was fashioned after the State had initially requested an instruction based upon RCW 9.94A.020(1). CP 194. The trial court heard argument on the issue. At the trial court, Chenoweth argued against giving the instruction contending it was not necessary, but acknowledging that ""[t]he Washington Supreme Court has upheld the instruction, and we are bound by its ruling." 12/11/13 RP 51. No claim was raised at the trial court that the instruction was inappropriate to a charge of incest. The trial court upheld giving the instruction.

> And even though Division I and apparently the Supreme Court on this precise issue have not ruled, I do believe that the analysis that they give makes good common sense and good legal sense. And under a case like this where there is absolutely no corroborating evidence the jury could easily be confused or even wondering what their leeway is. So I

> believe the two sentences make it a more fair instruction than just the first sentence. But for all the reasons cited and the specific facts of this case, and the authority of Division II the Court will be given that instruction.

12/11/13 RP 52. The trial court relied significantly on *State v. Johnson* which accepted use of the instruction but cautioned that is was best if it included a direction to the jury that it is the sole judge of credibility.

> Johnson points to language in *Clayton* that qualified the above instruction to specifically tell the jury that, while corroboration is not required, credibility questions remained entirely for the jury. Johnson argues that without the additional language, the instruction here puts the complaining witness's testimony in a favorable light, at least compared to the other witnesses. We note that in Clayton, the Supreme Court case on which Zimmerman relies, the instruction included additional language such as Johnson now advances. Zimmerman approved an instruction identical to that given here, but Zimmerman did not argue on appeal that the additional language was required. Thus, the Zimmerman court was not asked to consider whether such additional language must be given as part of the collaboration instruction.
>
> We see no clear pronouncement from our Supreme Court on whether the additional language is necessary to prevent an impermissible comment on the evidence under article IV, section 16, and we hold that the trial court's corroboration instruction was not an erroneous statement of the law. **When giving this instruction, however, trial courts should consider instructing the jury that it is to decide all questions of witness credibility as part of the instruction.** Without this specific inclusion, the instruction stating that no corroboration is required may be an impermissible comment on the alleged victim's credibility.

State v. Johnson, 152 Wn. App. 924, 936-37, 219 P.3d 958 (2009), see also *State v. Zimmerman*, 130 Wn. App. 170, 182-83, 121 P.3d 1216

(2005) (noting that the court was bound by *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949) to hold that it was not reversible error to give the instruction since *Clayton* held it was a proper statement of the law).

Chenoweth contends since the non-corroboration statute is contained within the rape chapter, RCW chapter 9A.44, it should not be applied to incest under RCW chapter 9A.64. Appellant's Opening Brief at page 16, 19. However, non-corroboration was applied both to incest and rape cases prior to enactment of RCW 9A.44.020(1). The non-corroboration requirement of the rape statute was initially codified by Laws of Washington 1975 1st ex.s. c 14 § 2 which became RCW 9.79.150 and was later re-codified as RCW 9A.44.020. That same year the legislature codified the incest statute in the Laws of Washington, 1975 1st ex.s. ch. 260 § 9A.64.020.

Prior to the enactment of the statutes, corroboration was held not to be required both for rape as well as incest. *State v. Davis*, 20 Wn.2d 443, 447, 147 P.2d 94 (1944) (disapproving of the requirement of corroboration in case of incest) citing *State v. Morden*, 87 Wash. 465, 151 Pac. 832 (1915) (noting repeal of corroboration statute), see also State v. Coffey, 8 Wn.2d 504, 506, 112 P.2d 989 (1941) (uncorroborated testimony of prosecutrix is sufficient in incest case); Laws of Washington 1993, Ch.

100, § 1 (Titled Abolishing Necessity of Corroborative Evidence in Rape, Seduction, Etc. repealing Remington & Ballinger's Code § 2443).

Since corroboration is not required for incest, the trial court's instruction was not a misstatement of the law and just as it was not error to give the instruction in *Johnson* or *Zimmerman*, it was not error here.

4. In the absence of error, there can be no cumulative error.

Chenoweth argues for a claim of cumulative error. Appellant's Opening Brief at page 28.

> It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each errorexamined on its own would otherwise be considered harmless. *See State v. Coe,* 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda,* 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander,* 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Whelchel,* 115 Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy,* 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied,*475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Whelchel,* at 728; *Guloy,* at 425. Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Halstien,* 122 Wn.2d 109, 127, 857 P.2d 270 (1993);*State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994).

Here there was no error and as such, there is insufficient basis to find cumulative error.

5. Any errors pertaining to the fact of complaint or jury instruction were harmless beyond a reasonable doubt.[2]

As a corollary to the claim of cumulative error, this Court can evaluate whether if it perceives any error, that error is harmless beyond a reasonable doubt.

The admission of the fact of complaint is within the category of a claimed evidentiary error.

> Where an error violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. *State v. Thomas,* 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Thomas, 150 Wn.2d at 871, 83 P.3d 970.

State v. Price, 126 Wn. App. 617, 638, 109 P.3d 27 (2005).

Here, there was no substance to the fact of complaint testified to by any witness. As such, there was nothing of evidentiary significance revealed by the witnesses. Nothing corroborated the victim. Thus,

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[2] The State does not contend that if this Court finds error in the admission of the wife's testimony that error would not be harmless. But for the reasons stated above, the State contends admission of her testimony was not error.

Chenoweth cannot show prejudice. There was no conflicting evidence or denial by Chenoweth to challenge C.C.'s testimony about the incident.

The claimed error pertaining to the jury instruction is subject to a harmless error analysis.

> In order to conduct its analysis, the *Neder* court set forth the following test for determining whether a constitutional error is harmless: "Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967))

State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

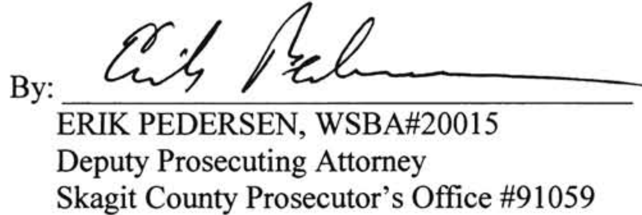
As explained above, the claimed error of the non-corroboration instruction is not a misstatement of the law. Therefore, by necessity, it could not have improperly contributed to cause the verdict obtained. Even if this Court determines that it would have been better not to have given the instruction, doing so did not cause the conviction and any error was harmless.

V. CONCLUSION

For the foregoing reasons, Chad Chenoweth's conviction for Incest in the First Degree must be affirmed.

DATED this 7th day of January, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY



By: ________________________________

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Oliver R. Davis, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 7th day of January, 2015.

KAREN R. WALLACE, DECLARANT