72210-7

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Court of Appeals
Division I
State of Washington

No. 72210-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VINCENT MELENDREZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MR. MELENDREZ'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE COURT REQUIRED HIM TO TESTIFY BEFORE THE OTHER DEFENSE WITNESSES IN ORDER TO PRESENT RELEVANT EVIDENCE

a. <u>This Court must review Mr. Melendrez's constitutional claims.</u>

The State asserts that because Mr. Melendrez did not argue below that his right to present a defense was violated by the trial court's rulings, RAP 2.5(a) bars him from raising this issue on appeal.[1] Under RAP 2.5(a)(3), a party is permitted to raise "a manifest error affecting a constitutional right" for the first time on appeal. The State claims the error is not manifest, but in doing so, it confuses a showing of an identifiable error with a showing of harm. *See* Resp. Br. at 19.

An error is "manifest" when it the trial record "is sufficient to determine the merits of the claim." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). As the Supreme Court explained in *O'Hara*, this is different than a harmlessness analysis:

> The determination of whether there is actual prejudice is a different question as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are

[1] The State initially cites to RAP 2.5(b) instead of RAP 2.5(a) but Mr. Melendrez assumes this was a typographical error. Resp. Br. at 18.

> separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in this actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

Id. at 99-100.

There is no dispute that the admissibility of R.M.'s misbehavior was highly contested at trial. The State concedes the parties and the trial grappled with this issue "[t]hroughout the trial." Resp. Br. at 16. The trial court's ruling that Mr. Melendrez must testify before R.M.'s actions could be admitted violated his constitutional right to present a defense and his privilege against self-incrimination, and this Court must consider these issues on appeal.

b. <u>The trial court's ruling violated Mr. Melendrez's constitutional right to present a defense and privilege against self-incrimination.</u>

At trial the State was permitted to introduce evidence of Mr. Melendrez's discipline of R.M., its argument being that this discipline demonstrated his desire to maintain control so that he could continue to sexually abuse her. RP 780, 835-37, RP 1121-23, 1221-22. The

defense sought to expose the problem with the State's theory by demonstrating, through cross-examination of R.M., that Mr. Melendrez's disciplinary actions actually correlated with R.M.'s misbehavior. RP 75, 112-14, 1022. In order to do this, Mr. Melendrez sought to introduce evidence that she had engaged in sexting, had been sneaking out of the house and inviting boys over, and using marijuana. RP 112-14.

The State concedes that at the heart of the admissibility of R.M.'s past acts "were the differing versions of the reasons behind the restrictions that Melendrez placed on R.M. and the punishments she received." Resp. Br. at 16. Evidence of R.M.'s misbehavior explained: (1) why Mr. Melendrez imposed the discipline and (2) why R.M. would have an incentive to falsely accuse her father of rape. However, the trial court excluded this evidence unless Mr. Melendrez first testified to personal knowledge of the behavior, ruling that it was otherwise irrelevant. RP 1039-42, 1046, 1661-62.

"The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Where the evidence at issue is highly probative, "no state interest can be compelling enough to

preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2000). The State argues the trial court's ruling was valid because the court did not exclude any evidence that was relevant to Mr. Melendrez's disciplinary actions. Resp. Br. at 18. This argument fails to appreciate the restrictions placed on Mr. Melendrez's ability to cross-examine R.M. and the other witnesses and incorrectly assumes it was lawful for the trial court to require Mr. Melendrez to testify before the other defense witnesses. In making this claim, the State relies on *Menendez v. Terhune*, 422 F.3d 1012, 1030 (9th Cir. 2005) and *Johnson v. Minor*, 594 F.3d 608 (8th Cir. 2010), both of which involved the admissibility of self-defense evidence.

In *Menendez*, the Ninth Circuit found that because the evidence of self-defense could *only* come from the defendant, requiring the defendant to testify first did not violate *Brooks v. Tennessee*. 406 U.S. 605, 92 S.Ct. 1038, 35 L.Ed.2d 358 (1972) (holding that requiring a defendant to testify before other witnesses unlawfully limits his freedom to decide whether to take the stand); *Menendez*, 422 F.3d at 1032. There was no one, other than the defendants, who could testify that they feared their parents would kill them. *Menendez*, 422 F.3d at

1032. Similarly, in *Johnson*, the Eighth Circuit approved the trial court's decision to require the defendant to testify first when the defense never suggested another witness could lay the foundation for self-defense evidence. 594 F.3d at 613.

Here self-defense evidence was not at issue. The State's theory of the case was that Mr. Melendrez began to severely restrict R.M.'s ability to leave the house or interact with others after he began having sex with her. RP 780, 835-37, RP 1121-23, 1221-22. Mr. Melendrez did not object to the State's introduction of evidence relating to the restrictions he placed on R.M. because it explained the dynamic in the household and why R.M. was motivated to lie. RP 110, 778-79, 893, 921, 925. However, Mr. Melendrez sought to put these restrictions in context for the jury through evidence of his daughter's corresponding misbehavior. RP 112-14, 1027 (defense expresses its disagreement with trial court's ruling).

R.M.'s grandmother, Guadalupe, and her brothers, William and Daniel, could testify that they informed Mr. Melendrez about R.M.'s bad behavior, proving evidence of his knowledge. *See* RP 1926; RP 1978. However, given that R.M.'s rebellious behavior coincided with evidence of the discipline admitted by the State, evidence of her

behavior met the threshold of minimal relevance even if Mr. Melendrez chose not to testify. *See Darden*, 145 Wn.2d 621 (even minimally relevant evidence is admissible and it makes no difference whether it is circumstantial or direct).

A defendant must be given the opportunity to present his version of the facts so that the jury may determine where the truth lies. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). This right includes his right to control the presentation of his defense. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013); *see also Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Court may not condition this right on forfeiting his constitutional right not to testify. *See Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."). The trial court's ruling violated both Mr. Melendrez's right to present a defense and his privilege against self-incrimination and this Court should reverse.

2. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT AND THE TRIAL COURT ERRED WHEN IT DENIED MR. MELENDREZ'S REQUEST FOR A BILL OF PARTICULARS

a. The information was deficient.

An information must allege the "particular facts" supporting every element of the charged offense. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010); *see also United States v. Zavala*, 839 F.2d 523, 526 (9th Cir. 1988). Only when this is provided does the defendant have sufficient notice to prepare his defense. *State v. Tandecki*, 153 Wn.2d 842, 846, 109 P.3d 398 (2005).

The State argues the information was constitutionally sufficient because it is not required to "fix a precise time for the commission of the alleged crime, when it cannot intelligently do so," relying on *State v. Pitts*, 62 Wn.2d 294, 299, 382 P.2d 508 (1963). Resp. Br. at 13-14. But in *Pitts*, the court approved a time period in the charging document that spanned days, not months. *Pitts*, 62 Wn.2d at 295. According to the testimony at trial, the crime may have occurred on three different days, and the defendant's alibi covered all three days. *Id*. at 300. On these facts, the court affirmed.

The facts here are very different. The charging period for three of the five counts was lengthy, making it impossible to mount a successful alibi defense. Mr. Melendrez was accused of sexual contact with his daughter between January 1, 2008, and April 28, 2009, in count I, and between April 29, 2009, and April 28, 2011, in count III. CP 96-97. He was charged with committing incest between April 29, 2011, and October 4, 2011, in count IV. CP 97.

As the South Carolina Supreme Court acknowledged in *State v. Baker*, it can often be difficult to identify the exact dates in child abuse cases. 411 S.C. 583, 592, 769 S.E.2d 860 (2015). However, this "class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles." *Id.*

Mr. Melendrez worked the night shift during much of the time period that R.M. claimed he assaulted her after bringing her to his bed at night. RP 839-40, 896. He attempted to counter R.M.'s allegations by presenting evidence that he had excellent attendance at work, but the trial court denied his request for an alibi instruction. RP 2134. It was impossible for Mr. Melendrez to successfully mount a defense when he was provided with so little information about when the alleged crimes occurred. The information was constitutionally deficient because the

lack of information contained in the charging document denied Mr. Melendrez a meaningful opportunity to defend against R.M.'s accusations. *See Tandecki*, 153 Wn.2d at 847. This Court should reverse.

b. <u>The trial court erred when it denied Mr. Melendrez's request for a bill of particulars.</u>

Mr. Melendrez requested a bill of particulars after the trial court permitted the State to amend the information against him for the second time, expanding the charging period in count I to encompass approximately one year and four months instead of only four months, as previously alleged. CP 57, 66; RP 1233. The trial court denied Mr. Melendrez's motion. RP 1234.

The State relies on *State v. Noltie* to argue the trial court's ruling was proper. 57 Wn. App. 21, 786 P.2d 332 (1990). However, in *Noltie*, the defense requested a bill of particulars seven months before trial started and the State opposed the motion because the defense interview with the alleged victim was imminent. *Id*. at 30. The trial court deferred its ruling, and the issue was not addressed on the record again. *Id*. Assuming the trial court denied the motion, this Court found the denial proper because the defense failed to renew its motion following its interview with the alleged victim. *Id*. at 31.

Here, Mr. Melendrez requested the bill of particulars after the State amended the information for the second time, several weeks *after* the start of trial. RP 1219, 1233. Mr. Melendrez *provisionally* agreed to the amendment and sought the bill of particulars. RP 1233. When Mr. Melendrez first made the motion, he explained that a bill of particulars had become increasingly important as the State continued to lengthen the time period over which the State alleged the events occurred. RP 1227.

Unlike the defendant in *Noltie*, who was months away from trial and was about to interview the alleged victim for the first time, Mr. Melendrez's request was made in response to the State's amendment during trial. As the State modified the charging document to reflect the alleged victim's testimony presented at trial, Mr. Melendrez sought information about how the State expected to prove its case.

The State claims that because Mr. Melendrez had access to the "substance" of the allegations made by R.M., including the opportunity to interview her before trial, the court's motion to deny the bill of particulars was proper. Resp. Br. at 11. However, the record demonstrates numerous inconsistencies between R.M.'s statements and her testimony at trial. RP 1071-72, 1097-98, 1088-89, 1100, 1135,

1139, 1165-73, 1182-83, 1258-64. Thus, any information Mr. Melendrez gained prior to trial had limited utility. Because Mr. Melendrez sought to present an alibi defense, the State's amendment, which expanded the charging period for count I, impacted his strategy and the bill of particulars would have given him the opportunity to adequately defend against R.M.'s accusations through cross-examination. When the trial court permitted the State to amend the information but denied Mr. Melendrez's request for a bill of particulars, it abused its discretion. This Court should reverse. *See State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014).

3. THE TRIAL COURT FAILED TO MAKE THE RELEVANT LEGAL STANDARD FOR COUNT IV MANIFESTLY APPARENT

A *Petrich* instruction was provided to the jury for the rape and incest charges.[2] CP 119, 122, 126-28. Despite providing this instruction, the jury asked whether they needed to "point to a specific incident or just agree an occurred" during the relevant time period for count IV, one of the charges of incest. CP 103. Mr. Melendrez asked that the court inform the jurors they needed to point to a specific incident. RP 2227. The court denied this request and declined to

[2] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

answer the jury's question directly. RP 2228. Instead, it directed the jury back to the same instructions that the jury had identified as confusing. CP 103-04.

"[J]ury instructions must make the relevant legal standard manifestly apparent to the average juror." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *see also State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). The State claims that because the instructions were legally correct, Mr. Melendrez's rights were protected. Resp. Br. at 29. It relies on *State v. Moultrie* for this argument, in which the defendant argued the trial court's instruction violated his right to unanimity because it did not mirror the pattern instruction. 143 Wn. App. 387, 392, 177 P.3d 776 (2008). However, the pattern instruction was modified such that it was identical to the instruction provided by the trial court. *Id*. at 393. This Court held there was no instructional error because the instruction "adequately addressed the requirement of jury unanimity such that the ordinary juror would interpret it to mean that the jury must unanimous on the act underlying the conviction." *Id*. at 394.

Here, the instruction was properly given, but the trial court's response to the jury's inquiry was error. The jury's question indicated

that it did not understand the instruction. The State claims that it would have been error for the trial court to inform the jury it was required to point to a specific incident, as requested by the defense. RP 2227; Resp. Br. at 32. It claims that because R.M. did not testify to any specific incident between April 29, 2011 and October 4, 2011, the jury could not have pointed to a specific incident because the verdict only needed to satisfy *State v. Hayes*, 81 Wn. App. 425, 914 P.2d 788; Resp. Br. at 32.

This claim is meritless. As the State concedes, *Hayes* simply declined to find, as a matter of law, that generic testimony is *always* insufficient to sustain a conviction. *Hayes*, 81 Wn. App. at 438; Resp. Br. at 32. When only generic testimony is provided, the evidence must still establish the kind of act, the number of acts committed with sufficient certainty to support the number of counts alleged by the State, and the general time period in which the acts occurred. *Hayes*, 81 Wn. App. at 438.

The State claims, incorrectly, that R.M. "did not recount the details of any single incident." Resp. Br. at 32. In fact, R.M. provided testimony regarding a specific incident when she testified Mr. Melendrez assaulted her on either October 3, 2011 or October 4, 2011.

RP 927 (testifying that he assaulted her on October 4, 2011), 943-44 (testifying that he assaulted her on October 3, 2011 but not October 4, 2011). The trial court properly instructed the jurors that they must agree on one particular act of incest, but it erred when it failed to answer the jury's specific question requesting clarification of this instruction. Because the court's response failed to make the relevant legal standard manifestly apparent to the jury, it violated Mr. Melendrez's due process rights and reversal of count IV is required. *State v. Cantabrana*, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996).

4. THE TRIAL COURT SHOULD HAVE EXCLUDED THE NURSE'S EXPERT TESTIMONY

Prior to trial, both parties agreed the testifying nurse, Susan Dippery, was not equipped to assert that her observations of R.M.'s hymen were consistent with sexual assault, and that it would need to be addressed outside the presence of the jury if something changed. RP 52. Despite this agreement, Ms. Dippery was permitted to testify, over Mr. Melendrez's objection, that it would not be surprising "in any way" to see a small remnant of the hymen in a 16 year-old girl who had engaged in sexual intercourse one hundred times.

The State claims that Mr. Melendrez does not challenge Ms. Dippery's qualifications as an expert. Resp. Br. at 23. In fact, Mr. Melendrez directly challenged Ms. Dippery's qualifications to provide this testimony in his opening brief. *See* Op. Br. at 44 ("Nothing about her training or job description indicated she had the relevant knowledge, skill training, experience, or education to allow her to testify about whether it would be surprising or unsurprising to find a remnant of a hymen in a teenager who had sex one hundred times."). As explained in Mr. Melendrez's opening brief, Ms. Dippery could not lay a foundation for this conclusory statement. Permitting this testimony, in contravention of its ruling precluding Ms. Dippery from testifying about whether her observations were consistent with sexual assault, was error. RP 51.

The State argues that any error was harmless because of the DNA evidence it presented at trial. Resp. Br. at 24. While the State presented evidence at trial that Mr. Melendrez's DNA was found on R.M.'s underwear, and R.M.'s DNA was found on Mr. Melendrez's boxer briefs, the State's crime lab scientist testified that in "a closed environment, like a family house" the innocent transfer of DNA from one family member to another was more common than the transfer of

DNA in other circumstances. RP 664. The crime lab scientist further testified that different scenarios are equally plausible and suppositions would have to be made in order to favor one scenario over another. RP 692.

Thus, the State could only prove its case against Mr. Melendrez if it found R.M. credible. Where a case turns on the complaining witness's credibility, the court's error cannot be found harmless. *State v. Hudson*, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). This Court should reverse.

5. MR. MELENDREZ'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE COURT INFORMED THE JURY MR. MELENDREZ WAS IN CUSTODY

For the reasons stated in Mr. Melendrez's opening brief, his constitutional right to a fair trial was violated when the trial court informed the jury Mr. Melendrez was being held in custody during the trial. *See* Op. Br. 39-41.

6. CUMULATIVE ERROR DENIED MR. MELENDREZ HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

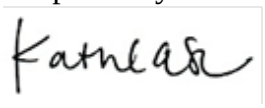
The State argues the cumulative error doctrine does not apply because no errors were made. Resp. Br. at 33-34. As explained above and in Mr. Melendrez's opening brief, several errors were made at trial that, alone, require reversal. In addition, this Court should find the combined errors denied Mr. Melendrez his right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). His convictions should be reversed.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Melendrez respectfully requests this Court reverse.

DATED this 5th of October, 2015.

Respectfully submitted,



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DIVISION ONE

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	)	
Respondent,	)	
	)	NO. 72210-7-I
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	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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