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Court of Appeals
Division I
State of Washington

No. 72935-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

NEN PHAN, Appellant.

BRIEF OF RESPONDENT

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2. Whether Phan has demonstrated the trial court clearly erred denying Phan's request for a Frank's hearing where the record reflects the information allegedly omitted from the warrant application was neither material to a probable cause finding and was intentionally made with reckless disregard for the truth, in an effort to mislead the magistrate who authorized the challenged search warrant.

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C. SUBSTANTIVE FACTS

At 18, Kim Phan married Phan and moved from Vietnam to the United States. RP 690. Kim reported that the first few years of their marriage were good but the last ten fraught with arguments and difficulty. RP 715. After years of difficulty in her relationship with Phan, Kim finally decided to get a divorce after returning from the trip to Vietnam in 2013. RP 715.

In 2013, while accompanying her mom, Kim Phan, to a family friends house for Kim to discuss how to fill out divorce paper work, Phan's sixteen year old daughter A.P. (d.o.b. 3/10/98) broke down emotionally and told her mom and family friend, Lee Jones, that her

father, Nen Phan had been sexually abusing her for years. RP 516-17,1108.

A.P. reported Phan started touching her in a sexual manner she started developing and starting puberty around age 9. RP 535. It was common for Phan to bathe naked with his family but eventually bath's with Phan turned sexual. AP disclosed that before Phan started having sexual intercourse with her around age 10, it was usual for her dad to grope her breasts, her butt, kiss and hug her. RP 526. It was also common for Phan to watch pornography with A.P. when she was younger, sometimes on a daily basis prior to Phan engaging in sexual contact with her. RP 545. Phan told A.P. not to tell anyone that he watched pornography with her. RP 543. A.P. reported Phan watched all different kinds of pornography, including child pornography and reported Phan would download and make videos of these images. RP 543-45. Prior to A.P. going on an earlier trip to Vietnam, A.P. reported Phan forced her down and took a picture of her privates with his phone and subsequently showed her the picture. RP 548. A.P. recalled that Phan marked his pornographic DVD's with an 'xxx.' RP 546.

The first time A.P. had sexual intercourse with Phan she was approximately ten years old. RP 519. A.P. remembered it happened an evening after parents had fought and Phan went to sleep alone in their

computer room. A.P. joined him because she felt bad that Phan was sad. A.P. reported that somehow she and Phan ended up having oral sex and sexual intercourse. RP 521-522. Phan sought to have a vasectomy after he started having sexual intercourse with A.P.. RP 719. Phan's wife Kim noticed Phan was close to A.P. but thought nothing of it. RP 717. Kim was often out of the home running a business. RP 590. Kim confirmed Phan obtained a vasectomy when A.P. was 9 or 10 years old and following the vasectomy told Kim his 'sex' was not active anymore. RP 720-721. Kim believed Phan was no longer sexually active after the vasectomy. RP 720-721.

A.P. reported that after Phan had his vasectomy, Phan started having sexual intercourse with her almost every day after school. RP 528. A.P. would come home and go to the computer room or the master bedroom with Phan and have sexual intercourse or sexual contact. Id. Phan told A.P. it was normal for dads to have sex with their daughters. RP 530. A.P.'s grandmother, who lived with the Phan family, noticed Phan would go up to room after school and be behind locked or closed doors 'many times.' RP 683. Once she caught Phan in the bath with A.P. and she yelled at him but Phan told her that was ok in America. RP 684.

After Phan started molesting A.P. when she was 8 or 9, Phan would not let A.P. go outside, go to friends or have friends over to the

house. RP 582, 593. A.P. felt Phan isolated her. RP 517. Phan told A.P. that there were no other men out there as good as him; that those men out there will just hurt you and want your body. RP 582-3. At one point Phan asked A.P.to refer to him as 'Anh' a Vietnamese term that a wife would call a husband. RP 584.

As A.P. got older, she hid the fact that she had a boyfriend at school from her family. RP 549. Everyone thought A.P. had a boyfriend though, prompting Phan to start asking A.P. if this was true. RP 459. Phan did not want A.P. to have a boyfriend. RP 733. After catching A.P. texting a boy, Phan confronted A.P. and she disclosed she did in fact have a boyfriend. RP 551. Phan threatened that he would disown A.P. if she kept her boyfriend. RP 555. Phan also told A.P. if she wanted to keep her boyfriend, she would have to keep having sex with him in a passionate manner. RP 552-553. When A.P.'s family was in Vietnam, and only Phan and A.P. were at the family home together, A.P. would have sex with Phan so he would let her go to her boyfriend's house. RP 555. When Phan picked A.P. up from her boyfriend's house, he was angry and accused her of having sex with her boyfriend. RP 557. A.P. denied having sex with her boyfriend. RP 601. Nonetheless, Phan then aggressively initiated having sexual intercourse again when the two returned home. RP 557. Phan then

told A.P. he was disowned her and stopped talking to her two weeks before she disclosed abuse. RP 600, 606..

When A.P. was younger she reported she gave Phan oral sex but as she got older she stopped and would only have sexual intercourse with Phan. RP 540. A.P. testified Phan sometimes hurt her during intercourse by pulling her hair and breasts. RP 574-5. In 2013 Phan started discussing having anal sex with A.P. telling her it wouldn't hurt as much. RP 577. A.P. said when Phan tried anal sex with her, it was painful. RP 579. Phan also wanted to get sex toys. RP 577. Phan drove to a 'Lovers' store and while A.P. waited in his car, went in and purchased some sex toys. RP 578. AP testified her and Phan used the sex toys approximately five – twenty times prior to A.P. tearfully disclosing the abuse to her mom. RP 578.

When investigators searched Phan's home they found numerous DVD's marked with an 'x' or 'xxx'. RP 966. When these videos were examined, investigators found, consistent with AP's disclosures, child and adult pornography. RP 1216. Investigators also found a little black bag, as described by AP, containing sex toys as described by AP and lubricant, in Phan's home. RP 580. A forensic medical exam of A.P. also revealed her hymen was significantly worn away consistent with repeated sexual

activity over the course of time and not a more recent sexual experience. RP 1086.

Following A.P.'s disclosures, Phan's youngest daughter, K.P. (d.o.b. 6/1/2005) also disclosed sexual abuse. RP 643. K.P. told investigators Phan would touch her potty spot when they watched a movie or he watched a movie on the computer, while sitting on his lap. RP 645. K.P. described the movies as Vietnamese action movie. Id. She also reported Phan touched her potty spot when he bathed her and had her wash his potty spot with her hand and mouth. RP 639, 640. K.P. explained Phan would have her wash his potty spot 'fast' with her hand or would have to put her mouth or lick the pink spot to wash Phan's potty spot. RP 788, 794. K.P. reported Phan also used his tongue to lick and tickle her potty spot. RP 799. K.P. also recalled a time with Phan was in the bath tub with her and her 9 year old friend A.D. and seeing Phan touch A.D. on her private spot in the bathtub. RP 790, 800. Phan also had A.P. and A.D. take turns kissing him and each other. RP 800.

Phan's friend, Lee Jones, who spoke both Vietnamese and English also took notice of Phan's inappropriate behavior with his daughters. Lee observed Phan and AP hugging and kissing while lying in a hammock and another time, observed Phan bend over and bite KP's lip, both incidents struck Jones as odd. RP 1098.

K.P.'s friend, A.D. (d.o.b.1/9/2004)also reported abuse. She disclosed she had taken a bath in the upstairs bath with Phan and K.P while they were all naked. RP 659, 661, 663. A.D. was surprised Phan washed her private parts between her legs where nobody is supposed to touch you. RP 777. A.D. reported that in addition to washing her and A.P.'s private parts, Phan kissed both her and A.P. on the mouth. RP 666, 792. When A.D. told her mother what happened, A.D. was very upset, crying and afraid. RP 676.

At trial Phan argued and inferred through questioning the sexual abuse allegations were manufactured to give Kim an advantage in the divorce and to give A.P. more freedom to have a boyfriend and a social life. RP 1121, 1123, 1228, 1311. Phan also inferred A.P. and her mom had tainted K.P. and A.D.'s disclosures and that A.P. had planted the child pornography in the Phan house. 1314, 1315. Following a jury trial, Phan was convicted as charged. CP 278-289.The jury also found by special verdict that each of the rape of a child in the first and third degrees were the result of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time. Id.

D. PROCEDURAL FACTS

Phan was charged with three counts of rape in the first degree on or between March 10th 2008-March 9th 2009, March 10th 2008 to March 10th 2010, one count of Child molestation in the first degree from March 10th 2005-March 9th 2010, four counts of rape of a child in the third degree from February 1st 2013- March 28th 2013, (one count is from Feb 14th –March 28th 2013, another March 14th 2013-March 28th 2013.) involving Phan's oldest daughter, A.P. (d.o.b 3/10/98.)

Phan was also charged with child molestation in the first degree on or about June 1st 2008 to March 30th 2013 involving Phan's youngest daughter's friend, A.D. (d.o.b.). In addition Phan faced two more counts of rape of a child in the first degree from June 1st 2008 to March 30th 2013 involving his youngest daughter, K.P. (d.o.b. 6/1/2005) and finally, four counts of possession of child pornography in the first degree.

The state also charged two aggravating factors under RCW 9.94A.535 alleging Phan committed multiple current offenses and that his offender score was so high it would result in some offenses going unpunished and, that the offense was part of an ongoing pattern of sexual abuse by the same victim under the age of eighteen manifested by multiple incidents over a prolonged period of time. CP 191.

Following a jury trial, Phan was convicted as charged and the jury returned special verdicts for both the aggravating factors alleged. CP 257-259. Phan was sentenced to a minimum term of 480 months to life. CP 278-298.

E. ARGUMENT

1. Severance of Phan's charges was not warranted in this case because evidence pertaining to Phan's possession and use of child pornography was cross admissible as res gestae evidence of the rape and molestation allegations and, the jury was instructed to consider each count separately and not let their decision on once count control their decision on another.

Phan argues, based on State v. Sutherby, 165 Wash. 2d 870, 883-4, 204 P.3d 916 (2009), the four counts of possession of child pornography charges should have been severed from the multiple counts of child molestation and rape charges. Br. of App. at 13.

In contrast to Sutherby however, the possession of child pornography evidence in this case was intertwined with the allegations of child rape and molestation because Phan used his pornography collection as a grooming tool. He watched pornography, including child pornography, with his older daughter prior to engaging in sexual contact or while molesting or raping her; particularly when she was younger.

Phan's younger daughter also reported Phan would have her sit on his lap while he was watching 'videos' and touch her potty spot. Thus, evidence that Phan possessed and used pornography, including child pornography was relevant and admissible in the child rape and molestation case as res gestae evidence.

Moreover, unlike in Sutherby, the prosecutor in this case carefully presented and argued this case to ensure the jury would not to use evidence of the Phan's possession or use of pornography to inappropriately find Phan guilty of the rape and molestation allegations; consistent with the trial court's limiting instruction. The trial court therefore did not abuse its discretion in denying Phan's request to sever these charges.

Two or more offenses may be joined in one charging document where the offenses are of the same or similar character or where they are based on a series of acts connected together or constituting parts of a single scheme or plan. Cr R 4.3(a)(1) and (2). This rule is construed broadly to ensure and promote conservation of judicial and prosecution resources. State v. Bryant, 89 Wash. App. 857, 864, 950 P.2d 1004 (1998).

Offenses properly joined under CrR 4.3(a) may be severed if the court determines the severance will promote a fair determination of the

defendant's guilt or innocence of each offense. Cr R 4.4(b), State v. Bythrow, 114 Wash. 2d 713, 717, 790 P.2d 154 (1990). The party seeking a severance has the burden of demonstrating joinder is so manifestly prejudicial as to outweigh concerns for judicial economy. State v. Russell, 125 Wash. 2d 24, 135, 882 P.2d 747 (1994). Failure of the trial court to sever counts is reversible only upon a showing that the trial court's decision was a manifest abuse of discretion. Bythrow, 114 Wash. 2d at 717-718. "In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice." Id. at 720.

In evaluating whether a denial of a motion to sever amounts to manifest abuse of discretion, a reviewing court must balance the potential prejudice against the following mitigating factors: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and(4) the admissibility of evidence of the other charges even if not joined for trial. Russell, 125 Wash. 2d 62-63.

Evidence of Phan's guilt on all counts were equally strong and easy to compartmentalize. Phan's victims all articulated similar instances and manner of sexual abuse. Their disclosures were age appropriate and

the opportunity for such abuse corroborated by each other and third parties. Additionally, a forensic medical exam revealing AP's hymen was significantly eroded, further corroborated AP's disclosure that she had endured extensive long term sexual abuse by her father.

Similarly strong was evidence Phan possessed child pornography. AP testified she often observed Phan downloading, creating DVD's of child and adult pornography. Phan, she explained, would mark those DVD's with an 'X' or 'xxx.' The possession of child pornography allegations were primarily presented through investigators who searched Phan's home and found the videos marked with 'xxx' that they later determined contained child pornography. Thus, the evidence while strong on all the counts, were presented in as compartmentalized a manner to ensure minimal potential for prejudice, consistent with the trial court limiting instruction to the jury instructing them not to use evidence of any once crime to convict Phan of any other charged crime.

Phan's defenses to the sexual abuse allegations and possession of child pornography charges were the same. Phan generally denied all of the allegations but also suggested all the allegations were the result of a contentious divorce. Phan inferred through questioning, his wife Kim wanted a financially advantageous divorce and A.P. wanted freedom from

her strict father. Phan argued A.P. was upset that her father had threatened to disown her if she had a boyfriend, wanted to be able to go out and have a social life. Consistent with this defense, Phan denied possessing the child pornography and inferred during questioning of officers, that A.P. could have planted the evidence and directed officers to this evidence. See RP 1230. Thus, Phan could not demonstrate joining all of these charges was unduly prejudicial to his defense where his defense encapsulated all of the charges.

Evidence that Phan possessed child pornography was additionally cross admissible in the child rape and molestation case because Phan used pornography to groom and initiate sexual contact with A.P.. A.P. testified that Phan would watch videos with her while she sat on his lap prior to engaging in molestation or engaging in sexual intercourse or while they were engaged in sexual contact. Similarly, K.P. testified Phan would touch her potty spot while she sat on his lap and watched videos with Phan on their computer. A.P. testified Phan watched and downloaded all kinds of pornography, inclusive of child pornography.

Admissibility of evidence lies within the discretion of the trial court and is only reversible when the trial court abuses that discretion; that is, when no reasonable person would take the view adopted by the trial

court. State v. Atsbeha, 142 Wash. 2d 904, 913-14, 16 P.3d 626 (2001). Generally, pursuant to ER 404(b), evidence of other crimes or acts is not admissible to prove the character of the person or in order to show action in conformity therewith. Under the res gestae exception however, evidence of other crimes may be admissible to complete the story or provide context for events close in time and place to the charged events. State v. Tharp, 27 Wash. App. 198, 616 P.2d 693 (1980) aff'd, 96 Wash. 2d 591, 637 P.2d 961 (1981).

Evidence of Phan's use of his pornography collection, inclusive of child pornography, was admissible within the discretion of the trial court pursuant to the res gestae exception to explain how Phan groomed A.P. and was starting to groom K.P. to engage in sexual contact and intercourse. Moreover, evidence Phan had pornographic videos marked with an 'xxx' as A.P. reported was relevant to further corroborating A.P.'s allegations that Phan used these videos prior to and during sexual contact with her. Therefore, even if severed, evidence pertaining to Phan's possession of child pornography would have been before the jury in the rape and molestation case. The trial court recognized granting a severance would require the state to duplicate evidence in multiple trials and require A.P. to testify twice. The trial court also understood it would be important

to ensure the jury be instructed to consider evidence pertaining to each count separately.

Phan argues nonetheless, that pursuant to Sutherby, severance of the charges is required when the charges are of a sexual nature because the very nature of all of these allegations creates a potential prejudice that the jury may use evidence of one crime to infer the defendant's guilt on another or general disposition. Sutherby, 165 Wash. 2d 870, *citing* Russell, 125 Wash. 2d, 62-3. In Sutherby, the state charged one count of child rape and one count of child molestation and, *ten* counts of possession of child pornography. The reviewing court determined, in the context of an ineffective assistance claim, that evidence of Sutherby's possession of pornography was not relevant and would not have been admissible had the child molestation/rape case been tried separately. In addition, the court was troubled by the prosecutor's exploitation the prejudicial fact that Sutherby was charged with ten counts of child pornography to obtain a conviction on the one count of child molestation and one count of rape. Particularly, when the jury was *not* instructed or given a limiting instruction to ensure they decided each count separate from one another.

While Sutherby cautions trial courts to be careful, it does not preclude a trial court from continued joinder of such offenses where the

potentially prejudicial evidence is cross admissible either because possession of pornographic shows sexual desire for the particular victim or in this case, where the evidence of the possession of pornography is otherwise admissible because Phan *used* the pornography he possessed, some of which A.P. testified was child pornography, to groom at least one of Phan's victims. The trial court also was assured that the prosecutor did not intend to exploit the prejudicial nature of the pornography charges to obtain a conviction of the child rape and molestation charges. Finally, the trial court planned to instruct the jury to consider each count separately and not find Phan guilty of any one count based on evidence pertaining to another. CP 195-245. The jury is presumed to follow the court's instruction. Russell, 125 Wash. 2d at 27. Under these circumstances, the trial court acted well within its discretion to deny Phan's request to sever his charges.

2. Phan cannot demonstrate the trial court's decision to deny his request for a Frank's hearing was clearly erroneous where the record reflects the information allegedly omitted from the warrant application was neither material to a probable cause finding or was intentionally or recklessly omitted in an effort to mislead the magistrate issuing the warrant.

Phan next argues the trial court erred denying a Frank's hearing based on Phan's allegation that information provided to the magistrate to

obtain a search warrant of the Phan home for child pornography was 'stale' because the detective who sought the warrant did not advise the issuing magistrate that A.P. had last seen 'some' of the child pornography two years prior to the warrant application. Br. of App. at 20, CP 50. Phan contends the fact that 'some' of the pornography had not been seen for two year was 'material' and this omission led the magistrate into "a false finding of probable cause." Br. of App. at 20.

Phan's request for a Frank's hearing to challenge the search warrant was appropriately denied because Phan failed to make any substantial preliminary showing that the request for a search warrant was predicated on an intentional or reckless material misstatement or omission of material fact. A.P. gave two interviews to law enforcement. In her first interview A.P.detailed the sexual abuse she endured and explained the role Phan's pornography played in the abuse. She explained Phan had her watch pornography with him when she was young and would often fondle her under her clothing while they watched it. CP 56-61. As A.P. became older, she explained pornography often led to sexual intercourse between her and Phan. During this interview, AP disclosed it had been a year and a half since she had seen 'some' of the pornography. Id. When AP was interviewed a second time, she provided investigators additional observations of Phan's use and possession of child pornography. AP

advised, consistent with the warrant application, that Phan had pictures of naked girls on his iPod and phone and that she had seen these images within the last week. Id. AP also detailed that Phan often downloaded child pornography to disks and gave or sold these disks to his friends. Id. Based on the information AP provided in both these interviews, investigators sought and obtained a search warrant of the Phan home.

A search warrant may issue only upon a determination of probable cause. State v. Atchley, 142 Wash. App. 147, 161, 173 P.3d 323 (2007)(*citing* State v. Cole, 128 Wash. 2d 262, 286, 906 P.2d 925 (1995)). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. Atchley, 142 Wash. App. at 161, *citing*, State v. Thein, 138 Wash. 2d 133, 140, 977 P.2d 582 (1999). "To establish probable cause, the affidavit for a search warrant 'must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity.' " Atchley, 142 Wash. App. at 161(*quoting* State v. Cord, 103 Wash. 2d 361, 365, 693 P.2d 81 (1985)).

Probable cause requires only a probability of criminal activity, not a prima facie showing. State v. Maddox, 152 Wash. 2d 499, 505, 98 P.3d 1199 (2004). In determining probable cause, the magistrate makes a

practical, commonsense decision, and is entitled to draw reasonable inferences from all the facts and circumstances set forth in the affidavit. Maddox, 152 Wash. 2d at 505. As noted, a magistrate's determination of probable cause is reviewed for abuse of discretion, the determination is accorded great deference by the reviewing court, and doubts are to be resolved in favor of the warrant's validity. Atchley, 142 Wash. App. at 161, State v. Chenoweth, 160 Wash. 2d 454, 477, 158 P.3d 595 (2007).

Factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material ***and*** (b) made in reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 155, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); Cord, 103 Wash. 2d, 366.(***emphasis added***.) A showing of mere negligence or inadvertence is insufficient to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. Franks, 438 U.S. at 17, State v. Seagull, 95 Wash. 2d 898, 908, 632 P.2d 44 (1981).

As a threshold matter, the defendant must first make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and that the allegedly false statement was necessary to the finding of probable cause." Id. Specifically, the defendant's allegations must be accompanied by an offer of proof, indicating the

portion of the warrant affidavit at issue, and the offer of proof should include relevant statements of witnesses and reasons supporting the claims. Franks, 438 U.S. 154. Assertions of mere negligence or innocent mistake are insufficient. Id. Rather, the defendant must allege deliberate falsehood or reckless disregard for the truth. Id.

The ***Franks*** test for material representations has been extended to material omissions of fact. Cord, 103 Wash. 2d at 367. Material omissions, similar to misrepresentations, will invalidate a search warrant only when made recklessly or intentionally. Chenoweth, 160 Wash. 2d at 484. In examining whether an omission rises to the level of a misrepresentation, the proper inquiry is not whether the information tended to negate probable cause or was potentially relevant, but, rather, the court must find the challenged information was necessary to the finding of probable cause. State v. Garrison, 118 Wash. 2d 870, 874, 827 P.2d 1388 (1992). If the defendant succeeds in showing a deliberate or reckless omission, then the omitted material is considered part of the affidavit. Garrison, 827 P.2d 1388. "If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required." Id. A trial court's conclusion that the affiant did not recklessly omit material facts in

obtaining a search warrant will be upheld where such determination is not clearly erroneous. Chenoweth, 160 Wash. 2d at 484**.**

Phan cannot demonstrate from this record that the trial court's decision to deny his request for a Frank's hearing was clearly erroneous. Phan asserted below the detective omitted the fact that AP had not seen 'some' of the pornography in the Phan home in two years and that she believed 'it had been discarded or destroyed' when she applied for the search warrant. RP 45, Br. of App. at 20. Phan argued had the issuing magistrate been given this information, she would have found the facts supporting the search warrant 'stale' and denied issuing the search warrant.

Nothing in Phan's offer of proof below demonstrated this information was recklessly and/or intentionally omitted by the affiant. See, RP 45. Additionally, as the trial court concluded, the alleged omitted information was not material to the trial court's probable cause finding. Had the issuing magistrate known AP had not seen 'some'of the pornography she described for two years and that she thought it had been destroyed, this information would not have rendered the basis for the search warrant 'stale' because the detective also accurately told the magistrate AP had reported seeing child pornography on Phan's phone, iPod and computer at the Phan home within the week prior to the request

for the search warrant. CP 56-61. Thus, the remaining information given to the issuing magistrate was accurate and with or without the allegedly missing information, supported the issuance of the warrant. In addition to failing to demonstrate this allegedly omitted information was material to the magistrates' probable cause determination, Phan made no showing the detective intentionally omitted this information with reckless disregard of the truth. The trial court appropriately denied Phan's request for a Frank's hearing.

3. Phan cannot demonstrate he suffered the requisite prejudice to warrant a new trial from the trial court's alleged error denying a 'for cause' challenge of a juror where Phan later excused the same juror from sitting on his jury using a peremptory challenge.

For the first time on appeal, Phan next argues the trial court erred denying a 'for cause' challenge of a juror he later excused from sitting on his jury via a peremptory challenge. If a defendant, through the use of his peremptory challenges elects to cure an alleged trial court error of not excusing a juror 'for cause' and is convicted by a jury on which no alleged bias juror sat, a defendant cannot demonstrate the prejudice required to warrant reversal regardless of whether the juror should or should not have been excused for cause. State v. Fire, 145 Wash. 2d 152, 34 P.3d 1218

(2001). Phan alleges the same error argued in Fire. Phan is not entitled to a new trial.

The denial of a challenge for cause is reviewed for abuse of discretion. State v. Gonzales, 111 Wash. App. 276, 278, 45 P.3d 205 (2002). A defendant has a right to an impartial jury under both the federal and state constitution. State v. Roberts, 142 Wash. 2d 471, 517, 14 P.3d 713, 717 (2000), as amended on denial of reconsideration (Mar. 2, 2001), . A prospective juror should be removed for cause when the juror's views and or opinions would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Hughes, 106 Wash. 2d 176, 181, 721 P.2d 902 (1986), *quoting*, Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). This 'actual bias' refers to the juror's state of mind to be impartial and act without prejudice to any party in the proceeding. Id.

In Fire, 145 Wash. 2d 152, our state supreme court considered the same issue Phan asserts herein. Fire was charged with child molestation and similar to this case, Fire challenged a potential juror during jury selection who expressed difficulty remaining impartial on a sexual abuse case. After the trial court denied Fire's 'for cause' challenge, determining the alleged juror could put aside the previously expressed bias concerns, Fire opted to use one of his peremptory challenges to remove the

challenged juror. The state supreme court concluded that *even if* the potential juror should have been excused, Fire was not entitled to a new trial because that challenged juror did not sit on the jury that convicted him. Thus, the court could found Fire suffered no prejudice to warrant reversing Fire's conviction.

As in Fire, the juror Phan unsuccessfully requested be excused 'for cause' was subsequently excused by Phan using a peremptory challenge. Thus, the challenged juror did not sit on the jury that convicted Phan as charged. Under these circumstances, Phan cannot demonstrate he suffered the prejudice required to warrant a new trial.

4. Phan was not entitled to cross examine A.P. or collaterally prove A.P. had a sexual relationship with a boyfriend because this evidence was collateral to the issues before the jury, irrelevant and at best, only remotely demonstrated bias and Phan was otherwise able to explore A.P. motive and bias.

Next, Phan argues the trial court violated his right to a fair trial by limiting his right to cross examine A.P. on her alleged sexual relationship with a boyfriend. Br. of App. at 30. Phan was permitted to question A.P. about her complex relationship with her father including that how strict Phan was, that she wasn't allowed to have friends and that Phan had disowned and stopped talking to her when he discovered she had a

boyfriend weeks before A.P. disclosed abuse. Phan cross examination of A.P. was only limited to preclude Phan from trying to question A.P. about the collateral issue of whether A.P. had a sexual relationship that A.P. testified her father accused her of having and that A.P. denied having. The trial court concluded this line of inquiry was collateral and irrelevant to the issues before the jury and therefore within the trial court's discretion to limit.

A defendant has the right to present a defense and to confront and cross examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). This right encompasses the right to impeach State's witness with relevant bias evidence. State v. Buss, 76 Wash. App. 780, 787, 887 P.2d 920 (1995) *abrogated by State v. Martin*, 137 Wash. 2d 774, 975 P.2d 1020 (1999), Davis, 39 L. Ed. 2d 347. A trial court may refuse cross-examination where the evidence only remotely shows bias, is merely argumentative, irrelevant or speculative. State v. Guizzotti, 60 Wash. App. 289, 293, 803 P.2d 808 (1991). Extrinsic evidence cannot be used to impeach a witness on matters collateral to the principle issues being tried, even if the evidence may have some indirect bearing on motive, bias or prejudice. State v. Carlson, 61 Wash. App. 865, 812 P.2d 536 (1991).

The scope of cross-examination is within the sound discretion of the trial court. State v. Portnoy, 43 Wash. App. 455, 459, 718 P.2d 805 (1986), State v. Darden, 145 Wash. 2d 612, 41 P.3d 1189 (2002), State v. Franklin, 180 Wash. 2d 371, 325 P.3d 159 (2014)(an appellate court reviews a decision to exclude evidence for abuse of discretion even when the ruling implicates a constitutional right to present a defense.). On review, the appellate court will determine the trial court abused its discretion if it based its decision on untenable grounds or for untenable reasons. State v. Johnson, 90 Wash. App. 54, 60, 950 P.2d 981 (1998).

Contrary to Phan's allegations, the trial court permitted Phan to explore A.P.'s conflict with Phan over the allegation that A.P. had a boyfriend with whom Phan accused her of being sexually active with as motive for A.P. making up sexual abuse allegations. RP 267, 284-5. After A.P. testified on direct examination that her father accused her of having a boyfriend, that he had accused her of being sexually active with her boyfriend but that she had not had sex with her boyfriend, the trial court permitted Phan to confirm cross examination that AP was denying that she had a sexual relationship with her alleged boyfriend and to explore AP's hurt and anger with Phan's strict rules, his disapproval over her having any boyfriend and his decision to tell A.P. he had disowned her because she had a boyfriend. The trial court limited Phan to cross examining A.P.

on matters that were directly relevant to the issues before the jury and to A.P.'s credibility and motive for making up allegations.

The court precluded Phan from going into any details of A.P.'s alleged 'sexual' relationship with a boyfriend because it determined within its discretion that permitting Phan to delve further into A.P.'s alleged sexual conduct with this alleged boyfriend was unnecessary, beyond the suggestion and accusation that Phan had already made, where Phan could tie A.P.'s testimony together with testimony that investigators found semen on A.P.'s sheets that analysis did not identify as belonging to Phan. This evidence suggested exactly what Phan alleged. That A.P. had a sexual relationship not with her father but with a boyfriend and that she covered it up in part, by alleging she had been sexually abused by Phan, in order to ensure her ability to have a boyfriend and get out from under her oppressive father. RP 568. AP's sexual conduct with her boyfriend beyond the allegation and her denial of any such relationship had no bearing on Phan's guilt of a strict liability child rape or molestation allegation. Only evidence that bared on A.P.'s credibility or bias was appropriate. Phan's cross examination as permitted sufficiently allowed Phan to examine A.P.s motive and bias without going into collateral matters regarding the nature of her alleged sexual relationship with this boyfriend.

Even if the trial court erred limiting Phan's cross examination of A.P. on her sexual relationship with her alleged boyfriend, this alleged error was harmless beyond a reasonable doubt. Franklin, 180 Wash. 2d, 377. Child rape and molestation are strict liability crimes. Therefore, evidence pertaining to whether A.P. had a sexual relationship with an alleged boyfriend was of no relevance to whether Phan sexually abused her. Phan wasn't and couldn't seek to introduce 'other suspect' evidence. And to the extent the evidence was relevant as to A.P.'s bias or motive for alleging sexual abuse; Phan was sufficiently able to explore her bias and motive without going into the details of her sexual relationship with her boyfriend. Phan questioned her on her frustration with her father's rules, his disapproval of her boyfriend, his unwillingness to permit her to have friends or be social. Moreover, Phan was able to suggest, based on DNA analysis, that the semen found on AP's sheets, likely belonged to her boyfriend since scientists couldn't match the semen to Phan. Phan's inability to collaterally prove A.P. was sexually active with a boyfriend, in contrast to her testimony, was therefore harmless beyond a reasonable doubt.

5. The court acted well within its discretion to qualify a sexual abuse therapist as an expert witness and permitting her to testify in a limited capacity on the general dynamics of child sexual

abuse and patterns of abuse disclosures in children.

Phan asserts the trial court also erred permitting the state to present expert testimony regarding the general dynamics of child sex abuse cases. Specifically, Phan complains the trial court abused its discretion permitting Gaasland-Smith to testify "about what sex offenders "sometimes" say to their victims or what "most" children victims of sexual abuse do or feel." Phan argues this alleged testimony was irrelevant, prejudicial and should have been excluded. Br. of App. at 38. Phan exaggerates the record.

Ms. Gaasland-Smith, an employee of the prosecutor's office, testified as a sexual assault specialist in this case. RP 101. After providing her qualifications, she testified generally about the dynamics of child sexual abuse and the manner and reasons why children may delay disclosing or disclose in a piece meal fashion. She explained why it is common for children to avoid or delay disclosing child abuse because children don't want to think about it, there may be fears or *sometimes the perpetrator will tell a child* that it's their fault that the abuse is going on. RP 464-5. After Phan objected, the trial court cautioned the prosecutor to focus questions on children's reactions and the trial court clarified to the jurors that Gaasland-Smith's testimony is simply to testify about her

experience and knowledge about the reactions of children to sexual abuse; specifically, the delayed reporting phenomena. RP 465-66. The trial court went on to say:

> Anything the witness has said thus far about other perpetrators or about people who have been accused in other cases, in fact, any remark the witness has made about perpetrators you should know that that is in, that's background information, it's not about Mr.Phan, who is not a perpetrator, has not been established as a perpetrator in this case or any case, that is the presumption of innocence still applies. So understand the witness's testimony, please, as being general background information on the issues of disclosure rather than any facts about this particular case.

RP 467. Later during testimony in response to Phan's continuing objections the trial court again cautioned the jury:

> …the court has instructed the jury and I'll remind them that this testimony is general testimony about children that have been abused in a variety of contexts, it's nothing, you shouldn't make any inferences from this testimony about the facts of this case because the facts of this case may or may not be different and in any event the facts of this case have yet to be proved to you beyond a reasonable doubt before you can make a fact finding.

RP 472. The court went on to explain Gaasland-Smith's testimony is relevant because it is designed to help the jury assess the reports of the children and to understand the family dynamics as they may relate to a child disclosing sexual abuse. RP 473.

Phan argues that Gaasland-Smith *repeatedly* testified about how *perpetrato*rs of child abuse sometime behave. Br. of App. at 38-39. The record belies his argument. Gaasland-Smith made ***one isolated*** statement

in response to a general question regarding why children may not disclose abuse that referenced perpetrators. Moreover, following Phan's objection to Gaasland-Smith's initial isolated response that referred to a perpetrator in the context of responding to a question about child sex abuse victims, the trial court cautioned jurors that Gassland-Smith was not a fact witness and was only generally testifying about the dynamics of child abuse in families and typical disclosure patterns common to child abuse. Thereafter, Gaasland-Smith made no other references to what perpetrators may or may not do. Phan cannot demonstrate Gaasland-Smith's isolated comment, in these circumstances, could have any prejudicial impact on the fairness of Phan's trial.

Notwithstanding this, Phan continues to assert the trial court abused its discretion permitting Gaasland-Smith's testimony under ER 702. First, Phan contends Gaasland-Smith education, training and experience fail to qualify as an expert. Br. of App. at 38. Expert testimony is admissible if the witness is qualified as an expert, the expert relies on theories that are generally accepted in the scientific community and the trial court determines the testimony would be helpful to the trier of fact. State v. Farr-Lenzini, 93 Wash. App. 453, 461, 970 P.2d 313 (1999).

The record demonstrates the trial court appropriately determined Gaasland-Smith qualified as an expert. Gaasland-Smith holds two has two

bachelor degrees and a master's degree in social work from the University of Washington in 1990. RP 456. Prior to working with victims of sexual abuse as the Sexual Assault specialist in 1997, Gaasland-Smith worked with children and adult survivors of sexual abuse in private practice and through contracts with organizations such as Bridget Collins house, the Bellingham School district and Northwest Youth Services. RP 458. As a clinical social worker, Gaasland-Smith also explained she served as an adjunct professor at Western Washington University in classes on child abuse and neglect and continues to attend continuing education trainings. During Phan's vior dire challenging her credentials, Gaasland-Smith explained she also relies on written materials on sexual abuse by experts in the field to support her testimony. RP 464. Gaasland-Smith's education, training and experience provide her with adequate foundation to testify generally to dynamics commonly seen in families struggling with sexual abuse and the different ways children react and or, may disclose. Phan's assertion that the trial court abused its discretion concluding Gaasland-Smith could testify as an expert, is not well-founded and should be rejected. State v. Johnston-Forbes v. Matsunaga, 181 Wash. 2d 346, 333 P.3d 388 (2014).

Phan also asserts Gaasland-Smith's testimony was irrelevant and prejudicial. Expert testimony is considered helpful if it concerns matters

beyond the common knowledge of the average layperson and does not mislead the jury. State v. Thomas, 123 Wash. App. 771, 778, 98 P.3d 1258 (2004). Expert testimony generally describing symptoms exhibited by victims may be admissible when relevant and when not offered as a direct comment or assessment on the credibility of the victim. State v. Stevens, 58 Wash. App. 478, 794 P.2d 38 (1990).

Trial courts have broad discretion to determine the circumstances under which expert testimony will be allowed. Johnston-Forbes, 181 Wash. 2d, 354. Therefore, a trial court's decision to admit expert testimony is reviewed for abuse of discretion. State v. Kirkman, 159 Wash. 2d 918, 927, 155 P.3d 125 (2007). As long as helpfulness is fairly debatable, a trial court does not abuse its discretion allowing an expert to testify. State v. Simon, 64 Wash. App. 948, 963, 831 P.2d 139 (1991) aff'd in part, rev'd in part, 120 Wash. 2d 196, 840 P.2d 172 (1992).

The dynamics of child abuse are not common to everyday lay persons. As such, testimony from an expert who has training, education and experience in the field is helpful in educating the jury to understanding why a child subjected to sexual abuse may not report, delay or provide a piecemeal disclosure. State v. King Cnty. Dist. Court W. Div., 175 Wash. App. 630, 307 P.3d 765 review denied, 179 Wash. 2d 1006, 315 P.3d 530 (2013). This testimony does not invade the jury so

long as the jury is left deciding the credibility of the disclosures, the fact evidence and guilt of the accused. Nothing in the record suggests Gaasland-Smith's testimony invaded the province of the jury on Phan or any other witness's credibility. Phan's argument predicated on general assertions regarding Gaasland-Smith's testimony and not specific concerns reflected in the record should be rejected.

6. The evidence presented below, examined in the light most favorable to the state, supports the jury verdict that Phan molested A.D. during a sleep over at the Phan residence where A.D. describe this incident in appropriate detail and could testify generally that this abuse occurred when she was eight or nine years old.

A person is guilty of first degree child molestation when the person has or knowingly causes sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.083 (1). Phan argues the state failed to prove Phan had sexual contact with A.D. within the charged time frame of June 2008 and March 2013. Br. of App. at 40.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hayes, 81 Wash. App. 425, 914 P.2d 788 (1996). The reviewing court defers to the trier of fact to resolve issues of

credibility, conflicts in testimony, weight to be given the evidence and reasonable inferences taken from such evidence. Id.

Inherent in prosecuting child sex abuse cases, is the difficulty in children recalling exactly when they were raped or molested. Children remember the details of the incident but often cannot be as specific on when the incident occurred. Recognizing this problem, Washington courts have approved use of 'generic' child testimony to support these types of convictions. State v. Brown, 55 Wash. App. 738, 780 P.2d 880 (1989) "to require [the victim] to pinpoint the exact dates of oft-repeated incidents of sexual contact would be contrary to reason." Id. Therefore, so long as the alleged victim can describe the kind of act or acts with sufficient specificity to the trier of fact to determine what offense, if any, has been committed, can describe the number of acts committed with sufficient certainty to support each of the alleged counts and describe the general time period in which the acts occurred, the evidence is sufficient to support the conviction. Time is not a material element of this type of offense.

A.D. described one incident that occurred when she slept over at the Phan residence when she was eight or nine. She testified she took a bath with Phan and his youngest daughter, K.P.. A.D. testified Phan washed her potty spot. K.P. also testified Phan kissed both girls and had

the girls kiss each other on the lips. This testimony is sufficient to support Phan's conviction for molesting A.D. on or about June 1st 2008 and March 30, 2013. At trial, in July of 2014, A.D. (d.o.b. 1/19/2004) was ten years old. A.D. thought she was eight or nine when she spent the night at the Phan residence. RP 656. Even if time were an element of the offense, A.D.'s testimony places her as being molested at the Phan residence in 2012 or 2011, well within the time frame charged. RP 656. A.D.'s general testimony that she thought she was eight or nine years old when Phan molested her is sufficient to support her conviction where she very was able to describe the nature of the abuse including where it occurred, what happened and how many times this occurred. Phan's challenge to the evidence should be rejected.

F. CONCLUSION

Based on the foregoing, the state respectfully requests this Court affirm Phan's convictions for multiple convictions of child rape, molestation and possession of child pornography.

Respectfully submitted this _____ day of September, 2015.

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CERTIFICATE

I certify that on this date I caused to be delivered a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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TDAStavik _____ 9/24/15

Legal Assistant Date