74056-3

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Court of Appeals
Division I
State of Washington

NO. 74056-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JORGE ZAYAS-LOPEZ,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

AMENDED BRIEF OF APPELLANT

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A. INTRODUCTION

Following a jury trial in King county superior court, appellant Jorge Zayas-Lopez was convicted of three counts of first degree rape of a child, one count of first degree child molestation and one count of communicating with a minor for immoral purposes. CP 159-63. The state alleged the charges were committed against A.B., the 11 year-old daughter of Zayas-Lopez's fiancée Armida Castro, while Zayas-Lopez was living with Castro and her daughters between April 2012 and September 2013. CP 1-7, 12-14.

Despite the number of people living in the couple's small apartment at various relevant times, the state offered no witness who ever saw any untoward conduct by Zayas-Lopez toward A.B. or Castro's other daughters. See e.g. RP 1591-95, 1065-66, 1074, 1081, 1085, 1593, 1622, 1635, 1641-42, 1732, 1748.

A.B. made the accusations one weekend in late October 2013, following the deterioration of Castro and Zayas-Lopez's engagement, which culminated in Castro calling the police after Zayas-Lopez took her car without permission. CP 16-17; Supp. CP __ (sub. no. 74, State's Trial Memorandum, 5/7/15); RP 880, 1270-77, 1626-27, 1721. A.B. admitted she wanted she wanted her

mother and Zayas-Lopez to break up. RP 1544-45. She had witnessed domestic violence between the two and was afraid Zayas-Lopez might hurt her mother. RP 1583.

Zayas-Lopez testified at trial and denied all charges. RP 1619-76. The case therefore boiled down to credibility. See e.g. RP 663 (state acknowledging no eye-witnesses, no forensic evidence). As argued in this brief, evidentiary error and improper opinion testimony likely caused jurors to weigh A.B.'s testimony more heavily than it otherwise would have and therefore impacted the outcome of the trial.

B. ASSIGNMENTS OF ERROR

1. The court erred in admitting A.B.'s non-verbal accusations in the absence of a legitimate hearsay exception.

2. Trial irregularity deprived Zayas-Lopez of his right to a fair trial.

3. The court erred in calculating Zayas-Lopez's offender score.

Issues Pertaining to Assignments of Error

1. Did the court err in admitting gestures A.B. made to the investigating officer and the forensic interview specialist while she was describing the sexual abuse that allegedly occurred, where

such gestures depicted sex acts, such as masturbation and oral sex?

2. Did the court err in denying Zayas-Lopez's motion for a mistrial – based on improper opinion testimony – following the advanced nurse practitioner's testimony that after interviewing A.B., the practitioner told A.B. "a little bit about how I see kids every day and that this has happened to other kids and that it was very brave that she told about it?"

3. An ambiguous verdict must be interpreted in favor of the accused. State v. DeRyke, 110 Wn. App. 815, 41 P.3d 1225 (2002). Where the jury could have convicted Zayas-Lopez of two counts of rape based on two alleged acts of penetration occurring during a continuing course of conduct, did the court err in counting the offenses separately at sentencing?

C. STATEMENT OF THE CASE[1]

1. Defense Motion to Exclude Hearsay

As the parties' pre-trial pleadings indicated, Castro called police on Sunday, October 20, 2013, to report allegations A.B. made after Zayas-Lopez took Castro's car. CP 17; Supp. CP __ (sub. no. 74, State's Trial Memo, 5/7/15). Kent police officer Melvin

Partido responded and took A.B.'s statement. Id. On October 24, 2013, A.B. was interviewed by Forensic interview specialist Carolyn Webster. Id. The interview was audio and video recorded. CP 19. The defense moved to exclude A.B.'s statements to Partido and Webster as inadmissible hearsay. CP 31-32, 129.

The state agreed to exclude A.B.'s oral statements but argued certain gestures she made during the interviews should be admitted. RP 96-97. Apparently, A.B. made a "jacking off" gesture when giving her statement to Partido. RP 97-98. During her forensic interview with Webster, A.B. made gestures demonstrating oral sex. RP 198.

The defense argued A.B.'s gestures were tantamount to assertions of what purportedly happened and therefore hearsay. CP 137-38; RP 198-200. The state responded it should be allowed to offer A.B.'s gestures as evidence of precocious sexual knowledge. CP 143-44; RP 203.

[1] "RP" refers to the jury trial held in May and June 2015. "1RP" refers to a hearing held on June 3, 2015, and sentencing on October 2, 2015, respectively.

As an alternative to exclusion, the defense took the position that if admitted, the gestures should be described, not shown, and the court therefore should exclude the video of A.B.'s gesture during the forensic interview. CP 143-44. The court ruled that if the state limited the evidence solely to showing precocious knowledge, the gestures, including the video, could be admitted. RP 208.

Before Webster's testimony, the court considered again whether the gestures were in fact hearsay: "if the child was saying, this is what I did, this is what I saw, then that is – that is a statement, hearsay statement. This is what I did. Right?" RP 1131. The state responded it was offering the gesture "to show that she's familiar with this adult male masturbatory gesture." RP 1131. The court acquiesced: "So, if you can present it just that way, yes." RP 1131.

In asking whether the defense wanted a limiting instruction, the court recognized, "It's a tough one." RP 1132. The defense declined. RP 1132.

2. Trial Testimony

When Castro and Zayas-Lopez met in the summer of 2011, Castro was living at the Silver Springs Apartments in Kent with her

three daughters A.B., Amaia and Alessandra ("Ali"). RP 1194, 1202. A.B. is the oldest, Amaia is two years younger than A.B., and Ali is about four years younger than Amaia. RP 1183, 1190-91. A.B. and Amaia have the same father, but he was not involved in their lives until after A.B. made the allegations at issue here. RP 1203, 1254.

In September 2011, Castro became pregnant and Zayas-Lopez moved in with Castro.[2] RP 1202. Throughout her relationship with Zayas-Lopez, Castro never saw anything between Zayas-Lopez and her daughters that caused her concern. RP 1305.

In anticipation of the baby's arrival, in April 2012, Castro and Zayas-Lopez moved into a bigger apartment in the same complex – C-206 – a three-bedroom, two-bathroom apartment. RP 1196-1200. Castro and Zayas-Lopez's master bedroom had its own bathroom and the girls' bathroom was across the hall from the room where all three girls slept in the same King-sized bed. 1078-80, 1113, 1206-07, 1308, 1379, 1539. The third bedroom was for the baby, but A.B. sometimes slept in it, as did house guests such as

[2] Their daughter Syanne was born in July 2012. RP 1192.

Zayas-Lopez's mother Judith Gonzales and Castro's friend Shukri Del. RP 1206, 1247.

Castro testified Gonzales stayed intermittently at C-206 and also at her daughter's house, between February and April 2013. RP 1282-83. Castro testified Gonzales and Del's stays at C-206 overlapped. RP 1284.

Gonzales testified she stayed with Castro and Zayas-Lopez for a month and left in April 2013. RP 1591-92. Gonzales never witnessed anything inappropriate between Zayas-Lopez and Castro's daughters. RP 1593.

Shukri Del stayed with Castro and Zayas-Lopez in April-May 2013. RP 1065-66. She testified Zayas-Lopez's interaction with the girls was normal and that she observed nothing inappropriate. RP 1074. Del never saw Zayas-Lopez sleep in any bedroom other than his own and never saw him go into any other bedroom. RP 1109. Del testified the bedrooms in the apartment were fairly close together and the walls were thin. RP 1081. She described the apartment as small and testified you could hear everything. RP 1081, 1085. As she explained, there was no privacy. RP 1116.

Del claimed that one morning from her room she overheard A.B. and Zayas-Lopez in the living room. RP 1085. According to

Del, Zayas-Lopez told A.B. to tell her mother she was sick and stay home from school. RP 1085. Afterward, Del reportedly heard the phone ring and A.B. telling the caller, presumably Castro, she was sick. RP 1087-88. Castro sometimes allowed the girls to stay home and ride the bus to school instead of dropping them off at daycare on her way to work.[3] RP 1208-09, 1216. Castro would call to make sure the girls were ready to catch the bus. RP 1087, 1149, 1244-45.

Del told Castro about what she reportedly overheard, but Castro never asked Zayas-Lopez about it. RP 1092, 1260-62. Castro believed Del did not like Zayas-Lopez and was trying to cause trouble. RP 1262. Del and Zayas-Lopez butted heads. RP 1262. A.B.'s school records for April 2013 did not indicate any absences.[4] RP 1602-03.

Castro testified that beginning in early 2013, Zayas-Lopez's inconsistent employment and drug use began to cause a rift in the relationship.[5] RP 1264-66. Despite complaining about Zayas-

[3] When Castro dropped the girls off at daycare, the daycare provider would take them to school. RP 1209.

[4] The school's records went up until April 22, 2013. RP 1599. The records custodian believed A.B. transferred to a different school at that time. RP 1599.

Lopez's reported drug use, Castro admitted she smoked cocaine with Zayas-Lopez in the summer of 2013. RP 1267-68.

Castro testified the last several months of the relationship were marked by yelling and physical fights. RP 1268-69. According to Castro, Zayas-Lopez constantly accused her of being unfaithful.[6] RP 1268. Castro also testified that she would try to catch Zayas-Lopez lying about his drug use by putting her hands in his pockets to see if he had drugs or paraphernalia. RP 1269, 1346-47. On such occasions, Zayas-Lopez would try to push Castro away and sometimes caused her to fall. RP 1269, 1347. Castro testified the girls saw her and were worried after Zayas-Lopez pushed her down in the hallway. RP 1347.

Amaia confirmed she witnessed Castro and Zayas-Lopez hit and hurt each other. RP 1388. A.B. likewise confirmed seeing Zayas-Lopez hit Castro. RP 1546. A.B. testified she thought Zayas-Lopez was on drugs. RP 1546.

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[5] Zayas-Lopez lost his job at an auto parts store in January 2013, but worked several temporary jobs afterward and was working in landscaping towards the end of the relationship. RP 1311-1313, 1623.

[6] Zayas-Lopez's mother and sister testified Castro was the jealous one. RP 1592, 1613.

Saturday morning on October 19, 2013, Castro fell asleep after breakfast. RP 1270. When she woke up, Zayas-Lopez and her car were gone. RP 1270. Castro acknowledged she had allowed Zayas-Lopez to borrow her car after he sold his. RP 1256. Castro called and texted Zayas-Lopez, but got no response. RP 1271-1272. Castro called police to report Zayas-Lopez as missing, but was told not enough time had elapsed. RP 1272.

The next morning, Castro called police again, either to report Zayas-Lopez as missing or her car as stolen. RP 1272. Because Zayas-Lopez had not brought the car back, Castro ended up having to call her pastor to take her to church. RP 1272. Castro's daughters overheard her say that "cokehead took my car and I have no ride." RP 1272.

While Castro was making dinner later that night, A.B. asked to speak with her in private. RP 1274-75. After hearing what A.B. had to say, Castro called police. RP 880.

Officer Partido responded around 8:20 p.m. and spoke to Castro and A.B.. RP 880-84. Partido testified that before taking A.B.'s statement, he explained he just wanted to know briefly what happened, to "establish what I am investigating." RP 885.

The prosecutor asked Partido if A.B. made any gestures while giving her statement. RP 885. Partido responded, "when she described different things." RP 885. When asked to describe the gesture, Partido testified:

> Okay. She described – she showed me a motion which, as if you were – say if you have a hammer, turn it upside-down, and you grab the top of the hammer with your hand and you rub the hammer up and down. That's what she described to me.

RP 886. Partido explained A.B.'s fingers were in a circle when she made the "up and down" gesture. RP 886.

Next, the prosecutor asked whether, "during the course of your conversation with A.B. did she point to any places on her body?" RP 886. Partido responded she pointed to "[h]er vaginal area and her buttocks area." RP 886. Although the prosecutor also elicited that A.B. "was ashamed" as she spoke to Partido, the court sustained defense counsel's objection. RP 886-87.

Castro testified that sometime after Partido left, Zayas-Lopez returned and accused her of being romantically involved with Partido. RP 1277. Castro reportedly told Zayas-Lopez to return her keys and leave. RP 1278. According to Castro, Zayas-Lopez pushed her and she fell on the bed. RP 1279. Castro claimed

Zayas-Lopez hit her in the face and choked her before leaving. RP 1280.

Partido responded to Castro's second 911 call around midnight. RP 891-92. He testified the left side of Castro's face was red and had not been so before, when he responded earlier. RP 893.

Zayas-Lopez testified that when he brought the car and keys back and was gathering his things to leave, Castro grabbed his arm and he accidentally hit her when he tried to pull away. RP 1626.

Castro took A.B. to Harborview the next day. RP 684-85. Social worker Kira Schreiber took a short statement from each after asking why they were at the emergency room. RP 687-88. According to Schreiber, A.B. essentially said her mother was dating a man that asked her to give him oral sex and keep it a secret from her mother. RP 687. Schreiber summarized what A.B. said to pediatric resident Jason Rubin. RP 723.

Rubin testified he asked A.B. when the last accused episode of sexual assault occurred and she said sometime in September. RP 726. Rubin physically examined A.B., including her genital and rectal area. RP 727-33, 729. He noted nothing unusual and no evidence of injury or trauma to A.B.'s hymen or rectum. RP 727-

33, 739. A.B. reported no history of bleeding. RP 755. Rubin testified that potentially, one would expect a tear or bleeding as a result of penetration. RP 739.

Joanne Mettler is an advanced registered nurse practitioner who performs head-to-toe physical exams – with the aid of a colposcope (a magnifying device) – of children who claim sexual abuse. RP 761, 766. She examined A.B. on October 30, 2013. RP 775. When Mettler asked why she was there, A.B. said, "about what happened to me." RP 780. When asked what happened, A.B. described vaginal and anal intercourse and said it happened on more than one day. RP 781. When asked who, she identified "George." RP 782.

Mettler continued and testified to the following:

> I then told her that I did not have any other questions. Did she have any questions?
>
> And she said, no. And then she said that she really did not want to talk about it too much, because she starts crying and it is painful.
>
> I said, that is fine, I did not want her to cry, that she did a really good job talking to me. I asked her if she had any other questions.
>
> And then she asked me if this has happened to other kids. I told her and talked with her a little bit about how I see kids every day and this has happened to other kids –

RP 782.

At this point, defense counsel objected and the jury was excused for a sidebar. RP 782. Defense counsel objected that these hearsay statements were not pertinent to medical diagnosis or treatment and that Mettler was giving a narrative. RP 783-84. The court agreed the statements were not relevant to a medical diagnosis or treatment. RP 785. The state appeared to agree, but focused on what it hoped to elicit next, that A.B. also told Mettler about Zayas-Lopez telling her to keep it a secret and that she and her mother no longer keep any "sexual secrets." RP 785-86. The court ruled that testimony would be allowed. RP 786.

When Mettler resumed testifying in front of the jury, the prosecutor elicited the same statements the court ruled were not relevant to medical diagnosis or treatment, in addition to the "secret" statement:

> Q. Nurse Mettler, please continue where we left off.
>
> A. Sure.
>
> Q. With "and I told her."
>
> A. I told her and talked with her a little bit about how I see kids every day and that this has happened to other kids and that it was very brave that she told about it.
>
> And she told me about how he told her to keep it a secret but now her and her mother have talked

about how they cannot keep secrets and cannot keep any sexual secrets.

And then we proceeded to the physical exam.

RP 788.

The defense later moved for a mistrial based on this testimony, on grounds Mettler's testimony was an improper comment on A.B.'s credibility and a comment on the ultimate issue. RP 828; CP 148-154 (citing State v. Carlson, 80 Wn. App. 116, 906 P.2d 999 (1995) (doctor's opinion testimony child was sexually abused was improper, because they were based on child's statements, rather than physical evidence); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (2000) (counselor's testimony alleged victim's description of abuse "very clear" was improper)).

The court denied the motion, reasoning the court did not take Mettler's testimony as "vouching:"

> So, I don't think that the statement when you tell – when she told the child you're brave, this happened to other people is vouching for the child. There was no indication from this witness that she was making any valuation about whether this child was credible or not.
>
> And I didn't take it that way. It's just something you say so that a child will talk, not that she was vouching. So, I don't think that was vouching at all.
>
> So, I'm going to deny the motion for mistrial.

RP 838.

Like Rubin, Mettler testified the exam results were normal. RP 789-90. No tearing or scars. RP 790-91, 801. In a prior interview, Mettler said that "most of the time," in her experience, the hymen would be torn or somehow affected by sexual intercourse. RP 803-04.

Forensic child interview specialist Carolyn Webster interviewed A.B. on October 24, 2013. RP 1166. Webster testified she follows the Washington State guidelines on child interviewing. RP 1161. She starts with a "narrative practice" where "we talk about a past event in the child's life." RP 1161. Afterward, Webster goes over "ground rules," such as the importance of telling the truth. RP 1161. After obtaining the child's promise to tell the truth, Webster goes "into the substantive section, where we're talking about any potential abuse allegations." RP 1161-62. In that vein, Webster testified: "I almost always start it by just saying, tell me why you came to see me today." RP 1164.

The prosecutor asked Webster whether there was a time during her interview that A.B. used a gesture. Webster said yes and confirmed exhibit 23 represented an accurate recording of that gesture, which was played for the jury. RP 1168-70.

A.B. testified the first time Zayas-Lopez touched her was in her mother's bathroom after they moved into C-206. RP 1465, 1528-29. A.B. claimed Zayas-Lopez pulled her pants and underwear down and rubbed her private part. RP 1466. A.B. described a separate occasion in her mother's bedroom where Zayas-Lopez engaged in anal sex with her and then oral sex. RP 1476-77. She described a separate occasion in her mother's bedroom where Zayas-Lopez reportedly engaged in vaginal sex with her. RP 1479-81, 1485-86. A.B. claimed Zayas-Lopez sometimes made her perform oral sex on him in the girls' bathroom. RP 1498-99. According to A.B., one time she looked up and saw Zayas-Lopez smoking a pipe. RP 1508-09. Reportedly, there was also a time Zayas-Lopez showed A.B. a video on his phone of people engaged in oral sex and asked her to do it like that. RP 1503. A.B. remembered telling officer Partido the last time anything happened was before her birthday in September 2013. RP 1586.

A.B. claimed Zayas-Lopez sometimes called for her by whispering her name at night when she was sleeping. RP 1481. According to A.B., one time Zayas-Lopez entered her room when she was sleeping on the same bed with her sisters, rousted her awake and put her in a little chair in the same room. RP 1494-96.

A.B. testified none of her sisters woke up and that Zayas-Lopez left after she pretended to be asleep.[7] RP 1496-97, 1556. She also claimed Amaia once saw her and Zayas-Lopez in the shower together. RP 1516.

A.B. testified that at the time she reported her allegations to her mother, Castro and Zayas-Lopez were fighting every day. RP 1468. A.B. was afraid her "mom would get hurt." RP 1468. A.B. remembered one time Zayas-Lopez almost slammed the door on Castro's hand. RP 1544. All the yelling and fighting upset A.B.. RP 1544-45.

A.B. remembered it was the day Zayas-Lopez took her mother's car that she made the accusations against him. RP 1545. Admittedly, A.B. wanted her mother and Zayas-Lopez to break up. RP 1583.

Amaia testified that one time when she and A.B. were playing in the living room, Zayas-Lopez called A.B. into the girls' bathroom. RP 1381. According to Amaia, A.B. went in the bathroom and the door was closed. RP 1382. Amaia went to the door to ask if A.B. was done talking. RP 1383. Zayas-Lopez reportedly said she would be out in a minute. RP 1383. Amaia

[7] Zayas-Lopez denied ever going into someone else's bedroom at night or

testified A.B. came out and resumed playing. RP 1384. When Amaia reportedly asked what she had been doing, A.B. said nothing.[8] RP 1384.

Amaia thought his happened in the afternoon during the school year. RP 1384. Amaia testified she never saw A.B. in the shower with Zayas-Lopez. RP 1392.

Despite the allegations, Castro accepted a number of Zayas-Lopez's calls afterward. RP 1292. She also responded to one of his letters, which she later turned over to the detective. RP 1294, 1304. In one of the letters, Zayas-Lopez wrote: "I know I messed up, but I love you so much." RP 1295. He also wrote, "I'm sorry for everything I've done bad and the drugs" and "I hope you don't hate me." RP 1301. In one letter he wrote, "I imagine that the whole world thinks that I'm the worst person in the world. I'm so sorry. I hope you can forgive me, just like Jesus, amen." RP 1302. At trial, Zayas-Lopez testified he was referring to the drug use, yelling and fighting – everything he put Castro through. RP 1641-42, 1653.

Detective Eric Moore is a digital forensics examiner. RP 919-20. He extracted data from Zayas-Lopez's cellular phone

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contacting A.B. when she was sleeping. RP 1633, 1635.

[8] Zayas-Lopez testified he was home when the girls got home from school but was never alone with A.B.. RP 1638.

pursuant to a search warrant. RP 940-41, 946, 952, 1038. Among the data extracted was the "web history" associated with the phone. RP 951. It included searches for "stepfamily fuck threesome," "fucking my stepdaughter in the bathroom" and "fuking [sic] my stepdaughter.com." RP 968, 979, 983, 988. Moore also located searches or links for "blow job videos." RP 983, 990. None of the images in the links were of minors. RP 1001, 1007-1008.

Zayas-Lopez testified he likes a wide variety of pornography. RP 1641. The stepfamily videos were of adult actors and merely involved role-play, which he never acted upon. RP 1641. Other role-play searches on his phone included one about sex and secretaries in Washington. RP 1640. Zayas-Lopez acknowledged he had pornography on his phone but denied ever showing it to A.B.. RP 1633.

Castro testified that before they broke up, she and Zayas-Lopez had a "healthy sexual relationship" and sometimes sent each other intimate pictures of one another on their phones. RP 1218, 1257. The girls sometimes were allowed to play on Castro and Zayas-Lopez's phones.[9] RP 1353.

[9] A.B. testified she played on her mother's phone, but not on Zayas-Lopez's. RP 1537-38.

Castro had a pornographic DVD. RP 1219. She and Zayas-Lopez watched it on possibly two occasions. RP 1220, 1342, 1714. Castro testified she threw it away after finding it hooked up to their Play Station, which the girls sometimes played on.[10] RP 1219-20, 1222, 1397. Castro testified the video depicted vaginal and oral sex; she was not sure whether it depicted anal sex. RP 1220.

Castro had broached the topic of sex with her daughters. She would tell A.B., Amaia and Ali to watch out for strangers who might want to kidnap, rape or kill them. RP 1251-52. She tried to instill fear in them by making them watch America's Most Wanted and Washington's Most Wanted. RP 1252. Castro testified the shows sometimes contained graphic discussions about rape. RP 1252. One topic was rape of a child. RP 1253, 1355.

A.B. remembered seeing the show when it was about sexually abused children. RP 1566. She also learned the phrase "raping little kids" by going on the internet and typing in "sad stories" on YouTube. RP 1568.

[10] A.B. claimed she never played on it, but Amaia testified differently. RP 1397, 1533.

Since the allegations, A.B. now spends time with her biological father. RP 1254, 1566. She frequently goes to his house on the weekends. RP 1254, 1566.

3. Sentencing

The defense argued one of the first degree rape counts violated the prohibition against double jeopardy and/or should be scored as same criminal conduct as another count because the prosecutor argued in closing two uninterrupted sex acts constituted two separate counts of rape. CP 193-201 (citing State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) (three rape convictions were part of "same criminal conduct" and were one crime for sentencing purposes").

Specifically, the state argued:

> Now, the law is going – the law requires you and it's in your instructions that you have to – if you're going to convict him of any of the counts of rape, that you must unanimously agree as to separate and distinct acts, all twelve of you.
>
> So, for example, the State would argue to you that a separate and distinct act of rape was what A.B. described on her mother's bed when she said that he put his penis into her butt hole where the poop comes out and that it hurt, that he told her to bend over on her knees on the bed, that she told him that it hurt, that he wouldn't stop, and that it continued to hurt and that it hurt later on and that she then performed oral sex on him when he told her to turn and to face him.

> That is a separate and distinct act. And that's important because in cases like this, . . . [.]

RP 1728 (emphasis added).

The state agreed that the two acts constituted a continuing course of conduct but disagreed it argued they could support two separate counts. RP 9-10. The court found "that these are separate and distinct acts," that the state argued they probably were same criminal conduct and that there were numerous acts the jury could have relied on:

> I did read the briefs of both sides, and I read the transcript that was provided, and I do find that these are separate and distinct acts. The State actually was very clear in their argument that the one act that defense says is the same criminal conduct, the State argued probably was the same criminal conduct. And I read the testimony of the witness, and there's a description of many different acts in different rooms on different days. And the jury was instructed that they had to be unanimous in finding that an act occurred. So I am going to find that his score is a 9.

RP 11.

D. ARGUMENT

1. THE COURT ERRED IN ADMITTING PREJUDICIAL HEARSAY.

The court erred in admitting testimony and video evidence A.B. made gestures depicting masturbation and oral sex, as well as pointed to her buttocks and vaginal area, when answering

questions about the alleged abuse. These were non-verbal assertions and could not be separated from the context in which they were given such that they would be considered solely as evidence of sexually precocious knowledge.

Evidentiary error requires reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). Considering that credibility was the key issue in the case, the improper admission of A.B.'s out-of-court accusations bolstered the state's case and likely affected the outcome of the trial.

"Hearsay is not admissible except as provided by [Washington's Rules of Evidence (ER)], by other court rules, or by statute." ER 802; In re Dependency of Penelope B., 104 Wn.2d 643, 709 P.2d 1185 (1985). The reasons for the hearsay rule have been explained by the United States Supreme Court:

> The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the trier of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the

> declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Chambers v. Mississippi, 410 U.S. 284, 298, 93 S. Ct. 1038, 1047, 35 L. Ed. 2d 297 (1973).

In Washington, the admissibility of hearsay evidence is governed by six evidence rules, ER 801-806. ER 801 defines the fundamental terms:

> The following definitions apply under this article:
>
> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.
>
> (c) 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 (part). This is identical to the comparable federal rule, Fed. R. Evid. 801(a)-(c).

Nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay, such as trembling. Penelope B., 104 Wn.2d at 652. However, non-verbal conduct can be assertive, depending on the circumstances:

> It does not matter whether a witness makes an out-of-court assertion orally, in writing or behaviorally. For example, a witness may be asked to pick out the culprit from a lineup. The witness may say, "the person on the left did it." Or the witness may fill out a form designating the person on the left. Or the witness may silently point to the person. In any of these situations, the witness has made an assertion. If at trial a police officer relates what he or she observed the witness say or do at the lineup to identify the culprit, the testimony of the police officer is inadmissible because it is hearsay.

Penelope B., 104 Wn.2d at 657.

A portion of the Penelope B. opinion is instructive here. In the dependency case, the state asserted Penelope was dependent because her father sexually abused her. The trial court dismissed the dependency on grounds the state's proof was based solely on hearsay. Penelope B., 104 Wn.2d at 646-646. On review, the Supreme Court held some of the out-of-court statements were admissible as statements for purposes of medical diagnosis or treatment, and that some of Penelope's communication or actions constituted non-assertive conduct. Penelope B., 104 Wn.2d at 652-657.

But more importantly here, the Supreme Court held the trial court was correct to exclude some of Penelope non-verbal conduct. Specifically, after Penelope thrust an unclad anatomically correct

male doll toward the face of a therapist, the two therapists questioned her as to who had done that to her. The court held the therapists' later testimony relating the child's answers to their questions was hearsay. Penelope B., at 657. But so were her drawings and gestures:

> So, too, what the child demonstrated with clay, drawings and the spelling out of words in response to questioning by the foregoing witnesses, was hearsay. Similarly, the therapist's testimony that the child responded to questions about what "her secret" was by making a "zipping her lip" sort of motion with her hand and mouth, was also hearsay.

Penelope B., at 658.

A.B.'s masturbatory gesture, as well as pointing to her buttocks and vaginal area, during her interview with Partido was just as much assertive conduct and hearsay as the described conduct held to be hearsay in Penelope B. A.B. made the gestures while giving a statement in response to officer Partido telling her he wanted to know briefly what happened, to "establish what I am investigating." RP 885; see also RP 97-98. The same is true of A.B.'s oral sex gesture to forensic interviewer, Carolyn Webster. A.B. made the gesture during the substantive portion of the interview in response to Webster telling her to "tell me why you came to see me today." RP 1164; see also RP 198. The testimony

and video evidence related A.B.'s intentional out-of-court assertions and should have been excluded as hearsay. See Penelope B., at 657.

The court appeared to recognize as much (RP 1131) but accepted the state's claim that the gestures had a relevant non-hearsay purpose – to show precocious sexual knowledge. RP 208, 1132. This was error, because the gestures could not be so easily divorced from the context in which they were made – as assertions of what happened. In fact, that is exactly how they were elicited at trial. The prosecutor asked both witnesses whether A.B. made any gestures during his (Partido's) and her (Webster's) interview of A.B. about what happened.

That the onion could not be sliced so thinly is also evidenced by the prosecutor's remarks during opening statement:

> So, you're going to learn from Officer Partido that he wanted to get the basic facts to establish that a crime had been committed, but he will also tell you that during his interview of this child that she made some gestures that to him suggested very significant knowledge of precisely what she was talking about, and he will describe for you the gestures that this little girl used when speaking with him.

RP 657-58 (emphasis added).

Due to the context in which they were given, the court should have excluded the gestures as hearsay. Alternately, the court should have excluded the out-of-court gestures under ER 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

Even if relevant to show precocious knowledge, the danger the jury would use the evidence for its improper hearsay purpose outweighed any probativeness. There was no limiting instruction that could be given to mitigate against this inevitable result without causing undue prejudice to the defendant, as the court itself recognized when it remarked, "It's a tough one," after asking the defense if it wanted a limiting instruction. The evidence therefore should have been excluded.

Considering that the case boiled down to credibility, any evidence tending to corroborate A.B.'s allegations no doubt affected the jury's consideration of the case and therefore its outcome. The gestures provided such corroborative evidence, as

the prosecutor recognized by emphasizing them in closing argument. RP 1737 ("the gesture that you saw in the forensic interview and the gesture Officer Partido described"). This Court therefore should reverse Zayas-Lopez's convictions.

2. THE COURT ERRED IN DENYING THE MOTION FOR A MISTRIAL.

Advanced registered nurse practitioner Joanne Mettler testified that at the end of her interview with A.B. about "what happened," she told A.B. "about how I see kids every day and that this has happened to other kids and that it was very brave that she told about it." RP 788; see also RP 782. In doing so, Mettler improperly vouched for A.B.'s credibility and improperly commented on Zayas-Lopez's guilt. The testimony invaded the province of the jury and amounted to a serious trial irregularity.

When examining a trial irregularity, the question is whether the irregularity so prejudiced the jury that the accused was denied his right to a fair trial. If it did, the trial court should have granted a mistrial. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity may have had this impact, the appellate court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative

instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The underlying questions of law are reviewed de novo. State v. Lord, 161 Wn. 2d 276, 284, 165 P.3d 1251 (2007).

(i) Mettler's Testimony Was a Serious Trial Irregularity.

A defendant s right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007); State v. Johnson, 152 Wn. App. 924, 931-35, 219 P.3d 958 (2009). The evil sought to be avoided by prohibiting a witness from expressing an opinion as to the defendant's guilt or innocence is having that witness tell the jury what result to reach, rather than allowing the jury to make an independent evaluation of the facts.

5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989). Consequently, no witness may express an opinion as to the guilt of a defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

As the Washington Supreme Court has held, it is clearly inappropriate for the State to offer opinion testimony in criminal trials that amounts to an expression of personal belief as to the guilt of the defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citation omitted). Such an opinion is not helpful to the jury and is highly prejudicial; thus it offends both constitutional principals and the rules of evidence. Id. at 591, n. 5.

To determine whether a statement constitutes improper opinion testimony, courts consider the following five factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) and the other evidence before the trier of fact. State v. Quaale, 182 Wn.2d 191, 200, 340 P.3d 213 (2014); Montgomery, 163 Wn.2d at 591.

Joanne Mettler is an advanced registered nurse practitioner who performs head-to-toe physical examinations of suspected child rape victims, in part through the use of a special magnification device known as a colposcope. RP 761, 766. She was called as

an expert witness to give the results of her examination of A.B.. RP 775-804. Due to Mettler's advanced medical expertise, and the aura of scientific certainty therefore surrounding her testimony, jurors would naturally attach significant weight to her opinion. See e.g. Quaale, 182 Wn.2d at 201-02 (admission of opinion testimony was not harmless because the trooper's assertion Quaale was impaired was based solely on the horizontal gaze nystagmus (HGN) test and offered by an officer in a manner that cast an aura of scientific certainty, significantly increasing the weight the jury likely attached to it).

It is improper for a medical expert to opine a child has been sexually abused where the expert's opinion is based solely on his or her perception of the child's truthfulness. Carlson, 80 Wn. App. 127-30; State v. Alexander, 64 Wn. App. at 154. But such was the specific nature of Mettler's testimony. The exam results were normal. RP 789-90. Yet, Mettler testified that at the end of her interview with A.B. about what happened – during which, A.B. described vaginal and anal intercourse – she told A.B. "this has happened to other kids" and that A.B. "was very brave that she told about it." RP 788. Mettler's testimony repeating her out-of-court statements to A.B. was tantamount to saying she believed A.B.. As

such, it was improper. See Carlson, 80 Wn. App. at 122-30 (Dr. Feldman's opinion, based on interview with "E," that "E" had been sexually abused was improper opinion); Alexander, 64 Wn. App. at 154 (counselor's testimony there was no indication "M" was lying about the abuse constituted an improper opinion on the witness' truthfulness).

The nature of the charges are such that there is often no eye-witnesses. In re Penelope B., 104 Wn.2d at 646. (crimes involving child sex abuse most always occur in secrecy). Indeed, as the state conceded here, there was no eye-witness and no forensic evidence. RP 663. Zayas-Lopez denied the allegations. Thus, the case boiled down to credibility. Under these circumstances, Mettler's improper vouching testimony likely impacted the jury's consideration of the case. As the court in Carlson explained:

> The case boiled down to E's word against Carlson's word. There was no physical evidence and no independent witness to the charged events. The first trial ended in a hung jury. It is within reasonable probabilities that the opinion affected the outcome of the trial.

Carlson, 80 Wn. App. at 129. For the same reasons, Mettler's testimony amounted to a serious trial irregularity.

(ii) Mettler's Opinion Was not Cumulative or Otherwise Admissible.

Defense counsel initially objected to Mettler's testimony on grounds it did not meet the hearsay exception for statements made for medical diagnosis or treatment. RP 783-84. The court agreed the statements were not relevant to a medical diagnosis or treatment. RP 785. The state appeared to agree as well. RP 785-86. Indeed, the statements about "this" happening to other kids and A.B. being "brave" to tell about it are not even attributable to the patient. Mettler's testimony therefore was not cumulative or otherwise admissible.

(iii) No Curative Instruction Was Given

Indeed, the court did not even recognize Mettler's testimony as improperly vouching for A.B. and commenting on Zayas-Lopez's guilt. For the reasons stated in subsection (i), the court's failure to recognize the impropriety of Mettler's testimony was in error. In a case such as this where credibility was so crucial, it is questionable whether a curative instruction could have mitigated the prejudicial impact of Mettler's opinion. See e.g. Escalona, 49 Wn. App. 251 (in state's assault prosecution against Escalona for threatening the complainant with a knife, evidence he stabbed someone else in the

past required a mistrial, despite court's curative instruction). In any event, none was given.

This case boiled down to A.B.'s word against Zayas-Lopez's. There was no physical evidence and no eye-witness. Moreover, there was evidence A.B. had a motive to fabricate – namely, to get rid of Zayas-Lopez and prevent him from hurting her mother. Under these circumstances, it cannot be doubted Mettler's opinion A.B. was telling the truth affected the outcome. This Court should therefore reverse Zayas-Lopez's convictions.

3. TWO OF THE COUNTS CONSTITUTED THE SAME CRIMINAL CONDUCT AND SHOULD HAVE BEEN SCORED AS ONE CRIME FOR SENTENCING PURPOSES.

The Court erred in scoring two of the rape convictions as separate crimes for purposes of sentencing. Under RCW 9.94A.589:

> (1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require

> the same criminal intent, are committed at the same time and place, and involve the same victim.

This Court reviews the "'trial court's determination of what constitutes the same criminal conduct ... [for] abuse of discretion or misapplication of the law.'" State v. Tili, 139 Wash.2d 107, 122, 985 P.2d 365 (1999) (quoting State v. Walden, 69 Wash.App. 183, 188, 847 P.2d 956 (1993)).

A.B. testified that during one incident occurring in her mother's bedroom, Zayas-Lopez engaged in anal intercourse and then had her turn to face him and perform oral sex. In closing, the state argued the oral sex "was a separate and distinct act." RP 1728. As a result, the jury may have convicted Zayas-Lopez of two separate counts based on the alleged anal intercourse and oral sex, which occurred during an uninterrupted sequence. And if that is the case, the two convictions constitute the same criminal conduct.

That the two penetrations in the bedroom constitute the same criminal conduct is mandated by the Supreme Court's decision in Tili. There, Tili was convicted of three counts of rape for digitally penetrating L.M.'s vagina and anus, separately (not at the same time), and inserting his penis into her vagina. The acts

occurred in L.M.'s kitchen over the course of two minutes. Tili, 139 Wn.2d at 111.

The Supreme Court held the convictions constituted the same criminal conduct, because the offenses involved the same victim, occurred at the same time and place and were nearly simultaneous in time, and defendant's three acts of rape involved the same objective criminal intent, given the extremely short time frame of two minutes and the defendant's unchanging pattern of conduct. Tili, 139 Wn.2d at 123-25.

The same must be found of Zayas-Lopez's alleged acts of anal and oral penetration. In ruling otherwise, the court found the acts were "separate and distinct." 1RP 11. This is clearly contrary to Tili and amounts to a misapplication of law. And significantly, the court did not appear to buy the state's argument it had not argued the acts were separate and distinct, as the court noted the state argued the acts "probably" constituted the same criminal conduct. 1RP 11. If it was not clear to the judge, it was not clear to the jury. And finally, the court appeared to find the convictions were not the same criminal conduct because there were other acts the jury could have relied upon. But the problem is there is no way to know whether the jury relied on separate incidents or the two

penetrations in the bedroom the state argued were separate and distinct.

Principles of lenity require the court to interpret an ambiguous jury verdict in favor of the defendant. State v. DeRyke, 110 Wn. App. 815, 41 P.3d 1225 (2002) (where defendant was convicted of kidnapping and attempted first degree rape but it was unclear whether the jury relied on the use of a deadly weapon or kidnapping to find the defendant guilty of attempted first degree rape, the kidnapping and rape offenses merged because: "[p]rinciples of lenity require us to interpret the ambiguous verdict in favor of DeRyke[,]" and to assume the jury based its verdict on DeRyke's kidnapping of the victim rather than on his use of a deadly weapon).

The court's failure to apply principles of lenity to the ambiguous verdicts in Zayas-Lopez's case was a misapplication of the law. This Court should remand for resentencing. Tili, 139 Wn.2d at 128.

3. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Zayas-Lopez was represented below by appointed counsel. Supp. CP __ (sub. no. 124, Order Authorizing Appeal In Forma

Pauperis, 10/5/15). The trial court found him indigent for purposes of this appeal. Id. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, the court imposed only the $500 VPA and $100 DNA fee. 1RP 22-23. The court sentenced Zayas-Lopez to a minimum term of 250 months of incarceration, which is just over 20 years. 1RP 21. It is possible he may serve more time. 1RP 21. When he gets out, he will be on community custody for the rest of his life and will have to register as a sex offender. 1RP 22.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, __ Wn. App. __, __ P.3d __ 2016 WL 393719.[11] Our Supreme Court has rejected the notion that discretion should

[11] Only the Westlaw version is available at the time of this filing.

be exercised only in "compelling circumstances." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. Sinclair, WL 393719, *5. Moreover, ability to pay is an important factor that may be considered. Id.

Based on Zayas'Lopez's indigence and the uphill road that will await him upon his release in twenty years, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

This Court should reverse Zayas-Lopez's convictions and remand for a new trial. Alternatively, this Court should remand for resentencing with a corrected offender score.

Dated this 7th day of March, 2016

Respectfully submitted

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 74056-3-I
	)	
JORGE ZAYAS-LOPEZ,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JORGE ZAYAS-LOPEZ
DOC NO. 383501
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF MARCH 2016.

X Patrick Mayovsky