74056-3

COURT OF APPEALS NO. 74056-3-I

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

STATE OF WASHINGTON

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

REPLY BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

RULES, STATUTES AND OTHERS

A. STATEMENT OF FACT IN REPLY

In its response brief, the state points out appellant Jorge Zayas-Lopez's attorney "never asked him in direct examination whether he had raped or molested A.R.B." Brief of Respondent (BOR) at 10. However, the state acknowledges Zayas-Lopez testified he was never alone with A.B. BOR at 10. The obvious import of this testimony is a denial that anything untoward happened. Moreover, the state acknowledges defense counsel attempted to ask Zayas-Lopez whether he ever directed A.B. to perform oral sex on him, but an objection to scope was sustained. BOR at 10. Importantly, Zayas-Lopez denied ever showing A.B. pornography or going into her room or bathroom or contacting her at night when she was sleeping. RP 1633, 1635. This testimony is tantamount to a denial of A.B.'s accusations.

B. ARGUMENT IN REPLY

1. THE COURT'S ERRONEOUS ADMISSION OF HEARSAY PREJUDICED ZAYAS-LOPEZ AND REQUIRES A NEW TRIAL.

In his opening appellate brief, Zayas-Lopez argued the court erred in admitting evidence of masturbatory hand gestures A.B. made while being interviewed by an investigating police officer and forensic interview specialist after: (1) the officer explained he just

wanted to know briefly what happened, to "establish what I am investigating;" and (2) the interview specialist said "tell me why you came to see me today." Brief of Appellant (BOA) at 23-30; RP 97-98, 885, 1164. Zayas-Lopez argued it was also error to admit the fact A.B. pointed to "[h]er vaginal area and buttocks area" while being interviewed by the police officer. BOA at 23, 27; RP 886.

Although the trial court admitted the gestures as evidence of precocious sexual knowledge, these non-verbal assertions could not be so easily divorced from the context in which they were given (as assertions of what happened) such that they would be considered solely as evidence of precocious sexual knowledge. BOA at 23-29. The court should have excluded the gestures as inadmissible hearsay.

Alternatively, Zayas-Lopez argued the gestures should have been excluded under ER 403, as the danger the jury would use the evidence for its improper hearsay purpose outweighed any probative value. BOA at 29-30.

In response, the state argues the gestures were not hearsay, reasoning they were "presented without specific context or accompanying questions," were not offered for the truth of the gestures themselves but as evidence of A.B.'s precocious sexual

knowledge, and that any error was harmless. BOR at 11. The state is incorrect.

First, the state is disingenuous when it claims the gestures were "presented without specific context or accompanying questions." BOR at 11. Kent police officer Melvin Partido responded to Armida Castro's 911 call. RP 880-84. He 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. Contrary to the state's claim, this is context. Partido responded, "when she described different things." RP 885. Partido then described the masturbatory gesture. Thus, it was made abundantly clear to the jury A.B. made the masturbatory gesture when telling the officer what happened to her.

The same is true of when A.B. pointed to her "vaginal area and her buttocks area." RP 886. It was made clear to the jury this was during the officer's "conversation" with A.B. The "conversation" was about what happened, "to establish" what Partido was "investigating." It is not as if A.B. was playing with dolls on her own and acted out these gestures without prompting.

The state also presented context to A.B.'s masturbatory gesture depicted on the video when interviewed by forensic interview specialist Carolyn Webster. Webster described to the jury her child interviewing protocol, which follows the Washington State guidelines on child interviewing. RP 1161. Webster explained that after obtaining the child's promise to tell the truth, she goes "into the substantive section, where we're talking about any potential abuse allegations." RP 1161-62. 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.

Thus, it was made abundantly clear to the jury A.B. made the masturbatory gesture during an interview about what happened to her. The gestures therefore constituted testimonial hearsay of the same ilk as those deemed inadmissible in In re Dependency of Penelope B., 104 Wn.2d 643, 709 P.2d 1185 (1985).

In that case, Penolope thrust an unclad anatomically correct male doll toward the face of the therapist. The two therapists with

Penelope questioned her as to who had done that to her. The Supreme Court held the therapists' later testimony relating to Penelope's answers to their questions was hearsay. Penelope B., at 657. And 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.

The circumstances here are directly analogous. A.B. made the masturbatory gestures in response to questioning by the investigating officer and child interview specialist. The state's assertion that Zayas-Lopez "correctly looks to In re Penelope B. for guidance, but he compares his case to the wrong examples" is false. BOR at 17. The gestures that were deemed admissible as non-hearsay in Penelope B. were not made in response to any questioning; they were made during play therapy when Penelope was playing with an anatomically correct doll. Penelope B., at 655.

The state boldly claims:

> The simple fact that A.R.B.'s hand motions were made while talking to police and the forensic interviewer -- turned them into hearsay, then *all* the

> non-verbal conduct in In re Penelope B. also would have been inadmissible hearsay simply by virtue of the broader context of a child-abuse examination.

BOR at 17 (emphasis in state's brief).

This is simply not true. What Penelope said and did on her own while playing with a doll was non-assertive conduct. What she said and did while being asked questions was assertive. Significantly, the court here excluded A.B.'s statements to Partido and Webster as hearsay because that's what they were. There was no reason to treat her assertive *conduct* during the interview any differently. It was done in response to questioning about what happened.

The state claims that because defense counsel did not request a limiting instruction Zayas-Lopez cannot now complain the jury might have used the evidence for purposes other than that for which the state offered it. BOR at 18. But there is no conceivable limiting instruction that would have mitigated the prejudice. The court recognized as much when it offered, "It's a tough one," when it asked the defense if it wanted an instruction. In sum, the gestures should have been excluded altogether and not offered for any purpose.

Finally, the state's claim the error was harmless should be rejected. The state claims "Zayas-Lopez's assertions that this case 'boiled down to credibility' – that it was a she-said-he-said case – fly in the face of the record." BOR at 20. But the trial prosecutor acknowledged the case depended on A.B.'s credibility. In his opening statement, the prosecutor acknowledged the lack of any corroborating evidence:

> And you're going to hear that approximately one week later she was sent to Harborview for an exam by a specialist, a registered nurse practitioner who's examined thousands of children, and also that she had a normal exam.
>
> . . .
>
> It's important also to know that, because of the amount of time that Arianna said had passed between the last time that he raped her, there was no sexual assault forensic evidence taken, no swabs, because, given the passage of more than five days, there's not going to be DNA, fluids would be gone, and, so, there was no point in collecting such evidence.
>
> So, ladies and gentlemen, you may begin to wonder at this point in time what evidence there will be in this case. Well, there will be no forensic evidence. You'll hear medical testimony about the absence of evidence. No DNA, no eyewitnesses.
>
> What you will hear is incredibly graphic sexual knowledge that an 11-year-old girl shouldn't have.

RP 663.

And significantly, the prosecutor primed the jury for the lack of corroboration during voir dire. See e.g. 511-514 (asking about

why there wouldn't be witnesses or medical evidence in a child rape case and how prospective jurors might evaluate credibility). Thus, according to the state's own theory, its case rested on A.B.'s credibility. The state should not be able to argue otherwise on appeal.

2. TESTIMONY BY THE ADVANCED NURSE PRACTITIONER SHE TOLD A.B. THAT "THIS HAPPENED TO OTHER KIDS AND THAT IT WAS VERY BRAVE THAT SHE TOLD ABOUT IT" INVADED THE PROVINCE OF THE JURY AND VIOLATED ZAYAS-LOPEZ'S RIGHT TO A FAIR TRIAL.

In his opening brief, Zayas-Lopez argued advanced registered nurse practitioner Joanne Mettler improperly vouched for A.B.'s credibility and improperly commented on Zayas-Lopez's guilt when she testified that at the end of her interview with A.B., 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." BOA at 30; RP 782, 788. Zayas-Lopez argued the court erred in denying the motion for mistrial based on this testimony.

In response, the state suggests defense counsel agreed to the admission of Mettler's statements. BOR at 22-24. The state is incorrect.

First of all, defense counsel objected to the very statement at issue:

> A. . . . 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 –
>
> MR. SANDERS [defense counsel]: Objection.

RP 782.

The jury was excused and the court asked the nature of defense counsel's objection:

> MR. SANDERS: The statements, the statements that have nothing to do whatsoever with medical diagnosis.
>
> THE COURT: Tell me which ones you think those are.
>
> MR. SANDERS: She then asked me if this happened to other kids.
>
> I told her, so, that this happened to other kids.
>
> What should I tell people when I go to school and they ask me where I was?

RP 783-84. The court agreed the statements were not pertinent to medical diagnosis. RP 785.

The prosecutor argued Mettler should be able to finish the statement up until when A.B. talked about "how he told her to keep his secret:"

> MS. LEE [prosecutor]: . . . And I would ask that the Court permit her to finish the sentence and that it was – this is what Miss Mettler told the child, so, it's not the child's statement, and that it was very brave that she told about it, and she told me about how he told her to keep his secret, but now she and her mom have talked about how they cannot keep secrets and cannot keep sexual secrets and end it at that point.

RP 785.

The court asked if defense counsel had "[a]ny objection to that?" RP 785. *Defense counsel did not respond.* RP 786. Rather, defense counsel asked:

> MR. SANDERS: So, Your Honor, if I understand you correctly, the State's still seeking to admit the statement in which Mr. Zayas-Lopez allegedly said, keep it a secret?

RP 786. The parties and court thereafter discussed whether such was addressed at the CrR 3.5 hearing. RP 786.

Defense counsel maintained his objection, but the court acquiesced to the state's request:

> MR. SANDERS: . . . Your Honor, I don't see why that's relevant to medical diagnosis, what she is saying that Mr. Zayas-Lopez told her.
>
> THE COURT: I'm going to allow that in. And, so, she can testify to the end of keep any sexual secrets and nothing else, and you need to let her know that.

RP 786. Thus, it was the court – not defense counsel – that agreed with the state's proposal to admit the testimony.

Mettler was then allowed to testify – as per the court's ruling:

> 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 mom have talked about how they cannot keep secrets and cannot keep any sexual secrets.

RP 788.

At this point, it was unnecessary for defense counsel to object. Counsel already objected to the exact same testimony and was overruled. Appellate review is not precluded when interposing an objection would have constituted a "useless endeavor" because an earlier objection, interposed on the same ground, had been overruled. State v. Cantabrana, 83 Wn.App. 204, 208–209, 921 P.2d 572 (1996).

Defense counsel subsequently and properly argued that not only did the testimony not qualify as a statement made for medical diagnosis – the basis on which the court admitted it (RP 785-86) – but it constituted an improper opinion on guilt and required a mistrial. CP 148-154. The issue is properly before this Court.

Addressing the merits, the state claims there was no irregularity because "Mettler's comments were simply neutral assurances made in the course of interviewing a young patient who was reporting traumatic sexual abuse." BOR at 27. Whether a seasoned trial lawyer who has experience with the interviewing techniques specialists employ with children might view Mettler's testimony in that fashion, lay people such as those making up the jury panel would not. On the contrary, a juror inexperienced in cases involving allegations of child sex abuse more naturally would view Mettler's statements to A.B. as an expression of her belief A.B. was telling the truth and was very brave for doing so. Importantly, Mettler never said she assured all children as part of her interviewing protocol that they were brave for coming forward. Indeed, such could be viewed as tainting the child's statements. Accordingly, the state's attempt to downplay the seriousness of Mettler's improper opinion should be rejected.

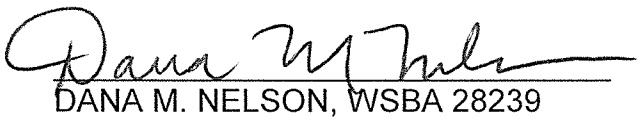
C. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Zayas-Lopez's convictions.

Dated this 22nd day of July, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant