66709-2

66709-2

NO. 66709-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR ALEMAN CRUZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE DOUGLASS NORTH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED

1. During the course of trial, jurors became aware that an unknown person, in some manner related to the defendant's case, had climbed out onto the roof of the courthouse. After the judge confirmed with each juror separately that each juror had very little information about the event, and that each juror could decide the case based solely on the evidence presented at trial, free from bias or prejudice, the court denied the defendant's motion for a mistrial. Has the defendant proven that no reasonable judge would have so ruled?

2. The defendant was convicted of sexually assaulting JC, KO, BB and OJ. During the exact same time period he sexually assaulted these young girls, the defendant sexually assaulted (and pled guilty to a lesser charge) two other young girls, AB and FP. The trial court admitted evidence of the defendant's sexual assault of AB and FP pursuant to RCW 10.58.090 and ER 404(b). There are three issues raised related to the admission of this evidence.

Since the filing of the Brief of Appellant, the Supreme Court has ruled that the legislature exceeded its authority in enacting RCW 10.58.090. Thus, the State concedes that the court should not have admitted the evidence under that statute.

The evidence showed the defendant had a common scheme or plan in molesting young girls. Has the defendant proven that no reasonable judge would have admitted the evidence under ER 404(b)?

Is the jury instruction pertaining to evidence of uncharged acts of sexual assault an impermissible judicial comment on the evidence?

3. Did the trial court properly admit the out-of-court statements of AB and FP under the child hearsay statute, RCW 9A.44.120?

4. Did the sentencing court have the authority to impose a $100 DNA collection fee?

5. Did the sentencing court have the authority to impose a condition that the defendant is required to submit to searches of his person, residence and computer by the Department of Corrections?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged as follows:

Count I: First-Degree Rape of a Child (victim BB)
11/1/97 -- 3/1/98

Count II: Third-Degree Rape of a Child (victim KO)
11/1/97 -- 3/1/98

Count III: First-Degree Rape of a Child (victim JC)
11/1/93 -- 2/28/97

Count IV: First-Degree Child Molestation (victim DG) 11/1/93 -- 2/28/97

Count V: First-Degree Rape of a Child (victim BB) 11/1/97 -- 3/1/98

Count VI: Third-Degree Rape of a Child (victim KO) 11/1/97 -- 3/1/98

Count VII: First-Degree Rape of a Child (victim JC) 11/1/93 -- 2/28/97

Count VIII: First-Degree Child Molestation (victim DG) 11/1/93 -- 2/28/97

Count IX: Communication with a Minor for Immoral Purposes (victim OJ) 2/1/98 -- 3/1/98

CP 146-52. Counts IV and VIII were dismissed during the course of trial when the State could not procure the testimony of DG. 11RP[1] 4-8. A jury found the defendant guilty as charged on all other counts. CP 194-200. The jury returned aggravating factors on counts I, II, III, V, VI and VII. CP 201-06. The court imposed an exceptional sentence of 636 months confinement. CP 245-58.

[1] The verbatim report of proceedings is cited as follows: 1RP -- 6/18, 6/29, 7/7, 7/29, 8/26, 9/10, 9/17, 9/24 & 10/1/10; 2RP -- 10/8, 10/22/10, 1/14/11 & 2/16/11; 3RP -- 10/25/10; 4RP -- 10/26/10; 5RP -- 10/27/10; 6RP -- 10/28/10; 7RP -- 11/1/20; 8RP -- 11/2/10; 9RP -- 11/3/10; 10RP -- 11/4/10; 11RP -- 11/8/10; 12RP -- 11/9/10; 13RP -- 11/10/10; 14RP -- 11/15/10; 15RP -- 11/16/10; 16RP -- 11/17/20; 17RP -- 11/18/10; 18RP -- 11/19/10 & 11/22/10; 19RP -- 11/29/10; 20RP -- 11/30/10; 21RP -- 12/1/10; 22RP -- 12/2/20 & 12/6/10; and 23RP -- 12/7/10, 12/8/10 & 1/21/11.

2. SUBSTANTIVE FACTS

While all of the defendant's acts and victims are intertwined, the first disclosures of abuse came from uncharged victims FP and AB.

At the time of trial (2010), FP was 21 years old, and her sister, AB, was 22 years old. 7RP 336; 13RP 48. Their fathers were not a part of their lives, and their mother, Beverly Pennington, was a chronic alcoholic and drug addict who died of a drug overdose in 2005. 13RP 50.

When the girls were seven and eight years old, they lived at a YWCA apartment in Redmond with their mother. 7RP 374, 390, 471. They made friends with two little girls who lived down the hall, JC and DG. 7RP 374; 13RP 51. JC and DG lived with their mother, Veronica Cabral, and the defendant--her live-in boyfriend. 7RP 375, 471.

The Penningtons subsequently moved to a house in Bellevue. 7RP 371. The defendant, Veronica, JC and DG visited them regularly at their home. 7RP 375; 13RP 54. During this time period, the Penningtons kept a ferret in their garage that belonged to Veronica and the defendant. 7RP 373, 379.

After a few months, the defendant, Veronica, JC and DG moved in with the Penningtons. 7RP 376. During this time period, the defendant would routinely tell FP that they needed to go out to the garage to clean the ferret cage. 7RP 380. This was the ruse the defendant used to get FP

into the garage where he would sexually assault her. 7RP 381-82. The defendant would make FP lean over a chair while he anally raped her with his penis. 7RP 384. He would lick her vagina and digitally penetrate her vagina with his fingers, as well as forcing her to masturbate him. 7RP 382, 384-86. When the defendant would do these things, FP would just close her eyes. 6RP 292. This happened at least once a week for the entire time the defendant lived in the household, and for a period of time after he moved out and would come back to visit. 7RP 388, 391.

FP testified that she did not disclose the abuse because she was scared for her life and the lives of her family, she did not fully understand what was happening to her, and she felt that she had no choice but to comply with the defendant's demands. 7RP 381, 383, 388-89. When FP would ask the defendant to stop and tell him that it hurt, he would tell her to shut up and threaten to kill her and her family if she ever told anyone. 7RP 383. The abuse occurred from when FP was six years old until she was eight years old. 7RP 390.

Unbeknownst to FP, during this same time period, the defendant was sexually assaulting her sister, AB. 13RP 57. AB recalled that the first time it happened she was watching the movie The Land Before Time, with her mother asleep drunk, and her sister and little brother sitting in front of her watching the TV. 13RP 57-58. The defendant, sitting next to

AB, reached over and put his hand up her skirt and started rubbing her vagina. 6RP 283; 13RP 58. Amber was nine years old at the time. 6RP 277, 283. She asked the defendant to stop but he told her that it was okay. 6RP 284. AB did not tell anyone about the incident because the defendant threatened to harm her if she did. 13RP 59. AB recalled another time when the defendant was playing with the kids and instead of playing, the defendant grabbed her vagina with his hand. 13RP 60.

The circumstances of AB and FP's disclosures are as follows: In February of 1997, AB and FP were at the home of Jerry Peloquin, a friend of their mother. 6RP 272; 7RP 392. While the three of them were sitting on the couch, Jerry touched AB on the leg, causing her to jump up suddenly and start crying. 7RP 392-93; 13RP 61. AB then disclosed to Jerry that she had been sexually assaulted by the defendant. 7RP 393; 13RP 61. When this happened, FP felt compelled and safe to disclose what had been happening to her. 7RP 393, 475. Jerry informed Beverly and the abuse was reported to authorities. 7RP 394.

By this time, the defendant, Veronica, JC and DG were living at the home of Carolyn Strange; having moved there in December of 1996. 6RP 285; 13RP 118-19. Carolyn Strange was friends with Beverly Pennington because Beverly used to bring her children to the daycare.

13RP 119. Carolyn met Veronica Cabral through Beverly and she hired Veronica in 1996 to work at the daycare. 13RP 120-21.

On February 28, 1997, detectives went to the home to arrest the defendant for sexually assaulting FP and AB. 6RP 285. While the detectives were talking to Carolyn, the defendant drove up but did not stop. 6RP 285. Instead, he drove right on past the house. 6RP 285. Detectives caught up with the defendant and placed him under arrest. 6RP 285. The defendant stopped living at Carolyn's house after his arrest, although Carolyn, not believing the allegations, helped the defendant obtain his release from jail. 13RP 128.

Veronica Cabral was born in Mexico and immigrated to the United States in 1987. 8RP 535-36. JC, 23 years old at the time of trial, and DG, 21 years old at the time of trial, are her daughters. 8RP 537. Veronica met the defendant through some friends and found him to be quite charming, "a real gentleman," she said. 8RP 539-40. In 1993, the defendant moved in with Veronica and her daughters in a YWCA apartment in Redmond. 8RP 541-43; 9RP 36.

The YMCA program required that Veronica be enrolled in school. 8RP 543. JC was also in school, with DG enrolled in daycare. 8RP 544. The defendant would pick the children up from school and daycare and thus he had a great deal of alone time with the two children. 8RP 553-54.

While living at the apartment, the four became good friends with Beverly Pennington and her daughters AB and FP. 8RP 546. Veronica and the defendant lived at the YWCA apartment for approximately 18 months, at which time they moved to the Heritage Woods Apartments in Redmond in May of 1995. 8RP 548; 9RP 37. About this same time, Beverly Pennington and her children moved to a house in Bellevue. 8RP 550. Veronica, the defendant, and Veronica's children would visit the Pennington family two or three times a week. 8RP 551. Around this same time is when Veronica began working for Carolyn Strange at her daycare. 8RP 551-52.

In September of 1996, Veronica and her family were evicted from their apartment in Redmond because they were keeping ferrets as pets. 8RP 558. Veronica, her two daughters, and the defendant then moved in with Beverly Pennington and her two daughters. 9RP 35, 37. They stayed there until December of 1996. 9RP 36. They then moved into Carolyn Strange's house. 9RP 35, 37.

Veronica recalled that when they lived with the Pennington family, there were many times when the defendant was alone with AB and FP; including time alone in the garage where the ferrets were kept. 9RP 41. On one occasion, Veronica recalled opening the door to the garage and

discovering FP and the defendant inside. 9RP 41. The defendant "jumped" and exclaimed that he was just showing FP the ferrets. 9RP 41.

Veronica and the defendant's relationship was marked by violence. On one occasion, after Veronica told the defendant that she did not want him living with her anymore, he grabbed her by the neck in front of the children and threatened, "We will be done when I want!" 9RP 47-48. On another occasion, he held a gun to Veronica's head and threatened to blow her brains out, with Veronica begging him not to do it in front of the children. 9RP 49-50. In fear for her life, Veronica never reported the abuse. 12RP 38.

When the defendant was arrested for sexually assaulting FP and AB, it was the first time Veronica learned of the allegations. 9RP 53. After the defendant obtained his release from custody, Veronica saw the defendant just one more time.

On June 21, 1997, the defendant called Veronica and threatened to drag her out of the house if she did not come out voluntarily. 9RP 105, 108. In fear, Veronica did not call the police. 9RP 109. Instead, after telling Carolyn Strange to call the police if she did not come back soon, Veronica went out and got into the defendant's car. 9RP 108-09, 117. The defendant then drove off with her. 9RP 109. He threatened to blow her head off if he got arrested. 10RP 8.

Carolyn then drove to the Fall City substation and told the police what had happened. 11RP 103; 13RP 131. Officers arrived at Carolyn's house just after the defendant returned with Veronica. 11RP 104. As Veronica tried to get out of the car, the defendant grabbed her by the hair and slapped her across the face.[2] 9RP 111. Veronica then ran into the house as the defendant hid behind a nearby van. 11RP 105. The police had to threaten the defendant with being maced before he would comply with any commands. 11RP 105, 107-08.

A short time later, while officers were still on the scene, Carolyn Strange reported that Veronica's daughter, JC (then nine years old), had just disclosed that she had been sexually assaulted by the defendant. 11RP 112, 133; 13RP 133. This was the first time that Veronica learned the defendant had been sexually assaulting her daughter. 9RP 54-55; 11RP 102. When asked, Veronica's other daughter, DG, denied having been sexually assaulted. 9RP 56.

Although he was from a different police jurisdiction, the detective assigned to the case involving AB and FP spoke with JC. 15RP 65-66. JC was reluctant to talk about the abuse other than to admit that the defendant had touched her in an inappropriate manner. 15RP 66, 74-75. The case

---

[2] Carolyn testified that she observed a bruise on Veronica's face. 15RP 8.

was passed on to the appropriate jurisdiction, at which time that detective learned of allegations of abuse by BB and KO.[3]

BB and KO are sisters, the daughters of Renee Beck. 16RP 63-64. KO was 13 years old at the time of the abuse, BB was eight years old. 9RP 10-13; 14RP 19; 16RP 74. In 1997, the Beck family lived at an apartment complex near where the defendant lived. 9RP 14; 16RP 65; 21RP 579. The family moved into a house in Bothell in December of 1997. 16RP 74.

In September of 1997, and again in February of 1998, BB was treated for a urinary tract infection and vaginitis--an inflammation of the vagina that can be caused by being touched forcefully. 9RP 13, 15-16. On May 14, 1998, BB was brought in for a medical examination after disclosing that she had been sexually assaulted by the defendant. 9RP 10-13; 14RP 19. She had also been exhibiting behavioral problems during the time period that she had been around the defendant. 14RP 20. Her otherwise inconclusive examination did reveal an increase in vaginal discharge. 9RP 29, 65.

BB was 22 years old at the time of trial. 21RP 575. BB met the defendant through her sister, KO. 21RP 581, 583. BB testified that the

[3] The detective involved in the investigation of allegations made by BB and KO did not testify at trial as he passed away in 2008. 18RP 43-44.

defendant seemed like a nice guy at the time but that things changed when he started to touch her inappropriately. 21RP 584, 586.

BB reported that on several occasions the defendant had stuck his fingers in her vagina and that on one occasion he sprayed "white stuff" all over her. 9RP 14; 14RP 19. The defendant also forced BB to touch his penis. 9RP 14. She remembered that one time at their apartment, she was on the couch when the defendant took off her pants and licked her vagina. 21RP 587. BB described how on multiple occasions, the defendant would reach over and rub her vagina at the slightest opportunity, like when her mother or father would leave her alone in the living room to do something else. 21RP 589. BB said she could not keep track of the number of times it happened. 21RP 590. Over time, the defendant would force BB to stroke his penis and would lick and rub her vagina and breast. 21RP 595-98. On one occasion, he tried to force his penis inside her, but it would not fit. 21RP 600-01.

BB did not tell anyone what was happening to her because the defendant had convinced her that it was her fault and threatened her with harm her if she did. 9RP 14; 21RP 593-94. Still, after initially denying that she had been abused, one day, her mother asked her again at which point BB broke down crying and disclosed that the defendant had been sexually assaulting her for quite some time. 21RP 604-06. The reason her

mother even asked was because other allegations of abuse had been made against the defendant.

It was a month or two before the Becks moved into their new home that KO brought the defendant home and told her parents that he was a friend from church. 16RP 72-74, 76. The defendant claimed he was 19 years old. 16RP 73. Thereafter, the defendant visited KO on a regular basis, including after the Beck family moved into their new home. 16RP 73, 77.

On February 8th of 1998, Renee hosted a birthday party for BB. 16RP 77. Renee recalled that the party lasted until around 8:00 p.m., and that both OJ and the defendant were present. 16RP 78.

OJ was 24 years old at the time of trial. 16RP 4. As a child, OJ was a friend and classmate of BB. 16RP 8. OJ testified that she remembered being at the party and hanging out with BB. 16RP 9-10. She also remembered being downstairs alone at one point when a man she knew as KO's boyfriend--the defendant--started kissing her on the mouth and feeling her chest. 16RP 10-12, 14.

On February 9, 1998, Elementary School Counselor Marion Holland noticed that OJ seemed very upset about something. 15RP 86, 90-91. Asked if she was okay, OJ said no and disclosed that she had been at a birthday party when the defendant had kissed her, put his tongue in

her mouth, and ran his hands up and down her body. 15RP 90, 93, 95. In fear, OJ had not yet disclosed the abuse to anyone. 15RP 94, 102.

When OJ's mother found out about the abuse, she called Renee Beck and told her what the defendant had done. 16RP 16, 79. Renee did not believe the allegation. 16RP 16, 79. Still, Renee called KO on the phone and told her about the allegations. 16RP 80-81, 100. KO was with the defendant at a store at the time. 16RP 100. This is the last time prior to trial that Renee or KO ever saw the defendant. 16RP 80-81.

During this same time period, Renee noticed some significant behavioral changes in BB. 16RP 82-83. She became a "very very angry little girl." 16RP 82. One day, approximately three months later, BB broke down crying and disclosed that the defendant had been sexually abusing her, that he had put his fingers inside her and shot white stuff all over her. 16RP 84; 17RP 13. KO was present at the time and confessed that she had been involved in a consensual sexual relationship with the defendant all along. 16RP 84-85.

KO was 27 years old at the time of trial. 17RP 82. She met the defendant in late 1997 when she was 13 years old. 17RP 84-86. She was introduced to the defendant by two of his friends but she lied to her parents and said she met the defendant at church. 17RP 86. Soon after meeting KO, the defendant began having sex with her. 17RP 88. KO said

that she fell in love with the defendant and that they talked about getting married. 17RP 90.

When KO's family moved to a house in Bothell, the defendant would come over three or four times a week. 17RP 94. There was a separate basement entrance where KO's room was and many times the defendant would come over and spend the night. 17RP 97. KO never told her parents about the nature of her relationship with the defendant. 17RP 98.

The first time the defendant had sex with KO was at his sister's apartment when he simply took her into the bedroom and had intercourse with her. 17RP 100. From then on, the defendant had sexual intercourse with KO a few times a week until approximately February of 1998, around the time of BB's birthday party--discussed above. 17RP 102-03. A few days after the party, KO was at a store with the defendant when she received a phone call from her mother telling her that the defendant was accused of sexually assaulting OJ at BB's party. 17RP 104-05. When KO told the defendant about the allegation, he drove her home and fled to Mexico.[4] 17RP 106-07.

[4] The defendant was on the lam from 1998 until he tried to return to the United States in November of 2008. 2RP 121.

After fleeing to Mexico, the defendant called KO and said that if she told the police about their relationship, he would send the Mexican Mafia after her family. 17RP 107. Thus, when the police investigating the allegations of abuse against OJ asked her, KO lied and said she had not been abused. 17RP 109. KO said she was scared, that she did not believe the allegations involving OJ, and she professed that she still loved the defendant. 17RP 108-09. However, when her sister, BB, later disclosed that she had been sexually assaulted by the defendant, KO admitted to the sexual relationship she had with the defendant. 17RP 110.

Finally there is JC, Veronica Cabral's daughter. 8RP 537. JC was 23 years old at the time of trial. 12RP 62. JC recalled that when she was going to elementary school she lived with the defendant at the YWCA apartment in Redmond, the Pennington house in Bellevue, and then Carolyn Strange's house in Fall City. 12RP 64. She remembered that at first the defendant was a father figure to her but that she now had no positive memories at all because all she could remember was the sexual assaults. 12RP 65, 71. He used to pick her up from school and bring her home at which point JC would run and hide under her bed. 12RP 71. The defendant would drag her out, take off her pants, hold her hands down and rape her. 12RP 72-74. He also would anally rape her with his penis.

12RP 81. The abuse started when they were living in Redmond, continued for at least three years, and happened "all the time." 12RP 74, 82.

At first JC did not understand that what the defendant was doing was wrong. 12RP 82. Even when she did, she did not tell anyone because the defendant threatened to kill her and her family. 12RP 83. On one occasion, the defendant held a gun to her head. 12RP 83.

On the day the defendant was arrested for assaulting Veronica Cabral (June 21, 1997), Carolyn Strange asked JC if the defendant had ever touched her inappropriately. 12RP 84, 87. At first JC denied it, but then she broke down and told Carolyn the truth, that the defendant had been sexually assaulting her for years. 12RP 84.

The defendant did not testify. Additional facts are included in the sections to which they pertain.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL.

During the course of trial, a person involved in the defendant's case climbed onto the roof of the courthouse. The jurors were not aware of who this person was, how this person was involved in the case, nor any other facts surrounding the situation other than it was a young woman

related in some fashion to the case. The defendant's motion for a mistrial based on the jurors' limited knowledge of this incident was denied. The defendant claims that the trial court abused its discretion; that no reasonable judge would have denied his request for a mistrial even though each juror specifically stated that they could put aside their limited knowledge of the event and reach a verdict based solely on the evidence presented at trial. The defendant's argument should be rejected because it is based entirely on assuming the jurors would ignore their sworn duty, lie to the court, assume various facts about the incident, and reach a verdict based on bias and prejudice.

a. The Facts.

On November 4, 2010, during the course of trial, an incident happened in the courthouse that was related to the defendant's case. One of the defendant's alleged victims, DG--who had not testified or appeared in court, went through an unlocked door and onto the roof of the courthouse in a potential suicide situation. 10RP 64-66; 11RP 3-92. She did not actually attempt to kill herself.[5] The jurors had very limited information about the incident, including who the person was.

---

[5] http://seattletimes.nwsource.com/html/localnews/2014002074_cruz22m.html.

When the incident happened, the court instructed the jurors as follows:

> "I understand that some of you have seen on your electronic media that there's a story about, relating to this case in the courthouse today. I want to remind you that we have to decide this case based purely on the evidence produced here in court, not to anything that's going on outside of court, anywhere, and so it's really important that you not get caught up in any news stories that may be related to this case at the courthouse today...Please take a news holiday."

10RP 67.

When the jurors returned to court the next trial day, the court and parties questioned each juror separately to determine (1) what information each juror had about the incident, (2) whether each juror had abided by the court's order to avoid media reports regarding the incident, and (3) whether each juror could continue to be fair and decide the case based solely on the evidence present at trial. 11RP 13-78. The record reveals that the jurors knew very little about the incident. At most, some of the jurors knew that a young woman had climbed out on the roof of the courthouse and that the incident was somehow related to the defendant's case. The only reason the jurors knew that the incident was related to the defendant's case was because the judge had alluded to that fact in cautioning the jurors to avoid media reports about the incident. See 11RP 54, 78. Otherwise, none of the jurors had any further information about

the incident, although one of the jurors speculated that the person likely wanted to jump. 11RP 64.

Each juror was asked directly whether they could be fair and decide the case solely on the evidence presented at trial. Each juror said that they could. 11RP 13-78. At the conclusion of the individual questioning of the jurors, the court denied the defendant's motion for a mistrial, finding no prejudice to the defendant's right to a fair trial. 11RP 92.

When trial resumed, the court instructed the jurors as follows:

> Just a couple of things I want to remind you of. There may be media coverage of things related to this trial. I want to remind you please, don't read anything about it, either in the paper or on the internet, don't listen to any reports on the radio or the TV or whatever. I want to remind you the case needs to be decided just on the evidence that's admitted here in the courtroom.

11RP 100.

On November 18, 2010, the court reminded the jury that the "evidence" consists of "the sworn testimony of the witnesses and the exhibits that are admitted into evidence." 17RP 77. On November 30, 2010, the court followed up again and asked if "any of you read anything or found out anything that would make you unable to be fair and impartial?" 20RP 64. Not a single juror indicated that he or she could not be fair and impartial. Id.

On December 1, 2010, the court again asked the jury if there had been anything in the media "that would in any way affect their ability to be fair and impartial in this case." 21RP 569. Again, not a single juror indicated that he or she could not be fair and impartial. Id. The next day, the court continued to insure that the defendant's right to a fair trial was preserved, asking yet again:

> Good morning, ladies and gentlemen. There may have been some more media coverage of things earlier relating to the courthouse or this case. Have any of you seen anything that would affect your ability to be fair and impartial at all in this case?

22RP 705. When not a single juror responded that they could not be fair and impartial, the court instructed the jurors to contact the bailiff if there was any issue in this regard. Id. No juror did so.

And finally, at the conclusion of the case, the court instructed the jury as follows:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial...Your decisions as jurors must be made solely upon the evidence presented during these proceedings. The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict....As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you

must act impartially with an earnest desire to reach a proper verdict.

CP 154-56.

b. Standard Of Review.

A trial irregularity is an irregularity which occurs during a criminal trial that potentially implicates a defendant's due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762 n.1, 675 P.2d 1213 (1994). Such an irregularity neither independently violates a defendant's constitutional rights nor violates a statute or rule of evidence. Id. When a trial irregularity occurs, a trial court "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). "More than a possibility of prejudice must be shown." Bourgeois, 133 Wn.2d at 406.

The granting or denial of a motion for a mistrial based on a trial irregularity is left to the sound discretion of the trial court. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986). This Court applies an abuse of discretion standard in reviewing a trial court's denial of a motion for a mistrial. Id. An abuse of discretion is

found only where the defendant can show that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284 (citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

In reaching a decision, a reviewing court must consider the fact that the trial judge, having seen and heard the proceedings, is in a better position to evaluate and adjudge the situation than an appellate court reading from a paper record. State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853, 858 (2011). Only errors that actually affect the outcome of the trial will be deemed prejudicial. Hopson, 113 Wn.2d at 284. In determining the effect of a trial irregularity, a reviewing court will examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. Id. (citing Mak, 105 Wn.2d at 701).

c. The Trial Court's Actions Were Appropriate.

Bourgeois provides a good example of the application of the above stated law. Bourgeois was charged with first-degree assault and first-degree murder for shooting two store owners in retaliation for one of them having testified against his brother in another trial. Many of the State's witnesses testified that they were fearful about testifying against the defendant. One of the witnesses who expressed fear about testifying was Debra Steward. Steward testified that the defendant had offered to pay her

if she testified that he was babysitting her son at the time of the commission of the crime, thus creating a false alibi. Bourgeois, at 395.

Post-trial it was discovered that jurors had observed certain members of the audience glaring at Steward as she testified, and that one of them had pointed a finger at her as if firing a gun. Id. at 398. The Supreme Court stated that the audience members' actions could be viewed as a direct threat against Steward and that it was likely intended to deter her from testifying against Bourgeois. Id. at 409.

The defendant moved for a new trial based on the misconduct. The trial court denied the motion. The Supreme Court affirmed the trial court. Although the Court found that the irregularity was "fairly serious," the Court held that it was not "so significant that the defendant will have been treated unfairly unless granted a new trial." Id. This was true even though the trial court was not able to specifically instruct the jury to disregard the event because it was not discovered until after the verdict. Instead, the Supreme Court noted with approval that the general instructions given before closing argument instructed the jury to consider only the testimony of the witnesses and the exhibits admitted into evidence. Id.

Here, the "irregularity" that occurred was much less apparent and less potentially prejudicial than the irregularity that occurred in Bourgeois.

First, the incident occurred outside of the courtroom and the jurors had very little information about the event. The jurors knew nothing more than the fact that a woman had climbed onto the roof of the courthouse and that in some manner she was related to the case. The jurors did not know if the person was a victim or a witness (for the State or the defendant), an attorney, an advocate or held some other position. The jurors also did not know what motivated the person to climb onto the courthouse roof.

In an abundance of caution, the trial court questioned each juror separately to determine what information they had about the event and whether each juror could put aside whatever limited information they had and decide the case based solely on the evidence presented at trial. Every single juror indicated that they had very limited information about the incident and that they could decide the case based solely on the evidence presented in court, fairly and without bias. Thereinafter, throughout the course of trial, the judge repeatedly instructed the jurors that they had to decide the case solely on the evidence presented at trial and that they should avoid the news media until the trial was over. There is nothing in the record showing that the defendant was prejudiced by the incident.

The defendant's argument to the contrary presumes that the jurors did not abide by their sworn duty, did not follow the court's instructions,

and that the jurors lied to the court when each of them said they could decide the case based solely on the evidence presented, free from bias and prejudice. But a reviewing court "must presume, absent any contrary showing, that the jury followed the court's instruction." Davenport, 100 Wn.2d at 763-64 (citing State v. Cerny, 78 Wn.2d 845, 850, 480 P.2d 199 (1971)). To combat this, as "evidence" of prejudice, the defendant relies on what he calls a "foreseeable inferential path." Def. br. at 23. He posits that the jurors must have concluded that the person on the courthouse roof was a victim attempting to take her own life rather than face the defendant and relive that abuse at trial. Def. br. at 23. However, this is pure speculation. One could just as easily conjure up other scenarios. For example, jurors could speculate that the person on the roof was an alleged victim who had lied about being abused and was willing to commit suicide rather than face the prospect of being exposed as a fraud at trial. The bottom line is trials do not get reversed based on speculation. See Bourgeois, at 409 (a "juror's assumption" is "irrelevant"); State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) (the mere "possibility" of prejudice is not enough to warrant a new trial).

The defendant also speculates that the event caused a "visceral reaction of outrage against Cruz" that could not possibly have been "neutraliz[ed] by a curative instruction." Def. br. at 24. This is not a

supportable proposition. First, as a precondition to his argument, one must accept the speculation posited by the defendant above--that the jurors knew the person was a victim, that she had in fact been abused, and that she was willing to kill herself rather than relive the abuse in court. Second, if the potential prejudice of a spectator threatening a testifying witness by mimicking the firing of a gun in front of the jurors can be deemed neutralized by the giving of a general instruction, as occurred in Bourgeois, then the event here, that happened outside the courtroom, wherein nobody was harmed or threatened, could certainly be neutralized by the multiple and specific cautionary instructions provided by the trial judge.

And finally, unlike any of the cases cited by the defendant, here, the trial judge actually confirmed with each juror separately that they could render a verdict based solely on the evidence, without bias or prejudice. Under the facts of this case, the defendant cannot show that he was so prejudiced by the event that nothing short of a mistrial was required in this case. In other words, that defendant cannot show that "no reasonable judge would have reached the same conclusion" as the trial judge did here in denying his motion for a mistrial. See Hopson, 113 Wn.2d at 284.

2. EVIDENCE THAT THE DEFENDANT SEXUALLY ASSAULTED AB AND FP--TWO UNCHARGED VICTIMS--WAS PROPERLY ADMITTED.

Evidence was admitted at trial that the defendant had sexually assaulted two other victims--uncharged victims--AB and FP. The court admitted the evidence pursuant to both RCW 10.58.090 and ER 404(b). See 1RP 48, 116-34; 22RP 696-99; 23RP 923-28.

ER 404(b) allows for the admission of prior criminal acts or prior bad acts to prove such things as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). At the same time, ER 404(b) prohibits the admission of such evidence for the purpose of demonstrating the criminal defendant's character in order to show activity in conformity with that character. State v. Gresham, 173 Wn.2d 405, 427, 269 P.3d 207 (2012).

In 2008, the legislature enacted RCW 10.58.090, a more expansive rule than ER 404(b), that was designed "to ensure that juries receive the necessary evidence to reach a just and fair verdict" in cases in which the defendant is accused of a sex offense. Gresham, 173 Wn.2d at 427 (citing Laws of 2008, ch. 90, §§ 1, 2). In pertinent part, the rule provides as follows:

> (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding

> Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.
>
> . . . . .
>
> (6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:
>
> (a) The similarity of the prior acts to the acts charged;
> (b) The closeness in time of the prior acts to the acts charged;
> (c) The frequency of the prior acts;
> (d) The presence or lack of intervening circumstances;
> (e) The necessity of the evidence beyond the testimonies already offered at trial;
> (f) Whether the prior act was a criminal conviction;
> (g) Whether the 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; and
> (h) Other facts and circumstances.

RCW 10.58.090.

a. The Legislature Violated The Separation Of Powers Doctrine In Enacting RCW 10.58.090.

On appeal, the defendant challenges the constitutionality of RCW 10.58.090. Since the filing of the defendant's Brief of Appellant, the Supreme Court has issued a decision on this issue. In Gresham, supra, the Court did not hold that the substance of RCW 10.58.090 was unconstitutional, i.e., that the admission of this type of evidence violated any constitutional provision. However, the Court did hold that by the legislature enacting RCW 10.58.090--as opposed to the Court creating the

rule, the legislature violated the separation of powers doctrine and thus the rule is unconstitutional. Gresham, at 428-32. Based on Gresham, the State concedes that one of the two independent bases relied on by the trial court for admission of evidence that AB and FP had been sexually abused by the defendant cannot be supported.

b. The Evidence Was Properly Admitted Under ER 404(b).

Evidence Rule 404(b) provides that:

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

When an issue exists as to whether a crime actually occurred (as opposed to the identity of the person who committed the crime), the existence of a similar plan or scheme by a defendant as to a prior similar act may be admissible under ER 404(b) as probative of whether the current crime occurred. State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). This basis for admission of prior bad act evidence is referred to as the "common scheme or plan" exception.

To admit common scheme or plan evidence, the prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an

element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

In regards to step number three, our Supreme Court has held that, "the trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it." DeVincentis, 150 Wn.2d at 13. If, the Court said, the trial court finds the existence of a prior similar plan, this past behavior is probative as to the issue of whether the crime occurred. DeVincentis, at 17-18.

In setting the standard that there need only be marked similarities between the prior acts and current crime sufficient to demonstrate a common scheme or plan, the Court rejected the argument that the similarities between the prior acts and the current acts must be unique or uncommon. DeVincentis, at 13. As the Court has previously stated, while the purpose of ER 404(b) is to prohibit admission of evidence designed to prove bad character, "it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case." Lough, at 859. Thus, if the prior bad acts are similar enough to be naturally explained as individual manifestations of an identifiable plan, the acts are admissible. DeVincentis, at 18.

The facts of DeVincentis illustrate well the type of similarity the Court is looking for to show a common plan, despite the substantial dissimilarities of individual facts that can exist.

In the summer of 1998, DeVincentis offered KS (age 12), the friend of a neighbor, money to mow his lawn. In September, he asked if she would also clean his house. While KS would be cleaning, DeVincentis would be present dressed in either a G-string or bikini underwear. In October, DeVincentis asked KS to give him a massage and then told her not to tell anyone or she would get in trouble. Two weeks later, DeVincentis again asked for a massage and this time had KS massage his penis, after which, he massaged her breast and touched inside her vagina. After one other similar incident, KS disclosed the abuse to her mother.

To help prove that the abuse of KS occurred, the State sought to admit DeVincentis' prior molestation of ten-year-old VC; abuse that occurred *15 years prior* to the acts committed against KS. DeVincentis met VC through his daughter, as they were best friends. VC would spend three or four evenings a week at DeVincentis' residence, many times with DeVincentis present, wearing only a G-string or bikini underwear. The sight of DeVincentis in underwear became normal for VC.

One time, after his daughter's birthday party, DeVincentis showed VC photos of naked people and asked if she had ever seen a penis before. On another occasion, he had VC sit on a rowing machine with him. VC could feel DeVincentis' erect penis on her back and he touched her private areas. On other occasions, DeVincentis demanded that VC try on transparent mesh-like clothing, he offered her $10 to pose nude, and he would leave magazines with pictures of nude people throughout the house where VC could find them. VC also recalled DeVincentis asking for a back massage and having VC put his penis in her mouth.

Without question, there were substantial differences between the meeting, grooming and sexual assault perpetrated upon VC and the meeting, grooming, and sexual assault perpetrated upon KS. The way DeVincentis met and got the victims into his home was substantially different; one was paid to clean his house, the other was best friends with his daughter. DeVincentis showed VC photos of naked people and left pornographic magazines for VC to find, neither of which occurred with KS. VC was asked to pose nude and ordered to wear sexually provocative clothing, neither of which occurred with KS. The sexual acts themselves were profoundly different with VC having to perform oral sex upon DeVincentis, while KS was asked to manually masturbate DeVincentis.

Despite these many dissimilarities, the Supreme Court upheld the trial court's determination that the prior acts committed against VC demonstrated a plan to get to know young people through a safe channel, create a familiarity in his own home, bring the children into "an apparently safe but actually unsafe and isolated environment," so that he could pursue his compulsion to have sexual contact with pubescent girls. DeVincentis, at 22. In short, despite the many factual differences, there were enough similarities to demonstrate DeVincentis had an overarching plan to gain access to and molest young girls.[6] This is exactly the type of situation that exists here.

This case is somewhat unique in a manner that is not helpful to the defendant. The acts of abuse against AB and FP did not occur 15 years prior like the acts admitted into evidence in DeVincentis. In fact, they are not prior acts at all. The defendant contemporaneously sexually assaulted AB, FP, JC, OJ, KO and BB. The only reason the acts perpetrated against

---

[6] See also State v. Carleton 82 Wn. App. 680, 919 P.2d 128 (1996) (pattern of meeting teenage boys through youth organizations and engaging in sex acts after describing himself as having an alternate homosexual personality found to be a common scheme or plan); State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996), rev. denied, 131 Wn.2d 1007 (1997) (accessing young boys through his relationship with his girlfriends, playing games with the children, taking them on outings, and molesting them in isolated locations found to be a common scheme or plan); State v. Baker, 89 Wn. App. 726, 733-34, 950 P.2d 486 (1997), rev. denied, 135 Wn.2d 1011 (1998) (allowing young girls at slumber parties to sleep with him and then touching them as they slept found to be a common scheme or plan).

AB and FP and the acts perpetrated against JC, OJ, KO and BB were not charged and tried in a single trial is because they were discovered at different times. In other words, the defendant's claim here is akin to arguing that no common scheme or plan evidence exists when a defendant commits ten armed robberies over the course of a month but they are discovered at different times.

Here, the defendant preyed upon young girls of the same age, with the exception of KO, who was just a few years older than the other five girls the defendant assaulted. He threatened physical harm or death to each of the girls, with the exception of OJ, who he only saw and molested on a single occasion. While he did not initially threaten KO, as they had consensual sexual intercourse, as soon as he realized his conduct could be discovered, he threatened her with death just like he did with his other victims.

The defendant also seems to have intentionally placed himself in situations where he had ready access to young girls. He abused them in many similar ways--having them touch him, fondling them--all the while telling them that if they disclosed the abuse he would hurt or kill them and/or their families. The defendant did not try and groom his victims, he intimidated them and used their young age against them. Moreover, the defendant was consistent in that he did not abuse the girls only when he

was left home alone with them. To the contrary, part of his *modus operandi* appears to be that he would abuse the girls while others were close by.

In the case at bar, there are sufficient similarities wherein a reasonable person could find that the defendant used a common plan to meet and sexually assault young girls. The trial court complied with the criteria enunciated by our Supreme Court in Lough and DeVincentis and this determination must be upheld. After all, the decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). The defendant has not met this burden.

c. Any Error In Admitting The Evidence Was Harmless.

Even assuming the defendant can meet his burden of proving the trial court abused its discretion, reversal is not required if the error is harmless. Error under ER 404(b) is not of constitutional magnitude and

therefore, to prevail, the defendant must prove that, within reasonable probabilities, the outcome of trial would have been different but for the error. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986). To determine the probable outcome, the appellate court must focus on the evidence that remains after excluding the tainted evidence. Thamert, 45 Wn. App. at 151.

The evidence that remains consists of four young girls with no motive to lie when they first disclosed that they had been abused, and no motive to lie 10 years later when they were willing to testify at trial after the defendant was finally apprehended. Evidence of flight is strong evidence tending to show guilt. State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). Moreover, it is one thing to be able to argue as to the credibility of a single victim, that the victim has a motive to lie, but it is quite another to argue that all four of these victims were lying, that all four of them were acting in concert to convict the defendant--a man they have not seen in over ten years. The evidence in this case was overwhelming. The defendant cannot show there is a reasonable probability the outcome of trial would have been different if the evidence pertaining to AB and FP had not been admitted.

d. The Jury Instruction Pertaining To Prior Offenses Or Acts Of Sexual Abuse Was Not A Comment On The Evidence.

The court gave the following limiting instruction to the jury:

> In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.
>
> However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information.

CP 162 (Instruction 7).[7]

The defendant claims that this instruction conveyed to the jury the judge's personal belief that the defendant had committed prior acts of sexual assault or child molestation against FP and AB.[8] Therefore, the defendant claims, because the judge impermissibly expressed his personal beliefs to the jury, all of his convictions must be reversed. This claim

---

[7] This instruction is similar to later enacted WPIC 5.40, an instruction approved of in United States v. Benally, 500 F.3d 1085, (10th Cir. 2007). See 11 WAPRAC WPIC 5.40 (February 1, 2010). A more standard 404(b) limiting instruction, such as WPIC 5.30, was not requested by the defendant. A trial court is not required to give a limiting instruction for ER 404(b) evidence absent a request for such an instruction. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011).

[8] The defendant did not object to the giving of this instruction. 22RP 885-86. However, the Supreme Court has ruled that a claim that a jury instruction

should be rejected. Read as a whole and in a common sense manner as required, the instructions conveyed to the jury that in child sexual assault cases, evidence of other child sexual abuse is admissible, and that it is the jury's duty to determine the facts, herein, whether the defendant actually committed prior acts of sexual assault or child molestation.

Under article IV, section 16, a judge is prohibited from commenting on the evidence presented at trial.[9] This prohibition is intended to prevent a trial judge from influencing a jury by interjecting his or her personal opinion about the evidence. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). To constitute a comment on the evidence, it must readily appear that the court's attitude toward the merits of the cause is reasonably inferable from the nature or manner of the questions asked and the things said. Cerny, 78 Wn.2d at 855-56 (citing State v. Brown, 31 Wn.2d 475, 197 P.2d 590 (1948)). The touchstone of error is whether the feelings of the trial court as to the truth-value of the testimony of a witness has actually been communicated to the jury. State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995). Whether certain words amount to an impermissible comment on the evidence is determined by

---

constitutes a comment on the evidence may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

[9] "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16.

looking at the particular circumstances of the case. State v. Knapp, 14 Wn. App. 101, 113, 540 P.2d 898, rev. denied, 86 Wn.2d 1005 (1975) (citing State v. Jacobsen, 78 Wn.2d 491, 477 P.2d 1 (1970)).

When it comes to jury instructions, the instructions must be read in a straightforward and commonsense manner. State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). Rather, instructions are sufficient if they are readily understood and not misleading to the ordinary mind. State v. Meneses, 169 Wn.2d 586, 592, 238 P.3d 495 (2010). Instructions are viewed as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Here, along with the instruction cited above, the court also provided the following directive to the jury:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial...Your decisions as jurors must be made solely upon the evidence presented during these proceedings.
>
> . . . . . .
>
> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. ***If it appeared to you that I have indicated my***

personal opinion in any way, either during the trial or in giving these instructions, you must disregard that apparent comment entirely.

CP 154, 156 (Instruction 1, emphasis added).

Instruction 7 is a generic instruction similar to other limiting instructions. See WPIC 5.05,[10] WPIC 5.30,[11] WPIC 6.42.[12] The instruction simply refers to what type of "evidence" may be admissible in "a criminal case" involving allegation of sexual assault or child molestation. This is an accurate statement of the law. A statement that evidence regarding a particular fact or subject matter may be admitted at trial is not an opinion that the fact or subject matter is true, accurate or a proven fact.

The instruction herein is unlike the instructional situation that existed in State v. Dewey, 93 Wn. App. 50, 966 P.2d 414 (1998), overruled on other grounds by DeVincentis, supra, a case relied upon by the defendant. Dewey is a classic date-rape case. Dewey and his victim

---

[10] "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." WPIC 5.05 Prior Conviction--Impeachment--Defendant.

[11] "Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of and] may be considered by you only for the purpose of ____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation." WPIC 5.30 Evidence Limited as to Purpose.

went out on a date, ended up back at his residence, wherein the victim claims she was raped and Dewey claims the two had consensual intercourse. The State introduced evidence that Dewey had done the same thing to another woman--A.N.R. In instructing the jury, the court did not give a generic limiting instruction like the court did here. Instead, the court instructed the jury that, "[e]vidence has been introduced in this case, on the subject of the rape of A.N.R. in June of 1994, for the limited purpose of showing..." Dewey, 93 Wn. App. at 58. This instruction was very specific and conclusionary, calling the acts committed against A.N.R. a rape even though that was an issue of the jury. That is not the situation here.

Read in a commonsense manner and in conjunction with instructions that told the jurors it was for them to determine the facts and that if the judge appeared to have commented on the evidence, the jurors were to ignore it, the defendant cannot show that the instruction was a comment on the evidence. Nor can he show it was prejudicial.

If a judge does impermissibly comment on the evidence, the error is harmless if "the record affirmatively shows that no prejudice could have

---

[12] "You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant." WPIC 6.42 Admissions or Incriminating Statement by Codefendant.

resulted." Levy, 156 Wn.2d at 725; see also Gresham, 173 Wn.2d at 423-25. See section 2(a) above for a factual harmless error analysis.

e. The Jury Instruction Pertaining To Prior Offenses Or Acts Of Sexual Abuse Was Not Misleading.

The defendant also contends that the same instruction, Instruction 7, was misleading. This argument must be rejected.

For the sexual assaults the defendant committed against AB and FP, the defendant was originally charged in 1997 with first-degree rape of a child and first-degree child molestation. CP 395. He pled guilty in 1997 to communicating with a minor for immoral purposes--reduced charges as part of a plea agreement. CP 254, 395. Now, for the first time on appeal, the defendant claims that Instruction 7 was misleading because it used the terms "sexual assault or child molestation" when it discussed evidence of prior acts. This argument is not well taken.

First, this claim has been waived. A claim that a jury instruction constitutes a comment on the evidence may be raised for the first time on appeal because it raises an issue of manifest constitutional error. Levy, 156 Wn.2d at 719-20.

However, as to other claims of error regarding jury instructions, the failure to object generally bars the issue from being raised for the first time on appeal. State v. Salas, 74 Wn. App. 400, 407, 873 P.2d 578

(1994), rev. on other grounds, 127 Wn.2d 544 (1995); RAP 2.5. The defendant did not object to instruction 7. 22RP 885-86. Thus, his claim that the instruction is misleading--a non-constitutional issue, is waived.

Second, the defendant claims that by using the terms "sexual assault or child molestation," the jury was necessarily misled into believing an untruth--that he committed one of those offenses, because the defendant actually pled guilty to a lesser offense of communication with a minor for immoral purposes. However, it was not the conviction that was introduced, it was evidence of the acts actually committed by the defendant. In this case, there is no question that the evidence supports that the defendant committed acts of sexual assault and child molestation against AB and FP. The fact that the defendant may have pled guilty to a lesser crime is of no moment and the instruction was not misleading.

3. THE DISCLOSURES OF FP AND AB WERE SUFFICIENTLY RELIABLE TO BE ADMITTED INTO EVIDENCE UNDER THE CHILD HEARSAY STATUTE, RCW 9A.44.120.

The defendant claims that the trial court erred in finding the statements of FP and AB sufficiently reliable to be admitted under the child hearsay statute, RCW 9A.44.120. In making his argument, the defendant does not appear to claim that the statements would not be admissible under the statute. Rather, he appears to claim that because the

court did not consider as many factors in determining admissibility as the defendant believes it should, the statements should not have been ruled admissible. This claim must be rejected. The trial court found what is required under the statute--that the time, content, and circumstances of the statements provided sufficient indicia of reliability. The defendant cannot show that no reasonable judge would have so ruled.[13]

To begin, it should be noted that it is not clear from the defendant's ramblings before the trial court whether he actually was objecting to the admission of the hearsay testimony. See 4RP 90-91. In fact, he appears to invite the court to admit the testimony because he wanted to show inconsistencies with later statements and testimony. Id.

The failure to object constitutes waiver. State v. Baxter, 68 Wn.2d 416, 424, 413 P.2d 638 (1966). Even when an objection is made, if it does not specify the particular ground upon which it is based, it is insufficient to preserve the question for appellate review. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985), cert. denied, 475 U.S. 1020 (1986). So to does the invited error doctrine prohibit a party from setting up an error at

---

[13] It should be noted that it is not clear from the defendant's ramblings before the trial court whether he actually was objecting to the admission of the hearsay testimony. See 4RP 90-91. In fact, he appears to invite the court to admit the testimony because he wanted to then show inconsistencies with later statements and testimony. Id. While the defendant raises this issue, at trial he repeatedly elicited hearsay evidence from all of the State's witnesses.

trial and then complaining of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995).

If the defendant's comments can be considered an objection at all, the objection certainly was not specific and certainly did not raise the issue he now raises on appeal. As such, this issue has been waived.[14]

In any event, hearsay statements of child victims of sexual abuse are conditionally admissible under RCW 9A.44.120. In pertinent part, the statute provides that:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child. . .is admissible. . .if...[t]he court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

RCW 9A.44.120.

The rule provides for admissibility where the circumstances reflect that the statement probably was reliable when made. State v. Karpenski, 94 Wn. App. 80, 108, 971 P.2d 553 (1999). RCW 9A.44.120 requires no more than a finding that "the time, content, and circumstances of the

---

[14] It should also be noted that throughout the course of trial, the defendant repeatedly and intentionally elicited hearsay statements from not only AB and FP but from every State's witness.

statement provide sufficient indicia of reliability." Karpenski, 94 Wn. App. at 109.

Over time, the Court has identified nine factors thought to be useful in determining reliability under RCW 9A.44.120.

1. Whether the declarant, at the time of making the statement, had an apparent motive to lie;

2. Whether the declarant's general character suggests trustworthiness;

3. Whether more than one person heard the statement;

4. The spontaneity of the statement;

5. Whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;

6. Whether the statement contains express assertions of past fact;

7. Whether the declarant's lack of knowledge could be established by cross-examination;

8. The remoteness of the possibility that the declarant's recollection is faulty; and

9. Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003) (citing State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984)).

The so called "Ryan factors" are both non-exclusive and non-essential. Karpenski, at 110-11. The factors simply provide one tool that

the trial court can use to help determine whether the "circumstances surrounding the statement indicate it is reliable." C.J., 148 Wn.2d at 771 (citing State v. Swan, 114 Wn.2d 613, 648, 790 P.2d 610 (1990)). In fact, the sixth, seventh, eighth, and ninth factors have been held to have little or no relevance in child abuse cases. Swan, 114 Wn.2d at 651; State v. Borland, 57 Wn. App. 7, 786 P.2d 810, rev. denied, 114 Wn.2d 1026 (1990), disapproved of on other grounds in State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997); State v. Strange, 53 Wn. App. 638, 769 P.2d 873, rev. denied, 113 Wn.2d 1007 (1989). A determination of whether child hearsay is admissible is primarily a question of fact; accordingly, the trial court's decision is reviewed only for an abuse of discretion. C.J., at 772; Karpenski, 94 Wn. App. at 108, n118.

Here, the court had the State's Trial Memorandum outlining the facts and heard the testimony of social worker Gail Backer and Detective Robert Thompson, the two people whom AB and FP made statements. 6RP 7-92; CP 389-433. In ruling on the admissibility of the child hearsay, the court held there was "good indicia of reliability" to admit the statements of FP and AB. 4RP 92. The court found there was no issue regarding either child's propensity or character for "truth-telling." 4RP 92-93. The court could not find that there was "any motivation [for the girls] to tell anything other than the truth here." 4RP 93. The court noted that

the children were not being threatened in any way, there was no potential discipline hanging over their heads and no coercion by any adults to lie. 4RP 93. The court found that there was "every indication" that the information conveyed was accurate, and that non-leading questions were asked in eliciting the statements from the children. 4RP 93. After weighing the evidence, the court stated, "I think that there's every reason to think that the statements of the children are reliable and they meet the standards of the child hearsay statute for admissibility." 4RP 93.

In arguing against the court's decision, the defendant brings up facts the court should have considered, but these facts were not in the record. For example, the defendant claims the court should have considered whether "the children may have talked with each other about the allegations and been influenced by each other." Def. br. at 60. Additionally, the defendant claims the court did not factor in how the relationship between the girls and their mother's boyfriend, Jerry Peloquin (the person the girls first disclosed) may have affected their disclosures. Def. br. at 60. The problem is there is no evidence in the record supporting the assertions that these things happened or that they affected the reliability of the disclosures. The defendant had the opportunity to cross-examine the witnesses and to present evidence. The court ruled on

the evidence presented. There is no requirement that the court consider facts or potential scenarios that are not part of the record.

The defendant also says that the trial court, in finding the interviewers did not use leading questions, did not consider that Backer said that she progressed from "very open questions to specific questions." 4RP 14-15. However, a specific question does not mean a leading question, i.e., a question that suggests the answer. See State v. Young, 62 Wn. App. 895, 901, 802 P.2d 829 (1991) (child's answers are spontaneous so long as the questions are not leading or suggestive); State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999) (presence of a professional trained in interviewing sexually abused children enhanced the reliability of the statement).

In short, the defendant takes issue with the court's finding of reliability, but he can point to nothing in the record that actually shows that the court's determination was incorrect. More importantly, the defendant has not met his burden of proving that no reasonable judge would have ruled as the trial court did here. Robtoy, 98 Wn.2d at 42.

Finally, any error in admitting the evidence was harmless. See section 2(c) above. This is especially true when considering the defendant repeatedly elicited the hearsay evidence himself and attempted--again repeatedly--to use this to his advantage.

4. THE SENTENCING COURT HAD THE AUTHORITY TO IMPOSE A $100 DNA COLLECTION FEE.

The defendant contends that the trial court had no authority to impose a $100 DNA collection fee. See CP 247. This argument should be rejected. RCW 43.43.7541 requires the court impose the fee for all sentences occurring after enactment of the statute, regardless of the date of offense or conviction. This Court has already ruled that the statute violates neither the savings clause nor *ex post facto* clause.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

> *Every sentence* imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.

RCW 43.43.7541 (emphasis added). This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (Laws of 2008, ch. 97, § 3, eff. June 12, 2008). The defendant was convicted on December 8, 2010 and sentenced on January 21, 2011. CP 245-58.

The defendant asserts that because he committed his criminal acts in 1997 and 1998, the court had no authority to impose a DNA collection fee. He is incorrect.

First, the defendant cites to a version of the statute and a Supreme Court case that is not applicable to his case. See Def. br. at 63 (citing

State v. Brockob, 159 Wn.2d 311, 349, 150 P.3d 59 (2006)). Brockob addressed, and the defendant relies, on an earlier version of RCW 43.43.7541 that specifically provided that the statute applied only to crimes "committed on or after July 1, 2002."[15] In amending the statute, the legislature removed any reference to when the crime was committed and stated that the provision applies to every sentence imposed. RCW 43.43.7541. This was the provision that was in effect at the time the defendant was sentenced. The fee is not considered "punishment," nor part of the Sentencing Reform Act (SRA), and thus this Court has previously rejected arguments that the date of offense controls under the savings clause,[16] the *ex post facto* clause,[17] or RCW 9.94A.345.[18] See State v. Bennett, 154 Wn. App. 202, 224 P.3d 849, rev. denied, 168 Wn.2d 1042 (2010); State v. Brewster, 152 Wn. App. 856, 218 P.3d 249 (2009),

---

[15] The original version, enacted in 2002, reads in pertinent part:

> Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 *that is committed on or after July 1, 2002*, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4) (emphasis added).

[16] RCW 10.01.040.

[17] U.S. Const. art. 1, § 10, cl. 1; WA Const. art. I, § 23.

[18] RCW 9.94A.345 provides that "Any sentence imposed under this chapter [the Sentencing Reform Act] shall be determined in accordance with the law in effect when the current offense was committed."

rev. denied, 168 Wn.2d 1030 (2010); State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009).

5. THE REQUIREMENT THAT THE DEFENDANT SUBMIT TO RANDOM SEARCHES IS NOT AN IMPROPER CRIME RELATED PROHIBITION.

As a condition of community custody, the court ordered that the defendant "be required to submit to random searches of his person, residence or computer by the Dept. of Corrections." CP 257. The defendant contends this is not an authorized "crime related prohibition." The defendant refers to the wrong statutory provision and case law.

As part of a sentence, the court can impose a requirement that the defendant "comply with any crime-related prohibitions." Former RCW 9.94A.120(9)(c)(v) (1998). A "crime-related prohibition," means

> an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be constructed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(11) (1998). These are the provisions that the defendant claims applies here. However, RCW 9.94A.120 requires the court impose other conditions.

RCW 9.94A.120(9)(b)(vi) directs that, unless specifically waived, the sentencing court "shall include the following conditions...[t]he offender shall submit to affirmative acts necessary to monitor compliance with the orders of the court as required by the department." Monitoring or testing tools ordered to confirm compliance with conditions of sentence are not "crime related prohibitions." See State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). They are appropriate conditions imposed pursuant to RCW 9.94A.120(9)(b)(vi) (1998). Id.

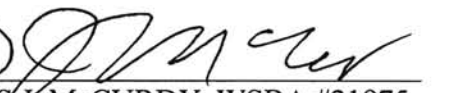
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 6 day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CRUZ, Cause No. 66709-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

UBrame
Name

4/6/12
Date

Done in Seattle, Washington