30850-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MIDDLEWORTH,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is a status conference a critical stage of proceedings implicating the Defendant's right to be present?
2. Is the Defendant's right to public trial implicated in a status conference where the only issue is readiness for trial?
3. Is the double jeopardy clause offended by convictions for different offenses and where there is sufficient evidence that the two acts were distinct and separate?
4. Does the "abiding belief" WPIC violate due process where it makes the burden of proof abundantly clear?
5. Does an "abiding belief" argument constitute reversible prosecutorial error where the argument mirrors the WPIC and there was no timely objection?

6. Did the trial court manifestly abuse its discretion by denying the motion to dismiss (a remedy of last resort), opting instead to allow the defense more time to prepare and an opportunity to call late witnesses and after learning that the late discovered information was not material, but at best impeaching?

7. Was there error which amounts to cumulative error?

8. Is the restitution order valid?

IV. STATEMENT OF THE CASE

The Defendant Robert Middleworth is convicted by jury of child rape in the first degree and child molestation in the first degree. CP 1087-88.

In August and September of 2010, Kristina Davis and her young daughter BD were living with the Defendant in the basement of his parents' home in College Place. RP 547, 563, 567, 938. There were about twenty cats living in the apartment with them. RP 743-44. The Defendant sent Ms. Davis to the store for cat food while he stayed home alone with BD. RP 555-56, 562, 565. A few days later, BD began complaining about vaginal pain. RP 564-65. The Defendant and Ms. Davis examined a rash in BD's vaginal area and applied cold cans of pop to the area. RP

560-61, 569-70, 941-42. The Defendant advised Ms. Davis to take BD to the doctor. RP 559, 942.

The next day, on September 21, 2010, Kristina Davis took five-year-old B.D. to the doctor, suspecting a bladder or urinary tract infection (UTI). RP 547, 552-53, 626, 747. BD was in so much pain that she refused to allow the nurse practitioner to touch her. RP 554-55, 674-75, 751, 756. She had to be escorted next door to the emergency room and sedated with ketamine for the examination. RP 555, 674-75, 747.

The child did not have a UTI. RP 753. She had raw and bloody genitalia: excoriation in the vaginal area and anal fissures. CP 1-2, 6; RP 680-88, 693, 698-699, 751-53, 805. The injuries were caused by penetrating trauma suggestive of sexual assault. RP 739, 753, 809-10. When the nurse practitioner asked "how your pee pee started hurting. Did anyone touch your pee pee?," BD said she had been watching TV and the Defendant shut the TV off and lay her down. RP 554, 735, 754-55. BD also had bruising on the inner thighs consistent with fingers. RP 677, 680-81, 689. Photographs taken during the examination were admitted as exhibits at trial and designated in this appeal. RP 677-85, 694-95.

CPS supervisor Jennifer Cooper was called to the hospital where she spoke with the nurse practitioner and the mother. RP 605-06, 754,

756. CPS took temporary custody of the child. In determining to take the child from the mother, Ms. Cooper assessed the mother's intellectual capacity, insight, level of functioning, and ability to protect the child. RP 606, 608, 613. The child had poor dental hygiene and head lice. RP 677, 698, 750. She was living in a house with two dogs and about twenty cats. RP 550, 943-44. Although the child had significant exterior and internal genital tearing (RP 606), bleeding, visible pustules, and sores (RP 625), the mother had suspected only a bladder infection (RP 553). Ms. Cooper did not consider that Ms. Davis was capable of understanding the seriousness of the situation. RP 622, 625-26. In following up with her family, police learned that Ms. Davis' family considered her mentally slow and isolated from her family by the Defendant, but a good mother. CP 2.

Ms. Cooper and Lt. Dutton met with the Defendant the next day. RP 611, 658. He explained that he presumed that CPS took custody of BD, because the State suspected him of sexual abuse. RP 660. The Defendant reported that after examining the child, he only suspected a UTI. RP 611. He falsely stated that the child had a history of UTI's. RP 611. She did not. RP 612, 749-50, 753. He seemed to believe that the child could have caught a UTI from the grandmother, although they are

not contagious. RP 612, 757. And he stated that he believed there were burns or bruising on the inside of the child's thighs due to the cold cans of pop. RP 612.

After the CPS placement, BD's panties were continually soaked with blood, she was lethargic, she did not eat, and she had not had a bowel movement. RP 610, 626. On September 24, she had to be transported to Sacred Heart in Spokane for treatment. RP 610, 626, 801. There she was treated for bacterial vaginosis and genital herpes simplex infection. RP 699-700, 803-09. By this time, she had developed herpes sores and a UTI. RP 806-07.

Dr. Wren and Dr. Edminster both testified that they had never seen this diagnosis in a child so young before. RP 715, 807. It is a sexually transmitted disease, which the Defendant also had contracted, for which pain is the chief symptom. RP 708-12, 715, 797, 817. It can be transmitted by hand to genital contact. RP 813, 819. During the September 29th collection of the rape kit, Nurse Reynolds observed yellow-colored sores with drying, crusty scabs encompassing the majority of the top of the Defendant's penis, consistent with a herpes outbreak in the last 3-12 days. RP 777, 790-92, 794, 798.

On September 28, DCFS investigator Brooke Martin interviewed

BD with Lt. Dutton observing. RP 634, 664. The 34-minute videotape of the interview (Exhibit 1) was played for the jury. RP 635-38. In that interview, BD identified that it was the Defendant who had touched her potty over her clothes once. RP 588, 646. As is common in child sexual assault timelines, her disclosures in that early interview were not as extensive as her testimony would be at trial. RP 583-86, 588-89. Even at trial, BD expressed a reluctance to speak about the Defendant's assault of her. RP 583.

At trial, BD described other incidences. She said he touched her under her clothes while she was sitting on his lap more than once. RP 398. She said that it happened more than ten times. RP 87, 405, 413. She testified that when her mother was at the store, the Defendant would have sex with BD on his special chair and that she had seen his private parts. RP 582-83, 589. She described them. RP 597. He would put her on his lap, take off her clothes and put his finger in her private spots between her legs. RP 584-85. She said this happened more than one time, "a lot." RP 583. She testified that no one else had touched her there and, after the touching, it began to hurt to urinate. RP 586.

There were two mistrials in this case. The first trial ran from February 7-9, 2011. RP 1-2, 263, 267. In that trial, the Defendant

attempted to fire his public defender. RP 36. The Defendant was removed from the courtroom when he refused to respect the court process and to recognize the trial and continued to interrupt. RP 37-50. Throughout the trial, the court continued to inquire whether the Defendant had a change of heart and was willing to observe proper courtroom decorum. RP 128-30, 219-20, 229-31. On the second day of trial, the Defendant communicated to the jail sergeant that "the only way he would come up to court was if he could address the jury himself and that he would be able to talk." RP 129. The Defendant's motion for new trial was granted on the basis that the Defendant's request to "address the jury" could have been interpreted as a request to testify and, therefore, should have been granted. CP 679-81.

The second trial ran from January 18-19, 2012. RP 381, 446, 535. The day began with a defense motion to dismiss based on the weather's effect on jury selection. RP 381-82. It was denied. RP 385. The Defendant made a motion for mistrial the next day for the reason that the State had not properly redacted a taped interview of BD in the way the court had ordered. RP 513-14, 518. The jury was permitted to hear the child comment on the Defendant's possession of a sex tape, which BD admitted on cross examination that she herself had never viewed. RP 514.

While the defense and court believed the error in redaction was inadvertent on the state's part (RP 514, 519, 521, 532), the court ultimately found the error unduly prejudicial and granted the mistrial. RP 534-35.

The third trial began April 2012, resulting in a conviction on both counts. RP 542, 998. It is from this verdict that the Defendant appeals.

V. ARGUMENT

A. THE STATUS CONFERENCE ON JANUARY 11, 2012 WAS NOT A CRITICAL STAGE IN PROCEEDINGS IMPLICATING THE DEFENDANT'S RIGHT TO BE PRESENT.

The Defendant argues that the trial court violated his right to be present by holding a critical stage hearing in chambers. Appellant's Opening Brief at 11-23. Because a status conference is not a critical stage, the right is not implicated.

A criminal defendant has a right to be present at all critical stages of a trial. *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011). "The core of this right is the right to be present when evidence is presented." *State v. Wilson,* 141 Wn.App. 597, 603, 171 P.3d 501 (2007). A critical stage has been defined as "one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which

the outcome of the case is otherwise substantially affected' " or "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Heddrick,* 166 Wn.2d 898, 910, 215 P.3d 201 (2009).

The Defendant concedes that an in-chambers conference is generally not a critical stage. Appellant's Brief at 12, *citing In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). The precedent states that a defendant has no constitutional right to attend a pretrial conference in chambers unless the meeting has a substantial relationship to his ability to defend. *State v. Ahern*, 64 Wn. App. 731, 826 P.2d 1086 (1992).

> Every court hearing which is held in a case relates in some way to trial. But the defendant does not have a blanket constitutional right to appear at all meetings between court and counsel.

State v. Ahern, 64 Wn. App. at 734.

The challenged discussion with counsel occurred on January 11, 2012, before the empanelling of the second jury. RP 364. From the outset, the court explained the purpose of the meeting was merely a status conference.

> The Court typically has pretrial conferences with counsel prior – the week prior to the trial of any matter,

> both criminal and civil. These are informal conferences or hearings. It is not really a hearing, an informal discussion with counsel about the status of the case. I do not allow the parties or witnesses to be present and I typically do not have these matters on the record.
>
> We are on the record today, however, because I have been advised that there has been an issue come up about Mr. Makus continuing as counsel in this matter, and because I know Mr. Middleworth has been a client who has been difficult to deal with for Ms. Siemers previously in this case and that there may need to be a review at some point in time of what is said in this particular discussion.
>
> ....
>
> And this is not a substantive part of the trial. There are no decisions or discussions that will be made in here that will dictate how we proceed during the trial. There is no legal issue that is raised here and will be decided in this particular discussion that would not be made part of the record and not be done in open court.
>
> So as far as this Court is concerned, I see no advantage or right of the Defendant in being involved in this particular discussion.

RP 364-65. The court noted that the Defendant had requested to be present, and the judge had denied his request. RP 365.

The Defendant complains that despite the court's intent, there were matters discussed at this meeting, which implicated his right to presence. Appellant's Brief at 13.

First, at that meeting, the court inquired whether both parties were aware that the proposed defense expert had two different written reports. RP 367. They were. RP 367-70. The court then inquired whether defense

would be calling the witness. RP 368. And defense was not certain at that time. RP 368, 371.

The Defendant's claim that, in this exchange there were issues of disputed facts critical to the Defendant's case, is not credible. While both attorneys shared facts with the court (consistent between the attorneys), and while the Defendant may have wished to defend against the appearance that he forged a report from an out-of-state expert, the truth or falsity or implications of these facts were irrelevant. The question was: were the parties ready to proceed? Nothing that occurred in this hearing determined the Defendant's ability to call his expert. There was no motion and no ruling. Nothing about this discussion indicates a critical stage of proceedings.

Second, the Defendant alleges that the court "amended" a pretrial ruling regarding the admissibility of evidence of foster care and that his absence prevented an objection. Appellant's Brief at 14. This is incorrect on two counts. First, the court did not amend any ruling. And second, even if it had, nothing would have prevented an objection to a ruling at a true hearing.

On January 5, 2012, at a motion hearing for which the Defendant was present, the court had ruled that the State could not admit evidence of

the child's placement out of the home "whether it be with relatives or foster care" in order to engender sympathy for the child – without an offer of proof of its relevance. RP 354-55. At the January 11, 2012 meeting, the court did not change the ruling. "I have previously ruled in terms of the foster care issue, and I am not going to change that ruling." RP 372. The court then noted that the prejudice he had anticipated was weaker upon review of the transcript of the past trial. RP 373. However the judge would "continue to rule that the issue shouldn't be brought up in the sense that she was placed in foster care for any reason" even though the placement appeared to be merely procedural. RP 373. It is clear that there was no amendment or refinement of the ruling. There was no motion and no ruling. Again, nothing about this discussion indicates a critical stage of proceedings.

Third, the Defendant alleges that a discussion of blood tests represented a critical stage where his presence was necessary. Appellant's Brief at 15. In fact, the question at the status conference was whether the prosecutor would assist defense counsel in communicating with Dr. Wren -- a purely administrative matter. RP 373-75. Defense counsel inquired whether the State had received Dr. Wren's opinion on the lab results. RP 373. The prosecutor explained that Dr. Wren had provided his opinion by

voicemail. RP 374. No written opinion was anticipated. RP 374-75. When defense counsel said he had a different question for Dr. Wren, the court asked the prosecutor to assist defense counsel in speaking with the doctor. RP 375. The Defendant's presence was not necessary and would not have been helpful in this communication.

The Defendant suggests that a Gunwall analysis is in order. Appellant's Brief at 17. Because the Defendant's arguments rest on a misrepresentation of the record where the challenged discussions demonstrate no motion, no ruling, and no reason or utility for the Defendant's particular input on any factual matter, the analysis would not assist the claim.

B. A STATUS CONFERENCE IS NOT A PROCEEDING WHICH IMPLICATES THE DEFENDANT'S RIGHT TO PUBLIC TRIAL.

The Defendant argues that this January 11, 2012 status conference violated his right to a public trial.

Before determining whether there was a violation, the court must first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). Recently, the Washington Supreme Court

adopted the United States Supreme Court's experience and logic test. *State v. Sublett*, 176 Wn.2d at 73, *citing Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). The experience prong asks "whether the place and process have historically been open to the press and general public." *Id.* And the logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* Both prongs must be satisfied for the public trial right to attach. *Id.*

In *State v. Sublett*, the court held that the *in camera* consideration of a jury question by judge and attorneys did not implicate the public trial right, because, similar in nature to proceedings regarding jury instructions, historically such proceedings are not held in an open courtroom, but rather conducted in writings. *State v. Sublett*, 176 Wn.2d at 75-76. If any objections arise to the discussions in an informal hearing, counsel has a duty to lodge formal objections, which then creates a public record. *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn.App. 609, 615–17, 1 P.3d 579 (2000).

In the instant case, neither the experience nor the logic prong is met.

As the trial judge explained repeatedly, he did not consider status

conferences to be hearings, but only an informal discussion with counsel about the status of the case. RP 364-65. Typically, there would not even be a record kept. RP 364. The judge explained that he considered these conferences to be open to the public, although they always occur "here," i.e. in chambers.

> The door happens to be shut, but if we were having a typical pretrial discussion with the other cases that were also set for trial next week, there would be other attorneys ***here*** on those particular cases, so I do not restrict who can come in except I don't allow any of the parties or witnesses to come into this discussion. That would just prolong the discussion, in my opinion.

RP 365 (emphasis added). This is consistent with the practice in *State v. Ahern*, where "the record makes no mention of the in-chambers conference." *State v. Ahern*, 64 Wn. App. at 734.

The Defendant argues that the trial court stated that "these specific proceedings" are generally held in a courtroom. Appellant's Brief at 26. Because status or pretrial conferences are typically held in chambers in Walla Walla, the Defendant is misinterpreting the judge's words.

Because the hearings are typically held in chambers with only attorneys in other cases in attendance, because the nature of the hearing (scheduling trial) is so prosaic as to only interest the attorneys, whether the public is permitted access or not, it is likely that the only actual attendees

of the conferences are attorneys. In other words, the experience of the court is that the public is not present at these conferences. There is no indication in this record that there is public notice for these hearings.

Logically, public presence serves no purpose at a status conference. The only subject of discussion is whether the parties are ready for trial. It is as ministerial as it gets.

A status conference is distinguishable from the pretrial motion hearing in *State v. Easterling*, where the court heard argument on a motion to sever trial and in which the state conceded both a closure and an error. *State v. Easterling*, 157 Wn.2d 167, 171, 175-76, 137 P.3d 825 (2006). At a status conference, attorneys turn in their proposed jury instructions. But there are no motions, no arguments, no rulings, no continuances requested or granted, just a single question: is everyone ready to go? The only decision made at a status conference is which trial is going in which order. If there are issues that need to be addressed, then an actual hearing is scheduled.

The Defendant suggests that the public's presence would assure the proper procedures are followed. Appellant's Brief at 29, *quoting Press II*. But there are no procedures. The court merely inquires if the parties are ready for trial.

Because status conferences are historically held in camera and would not benefit from public access, the Defendant's public trial rights are not implicated.

C. THE JURY INSTRUCTIONS DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

The Defendant argues that the jury instructions violate the double jeopardy clause by failing to make clear whether the two offenses may be based upon the same conduct. Appellant's Brief at 32. The trial judge considered and ruled against this challenge at trial. RP 951-59.

At trial, the Defendant challenged Instruction 13 (CP 1081) and proposed his own instructions (CP 1004-18, 1062-64), arguing that his instructions more clearly explained that the jury must find two separate acts and relying upon *State v. Borsheim*, 140 Wn. App. 357, 165 P.3d 417 (2007). RP 951-57. The court ruled that Instruction 13 was a correct instruction according to WPIC, accurately stating the law while allowing the parties to argue their theories of the case. RP 957, 959. The Defendant's proposal, on the other hand, was so much surplus language which would only confuse the jury. RP 958. The court noted that there was already an instruction (No. 5 – CP 1073), which talked about separate counts and instructed the jury to decide each count separately. RP 959.

The judge said that both these instructions: "should be clear to the jury, that they cannot confuse the elements nor confuse the facts and rely on only one set of facts to convict on both counts." RP 959. The State was instructed that it could not argue that a single act sufficed for both convictions. RP 958. The court distinguished *Borsheim*, noting that it regarded a case with multiple counts of the same offense and did not mandate the Defendant's proposed instruction. RP 958.

The Defendant had raised this argument earlier, in his motion to dismiss following the presentation of the state's case. RP 890-91. The prosecutor responded, in part, that the law was clear that child rape and child molestation convictions cannot be the basis for a double jeopardy challenge. RP 892-93. The crimes of molestation and rape have different elements. Child molestation requires sexual gratification; and child rape requires penetration or oral/genital contact. RCW 9A.44.010 (1) and (2); RCW 9A.44.073; RCW 9A.44.083; *State v. Jones*, 71 Wn. App. 798, 825, 863 P.2d 85 (1993). The courts have held that child rape and child molestation are not the same offense for double jeopardy purposes. *State v. French*, 157 Wn.2d 593, 610-11, 141 P.3d 54 (2006); *State v. Jones*, 71

Wn. App. at 822.[1] Nor can the Defendant claim that the legislature did not intend multiple punishments here. The legislature is deemed to acquiesce to the court's interpretation of a statue if no change is made for a substantial period following the court's decision. *In re Reed*, 136 Wn. App. 352, 361, 149 P.3d 415 (2006).

These cases, *State v. French* and *State v. Jones*, are dispositive of the claim. However, in light of the inconsistent case law on double jeopardy, the Defendant's arguments are addressed for good measure.

In *State v. Borsheim*, the jury convicted the defendant of four counts of first-degree child rape. *State v. Borsheim*, 140 Wn. App. at 362. The court of appeals found no problem with the unanimity instruction, but reversed three of the four counts on double jeopardy grounds. *State v. Borsheim*, 140 Wn. App. at 365-66, 371. The court noted that where multiple identical counts are alleged to have occurred within the same charging period, the trial count must instruct the jury to find "separate and distinct acts for each count." *State v. Borsheim*, 140 Wn. App. at 367. Otherwise, it is not manifestly apparent to a criminal trial jury that the State is not seeking to impose multiple punishments for the same offense.

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[1] *But see State v. Land*, -- Wn. App. --, 295 P.3d 782, 785 (Wn. App. filed January 7, 2013) (holding that *Jones* and *French* do not overcome the requirement for separate acts). Note that this same division of the court of appeals filed an unpublished (in part) decision a week after *Land* coming to the opposite conclusion.

Id.

As Judge Schacht stated, unlike *Borsheim*, the instant case did not involve multiple identical counts. RP 958. Therefore, with different elements for the separate counts, there is not that same impression that the State is seeking to impose multiple punishments for the same offense. The *Borsheim* court proposed that separate to-convict instructions would have helped. *State v. Borsheim*, 140 Wn. App. at 368. And in the instant case, there *were* separate to-convict instructions. CP 1077, 1080.

In *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011), the defendant was convicted of five counts of second-degree rape. Like *Borsheim*, this was a case of multiple counts of the identical crime. However, in *Mutch* the Washington Supreme Court held that a flawed instruction alone did not violate the double jeopardy clause, because it was not the *potential* for multiple punishments for the same offense which offended the constitution, but the actual imposition of multiple punishments. *State v. Mutch*, 171 Wn.2d at 663. The court held that there is no violation when it is manifestly apparent that the conviction on each count is based on a separate act. *State v. Mutch*, 171 Wn.2d at 664. The reviewing court looks to the entire trial record. *Id.*

In *Mutch*, the court found persuasive that the defendant did not

choose to attack the separateness of the counts in cross-examination of the victim or challenge the sufficiency of the evidence on that basis; that the prosecutor discussed all five episodes in argument; and that there were five separate to-convict instructions. *State v. Mutch*, 171 Wn.2d at 665.

In the instant case, the Defendant did challenge the victim and make the half-time motion. In his cross-examination of the child, however, he brought out that BD alleged a touching over the clothes and a touching under the clothes, a touching while being held on the Defendant's lap and a touching while lying down on the floor. RP 588-89, 594. And in the dismissal motion, he acknowledged that the victim described an assault which interrupted her TV viewing and another assault which woke her from sleep. RP 890-91. In other words, his very challenge articulated the separate acts.

As in *Mutch*, there were two different to-convict instructions for each singular count. And the prosecutor described the evidence in testimony and exhibits as consisting of various, separate acts: once that the Defendant turned off Sponge Bob and then lay BD down and sexually assaulted her; and on various other occasions, he would pull BD onto his lap and touch her under her clothes. RP 976.

The *Mutch* opinion is not unlike that in *State v. Corbett*, 158 Wn.

App. 576, 591-93, 242 P.3d 52 (2010), which looked to the context of the presentation of evidence and the argument at trial. The Corbett court found that this record eliminated a strained prejudicial reading of an instruction so that the verdict was clear and any instructional error was harmless. In this totality review, the *Corbett* court also accorded significance to the unanimity instruction, which was used in this trial (CP 1073).[2] *State v. Corbett*, 158 Wn. App. at 592. Because the jury considers instructions as a whole (*State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006)), this instruction (that a separate crime is charged in each count and each count should be decided separately not influencing a verdict on other counts) weighs toward manifestly apparent separate acts.

Even were double jeopardy implicated in the conviction of different crimes, (1) the separate to-convict instructions, (2) the different titles and elements of each count, (3) the unanimity instruction, (4) the defendant's acknowledgement of separate acts in evidence, and (5) the prosecutor's description of different acts make manifestly apparent the fact that the verdicts resulted from distinct acts.

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[2] The Defendant argues that this jury instruction was "found lacking in *Mutch*, *Carter*, and *Borsheim*." Appellant's Brief at 35-36. This is inaccurate. Departing from *Carter* and *Borsheim*, *Mutch* changed the standard, so that this instruction is part of entire trial record, which is reviewed to determine whether the convictions are based on separate acts.

D. THE "ABIDING BELIEF" JURY INSTRUCTION IS NOT ERROR.

The Defendant challenges Instruction 4 under *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

In *State v. Emery*, the Washington Supreme Court held that the prosecutor improperly suggested that jury's job was to determine the truth and that to find reasonable doubt the jury should be able to fill in a blank, thereby muddling the burden of proof. *State v. Emery*, 174 Wn.2d at 760. However, the defendants failed to demonstrate that the error was so flagrant and ill intentioned as to be incurable by instruction. *State v. Emery*, 174 Wn.2d at 764.

The *Emery* opinion notes that closing argument cannot be likened to instructional error, because jurors are instructed to disregard argument that is contrary to the court's instruction. *State v. Emery*, 174 Wn.2d at 759. Based on this, the Defendant asserts it is error to instruct the jury that "[i]f, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 1072; RP 965. But this WPIC has been thoroughly vetted on precisely this question.

The Defendant acknowledges that the challenged language comes from WPIC 4.01. Washington's traditional abiding-belief instruction has

been upheld in several cases. *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *State v. Bennett*, 161 Wn.2d 303, 309, 165 P.3d 1241 (2007). *See State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn.App. 286, 299–301, 786 P.2d 277 (1989) (rejecting the argument that WPIC 4.01 dilutes the State's burden of proof); *State v. Mabry*, 51 Wn.App. 24, 751 P.2d 882 (1988); *State v. Price*, 33 Wn.App. 472, 655 P.2d 1191 (1982).

The Defendant argues that in *Pirtle* the question was different. This is plainly not so. In *Pirtle*, the question was whether the "abiding belief" language ***changed the burden of proof***. *State v. Pirtle*, 127 Wn.2d at 656 ("Pirtle argues the last sentence [] invites the jury to convict under a preponderance test"); Appellant's Brief at 48 (agreeing that this was the question). That is the same question here, and the answer must be the same. The addition of the last sentence is not error. *State v. Pirtle*, 127 Wn.2d at 658. It does not "diminish the definition of reasonable doubt given in the first two sentences." *Id.* The instruction does not change the burden of proof and, therefore, is a correct statement of law.

The Defendant finds offense in the word "truth" without regard for context. The problem with *Emery* was that the prosecutor was suggesting that the jury's verdict would be a declaration of truth rather than an

assessment of the sufficiency of the State's case by the proper standard. *State v. Emery*, 174 Wn.2d at 760. But the prosecutor's statement in *Emery* did not quote the jury instruction.

Any instruction or part of an instruction must be read within the context of the jury instructions as a whole. *State v. Pirtle*, 127 Wn.2d at 656; *State v. Jackman*, 156 Wn.2d at 743. The actual instruction repeats the phrase "reasonable doubt" five times. (The *Pirtle* court also found this significant. *State v. Pirtle*, 127 Wn.2d at 657.) The instruction explains that the State has this burden, and the defendant has no burden. It explains that a reasonable doubt is one for which a reason exists. In this context, "if from such consideration," the jury has an abiding belief in the truth of the charge, it has not found a reasonable doubt.

This jury instruction is not tantamount to the *Emery* prosecutor's argument and it is not error.

E. THE PROSECUTOR'S RECITATION OF THE "ABIDING BELIEF" JURY INSTRUCTION IN CLOSING ARGUMENT WAS NOT PREJUDICIAL ERROR.

In closing argument the prosecutor said:

> The Defendant starts with the presumption of innocence. And beyond a reasonable doubt as you have heard the Court instruct you, means an abiding belief in the truth of the charge. I would say that means when you start with a blank page, once you believe the charges to be true, you are

satisfied beyond a reasonable doubt.

RP 977. The Defendant argues that this was prejudicial error.

The prosecutor did not characterize the trial as a search for truth as opposed to a search for doubt as happened in *State v. Warren*, 165 Wn.2d 17, 25, 195 P.3d 940 (2008). She did not exhort the jury to speak the truth through their verdict and fill in a blank with an articulable doubt as happened in *State v. Emery*, 174 Wn.2d at 751. Rather, this argument fairly recites the jury instruction, complete with reminders about the presumption of innocence and the beyond a reasonable doubt standard.

The outcome in both *Warren* and *Emery* was <u>not</u> reversal. When the prosecutor in *Warren* mischaracterized the trial as a search for truth and flagrantly and repeatedly undermined the presumption of innocence despite defense objections, the court held that prejudice was cured even though the curative instruction had been imperfect. *State v. Warren*, 165 Wn.2d at 455. And when the prosecutor in *Emery* required the jury to fill in the blank and to speak the truth in their verdict (*State v. Emery*, 174 Wn.2d at 750-51), the court did not find reversible prejudice. *State v. Emery*, 174 Wn.2d at 760-65.

The *Emery* court explained that this type of error is not akin to the deliberate injection of racial bias, "but an improper attempt to explain 'an

esoteric concept, not always well understood by lawyers and judges.'" *State v. Emery*, 174 Wn.2d at 758, *quoting State v. Bennett*, 161 Wn.2d 303, 319, 165 P.3d 1241 (2007).

> [T]he prosecutor's misstatements "are not the type of comments which this court has held to be inflammatory," *State v. Brett*, 126 Wash.2d 136, 180, 892 P.2d 29 (1995), so there is no possibility that the prosecutor's statements engendered an "inflammatory effect," *State v. Perry*, 24 Wash.2d 764, 770, 167 P.2d 173 (1946).

State v. Emery, 174 Wn.2d at 763. Nor does it rise to the seriousness of an instructional error, because the jury is specifically instructed to disregard argument which conflicts with the court's instructions. *State v. Emery*, 174 Wn.2d at 759.

Despite this precedent and despite the fact that the instant case doesn't even rise to the level of the precedent, the Defendant argues that the prosecutor's argument was "flagrant and ill-intentioned." Appellant's Brief at 52. "Flagrant and ill-intentioned so as to be incurable by court instruction" is the proper standard because the Defendant failed to make a timely objection. *State v. Emery*, 174 Wn.2d at 761. The Defendant argues that the argument was ill-intentioned, because there were some court decisions finding "declare the truth" arguments to be error. Appellant's Brief at 52. However, the Defendant also acknowledges that

there was a split of opinions in the courts of appeals, and the Washington Supreme Court would not issue an opinion in *Emery* until two months after the conclusion of this trial. *Id.*

The prosecutor's argument here does not rise to the level of that in *Emery* or *Warren* – cases where the court did not find reversible error. Therefore, reversal is inappropriate here, too.

F. THE TRIAL COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO DISMISS.

The Defendant challenges the court's denial of his CrR 8.3 motion to dismiss.

The Defendant properly notes that the standard of review for a challenge to a court's CrR 8.3 ruling is "manifest abuse of discretion." Appellant's Brief at 54. The trial court's decision is given great deference. *State v. Kone*, 165 Wn. App. 420, 266 P.3d 916 (2011). Case law instructs a trial judge that dismissal is an extraordinary remedy that should only be used as a last resort. *State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). A defendant must show actual, not merely speculative, prejudice which affected his right to a fair trial. *State v. Kone*, 165 Wn. App. at 433. Even now, the Defendant only argues speculative prejudice. Appellant's Brief at 59 (arguing that although the court allowed defense a

continuance to address the new information, this continuance was not equivalent to pretrial investigation).

In this case, the Defendant did not learn of a second recorded interview with BD until the third trial. RP 638-39, 641, 766. DCFS conducted the 20-minute interview and did not provide the tape to law enforcement. RP 634, 639. Outside of the presence of the jury, the DCFS investigator explained that the child had made a strange comment during a car trip regarding a wiener in her mouth, and DCFS decided to question BD about it formally. RP 640-41. When they did, they learned that she was not disclosing any new information about sexual assault, but only talking about eating a hot dog. RP 640. The interview did not result in any relevant evidence. RP 640.

In other words, this was neither material within the prosecutor's possession or control (CrR 4.7(a)(1)), nor was it information within the prosecutor's knowledge, which tended to negate guilt (CrR 4.7(a)(3)). Contrary to the Defendant's suggestion (Appellant's Brief at 57), CPS is not a department within the prosecutor's control. CPS is not an agent of the prosecutor or of law enforcement. This agency conducts its investigation quite separately from the county prosecutor for different purposes and under different rules.

The Defendant claims that the State had knowledge of this tape when Ms. Martin testified at the first trial. This is inaccurate. The CPS investigator did not testify about the existence of any second tape, only the occurrence of a second interview. RP 166. And apparently her testimony was not marked by the prosecutor. The Defendant's accusation against the prosecutor is not reasonable. Why would the prosecutor elicit testimony about the existence of evidence and then not inquire into the details of that other evidence, except that the prosecutor did not expect the answer she received? The prosecutor advised the court that when she asked Ms. Martin if she ever spoke with BD again, "I fully expected her answer to be no." RP 851.

Defense learned about the interview on April 3, 2012. By the next morning, counsel had reviewed the tape. RP 766. He informed the court that he had learned critical information from the tape, which he believed implicated Ms. Davis' parents in the abuse. RP 766.

The defense provide the court with the authority of *State v. Krenik*, 156 Wn. App. 314, 231 P.3d 252 (2010) and acknowledged that dismissal is an extraordinary remedy. RP 834-35. From this authority, the court noted that the proper remedy would be a continuance to allow the defense to interview new witnesses as opposed to a mistrial. RP 837. Only after

that time would defense be able to assess prejudice. RP 839. The court ordered the State to assist the defense in locating witnesses and arranging interviews. RP 839. The prosecutor was able to identify Nana and Papa Brian and also offered to provide the defense with an interpreter to assist in the interviews. RP 840, 848-49.

Trial resumed six days later. RP 851. Counsel's expectation that the information would lead to exculpatory material proved to be inaccurate. RP 770, 897-937. The DCFS investigation determined that the Spanish speaking foster mother had misunderstood BD's comments. RP 851-54. And the Band-Aid comment regarded a much earlier injury to the knee or leg. RP 854.

The Defendant called new witnesses. RP 897-937. Ms. Davis was recalled in order to testify that BD visited with her parents. RP 898. Ms. Davis's stepfather Brian Paulson testified that when BD was born, Ms. Davis, her mother, and BD lived in a home separate from Mr. Paulson. RP 931. When Ms. Davis moved in with the Defendant, her mother returned to Mr. Paulson's home. RP 932. Then when BD visited her grandparents, she would sleep with her grandmother – on the couch. RP 932. DSHS worker Maggie Zamora did not have a memory of BD's comments related to Mr. Paulson, and defense decided not to call her

before the jury. RP 901-03, 905. Foster mother Maria Diaz did testify. RP 921-29. She did not speak English. RP 840, 923. She testified that BD cried from pain during her bath, and the genital damage was so severe that it made Ms. Diaz cry as well. RP 925-26. BD was one of the first children she fostered and the injuries Ms. Diaz observed made her hypervigilant. RP 853, 858. When Ms. Diaz was dressing BD, she told her "you're going to be okay with us here." RP 927. At that time and again at bedtime, BD asked if Brian would be coming. RP 927. Ms. Diaz jumped to the conclusion that Brian was the abuser (RP 853), but BD never said she was afraid of him. RP 927. DCFS immediately followed up on this information in the second interview. RP 851-52. But BD denied that Brian had hurt her. RP 852-54. BD has consistently only named the Defendant as her abuser. RP 879. DCFS was satisfied that Ms. Diaz had misunderstood BD. RP 853.

While defense counsel made his strongest arguments for dismissal (RP 864-77), it was not credible that an attorney of 25 years should be surprised by a child sexual abuse victim's evolving disclosures. RP 867-72. Nor could he have been surprised that Ms. Davis, who was identified in the initial police report (CP 2) as mentally slow, might be vague or inaccurate in describing the amount of time others (including the

Defendant) had with BD. RP 872. The fact that the mother was unreliable in this regard was apparent from the police reports. RP 882. But it was the defense tactic to aggressively hide the mother's deficits from the jury in order to suggest that the Defendant only had a few minutes alone with BD. RP 621-24. Nor was counsel's recitation of the new evidence borne out in subsequent testimony. RP 897-937. There was zero testimony that BD was afraid of Brian, did not want to see Brian, or accused him of hurting her. RP 866, 870. Counsel argued that the foster mom was fully capable of speaking English. RP 866. Yet she was not able to understand the question "you can correspond in English?" and the court interpreter was necessary for her testimony, because "sometimes confusing for me (sic)." RP 923-24. She did not testify that BD said she was afraid of Brian or that Brian hurt her.

In denying the defense motion, the court found that the late discovery was not substantive, but only useful "at best" for impeachment. RP 884. Therefore, the week's continuance was a sufficient remedy. And the court would allow the defense to offer new witnesses with an offer of proof. RP 885.

Because the court's ruling is based on tenable grounds, there was no manifest abuse of discretion.

G. WHERE THERE IS NO ERROR, THERE IS NO CUMULATIVE ERROR.

The Defendant argues that if the alleged errors do not demand reversal individually, then cumulative error demands it. The State denies any error.

H. THE RESTITUTION ORDER IS VALID UNDER THE STATUTE.

The Defendant argues that the restitution order is invalid.

The court ordered restitution in the amount of $2597.22 in expert witness fees and reserved restitution to be paid for BD's medical care. CP 1092. An asterisk at the bottom of the page indicates that the "victim requires continuing medical and/or therapy care for injuries and/or mental trauma sustained during the crime. The court reserves the right to modify the restitution amount for future medical and/or therapy costs." CP 1092.

The Defendant argues that damages are speculative. Appellant's Brief at 66. This is in accurate.

The first award is specific to the penny, not speculative. If this legal financial obligation is more properly a "witness fee," which appears likely, such is allowed under RCW 4.84.010(6), RCW 9.94A.760(1), RCW 10.01.160, RCW 10.46.190 and *State v. Lass*, 55 Wn. App. 300,

307, 777 P.2d 539 (1989). Trial courts have wide latitude in imposing costs and fees on a convicted defendant. *State v. Moon*, 124 Wn. App. 190, 100 P.3d 357 (2004).

The second award is also not speculative; it is simply not yet specified. There was more than sufficient evidence of the victim's herpes infection resulting from the assault. As the doctor testified, herpes is a life-long condition that requires medical treatment. RP 808, 818.

Restitution may include actual expenses incurred for treatment for injury to persons and the costs of counseling reasonably related to the offense. RCW 9.94A.753(3). If restitution is ordered, as it was here, the court may continue the hearing beyond the 180 days for good cause. RCW 9.94A.753(1). That is the case here. The court ordered restitution and continued the hearing, because the victim's care is ongoing.

For restitution purposes, the offender shall remain under the superior court's jurisdiction for an initial ten years beginning upon the offender's release from confinement. RCW 9.94A.753(4). This jurisdictional period may be doubled. *Id.* Once an order of restitution is entered, it can be amended at any time as to amount, terms, and conditions while the court has jurisdiction. *Id.; State v. Gonzalez*, 168 Wn.2d 256, 226 P.3d 131 (2010).

A court's authority to order restitution is derived solely from statute. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Both the awards are proper under the statutes.

Because the Defendant is incarcerated, restitution is not yet being collected and his challenge is not ripe. Any challenge should, at most, result in a modification hearing.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: April 1, 2013.

Respectfully submitted:

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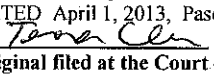
Marla Zink < wapofficemail@washapp.org> Robert J. Middleworth DOC # 948011 Coyote Ridge Corrections Center 1301 N. Ephrata Ave P.O. Box 769 Connell, WA 99326	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 1, 2013, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**