72210-7

FILED
Aug 06, 2015
Court of Appeals
Division I
State of Washington

NO. 72210-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VINCENT MELENDREZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BILL BOWMAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Other Jurisdictions:

Statutes

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED.

1. Whether the defendant was given constitutionally sufficient notice of the charges where the charging document included all the elements of the crimes and the defense had full access to the substance of the allegations.

2. Whether the trial court properly exercised its discretion in ruling that the victim's misconduct was not relevant unless known by the defendant, and whether this ruling infringed on his constitutional rights simply because it affected the order of the witnesses.

3. Whether the trial court properly exercised its discretion in allowing the sexual assault nurse examiner to opine on a matter helpful to the jury and beyond their common knowledge.

4. Whether the trial court properly exercised its discretion in denying a defense motion for a mistrial based on an ambiguous comment that did not apprise the jury of the defendant's custodial status.

5. Whether the jury was properly instructed where the trial court gave the standard Petrich[1] instruction to ensure jury unanimity as to Count 4.

6. Whether the cumulative error doctrine is inapplicable where there were no errors.

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Vincent Melendrez was charged by amended information with rape of a child in the second degree (Count 1), rape of a child in the third degree (Count 3), incest in the first degree (Count 4), incest in the first degree (Count 5) and tampering with a witness (Count 6). CP 96-98. Count 2 was dismissed during trial without objection. RP 1229-34.[2] A jury found Melendrez guilty of all five counts. RP 2231-32. This appeal follows.

2. FACTS OF THE CRIME.

Eighteen-year-old R.M. testified at trial that her father, Vincent Melendrez, began having sex with her at age twelve or thirteen, and continued to do so for over three years until she

[1] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

[2] The 19 volumes of the Verbatim Report of Proceedings are sequentially paginated.

disclosed the abuse to a high school counselor on October 5, 2011. RP 772, 780-82, 784, 818, 837-38, 864, 902, 935-38. Melendrez was a divorced father with custody of seven children and R.M. was the oldest child. RP 773, 1812. The family relocated from Alaska to Washington in 2008 after Melendrez's divorce. RP 775, 1812. The family lived in several locations and moved from Kitsap County to Renton, Washington in 2010. RP 774-77.

R.M. testified that when she was 12 or 13 years old and the family was living in Bremerton, Melendrez showed her pornography on the computer and then explained sex to her, although R.M. had already received sex education at school. RP 781. After she went to bed, Melendrez told her he wanted to "check something" and asked her to remove her underwear. RP 782. She did so, and then Melendrez performed oral sex on her and then vaginally penetrated her. RP 782. R.M. was crying and in pain as this occurred, but did not report this initial assault to anyone because she did not want to "ruin my family." RP 783.

Melendrez had sexual relations with R.M. again and this time R.M.'s brothers suspected something and spoke to R.M.'s maternal grandmother. RP 784-85. The grandmother, Guadalupe Melendrez, told R.M. that she needed to push Melendrez away and

fight him off and even threaten to tell the police. RP 786. But R.M.'s grandmother told her not to tell anyone because if she did, Melendrez would go to jail. RP 787. R.M. told her two oldest brothers, W.M. and D.M., about the abuse but they also told her to simply fight their father off. RP 787. D.M. confronted Melendrez about the accusations, but Melendrez denied it and R.M. decided that she "couldn't split up my family" by reporting the sexual abuse. RP 788.

R.M. testified that her father, who worked long hours at Microsoft, was controlling, and delegated most of the responsibility over her six younger siblings to her. RP 814-16, 823, 826-30. As a result, she did not have many friends and was not allowed to engage in after-school activities. RP 813, 818, 870-72.

Melendrez's sexual abuse of his daughter continued at each of the places they lived, but increased after the family moved to an apartment complex in Renton. RP 837-38. R.M. testified that "after 30 times of that, I gave up and lost count." RP 837. The abuse progressed to where it was happening multiple times a week. RP 864. R.M. still did not report the abuse to anyone outside the family because she wanted to protect her family. RP 858. R.M.

testified that she eventually reached a point where she could "pretend[] like none of it ever happened." RP 862.

However, in 2010 on Thanksgiving evening, R.M. went to a friend's house without permission and refused to return home for several days. RP 868, 873-74. She told this friend that she was being sexually abused by her father, but asked her not to tell anyone. RP 740-42. The friend testified and corroborated that R.M. had told her about the sexual abuse at the time. RP 740-42. R.M. returned home after a few days, and Melendrez punished her by withdrawing her from public high school and making her attend an online program from home for the following semester. RP 881-82, 893-94. R.M. did not report the continuing sexual abuse to anyone else because she was "scared of splitting up my family" and because her siblings would hate her for it. RP 888-89. R.M.'s friend did not tell anyone, as R.M. had requested. RP 743, 747.

R.M. was allowed to return to public high school in the fall of 2011 as she entered 11th grade. RP 912. On October 3, 2011, R.M. was caught by the property manager of the apartment complex having a sexual encounter with a boy in the complex's Welcome Center. RP 919. The manager reported the incident to Melendrez. RP 920. In response, Melendrez beat R.M., called her

a whore and forbade her from going to school or leaving the house on October 4, 2011. RP 921-26. The next morning, on October 5, 2011, Melendrez had intercourse with R.M. in the morning and left for work. RP 927. R.M. called her grandmother and told her that she was running away. RP 928. R.M. then grabbed some of her belongings and went to school, against her father's orders. RP 928-32. She saw her oldest brother, W.M., at school and he yelled at her and told her she needed to return home. RP 933-34. W.M. called their grandmother, who then tried to contact R.M. through her cell phone. RP 934. R.M. went to the school counselor, who testified at trial that R.M. reported that her father had beaten her, called her a "lying whore" and had been sexually abusing her since 2008. RP 1282-83, 1288-89. The counselor saw injuries on R.M.'s face and legs. RP 1277. R.M. explained that she decided to finally disclose the sexual abuse because she was "depressed," "unhappy" and "tired of protecting people." RP 981.

Sexual assault nurse examiner Susan Dippery examined R.M. on October 5, 2011, and observed physical signs consistent with recent sexual activity. RP 1398, 1403-05. Dippery collected swabs from R.M. for the rape examination kit. RP 1345, 1355, 1409. Both R.M.'s and Melendrez's clothes were seized and

submitted for forensic testing with the swabs. RP 493-99, 515-16, 1408. Sperm was found in the perineal and vulvar swabs collected from R.M. and semen was found in the vaginal swab. RP 586-87. DNA found in the perineal and vulvar swabs matched Melendrez's DNA profile with an estimated probability of selecting an unrelated individual at random from the U.S. of approximately 1 in 1.9 quintillion. RP 643-44. DNA found in sperm from two cuttings from R.M.'s underwear also matched Melendrez's profile with the probability of a match being approximately 1 in 1.9 quintillion and 1 in 1.9 quadrillion. RP 647-56. DNA found on Melendrez's underwear matched the victim with the probability of a match being approximately 1 in 63 quintillion. RP 620.

Less than a half hour after going to the school counselor's office, R.M. began receiving text messages from Melendrez which first accused her of "telling lies about the family," and then read, "we love you, hope you are safe, please come home," and that Melendrez was willing to let R.M. "live anywhere." RP 949-52.

On October 12, 2011, after R.M and her siblings had been removed from the home by Child Protective Services, R.M. was instructed to pick up documents at the UPS store. RP 732, 953, 1015, 1561. One document was an affidavit signed by Melendrez

stating that he would not seek custody of R.M. and would provide her with monetary support until the age of 18. RP 1010. The second document was an affidavit for R.M. to sign stating that she had never been "imprisoned, abused, sexually molested or sexually assaulted" by Melendrez. RP 1011. R.M. refused to sign the affidavit because it was not true. RP 1011.

W.M., R.M.'s brother who is one year younger than R.M., testified at trial for the defense. W.M. testified that R.M. had told him several times that she and their father were having sex, including when she ran away at Thanksgiving, but that he did not believe her. RP 1529-31, 1567-70. He also testified to statements that R.M. had made indicating sexual activity with boys her age. RP 1540, 1543. W.M. testified that the "house rules" of the Melendrez home were do not lie to Melendrez or "betray him," love each other, and "defend the family." RP 1556.

D.M., who is two years younger than R.M., also testified for the defense. RP 1670. He confirmed that R.M. had told him that she and their father were having sex. RP 1687-88. D.M. confronted Melendrez but Melendrez denied it. RP 1570. In response, Melendrez made R.M. tell the other siblings that it had not happened. RP 1702. In 2010, D.M. told a school counselor

that he hated his life, but asked that she not speak to Melendrez because he would think "I did not defend the family," echoing the "house rules" testified to by his older brother. RP 1743.

Guadalupe Melendrez, R.M.'s grandmother, testified for the defense. RP 1920. She testified to seeing nude pictures of R.M. on R.M.'s phone and to statements by R.M. that she was having sex with a boy her age. RP 1925-28. She denied that R.M. had ever told her about the sexual abuse. RP 1926, 1931, 1933. She confirmed that R.M. had called her on October 5, 2011, and told her that she wanted to run away. RP 1929-32.

Melendrez testified at trial. RP 1803. He denied ever having any sexual contact with R.M. RP 2034-35. He testified that he was aware that R.M. was "sexting" and was engaged in other sexual activity with boys her age, and that he had imposed discipline on her for what he perceived as sexual promiscuities. RP 1980-81, 2014, 2017, 2025, 2058. After the incident at the Welcome Center, Melendrez told R.M. that she would have to attend online school again and would not be allowed to attend public high school. RP 2030. He admitted that D.M. had previously confronted him about an accusation that he was sexually abusing R.M. RP 2052. In response, he denied it and told R.M. "I don't ever want to hear

you say those kinds of things again" and grounded her for two weeks. RP 2052-53. He admitted to drafting the affidavits that were left for R.M. at the UPS store. RP 2061. He claimed that he drafted the affidavits because his ex-wife told him that R.M. would say she "made the whole thing up" in order to get her cell phone turned back on and be left alone. RP 2059-63, 2109.

C. ARGUMENT.

1. THE INFORMATION WAS CONSTITUTIONALLY SUFFICIENT AND NO BILL OF PARTICULARS WAS REQUIRED TO GIVE MELENDREZ SUFFICIENT NOTICE OF THE CRIMES CHARGED IN COUNTS 1, 3 and 4.

Melendrez claims that he did not have constitutionally sufficient notice of the charges contained in Counts 1, 3 and 4 due to the period of time encompassed in the charging periods. His claim should be rejected. Child sexual abuse usually occurs over a period of years with multiple incidents, and victims are often unable to pinpoint precise dates on which abuse occurred. Washington courts have long approved of charging a single crime occurring over a period of months or years where the precise date of a crime cannot be determined. The information was constitutionally sufficient. Because the defense had full access to the substance of

the allegations made by R.M., including a lengthy pretrial interview with R.M., the trial court properly exercised its discretion in denying the motion for a bill of particulars.

In Count 1, Melendrez was initially charged with rape of a child in the second degree for the period of time from January 1, 2008, to April 28, 2008, when R.M. was 12 years old. CP 1. That charge was amended during trial to extend the charging period one year to April 28, 2009, R.M.'s 14th birthday. CP 66. R.M. had testified that she was first sexually abused by her father when she was 12 or 13 years old when the family was living in Bremerton. RP 780-83. In addition to amending Count 1, the State moved to dismiss Count 2, which had charged rape of a child in the second degree for the period of time from April 29, 2008, to April 28, 2009, while R.M was 13 years old. CP 57.

In Count 3, Melendrez was charged with incest in the first degree from April 29, 2009, to April 28, 2011, when R.M. was 14 and 15 years old. CP 67. In Count 4, Melendrez was charged with incest in the first degree from April 29, 2011, to October 4, 2011, when R.M. was 16 years old. CP 67.

A criminal charge is constitutionally sufficient under Washington law if it accurately states all the elements of the crime,

even if it is vague as to some other matter. State v. Bonds, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982); State v. Mason, 170 Wn. App. 375, 378-79, 285 P.3d 154 (2012). When the elements are correctly charged, the charging document may be so vague as to particulars that it is subject to a timely motion for a more definite statement. Id. The charge is not subject to dismissal unless the prosecutor refuses to comply with an order requiring more particularity. Id. A timely request for a bill of particulars should be granted when it will aid the defendant in preparing his case. State v. Dictado, 102 Wn.2d 277, 286, 687 P.2d 172 (1984), overruled on other grounds, State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). The trial court's ruling on a request for a bill of particulars is reviewed for abuse of discretion. Dictado, 102 Wn.2d 286; State v. Noltie, 57 Wn. App. 21, 786 P.2d 332 (1990).

In State v. Noltie, 57 Wn. App. at 22, the defendant was charged with statutory rape and indecent liberties. Noltie was alleged to have sexually abused his stepdaughter. Noltie complained that the charging period encompassed "hundreds of innocent contacts" with the victim. Id. at 30. However, because a defense interview with the victim had occurred and "there [was] no contention that the defense was not fully informed of the details of

M's testimony prior to trial," the trial court properly exercised its discretion in denying the motion for a bill of particulars. Id. at 31.

In this case, the charging language included all the elements. When the State moved to expand the charging period for Count 1 by one year, and dismiss Count 2, defense counsel agreed to the amendment but moved for a bill of particulars. RP 1233. The trial court noted that the amendment reduced two charges with two consecutive charging periods into a single count with a single charging period spanning the same dates. RP 1234. As a result, the crime charged and the charging period did not change, and "the defense was aware of the overall time period in the beginning." RP 1234. Defense counsel confirmed that they had prepared to defend the entire time period. RP 1235. The defense had also been allowed a long interview with the victim. RP 166-67. A bill of particulars was not needed to aid the defense in preparing for trial. As in Noltie, the trial court properly exercised its discretion in denying the motion for a bill of particulars.

Melendrez's claim that the charging period rendered the information insufficient has no basis in Washington law. It has long been the law in Washington that when a victim is unable to fix the exact date on which a crime was committed, the State need not "fix

a precise time for the commission of the alleged crime, when it cannot intelligently do so." State v. Pitts, 62 Wn.2d 294, 299, 382 P.2d 508 (1963). Melendrez attempts to rely on a South Carolina case applying South Carolina law. In State v. Baker, 411 S.C. 583, 585, 769 S.E.2d 860 (2015), the defendant was charged with committing a lewd act upon a minor, his niece. Two weeks before trial, a new indictment was presented to Baker with a new charge spanning a six-year charging period. Id. at 590-91. Baker moved to quash the indictment as "overbroad and vague" because the charging period spanned six years. Id. Prior to the new indictment, Baker was only apprised that the alleged acts occurred during three consecutive summers. Id. Thus, Baker was given only two weeks to prepare for a significantly expanded charging period. Id. The appellate court held that the indictment should have been quashed, while recognizing "the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases." Id. at 592.

In contrast, Melendrez was on notice with the original charges filed in 2012 that the State was alleging that he committed rape of a child in the second degree between January 1, 2008 and April 28, 2009. CP 1-2. This 16-month charging period, and the almost two years Melendrez had to prepare to defend the

allegations, is fundamentally different from the situation addressed in Baker. Moreover, the Baker court fails to explain the constitutional principle upon which its opinion is based.[3]

Baker is distinguishable and should not be followed in this case. The information in this case included all the elements of the crimes and was constitutionally sufficient. The trial court reasonably concluded that a bill of particulars was unnecessary where the defense was fully informed of the details of the victim's testimony well in advance of trial.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT EVIDENCE OF THE VICTIM'S ALLEGED MISCONDUCT WAS NOT ADMISSIBLE UNLESS KNOWN TO THE DEFENDANT.

Melendrez contends that the trial court violated his constitutional rights when it "required him to testify before other defense witnesses." However, this contention does not reflect what actually happened at trial. The trial court did not require Melendrez to testify first. Three of the six defense witnesses testified before

[3] The late amendment in Baker likely would have resulted in dismissal of the charge under Washington law pursuant to CrR 8.3(b) due to governmental mismanagement. See State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997) (dismissing trafficking charges added only three days before trial). But there was no late amendment to new charges or a new charging period in this case.

Melendrez. The trial court did not arbitrarily dictate the order of the defense witnesses. Rather, the trial court ruled that evidence of the victim's alleged misbehavior was not admissible pursuant to ER 404(b) to attack her character, but would be relevant and admissible if offered to explain the defendant's disciplinary decisions. However, that relevance was contingent upon the defendant's actual knowledge of such misbehavior. Thus, before other witnesses could testify to acts of alleged misconduct, the defense had to lay a foundation for the defendant's own knowledge of the behavior. The trial court's ruling was a correct interpretation of ER 404(b) and did not violate the defendant's constitutional rights.

Throughout the trial, the parties and the trial court grappled with admissibility of evidence offered by the defense to attack the victim's character. The State argued the evidence was inadmissible pursuant to ER 404(b) and the rape shield law. RP 72-88, 174-94, 1016-56, 1482-89, 1599-1649, 1661, 1760-71. At the heart of this issue were differing versions of the reasons behind the restrictions that Melendrez placed on R.M. and the punishments she received. The State's theory was that Melendrez's sexual jealousy of his daughter caused him to place severe restrictions on

her movements, like requiring her to attend high school online from home, and caused him to punish her severely when she had contact with boys her age. The defense theory was that these restrictions and punishments were simply part of Melendrez's ordinary parenting. The defense trial memorandum discussed the alleged "long history of disciplinary problems" involving R.M. CP 32. That memorandum outlined evidence that R.M.'s brothers, D.M. and W.M., "were well aware of the various issues with their sister including some not known by their father." CP 32. The State, in its trial memorandum, moved to exclude evidence regarding R.M.'s past sexual history, including the texting of images, pursuant to the rape shield statute, RCW 9A.44.020, and any other alleged misconduct pursuant to ER 404(b). RP 188-89, 196-97.

Before W.M. testified, the trial court explained its ruling as to the evidence it would allow of R.M.'s alleged bad acts:

> So evidence of bad acts or conduct that can be evidence of bad acts, hanging out, smoking dope, hanging out in the wrong places, you know, these types of things, the relevance of that evidence comes from the knowledge of the father and the father's decision to act on that knowledge by imposing restrictions on [R.M.].

> So simply eliciting evidence of the bad acts themselves, there will be no relevance to the acts unless that was established.

RP 1488-89. The court later clarified:

> . . . the actions of [R.M.], whether it be sneaking out of the house or smoking marijuana or any other actions for which she may been disciplined, are only relevant to the extent that Dad knew of them and that Dad took action because of them.

RP 1661.

Melendrez argues that this ruling violated his right to present a defense. However, the trial court did not exclude any evidence that was relevant to the defendant's disciplinary actions. Melendrez fails to show how other acts of misconduct were relevant.

Melendrez's claim is being raised for the first time on appeal, and should not be considered pursuant to RAP 2.5(b). An evidentiary error is unpreserved unless a timely objection is made that states the specific ground of objection. State v. Wilbur-Bobb, 134 Wn. App. 627, 634, 141 P.3d 665 (2006). At no time did defense counsel object to the court's ruling as infringing on Melendrez's constitutional rights. RP 1760-71. The appellate court will review errors not preserved below pursuant to RAP 2.5(a)(3) only if the error is a "manifest error affecting a constitutional right." State v. Kalebaugh, __ Wn.2d __, __ P.3d __, 2015 WL 4136540

(2015). An error is "manifest" when there is a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Id. (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Here, Melendrez cannot show that the trial court's ruling had practical and identifiable consequences in the trial. Melendrez was not forced to testify first. Melendrez was not precluded from presenting any highly probative evidence. Melendrez has failed to show he preserved this error below, and has failed to show that it constitutes a manifest error affecting a constitutional right that can be raised for the first time on appeal.

Turning to the merits of the claim, a criminal defendant has the right to be heard in his own defense and to offer evidence, but these rights are not absolute. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). A criminal defendant has no constitutional right to present irrelevant evidence. Id. The Constitution also permits judges to exclude evidence that is only marginally relevant and is outweighed by other factors such as unfair prejudice, confusion of the issues, or the potential to mislead the jury. Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). For example, evidence of a rape victim's past

promiscuity can be constitutionally excluded from trial as long as the evidence does not have a high probative value. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983).

In this case, there was plenty of evidence admitted through the testimony of W.M., the defendant and Guadalupe Melendrez regarding R.M.'s alleged misbehavior of which Melendrez was aware and to which he reacted by imposing discipline. RP 1514, 1520, 1540, 1543, 1925, 1928, 1972-82, 2014, 2016-17, 2023.[4] Melendrez has failed to show that the trial court excluded any highly probative evidence.

Melendrez appears to argue that the trial court's evidentiary ruling affected the order of the defense witnesses.[5] This is, however, constitutionally permissible. In Brooks v. Tennessee, 406 U.S. 605, 92 S. Ct. 1038, 35 L. Ed. 2d 358 (1972), the Court invalidated a statute that required the defendant to testify first in all cases. However, reasonable rulings as to the admissibility of

[4] The State believes it would be a disservice to the victim to recount this testimony in detail.

[5] Melendrez's argument that the ruling unfairly restricted the testimony of W.M. and D.M. is without merit. If the defense felt that additional evidence could have been offered by the boys, they could have been recalled after Melendrez testified. It is the nature of trial work that witnesses are often called out of order, or recalled, as happened here with the testimony of both R.M. and Melendrez. As defense counsel himself noted at the beginning of trial, "I've got a couple of professional witnesses we're working with, working schedules, so it may be a situation where we end up taking somebody out of order, but I think that would be par for the course." RP 7.

evidence that may affect the order of defense witnesses do not pose constitutional problems. In Menendez v. Terhune, 422 F.3d 1012, 1030 (9th Cir. 2005), the co-defendants wanted to introduce testimony that "could explain why they feared their parents," whom they had murdered. The trial court ruled that the defendants were first required to lay a foundation about their actual belief in imminent danger. Id. In affirming the trial court's exercise of discretion, the Ninth Circuit explained that Brooks did not curtail the power of trial courts to set the order of proof. Id. at 1031. A trial court may refuse to allow testimony until a proper foundation is laid, including when that foundation must be laid by the defendant's testimony. Id. See also Johnson v. Minor, 594 F.3d 608 (8th Cir. 2010) (defendant properly required to testify before his wife to lay foundation for evidence of threats by victim). Similarly, a trial court may require the defendant to testify before a defense witness when that witness is currently unavailable. Harris v. Barkley, 202 F.3d 169 (2nd Cir. 2000); People v. Wiege, 133 Cal.App.4th 1342, 35 Cal.Rptr. 482 (2005). As the Second Circuit has explained, "Brooks does not constitute a general prohibition against a trial judge's regulation of the order of trial in a way that may affect the timing of a defendant's testimony." Harris, 202 F.3d at 173.

In this case, the trial court's ruling was soundly based on the evidence rules and did not exclude any highly probative evidence. While the trial court's ruling may have affected the order of the defense witnesses, the ruling was well within the trial court's discretion and did not violate any of Melendrez's constitutional rights.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT THE NURSE EXAMINER'S OPINION TESTIMONY AS TO MEDICAL OBSERVATIONS WAS ADMISSIBLE.

Melendrez contends that the trial court abused its discretion in allowing opinion testimony by the nurse examiner. This claim should be rejected. The challenged testimony was based on the nurse examiner's observations and expertise and was helpful to the jury in a matter beyond the common knowledge of the average layperson.

The sexual assault nurse examiner testified that she was both a registered nurse and a nurse practitioner and worked for seven years as a specially-trained sexual assault nurse examiner at Harborview Medical Center. RP 1345-47. She had been a nurse for 30 years. RP 1345. She testified that she had performed approximately 900 sexual assault examinations in her career, with

half of those patients being teenagers. RP 1349. The nurse examiner testified without objection that it is possible to have a partially intact hymen after sexual activity. RP 1401. In this case, she observed remnants of the victim's hymen still intact. RP 1401. The prosecutor asked whether it would be surprising to her if a teenager who had had sex a hundred times would still have remnants of the hymen intact. RP 1402. The court overruled a defense objection. RP 1402. The nurse examiner answered no. RP 1402.

Melendrez argues that the nurse examiner's testimony was "highly speculative and lacked foundation." Melendrez does not challenge her qualifications as an expert, or claim that her testimony contained an improper opinion as to the defendant's guilt.

ER 702 allows the trial court to admit an expert opinion that is helpful to the jury. State v. Jones, 59 Wn. App. 744, 750, 801 P.2d 263 (1990). Expert evidence is helpful and appropriate when it addresses matters that are beyond the common knowledge of the average layperson. Id. In this case, the nurse examiner's medical knowledge as to the state of hymens after repeated sexual activity was a matter beyond the common knowledge of the average layperson, and was helpful to the jury. The fact that parts of a

hymen can remain intact after many instances of intercourse was relevant, as without that expert testimony the jury might have believed, based on common myths, that the state of the victim's hymen was indicative of very few sexual encounters. The trial court did not abuse its discretion in allowing this testimony.

Moreover, any error in allowing the testimony was harmless. An error in admitting expert testimony is subject to harmless error analysis. State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007). The violation of an evidentiary rule is harmless unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). In this case, the challenged testimony of the nurse examiner was of minor significance in light of the DNA evidence showing that Melendrez's sperm was found in the victim's underwear on the day she reported abuse, and that the victim's DNA was found on Melendrez's underwear on the same day. The DNA evidence provided overwhelming corroboration of the victim's testimony. Any error in admitting the nurse examiner's testimony regarding hymens was harmless.

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL BASED ON THE COURT'S COMMENT ABOUT EXTENDING COURT HOURS.

Melendrez contends that the trial court abused its discretion in denying his motion for a mistrial based on a very brief question by the trial court to "jail staff" about extending the court day. This claim is without merit. The trial court's question was ambiguous and did not advise the jury that the defendant was in custody. Evidence presented at trial indicated that Melendrez was out of custody pending trial. Moreover, the court agreed to give a curative instruction proposed by the defense. In light of these circumstances, the trial court did not abuse its discretion in concluding that its comment did not warrant a mistrial.

The comment in question arose because the trial court became concerned about the unexpected length of the trial. Jury selection in this case began on January 6, 2014. RP 1, 123. The first witness was presented one week later, but the trial was then recessed for a week due to the prosecutor's illness. RP 374. On January 27th, trial was recessed again for one day due to a juror's illness. RP 796. The trial court became concerned about the jurors' continuing availability to serve on the jury, and started

considering extending the court days. RP 1211. At the end of the court day on February 3rd, the trial court asked the jurors if they could stay until 4:30 the following day. RP 1374. The court then asked, "Is the jail able to staff until 4:30 tomorrow afternoon? Excellent. Thank you." RP 1374.

The next morning, defense counsel moved for a mistrial, arguing that the trial court's comment inadvertently informed the jury that Melendrez was being held in jail. RP 1390. After reviewing the recording of the exchange, the trial court denied the motion, agreeing with the State that the jury could just as likely believe that the jail provides general courthouse security. RP 1391, 1455-56. The trial court agreed to give a curative instruction, which defense counsel proposed, in the instructions to the jury. RP 1456; CP 82. That instruction read as follows: "The custody status of a defendant is irrelevant. It does not and may not, in any way, diminish the presumption of innocence or in any other way influence your deliberations in this case." CP 114.

Melendrez argues that reversal is required because the trial court's comment might have caused some of the jurors to conclude that Melendrez was in custody. A defendant has the right to "the physical indicia of innocence," which includes appearing before the

jury free of restraints "with the appearance, dignity and self-respect of a free and innocent man." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Thus, shackling or handcuffing a defendant in view of the jury is inherently prejudicial and erodes the presumption of innocence. Id. However, even improper shackling is subject to harmless error analysis. State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). In this case, Melendrez was not handcuffed or shackled in view of the jury and retained "the physical indicia of innocence" throughout trial.

Comments from the court or witnesses can also erode the presumption of innocence. In State v. Gonzalez, 129 Wn. App. 895, 898, 120 P.3d 645 (2005), the trial court, sua sponte, informed the jury during voir dire that the defendant was unable to post bail and was being held in custody. The appellate court found that the trial court's special announcement intentionally calling attention to the defendant's custody status was reversible error. Id. at 902. The appellate court noted, however, that inadvertent comments may be remedied with a curative instruction. Id. at 901.

When a trial irregularity has occurred, the trial court should consider (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence, and

(3) whether the irregularity could be cured by an instruction to the jury. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The trial court is in the best position to determine how prejudicial an irregularity is, and appellate court review of a denial of a motion for mistrial is for abuse of discretion. Id.

In State v. Condon, 72 Wn. App. 638, 648, 865 P.2d 521 (1993), a witness testified that the defendant had called her from jail and asked her to pick him up from jail, in violation of a motion in limine prohibiting reference to time the defendant spent in jail. The appellate court held that the comments were ambiguous and did not require a mistrial. Id. The court distinguished cases where improper statements alerted the jury that defendant had previously committed similar crimes, as such propensity evidence is more prejudicial than custodial status. Id. The court found in Condon that the trial court's curative instruction was sufficient to alleviate any prejudice. Id.

The comment at issue in this case is even more ambiguous than the testimony in Condon. The jury was never informed that Melendrez was or had ever been in jail. Indeed, there was testimony that Melendrez had *not* been in custody pending trial. Melendrez's supervisor at Microsoft testified that Melendrez was

still working at Microsoft when she left her job in June of 2013. RP 1791. Guadalupe Melendrez testified that Melendrez had visited her in California since October of 2011. RP 1938. Having heard this testimony, the jury would likely assume that Melendrez remained out of custody. The jurors also likely assumed that the trial court's question to "jail staff" about staying late was a matter of courtroom security, and not an indication of Melendrez's custody status. As in Condon, the trial court's reference to "jail staff" was not serious enough to warrant a mistrial, and the court's instruction to the jury was sufficient to alleviate any possible prejudice. The trial court properly exercised its discretion in denying the motion for a mistrial.

5. THE JURY INSTRUCTIONS PROPERLY REQUIRED JURY UNANIMITY AS TO THE ACTS THAT FORMED THE BASIS OF THE CRIMES.

Melendrez contends that the trial court erred in not further defining or explaining the Petrich instruction given by the trial court. This claim should be rejected. The instructions given to the jury were legally correct and adequately protected Melendrez's right to a unanimous jury.

To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). In cases where there is evidence of multiple acts that could support conviction of a single charge, the jury should be instructed in a way that ensures unanimity. State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990). In State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), the court established the rule that the jury should be instructed that all twelve members must agree that the same underlying act has been proven beyond a reasonable doubt if the State does not elect which act constituted the crime. The Petrich rule protects the defendant's right to a unanimous verdict. Camarillo, 115 Wn.2d at 64.

Because the rape of a child and incest charges in Counts 1, 3, 4 and 5 involved evidence of multiple acts that could constitute the crime, the State proposed and the trial court gave a Petrich instruction for each of those counts. CP 119, 122, 126, 224, 228, 232. The instructions followed WPIC 4.25, which reads, in part: "[O]ne particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the

defendant committed all the acts of (identify crime)." 11 Wash. Prac., Pattern Jury Instr. Crim. 4.25 (3d Ed).

During deliberations, the jury posed a question to the trial court regarding Count 4. CP 103. The question read, "Do we need to point to a specific instance or just agree an act occurred during this time frame?" The trial court answered the question by referring the jury to the instructions. CP 103.

Melendrez argues that the trial court violated due process by not further explaining the need for unanimity. However, the instruction given was a plain statement of that constitutional requirement. Melendrez cites State v. Cantabrana, 83 Wn. App. 204, 921 P.2d 572 (1996), for his argument that the legal standard was not manifestly apparent to the jury. However, Cantabrana is distinguishable. In that case, the trial court refused to give the standard WPIC instruction on constructive possession, and instead gave its own instruction which contained a misstatement of law. In contrast, the instruction challenged in this case was a correct statement of the law. Indeed, in State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776 (2008), this Court held that the standard Petrich instruction given here adequately addresses the requirement of jury unanimity "such that the ordinary juror would

interpret it to mean that the jury must be unanimous on the act underlying the conviction." The trial court did not err or abuse its discretion in declining to further explain the instruction to the jury.

Moreover, instructing the jury that they must not only agree that one particular act had been proved, but "point to a specific incident" would have been an incorrect statement of the law. The victim's testimony as to Count 4, which spanned the period of time between R.M.'s 16th birthday and her disclosure to the school counselor, was that the abuse occurred daily. RP 904, 915. She did not recount the details of any single incident. Melendrez apparently argues that because his abuse of his daughter became so commonplace that she could not separate the daily instances of it, he cannot be convicted of incest. But this is not the law. This Court addressed this issue in State v. Hayes, 81 Wn. App. 425, 438, 914 P.2d 788 (1996):

> To hold as a matter of law that generic testimony is always insufficient to sustain a conviction of a resident child molester risks unfairly immunizing from prosecution those offenders who subject young victims to multiple assaults. The challenge is to fairly balance the due process rights of the accused against the inability of the young accuser to give extensive details regarding multiple alleged assaults. We believe the proper balance is struck by requiring, at a minimum, three things. First, the alleged victim must describe the kind of act or acts with sufficient

> specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred. The trier of fact must determine whether the testimony of the alleged victim is credible on these basic points.

The requirements set forth in Hayes were met in this case. R.M. described the acts with sufficient specificity for the jury to determine that the crime of incest had been proved. R.M. described the number of acts with sufficient certainty to support the multiple counts charged. And finally, R.M. described the general time period in which the acts occurred. Nothing more was required to support the conviction on Count 4. The trial court did not err in refusing to instruct the jury that it needed to "point to a specific incident" in order to convict Melendrez of Count 4.

6. THE CUMULATIVE ERROR DOCTRINE DOES NOT REQUIRE REVERSAL.

Melendrez contends that the cumulative error doctrine requires reversal. Cumulative error may warrant reversal where each error committed, standing alone, would otherwise be considered harmless. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, the doctrine does not apply where errors are

few and have little or no effect on the outcome of the trial. Id. As demonstrated above, Melendrez has failed to establish any errors, and has failed to demonstrate how any combined alleged errors affected the outcome of his trial. Melendrez's cumulative error claim fails.

D. CONCLUSION.

The convictions should be affirmed.

DATED this 6th day of August, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kathleen Shea, the attorney for the appellant, at kate@washapp.org, containing a copy of the Brief of Respondent, in State v. Vincent Paul Melendrez, Cause No. 72210-7, 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.

Dated this 6 day of August, 2015.

Name:
Done in Seattle, Washington