Supreme Court No.: 93822-3
Court of Appeals No.: 72210-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VINCENT MELENDREZ,

Petitioner.

PETITION FOR REVIEW

VINCENT MELENDREZ
DOC # 373005
G-B-D27
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Melendrez requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Vincent Melendrez*, No. 72210-7-I, filed December 28, 2015. A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

By this reference, Mr. Melendrez incorporates the Issues Pertaining to the Assignments of Error presented in the Appellant's Opening Brief.

C. STATEMENT OF THE CASE

By this reference, Mr. Melendrez incorporates the Statement of the Case presented in the Appellant's Opening Brief.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. MR. MELENDREZ'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE COURT REQUIRED HIM TO TESTIFY IN ORDER TO ADMIT RELEVANT EVIDENCE.

a. The Court must review Mr. Melendrez's Constitutional Claims.

There are a few reasons Melendrez's Constitutional Claims were preserved for appeal at trial. Although these reasons were referenced in prior briefs concerning this appeal, it is necessary to clarify these issues in justifying the Appellants Petition for Review. First, at the start of trial, the

state submitted a motion in limine to admit 404(b) evidence of household rules and discipline. RP110. When ruling on this issue the court stated that "With regard to the purpose for which they're offered, the purpose, as both counsel have addressed it, is sort of a res gestae purpose, to explain the circumstances and events surrounding what was happening in the home at the time that these alleged incidents took place, that it may also be relevant to why it is that -- that the alleged victim did or didn't disclose and why it is that she did or didn't engage in conduct that she did throughout the course of the time period that these incidents were alleged to have occurred, that -- that these are relevant to the elements at least of the rape and incest charges, and that any prejudice from these activities can certainly be addressed and a way out through cross-examination from the defense through other witnesses and evidence contradicting these particular facts and circumstances. So I'll find that -- that these incidents as relayed in the brief would be admissible under ER 404(b) for those purposes." RP110-111. At this point, the defense did not object to the court's ruling on this motion in limine because the court stated that any prejudice from this evidence can be addressed through cross-examination and through other witnesses.

Later in the trial, the state did indeed elicit testimony from R.M. (Rebecca Melendrez) which established its theory of the case as to the

events and circumstances in the home at the time the alleged incidents took place. R.M. testified that "Since we were old enough, our discipline was always the same;" RP831.

In the testimony that followed, the state elicited testimony from R.M. regarding the increasing restrictions Mr. Melendrez placed on her after the sex allegedly began. R.M. testified that the summer after the first incident, he found out she and her brothers were allowing kids over to the house without permission and sneaking out while he was at work. RP 832, 834-35. According to R.M., Mr. Melendrez sexually assaulted her as punishment and then began restricting her ability to leave the apartment. RP 835. He confiscated her cell phone, as well as her brothers, and timed how long it took her to get home from school. RP 836. R.M. acknowledged in her testimony that he also placed restriction on the boys, but claimed that, unlike her, the boys were allowed out of the home once their behavior improved. RP 837. Also included in the testimony from R.M., which referenced several occasions when friends would come over, was the consistent claims that on most occasions she was not the one behaving badly but was merely present in the home, blamed by her brothers for the behavior, and received punishment. RP 832-37. R.M. then contradicted her testimony, testifying that her movements were actually restricted from the time Mr. Melendrez began having sex with her, rather

than the following summer, and that the restrictions continued with only brief periods of leniency thereafter. RP 835-37.

At this point in the trial the defense did not object to the introduction of this compelling evidence since the court had ruled in the states motion in limine that this evidence was admissible and that the defense would have the opportunity to address the prejudice through cross-examination and through other witnesses. RP 110-111.

Although as a general rule the courts don't preserve an evidentiary issue for appeal when no objection is made to the evidence at trial. A different situation is presented, however, when, the court makes evidentiary rulings pursuant to motions in limine. Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion, unless the trial court indicates that further objections at trial are required when making its ruling. *State v. Powell*, 126 Wn.2d 244 (1995) held that a "defendant had a standing objection on the majority of the trial court's rulings because it made final rulings on defendants motion in limine."

In this case, the trial court's ruling as to the evidence the state introduced regarding the environment in the home during and surrounding

the alleged crimes at trial was clear and the court did not indicate that any objection was required but in fact assured the defense that any prejudice from this evidence could be addressed through cross-examination and other witnesses. RP 110-111. Had the defense known a latter ruling would prohibit Melendrez from fully addressing the prejudice or had the defense not been assured by the court it could do so the defense would have certainly objected multiple times to the introduction of the state's theory of the case. Because the court made a latter ruling directly affecting and relating to the defenses ability to respond to the prejudice created from the state's uninhibited introduction of its theory of the case, it is clear that a standing objection exists for this issue.

Second, the trial court ruled that "the only way in which any specific act of misconduct outside of sexual activity of Ms. Melendrez would be relevant in this case would be if the defendant is going to testify that the purpose for which he imposed the discipline was not to keep his -- his daughter as -- as a sexual partner in their home or to enforce his desire to have sex with her, but instead was to deal with disciplinary issues. That's the first step. The second step is the specific acts would only be relevant if they are acts that the defendant knew of, because he wouldn't be imposing discipline for those acts unless he knew of them. So they don't become relevant until that testimony is elicited." RP 1046. In

response to this ruling, the defense inquired of the court which evidentiary analysis was used in determining the relevance of the sexting evidence and after modifying it's ruling to allow cross-examination of the sexting evidence the court repeated its ruling that "with regard to the other testimony, I am not going to allow questions regarding acts outside of the acts I've talked about of a sexual nature at this time, and the reason I'm not going to is because it hasn't become relevant and won't become relevant until the defendant's testimony is that I disciplined her because of certain acts. These are the acts that I knew of." RP 1055. To this ruling the defense responds "And let the record reflect the defense respectfully disagrees with the court on this latter ruling." RP 1057.

The objection to the ruling requiring Melendrez to testify in order to make evidence relevant is clear.

In *Palmerin v. City of Riverside*, 794 F.2d 1409, 1411 (9th Cir.1986) the court held that "where the substance of the objection has been thoroughly explored during the hearing on the motion in limine, and the trial court's ruling permitted introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of the evidence."

In this case, not only did Melendrez object to the court's ruling which required him to testify in order to admit evidence which was

already relevant but the court stated, when granting the state's motion in limine, the substance of the objection which is the defense's ability to address the evidence the state introduced as it's theory of the case. Evidence which the court stated is offered for the purpose of explaining the events and circumstances that were happening in the home at the time the alleged incidents took place. RP 110-111. Evidence Melendrez should have been allowed to fully address on cross-examination and through other witnesses as the court had stated when making the ruling to allow the evidence the state introduced. RP 110-111.

It is clear that Melendrez did indeed preserve this issue for appeal by either standing objection or the objection to the court's ruling, but it is also necessary to bolster this argument and show how the defense was prejudiced by more closely examining the evidence the state introduced as it's theory of the case.

At trial, the state presented it's theory of the case that Melendrez was in incredibly controlling father who restricted his daughter to the home in order to sexually assault her. The testimony of R.M. included the claim that it was obvious to everyone in the household, including her brother friends who would visit, that the allegations were occurring in the home. RP844-45, RP 864, RP 870, RP 889, RP897, RP906-907, RP916, RP926-27. R.M. testified to numerous behaviors of her brothers, which

she specifically stated she did not commit but was present for, that resulted in punishment. RP780, RP832-834. R.M. testified as to the state of mind of the accused specifically indicating Melendrez was jealous and upset at her behaviors which she claims were a result of the allegations. RP813-814, RP823, RP835, RP836, RP884, RP893, RP911, RP925. R.M. also testified to the character of the household members stating "William is just like his father" and Grandma "Is just protecting her son." RP827, RP853-54, RP876, RP928-929, RP932, RP959-960, RP978-979. While testifying to her own character R.M. stated "I've never been in a fight", "I've never been like that at all.", and "I didn't do any of it." when testifying about behaviors she claimed others committed. RP779, RP829, RP831-837, RP918, RP920, RP924, RP936. Indicating specifically that "most kids have probably done worse". RP924. Also testifying that the accused sexually assaulted her as punishment for behavior she claims her brothers blamed her for. RP835-837. While testifying throughout that from the first allegation of sexual assault she was restricted to the home. RP835-837, RP849-851, RP871, RP893, RP909-910.

The prejudice to the defense is clear from the record. The state was uninhibited from presenting its theory of the case as to the environment in the home at the time these allegations took place in all counts, except count VI. Any evidence by defense showing different facts than those

presented regarding the environment in the home at the time these allegations were claimed to have occurred would have been relevant under the same exception to 404(b) as the trial court allowed the state to present its case.

In *State v. Filitaula*, 339 P.3d 221 (2014) the court held that Tamblin's testimony about how he insulted Filitaula not only went to the issue of motive, it was also admitted under the "res gestae" or "same transaction" exception to ER 404(b) because the conduct took place in the immediate timeframe of the assault. *See also State v. Lane*, 125 Wn.2d 825, 831-33, 899 P.2d 929 (1995) which holds that "Evidence is properly admitted under the res gestae exception if it is necessary to depict a complete picture for the jury."

In this case, it is clear in the record the court erred when ruling Melendrez must testify in order to make relevant evidence of R.M.'s behavior since any evidence by defense on the cross-examination of R.M. or through other witnesses contradicting the state's theory of the case that R.M. was restricted to the home by the accused to sexually assault her was already relevant because it would have shown a different picture of the environment in the home. An error is "Manifest" when the trial record "is sufficient to determine the merits of the claim." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). As previously stated in briefs relevant

to this appeal, this error is "Manifest".

Whether by standing objection, the objection to the trial court's ruling requiring Melendrez to testify in order to admit evidence that was already relevant, or the fact that the error in requiring Melendrez to testify is manifestly apparent in the record, this court must review Melendrez's Constitutional Claims.

b. The trial court's ruling violated Mr. Melendrez's Constitutional Right to present a complete defense and privilege against self-incrimination.

At trial, prior to the cross-examination of R.M. the defense motioned the court about some prior rulings the court made to Rape Shield and specific facts regarding sexting, stating the door has clearly been opened to prior sex. RP1016. Although the court had not made a ruling in the prior discussion regarding the state's request that defense bring forth any 404(b) evidence with regard to state's witnesses, specifically R.M. RP112-117, the defense also offered that Ms. Melendrez testified extensively to her own character indicating she was embarrassed because she "never wanted to be a girl like that" (referring to the bathroom incident), "never been in a fight", and "I don't get into trouble" when talking to a neighbor. RP1016-1017.

After some discussion, the court addresses this offer made by defense stating that he thought the earlier discussion involved the

defendant's testimony stating the reason for the discipline then asks the defense if there are specific facts that should be admitted. RP1021.

To this the defense responds that it has specifics and that the brothers will testify specifically to evidence contradicting the claim by R.M. that she had never been in a fight, and other testimony that would also contradict this claim and provide evidence to the contrary. RP1021-22. The court then asks "What specifically are you proposing for purposes of cross-examination of Rebecca Melendrez that you should be allowed to ask?" RP1022. The defense then states "What I expect to elicit from her is the expected denial with respect to these things, (referring to the claims R.M. made about her behavior) and then impeach through other witnesses. She may or may not admit to some of this behavior. It is a little unpredictable, but I'm prepared to follow-up and reference everything I ask through other witnesses. She specifically testified to -- if I may sit -- said to another person named Tony Martin -- this is -- this is the witness where she was beginning to say that this Tony Martin apparently had said something to her that made her believe that Tony Martin was aware of these allegations. If my recollection serves, Tony Martin is another of the parade of young boys who would come to the house without the father's permission. Ms. Melendrez already testified that that happened on a number of occasions, not just with her but also with her brothers. RP1022

It is clear at this point that the defense has made an offer of proof to provide contradictory evidence based on the state's introduction of evidence, through the cross-examination of testimony R.M. has already provided and following that up with the expected testimony of other witnesses. In essence, offering to address the prejudice that exists from the introduction of state's evidence that claims that Melendrez restricted R.M. from leaving the home since the first allegation of sexual assault, punished her for the bad behavior of her brothers, that she did not commit bad behavior to warrant any restriction and that the restriction was in order to sexually assault her.

Although the Washington Rules of Evidence 103 (A)(2) does not specify the procedure which must be followed or allowed in making an offer of proof, previous court decisions have held that a "formal offer of proof is not necessary to preserve a claimed error in excluding evidence for review on appeal, when the substance of the excluded evidence is apparent from the record." *Hensrude v. Sloss*, 150 Wn.App. 853, 209 P.3d 543 (2009). In order to show what evidence was excluded we look at the record after defense made it's offer of proof.

While discussing what evidence the defense intended to elicit on cross-examination the court again asks "whether you have specific acts that you want the court to be – to weigh with regard to their admissibility.

It's – particularly if you know that the brother are going to testify, that – that this is what occurred." RP1040. TO THIS THE DEFENSE RESPONDS Yes. The brothers know what was going on in the house. The brother know why dad imposed discipline, so they can speak to their understanding or what they saw or what conversations occurred that they were a part of! RP1040. The court then responds "I don't know that I agree with you there. I don't think that the brothers can testify why dad did what he did in terms of imposing the discipline. I think dad's the one that needs to bring forth that testimony." RP1040. Let us not forget that R.M. already testified why dad imposed the discipline he did and the acts which led to that discipline which included the brother, RP831-37. The court maintained this position and as a result made the ruling requiring Melendrez to testify.

As the trial continued, Melendrez did not cross-examine R.M. on the numerous occasions when friends would come over to the home which according to R.M., the brother blamed all on her, leading to punishment for all and including an allegation of sexual assault. Had the court allowed that the brothers could testify to their understanding or what they saw or why conversations occurred that they were a part of the defense would have elicited cross-examination of R.M. regarding the occasions leading to punishment and her role in them and their follow-up with testimony from

the brothers as defense had offered to the court previously RP1022. As it was, the defense chose not to violate Melendrez's 5th amendment right not to testify and chose to sacrifice the 6th amendment right to present a complete defense. This critical body of evidence would have helped point a complete picture for the jury and was already relevant based on the introduction of states evidence.

Another body of evidence not allowed by the courts ruling was when later in the trial, the state motions for the preclusion of defense asking in any way whether or not grandmother was concerned with any of Rebecca Melendrez's behaviors. RP1627. To this the defense responds that there is a foundation for it because there's history. "So I don't know why in this case, since she's in the home to assist her son with her grandkids that any discipline-related issues that apply to Mr. Melendrez wouldn't apply to the other adult in this household." To this the court responds with the way he sees it. "So, with regard to the – the disciplinary defense really pertains an explanation as to why Mr. Melendrez took the actions he took with regard to, to a certain extent, the kind of discipline imposed, but I actually see that as even less relevant. That has more to do with sort of the res gestae of what was going on in the home." RP1628. Here again the court does not account for the purpose for which the state introduced the evidence that alleged that since the time the defendant

started having sex with her, he wouldn't let her leave the home, he wouldn't let her have people over, etc. When ruling the state could introduce their theory of the case the court stated it was for a res gestae purpose and that any prejudice could be addressed by defense. RP110-111. The trial court makes it clear the defense was not entitled to the same evidentiary ruling as the state. As a result the defendant was forced to testify in the attempt to cure the prejudice, however, even after doing so the court still prevented the grandmother from testifying to behaviors she observed. RP1894. So the defense did not elicit testimony from the grandmother as to the behaviors of R.M. which would have explained why she was restricted to the home or any other facts that would have contradicted the States theory of the case that Melendrez kept R.M. home to have sex with her.

c. The error was not harmless.

As cited previously in brief relevant to this appeal, the evidence Melendrez sought to introduce was already relevant and highly probative to contradict the states theory of the case. When evidence is highly probative, "no state interest can be compelling enough to preclude its introductions consistent with the Sixth Amendment and Const. art 1 § 22." *State v. Jones*, 168 Wn.2d 713, 729, 230 P.3d 576 (2000).

Since it has been shown from the record that Melendrez was denied presenting entire bodies of evidence in violation of his Sixth Amendment rights the appellant cites *Washington v. Texas*, 388 U.S. 14, 1987 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) which holds a defendant must be given the opportunity to present his version of the facts so that the jury may determine where the truth lies; the court may not condition this right on forfeiting his constitutional right not to testify. *See Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) ("{W}e find it intolerable that one constitutional right should have to be surrendered in order to assert another.") The trial court's ruling violated both Mr. Melendrez's right to present a defense and his privilege against self-incrimination and this court should grant review and upon review reverse Melendrez's convictions.

2. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT AND THE TRIAL COURT ERRED WHEN IT DENIED MR. MELENDREZ'S REQUEST FOR A BILL OF PARTICULARS.

a. <u>The information was deficient.</u>

At trial, Melendrez attempted to defend against the charges against him with an alibi defense, providing evidence he worked the night shift with excellent attendance during much of the time period that R.M. claimed he assaulted her after bringing her to his bed at night. RP839-40,

896. In order to mount a proper alibi defense Melendrez needed information about when the alleged crimes occurred. As previously cited in briefs relevant, to this appeal, an information must allege the "particular facts" supporting every element of the charged offense. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010); see also *United States v. Zavala*, 839F.2d 523, 526 (9th Cr.1988). Only when this is provided does the defendant have sufficient notice to prepare his defense. *State v. Tandecki*, 153 Wn.2d 842, 846, 109 P.3d 398 (2005).

In this case it was impossible for Mr. Melendrez to successfully mount a defense when he was provided with so little information about where the alleged crimes occurred. Further exacerbating the issue were the numerous inconsistencies between R.M.'s statements and her testimony at trial. RP1071-72, 1097-98, 1088-89, 1100, 1135, 1139, 1165-73, 1182-83. In her testimony, R.M. also admitted to bring in all previous statements and depositions to at least 5 attorneys, CPS, the school counselor, and police detectives investigating the case and admitted to willfully with-holding the name of a potential witness at defense interview. RP923, RP1062-1066, RP1102-1105. Thus, the information Mr. Melendrez gained prior to trial had limited utility.

b. The trial court erred when it denied Mr. Melendrez's request for a bill of particulars after the state amended the information a second time to reflect the alleged victim's testimony presented at trial. RP1219, 1233.

Mr. Melendrez provisionally agreed to the amendment and sought a bill of particulars. RP1233. When Mr. Melendrez first made the motion, he explained that a bill of particulars had become increasingly important as the state continued to lengthen the time period over which the state alleged the events occurred. RP1227.

Having shown the issues, from the record, with the information Mr. Melendrez gained prior to trial and because Mr. Melendrez sought to present an alibi defense, the state's amendment which expanded the charging period for Court I made it impossible for him to adequately defend against R.M's accusations through cross-examination and another witnesses and a bill of particulars would have allowed him to do so.

It is clear the information was constitutionally deficient because the lack of information continued in the charging document denied Mr. Melendrez a meaningful opportunity to defend against R.M's accusations. Furthermore, it is clear a bill of particulars was warranted and the trial court abused its discretion when it denied Melendrez's request. This court should grant review and upon review reverse Melendrez's convictions. If, as it has been brought forth by the appellate court, Melendrez was not

entitled to an alibi defense based on the allegations then Mr. Melendrez reserves the right to appeal to the Federal Courts to protect his constitutional right to mount a proper defense. *United States v. Hairston*, 64 F.3d 491, 494 (9th Cir. 1995) (citing *United States v. Ragghianti*, 560 F.2d 1376, 1379 (9th Cir. 1977)).

3. THE TRIAL COURT ABUSED ITS' DESCRETION WHEN IT DENIED MELENDREZ THE IDENTITY OF THE UNKNOWN MALE WITNESS RESULTING IN A DENIAL OF HIS RIGHTS TO CONFRONTATION AND TO PRESENT A COMPLETE DEFENSE.

a. The unknown male witnesses' identity was relevant and highly probative in relation to evidence presented as part of the state's case.

At trial, R.M. testified as part of the state's motion intamine introducing its theory of the case, that Melendrez restricted his ability to leave the home in order to sexually assault her. RP110, RP831-37. Part of this testimony from R.M. included several occasions where R.M. was hit with a belt, restricted in the home and blamed by her brother for behavior she claims she did not commit. One occasion of behavior introduced by the state was the claim by R.M. that she had oral sex with a boy at the Welcome Center of the apartment complex the family lived in on October 3, 2011. RP910-911, RP910-920. According to the narrative provided by R.M. Mr. Melendrez reacted to those events by beating her and confining her to the apartment. RP921, RP925. It should be noted

that this oral sex act was the subject of an admitted act of perjury by R.M. in which she originally denied the sex act to at least 5 attorneys, CPS, the school counselor, and the police investigating this case. RP923, RP1062-1066, RP1102-1105 R.M. also admitted to willfully with-holding the name of the boy at the defense interview. RP1102

When defense first learned this information, after the first week of trial, that the oral sex act occurred, the defense made an offer of proof to the court that the identity of this boy is significant in order to provide confirmation an act did occur, which was precedent to other actions R.M. will claim the defendant took. RP 272. The defense also offered this boy would have information about the behavior based issues of R.M. that were responded to by the father. RP272. In other words the boy would have information as to the real reason R.M. was restricted to the home, which was not to sexually assault her as the state claimed, but because of behaviors she and this boy may have been involved in that resulted in punishment like not checking in at home after school. R.M. admitted on the stand that this was the only boy she kept talking to. RP910-911, RP918-920.

Given the states theory of the case, the testimony of the unknown male witness was highly probative to provide evidence related to the

accusation Mr. Melendrez kept R.M. restricted to the home to sexually assault her.

b. Mr. Melendrez constitutional rights to confrontation and to provide a complete defense were violated by the courts ruling.

At trial, after hearing the offer of proof by defense and the states un-inhibited introduction of its theory of the case the defense asks R.M. for the name of the boy she testified to having the oral sex act with on October 3, 2011. RP1102. This question was objected to by the state and the court sustained the objection. RP1102.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense" *Homes v. South Carolina*, 547 U.S. 319, 324, 126 S.C.t. 1727, 164 L.Ed.2d 503 (2006) (quoting *Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142 90 L.Ed 636 (1986)*). In essence, this is a defendants "right to a fair opportunity to defend against the States accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 93 S.Ct 1038, 35 L.Ed.2d 297 (2010); U.S. Const. Amends. VI, XIV; const. Art I §§ 3, 22.

In this case, Mr. Melendrez's right to confrontation and to present a Complete Defense were violated when the trial court ruled he could not

know the identity of witness and bring forth testimony which directly related to the State's theory of the case that Melendrez restricted R.M. to the home in order to sexually assault her. This court should grant review and upon review reverse Mr. Melendrez's convictions.

c. The error was not harmless.

In briefs relevant to this appeal, it has been argued that any error violating Mr. Melendrez's rights was harmless because of the DNA evidence. While the State presented evidence at trial that Mr. Melendrez's DNA was found on R.M.'s underwear, and R.M's DNA was found on Mr. Melendrez's boxer briefs, the State's crime lab scientist testified that in "a closed environment, like a family house" the innocent transfer of DNA from one family member to another was more common than the transfer of DNA in other circumstances RP664. Furthermore, R.M. testified that she got Melendrez's stuff out (referring to clothing) that morning and Melendrez confirmed R.M. provided his clothing since R.M. was in charge of household laundry. The crime lab scientist further testified that different scenarios are equally plausible and suppositions would have to be made in order to favor one scenario over another. RP692. Thus, the state could only prove its case against Mr. Melendrez if it found R.M. credible. Where a case turns on the complaining witness's credibility, the courts error cannot be found harmless. *State v. Hudson*, 150 Wn. App. 646, 656.

208 P.3d 1236 (2009). This court should grant review and upon review, reverse Mr. Melendrez's convictions

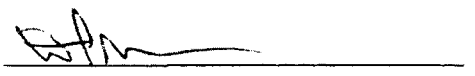
E. CONCLUSION

Having shown the reasons this court should review Mr. Melendrez's Constitutional Claims, the denial of his Sixth Amendment right to present a complete defense by not allowing evidence contrary to the states theory of the case, and forcing Melendrez to testify in violation of his Fifth Amendment right in order to admit evidence that was already relevant in relation to the evidence presented by the state, the appellant requests this court grant review and upon review reverse Melendrez's convictions.

Having also shown the appellant is constitutionally entitled to present one alibi defense, attempted to do so, and was denied by the court, the appellant requests this court grant review and upon review reverse Melendrez's convictions.

Finally, having made clear from the record the trial courts error in denying Melendrez the identity of the unknown male witness was not harmless. The appellant request this court grant review and upon review reverse Melendrez's convictions.

Dated this 26th day of January, 2016



Vincent P. Melendrez
Appellant

APPENDIX A

COURT OF APPEALS, DIVISION I OPINION

December 28, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 72210-7-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
VINCENT PAUL MELENDREZ,	)	
	)	
Appellant.	)	FILED: December 28, 2015
	)	

LEACH, J. — Vincent Melendrez appeals his convictions for child rape, incest, and witness tampering. Primarily, he raises constitutional and foundational challenges to the trial court's evidentiary rulings. The trial court's decisions about evidence did not violate Melendrez's right to present a defense or his privilege against self-incrimination. Because Melendrez's numerous other arguments also lack merit, we affirm.

FACTS

Substantive Facts

After Vincent Melendrez and his wife divorced in 2007, he raised their seven children in western Washington. R.M. is his oldest child, followed by two boys, W.M. and D.M. The family changed residences every year or so. For two long periods, they lived in Bremerton with Melendrez's brother Charlie and

mother, Guadalupe. Melendrez began working nights at Microsoft in 2008. In November 2010, the family moved into the Windsor Apartments in Renton.

Melendrez was a strict father. He set three rules for his family: never lie to or betray him, love each other, and defend the family. He posted a schedule on the refrigerator that governed his children's days. If they wanted to have friends over, Melendrez insisted he meet the friends first. When his children misbehaved by talking back, sneaking out, or having friends over without permission, Melendrez punished them physically, sometimes hitting them with a belt.

R.M. testified her father began having sex with her in 2008, when she was 12 or 13 and the family lived at Charlie's house in Bremerton. She described the first incident, during which she said Melendrez showed her pornography, put his mouth on her vagina, and had vaginal intercourse with her. She testified that Melendrez had sex with her regularly between 2008 and 2011. She said that her brothers, W.M. and D.M., found her naked in bed with Melendrez in January 2009, then told her grandmother, Guadalupe, what they saw. R.M. said Guadalupe told her, "You need to push him away" and "Don't say anything because you don't want to get the family in trouble." W.M., D.M., and Guadalupe contradicted R.M.'s testimony, saying these events never happened.

R.M. testified that Melendrez became more controlling after he began having sex with her, rarely letting her leave the house. She said sex became more frequent after the family moved to Renton and that her father virtually moved her into his bedroom.

R.M. told D.M. in early 2009 that she and her father "did it." When D.M. confronted Melendrez about it, he denied it. Afterward, Melendrez forced R.M. to retract her claim in front of the family. After this incident, R.M. told W.M. two more times that her father was raping her. She also told a friend. On Thanksgiving 2010, R.M. left her house and stayed at the friend's house for three days. She refused to return home. During that time, she told the friend that her father had been having sex with her. Melendrez persuaded R.M. by phone to return home to collect her things. When she arrived, he pulled her inside and slammed the door. As punishment for running away, Melendrez removed R.M. from public high school and enrolled her in online classes. She remained in online school until the next school year began in September 2011, when he allowed her to return.

R.M. continued living at home. That August, Melendrez found pictures of naked people on her phone. He grounded her and threatened to prevent her from returning to high school. Then on October 3, 2011, the manager of the family's apartment complex found R.M. and a 16-year-old boy engaging in oral

sex in a common restroom. When the manager notified Melendrez, he appeared to take the news calmly. But R.M. testified that Melendrez then beat her, made her face bleed, shoved soap in her mouth, and called her a whore. She said Melendrez imprisoned her in his room for all of October 4, blocking the door with an ironing board, a mattress, and a shoe. R.M. testified that she had nothing to eat until her brothers arrived home from school and let her out. Her brothers again contradicted her testimony. They testified that R.M. was not barricaded in her father's bedroom that day but that she and D.M. had a fight in which D.M. hit R.M. in the face repeatedly, breaking her lip. D.M. said the fight began because R.M. told D.M. she was planning to lie about their father sexually abusing her.

The next day, October 5, R.M. spoke to a counselor at her high school. During that interview, she told the counselor that her father had been having sex with her since 2008. The police arrested Melendrez later that day. Susan Dippery, a sexual assault nurse examiner, examined R.M. the same day.

At trial, the State presented DNA (deoxyribonucleic acid) evidence taken from the underwear R.M. wore to school on October 5 and from the boxers Melendrez was wearing when arrested, along with DNA evidence gathered during the sexual assault examination of R.M. The DNA analysis showed Melendrez's sperm and semen on the exterior of R.M.'s genitals. It also found R.M.'s DNA on the fly of Melendrez's boxers.

Procedural Facts

The trial court let the State amend the information three times during trial. The second amendment came a month into trial when the State dismissed count II and enlarged the charging period of count I to include the period charged in count II.[1] Melendrez asked for a bill of particulars, which the court denied.

Nurse Dippery noted in her examination that part of R.M.'s hymen remained intact. The State asked her if she would be surprised, based on her experience, to observe with this remnant a 16-year-old girl who had had sex 100 times. Melendrez objected that the question exceeded the scope of Dippery's expertise. The court overruled the objection, and Dippery answered, "No."

Melendrez's defense focused on R.M.'s motive to lie. He tried to introduce evidence that R.M. constantly misbehaved by sneaking out of the house, "sexting," having boys over without permission, and engaging in sexual activity; that Melendrez disciplined her in response to her behavior; and that, in retaliation and to break free, R.M. fabricated a story of sex abuse. The State objected to the introduction of misbehavior evidence as irrelevant, prohibited by the rape shield statute, RCW 9A.44.020, and improper evidence of past specific acts under ER 404(b). The trial court ruled Melendrez could introduce this evidence if he first presented evidence that he knew of the misbehavior and disciplined R.M.

[1] Both counts were for rape of a child in the second degree.

in response to it. Ultimately, Melendrez introduced numerous instances of misbehavior. Melendrez testified after three other defense witnesses. His testimony was then interrupted several times by that of several other defense witnesses to accommodate their schedules.

Late in the trial and in the jury's presence, the judge asked, "Is the jail able to staff until 4:30 tomorrow afternoon?" Melendrez moved for a mistrial outside the jury's presence, arguing this comment informed the jury he was in custody. The court denied his motion.

The trial court instructed the jury that to convict Melendrez of count IV, incest committed between April 29, 2011, and October 4, 2011, the jury had to find "one particular act of Incest in the First Degree . . . proved beyond a reasonable doubt" and that it "must unanimously agree as to which act has been proved." During deliberations, the jury asked the court, "Do we need to point to a specific incident or just agree an act occurred during this time frame[?]" The court reasoned that it would be hard "to explain it any more plainly than it exists in the jury instruction" and that changing instructions in such situations "can sometimes create more problems than . . . solutions." Accordingly, it referred the jury back to the relevant parts of the instructions.

STANDARD OF REVIEW

We review questions of law de novo, including alleged violations of the Sixth Amendment right to present a complete defense and Fifth Amendment privilege against self-incrimination,[2] alleged violations of the right to an impartial jury and the presumption of innocence,[3] and the constitutional adequacy of jury instructions.[4] We use common sense to evaluate the effect of an act on the judgment of jurors.[5]

We review evidentiary rulings, denials of motions for bills of particulars, and denials of motions for a new trial for abuse of discretion.[6]

ANALYSIS

Right To Present a Complete Defense

The trial court ruled that evidence of R.M. sneaking out, "sexting," having boys over, and having sex was relevant and thus admissible only if Melendrez presented evidence he knew of that behavior. Melendrez contends that this ruling violated his Sixth Amendment right to present a complete defense.

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[2] State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).
[3] State v. Gonzalez, 129 Wn. App. 895, 900, 120 P.3d 645 (2005).
[4] State v. Gonzalez-Lopez, 132 Wn. App. 622, 637, 132 P.3d 1128 (2006).
[5] Gonzalez, 129 Wn. App. at 900-01.
[6] State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014); State v. Dictado, 102 Wn.2d 277, 286, 687 P.2d 172 (1984), abrogated on other grounds by State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986); State v. Robinson, 79 Wn. App. 386, 396, 902 P.2d 652 (1995).

The State responds first that we should decline to consider this issue because Melendrez raised it for the first time on appeal. A failure to object to a trial court error generally waives a party's right to raise the challenge on appeal unless a "manifest error affecting a constitutional right" occurred.[7] This court previews the merits of a claimed constitutional error to determine whether the argument is likely to succeed.[8]

Under the Sixth Amendment, defendants have a right to "'a meaningful opportunity to present a complete defense.'"[9] This does not give them a right to present irrelevant evidence, however.[10] The trial court has discretion to determine the relevance of evidence.[11]

In State v. Jones,[12] the Supreme Court ruled that a trial court's refusal to allow a defendant to testify to the circumstances of an alleged sexual assault violated the defendant's right to present a defense. The proffered testimony indicated that the sexual contact occurred consensually during an alcohol-fueled

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[7] RAP 2.5(a); State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

[8] State v. Huyen Bich Nguyen, 165 Wn.2d 428, 433-34, 197 P.3d 673 (2008).

[9] Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (internal quotation marks omitted) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)); see State v. Lynch, 178 Wn.2d 487, 491, 309 P.3d 482 (2013).

[10] Jones, 168 Wn.2d at 720.

[11] Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668, 230 P.3d 583 (2010).

[12] 168 Wn.2d 713, 721, 230 P.3d 576 (2010).

sex party and was not rape as the complaining witness claimed.[13] The court distinguished "between evidence of the general promiscuity of a rape victim and evidence that, if excluded, would deprive defendants of the ability to testify to their versions of the incident."[14] The court reasoned that the proffered evidence was not "marginally relevant" but of "extremely high probative value," since it was the defendant's "entire defense."[15]

In contrast, the evidence Melendrez sought to introduce was not his "entire defense." Excluding evidence of R.M.'s perceived misbehavior did not deprive Melendrez of the ability to testify to his version of any incident, as in Jones.[16] Instead, testimony that R.M. was sexually active, used drugs, and broke her father's rules resembled general promiscuity evidence, which, as the trial court correctly ruled, could only be relevant to show bias. Even then, its probative value was slight. The evidence Melendrez sought to introduce was thus "marginally relevant," not "high[ly] probative."[17]

In addition, defendants seeking appellate review of a trial court's decision to exclude evidence generally must have made an offer of proof at trial.[18] An extended colloquy in the record can substitute for this offer of proof if it makes

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[13] Jones, 168 Wn.2d at 721.
[14] Jones, 168 Wn.2d at 720-21.
[15] Jones, 168 Wn.2d at 721.
[16] See Jones, 168 Wn.2d at 720-21.
[17] See Jones, 168 Wn.2d at 721.
[18] State v. Vargas, 25 Wn. App. 809, 816-17, 610 P.2d 1 (1980).

clear the substance of the evidence a party wished to introduce.[19] If Melendrez wanted to preserve error as to the exclusion of an item of evidence, he should have made an offer of proof at trial. He concedes that he did not do so. And neither the record nor oral argument makes clear the substance of the evidence Melendrez wished to introduce. Melendrez thus did not preserve the right to request review of the exclusion of evidence about R.M.'s perceived misbehavior.

Further, Melendrez did introduce evidence of that behavior and the discipline he imposed in reaction to it. Before trial, Melendrez's counsel argued that the trial court should allow Melendrez to present evidence showing why he took disciplinary steps against R.M. This evidence included R.M.'s brothers' discovery of "sexts" on her phone and the ensuing conversations between R.M., her brothers, and Guadalupe. It also may have included evidence referred to in Melendrez's trial briefing, including suspected drug use, sexual activity, lying, and generally hanging out with the wrong crowd. Either the State or Melendrez eventually introduced evidence of all this behavior. Thus, not only did Melendrez fail to preserve this issue by making an offer of proof at trial, but he has not shown that the trial court excluded any highly probative evidence.

Melendrez claimed that he had reason to punish R.M. and this gave R.M. a motive to lie about Melendrez raping her. The facts introduced at trial to

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[19] State v. Ray, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991); ER 103(a)(2).

support this defense gave the jury ample opportunity not to believe R.M. That it believed her does not give Melendrez grounds for appeal.

Melendrez further contends that repeated interruptions "fragment[ed]" his testimony and violated his "right to a complete and meaningful defense." But Melendrez cites no case in which a court found constitutional error in an evidentiary ruling because it interrupted a defendant's testimony. Melendrez's counsel made no objection to the interruptions at trial. And an objection would have made no sense, as the schedules of Melendrez's own witnesses made the interruptions necessary.[20]

Because our preview of the merits shows that Melendrez likely will not succeed on his Sixth Amendment claim, Melendrez does not show a manifest constitutional error on appeal. We therefore decline to review his Sixth Amendment claim under RAP 2.5(a).

Privilege against Self-Incrimination

Melendrez also contends that the trial court's evidentiary rulings violated his privilege against self-incrimination by compelling him to testify in order to introduce evidence about R.M.'s behavior.

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[20] For example, Melendrez's counsel stated at one point, "So I think we can fill the day tomorrow. . . . I can have one witness available at 9, I can have the Skype [live video chat and long-distance voice calling service] testimony after that, I can have another witness here at 1:30, and we could have Mr. Melendrez fill all the points in between."

A state law requiring a defendant to testify before any other defense witnesses violates that defendant's Fifth Amendment right against self-incrimination.[21] This rule is not "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."[22] An evidentiary ruling can thus affect the order of defense witnesses without violating the defendant's right to present a defense.[23] ER 611(a) gives the trial court wide discretion over the order and presentation of evidence.[24]

In Menendez v. Terhune,[25] the Ninth Circuit held that the trial court's ruling that certain evidence was inadmissible without the defendants testifying first did not violate the defendants' due process rights. The defendants sought to introduce evidence to explain their alleged fear of their parents to bolster the defendants' claim of self-defense in killing them.[26] The trial court ruled that the defendants' witnesses could not testify until after the defendants laid a foundation

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[21] Brooks v. Tennessee, 406 U.S. 605, 607, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972).

[22] Harris v. Barkley, 202 F.3d 169, 173 (2d Cir. 2000).

[23] See Menendez v. Terhune, 422 F.3d 1012, 1031 (9th Cir. 2005); Johnson v. Minor, 594 F.3d 608, 613 (8th Cir. 2010).

[24] Sanders v. State, 169 Wn.2d 827, 851, 240 P.3d 120 (2010). "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." ER 611(a).

[25] 422 F.3d 1012, 1032 (9th Cir. 2005).

[26] Menendez, 422 F.3d at 1030.

by testifying "about their actual belief of imminent danger."[27] The Ninth Circuit reasoned that the trial court judge "merely regulated the admission of evidence, and his commentary as to what evidence might constitute a foundation did not infringe on [the defendants'] right to decide whether to testify."[28] The court distinguished the Supreme Court's decision in Brooks v. Tennessee, which invalidated a statute that compelled a defendant to testify first if at all,[29] noting that unlike a defendant under the Tennessee statute, the defendants "had the opportunity, at every stage of the trial, to decide whether or not to take the stand."[30]

Here, unlike in Brooks, no statute or rule compelled Melendrez to testify first or at all. In fact, three of six defense witnesses testified before him. Melendrez argues that the trial court specified the order of his witnesses and "forced him to testify in order to admit relevant evidence," but that begs the question. Like the trial court in Menendez, the trial court here ruled that the misbehavior evidence Melendrez sought to admit was not relevant unless Melendrez laid a foundation by presenting evidence that he knew about the misbehavior. One way, but not the only way, Melendrez could do so was by testifying himself. In so ruling, the trial court properly used its discretion to

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[27] Menendez, 422 F.3d at 1030-31.
[28] Menendez, 422 F.3d at 1032; see also Johnson, 594 F.3d at 613.
[29] 406 U.S. 605, 607, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972).
[30] Menendez, 422 F.3d at 1031.

"exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence."[31] We therefore reject Melendrez's Fifth Amendment argument.

Sufficiency of the Information and Denial of Bill of Particulars

Melendrez next contends that because the information covered long periods, giving him little information about when the alleged crimes occurred, he could not effectively defend against the charges with an alibi. Melendrez did present evidence that he worked the night shift at Microsoft and was dependable in showing up for work to counter R.M.'s testimony that Melendrez frequently raped her at night and eventually moved her into his bedroom.

An information that accurately states the elements of the crime charged is not constitutionally defective.[32] The information must also allege facts supporting those elements.[33] This requirement's purpose "'is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.'"[34]

Melendrez makes no claim that the information omits any element of any crimes charged. Instead he argues that the information was not specific enough about the time period in count I to provide him with adequate notice. But in child

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[31] ER 611(a).

[32] State v. Bonds, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982); State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

[33] State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).

[34] Zillyette, 178 Wn.2d at 158-59 (quoting State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)).

sex abuse cases, "whether single or multiple incidents of sexual contact are charged, a defendant has no due process right to a reasonable opportunity to raise an alibi defense."[35] Alibi is not likely to be a valid defense where, as here, "'the accused child molester virtually has unchecked access to the victim,'" because in such cases "'[t]he true issue is credibility.'"[36]

Melendrez relies on a South Carolina case, State v. Baker,[37] where the court held an indictment to be unconstitutionally overbroad. There, the State amended the information two weeks before trial to enlarge by over three years the period when the defendant committed alleged child abuse.[38] The defendant's only available complete defense was alibi. The court ruled that the late amendment of the charging instrument made that defense impossible.[39]

Baker is the only authority Melendrez cites for the proposition that a long charging period can violate a defendant's constitutional rights. But apart from being nonbinding authority, Baker is distinguishable. Unlike the defendant in Baker, Melendrez had ample notice of the charges and the period they encompassed. The amended information did not change the charging period; it simply combined the periods for counts I and II and eliminated count II.

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[35] State v. Cozza, 71 Wn. App. 252, 259, 858 P.2d 270 (1993).

[36] State v. Hayes, 81 Wn. App. 425, 433, 914 P.2d 788 (1996) (quoting State v. Brown, 55 Wn. App. 738, 748, 780 P.2d 880 (1989)).

[37] 411 S.C. 583, 769 S.E.2d 860, 865 (2015).

[38] Baker, 769 S.E.2d at 864.

[39] Baker, 769 S.E.2d at 864.

Melendrez knew for nearly two years before trial that he had to defend against charges that he raped his daughter during the 16-month period described in the amended count I.[40] Thus, the information satisfied constitutional notice requirements.[41]

Melendrez also contends that even if the information was not deficient, the trial court abused its discretion in denying Melendrez a bill of particulars because without it he could not adequately prepare a defense.

An information may be constitutionally sufficient but still so vague as to make it subject to a motion for a more definite statement.[42] A trial court should grant a bill of particulars if the defendant needs the requested details to prepare a defense and to avoid "prejudicial surprise."[43] If the bill of particulars is not necessary, then the trial court does not abuse its discretion in denying it.[44]

In State v. Noltie,[45] this court rejected challenges to an information with a lengthy charging period and the denial of a bill of particulars, holding the defendant had adequate notice of the charges against him. The charges

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[40] The first information is dated March 2012; the trial began in January 2014.

[41] See Zillyette, 178 Wn.2d at 158.

[42] Bonds, 98 Wn.2d at 17; Dictado, 102 Wn.2d at 286.

[43] State v. Allen, 116 Wn. App. 454, 460, 66 P.3d 653 (2003) (quoting 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 129 (3d ed.1999)).

[44] Dictado, 102 Wn.2d at 286.

[45] 57 Wn. App. 21, 30, 786 P.2d 332 (1990), aff'd, 116 Wn.2d 831, 841-42, 809 P.2d 190 (1991).

"spanned a 3-year period and presented a pattern of frequent and escalating abuse" of the defendant's stepdaughter.[46] The defendant claimed he lacked adequate notice to prepare a defense because the information was too vague for him to "separate the charged acts from the 'hundreds of innocent contacts' he had with [the victim] during the charging period."[47] This court rejected that argument, noting the defendant had an opportunity to interview the complaining witness. The court also noted that the defendant did not point to any "information that surprised him at trial[ ] that would have provided additional notice of the charges."[48] The court concluded that the trial court did not abuse its discretion.[49]

Here, as in Noltie, the charges did not surprise the defendant, even without a bill of particulars.[50] Like Noltie, Melendrez's counsel interviewed the complaining witness, R.M., at length and in advance of trial. And like Noltie, Melendrez fails to point out any information that would have given him additional notice of the charges. His only specific contention as to prejudice is that he lacked the dates he needed to present an alibi defense. But "a defendant has no due process right to a reasonable opportunity to raise an alibi defense" against a charge of child sex abuse.[51] And as the State points out, the period over which

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[46] Noltie, 116 Wn.2d at 845.
[47] Noltie, 57 Wn. App. at 30.
[48] Noltie, 57 Wn. App. at 31.
[49] Noltie, 57 Wn. App. at 31.
[50] Noltie, 116 Wn.2d at 845.
[51] Cozza, 71 Wn. App. at 259.

the alleged crimes took place didn't change with the amendment, which merely combined counts I and II. Melendrez thus failed to show how a bill of particulars would have helped his defense. The trial court did not abuse its discretion in denying a bill of particulars.

Expert Testimony

Next, Melendrez contends that Nurse Dippery's testimony that she would not be surprised to see part of the hymen intact on a 16-year-old girl who had had sex over 100 times "was highly speculative and lacked foundation."

ER 702 permits "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify where her "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

Melendrez again fails to cite the facts of any case that would support a reversal. He also fails to explain how Dippery's statement lacked a foundation. Dippery testified to her extensive qualifications: seven years examining patients at Harborview Medical Center for signs of sexual assaults and around 900 sexual assault examinations performed, roughly half of them on teenagers. She testified without objection that it is "possible for someone to have a relatively intact hymen, even after sexual activity" and that R.M.'s was partially intact. The trial court could reasonably conclude Dippery was qualified to make the challenged

statement and that the statement would "assist the trier of fact to understand the evidence" gained in R.M.'s sexual assault exam.[52] The trial court did not abuse its discretion in overruling Melendrez's ER 702 objection.

Right to a Fair Trial

Melendrez next asserts that the trial court violated his right to a presumption of innocence by asking the bailiff in the jury's presence, "Is the jail able to staff until 4:30 tomorrow afternoon?"

"The right to a fair trial includes the right to the presumption of innocence."[53] This includes "'the physical indicia of innocence,'" i.e., freedom from shackles or other restraints.[54] It also precludes a court from deliberately drawing the jury's attention to a defendant's custody with a preliminary instruction.[55] Such violations are subject to harmless error analysis.[56]

In State v. Gonzalez,[57] Division Three of this court held that a trial court's "special announcement" informing the jury the defendant "was indigent, incarcerated, had been transported in restraints, and was being tried under guard" violated the defendant's right to a fair trial. In State v. Escalona,[58] this

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[52] See ER 702.
[53] Gonzalez, 129 Wn. App. at 900.
[54] Gonzalez, 129 Wn. App. at 901 (quoting State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)).
[55] Gonzalez, 129 Wn. App. at 901.
[56] Finch, 137 Wn.2d at 859.
[57] 129 Wn. App. 895, 901, 129 P.3d 645 (2005).
[58] 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987).

court ruled that the defendant's right to a fair trial was violated where the victim disclosed that the defendant had previously been convicted of an identical crime to the one he was on trial for. In contrast, in State v. Condon,[59] this court held that a witness twice mentioning that the defendant had been in jail did not violate the defendant's right to a fair trial. The trial court admonished the witness, denied the defendant's motion for a mistrial, and gave the jury a curative instruction.[60] This court reasoned that the references to the defendant's custody were more ambiguous and thus less prejudicial than the statements in Escalona.[61] The Condon court also pointed out that being in jail does not necessarily mean the defendant has a propensity to commit murder or has been convicted of a crime.[62] It held that the statements were not serious enough to merit a mistrial and the trial court's instruction cured their "potential for prejudice."[63]

Melendrez again fails to cite any case in his favor. He bore no physical indicia of being in custody. And unlike the trial court in Gonzalez, the trial court here did not explicitly and intentionally call the jury's attention to Melendrez's custodial status. Rather, it made a comment that it reasonably concluded was

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[59] 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993).
[60] Condon, 72 Wn. App. at 648.
[61] Condon, 72 Wn. App. at 648.
[62] Condon, 72 Wn. App. at 649.
[63] Condon, 72 Wn. App. at 649-50.

ambiguous in denying Melendrez's motion for a mistrial. As both the trial court and the State note, the jury could infer from the judge's question that Melendrez was in custody, but it could just as easily think jail staff was responsible for courtroom security. And even an implication of custody would not warrant reversal unless it was particularly prejudicial, like the testimony in Escalona.[64] The trial court's fleeting, inadvertent, and ambiguous comment did not abridge Melendrez's presumption of innocence.

Manifestly Apparent Legal Standard

Melendrez contends that the trial court failed to make the relevant legal standard "manifestly apparent" in answering the jury's question of whether it needed to "point to a specific incident or just agree an act occurred during" the charging period for count IV. This, Melendrez argues, warrants reversal of his conviction on that count, as the trial court should have told the jury it needed to agree on a specific incident in order to find Melendrez guilty.

"Jury instructions must make the relevant legal standard manifestly apparent to the average juror."[65] Melendrez cites State v. Cantabrana,[66] in which the court found reversible error in a jury instruction that was wrong about the law. But he does not cite any case in which a legally accurate jury instruction failed to

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[64] See Condon, 72 Wn. App. at 648.
[65] State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).
[66] 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996).

"make the relevant legal standard manifestly apparent." Nor does he contend that the trial court's original instruction or response to the jury's question were incorrect.

Moreover, the trial court's instructions did "make the relevant legal standard manifestly apparent to the average juror." This court held in State v. Moultrie[67] that an almost identical Petrich[68] instruction adequately addressed the legal standard for the average juror. In arguing that "[t]he jury's question indicated that it did not understand the instruction," Melendrez misunderstands the "manifestly apparent" test. The subjective understanding of the jurors in Melendrez's case is irrelevant because the test is objective. The instruction only has to make the standard "manifestly apparent to the average juror,"[69] and in Moultrie this court found that an almost identical instruction did so.[70]

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[67] 143 Wn. App. 387, 392, 177 P.3d 776 (2008). The instruction in Moultrie read in part,

> To convict the defendant of rape in the second degree, one particular act of rape in the second degree 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 rape in the second degree.

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

[69] Cantabrana, 83 Wn. App. at 208 (emphasis added).

[70] See Moultrie, 143 Wn. App. at 394.

Issues Raised in Statement of Additional Grounds for Review

Melendrez raises several more issues in his statement of additional grounds for review. Each of these lacks merit. First, Melendrez contends the trial court failed to properly address evidence discovered during trial, violating his rights to due process and a fair trial. An error by a trial court resulting in a failure to disclose relevant evidence does not warrant reversal unless the exculpatory evidence was constitutionally material.[71] Evidence is not constitutionally material if the defendant was able to obtain the substantial equivalent of the evidence and use it to cross-examine the witness.[72] Here, the State spoke to R.M. during a trial recess and gave Melendrez a summary of its notes. The interview contained two items of information the defense thought was relevant.[73] The trial court noted that this information could be used on cross-examination and "elicited, if relevant, for contradictory testimony." Melendrez does not allege the State failed to disclose any relevant information. And the asserted "delay" in the State reporting the interview was reasonable as it was between a Friday afternoon and the following Monday morning. We reject Melendrez's first pro se argument.

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[71] State v. Garcia, 45 Wn. App. 132, 139, 724 P.2d 412 (1986).

[72] Garcia, 45 Wn. App. at 140.

[73] Those items were an acknowledgment that R.M. had oral sex in the apartment complex restroom and a statement that her father at times rewarded her with food for sex.

Second, Melendrez claims that because R.M.'s testimony at trial was inconsistent with her previous formal statements, the State made "knowing use of perjured testimony," warranting reversal, quoting State v. Larson.[74] Melendrez has not shown, and the record does not support, that R.M. lied in her trial testimony or that the State knew any of her testimony to be false.[75] Melendrez was able to thoroughly cross-examine R.M. about her inconsistent statements. Whether R.M. lied at trial was a question of credibility properly left to the jury.[76] We therefore reject Melendrez's second argument.

Third, Melendrez contends that the trial court abused its discretion in ruling irrelevant the identity of the boy R.M. was caught in a restroom with. Melendrez argues that the trial court's ruling denied him the ability to question the boy and that the boy's testimony would have helped establish R.M.'s bias against her father.

"[A] defendant has a constitutional right to impeach a prosecution witness with bias evidence" using an independent witness.[77] An error in excluding such evidence is harmless if "no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place."[78]

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[74] 160 Wn. App. 577, 594, 249 P.3d 669 (2011).
[75] See Larson, 160 Wn. App. at 594.
[76] See Larson, 160 Wn. App. at 594-95.
[77] State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002).
[78] Spencer, 111 Wn. App. at 408.

Melendrez offers only one theory about the relevance of the boy's identity, that the boy could have information about R.M.'s "behavior-based issues." As noted above, the trial court properly limited evidence of R.M.'s behavior to events known to Melendrez. Melendrez does not explain how the boy could be unknown to him, yet know about behavior that Melendrez was aware of. But we need not decide whether the trial court erred in denying Melendrez the ability to introduce testimony from the boy because any error in doing so was harmless. "[N]o rational jury could have a reasonable doubt" that Melendrez would have been convicted even if the trial court had not excluded evidence of the boy's identity. Melendrez presented ample evidence of R.M.'s potential bias without the boy. And R.M.'s testimony, along with the DNA evidence, would have been unchanged.

Next, Melendrez contends that the trial court erred in allowing the State to ask D.M. questions that suggested D.M. was being untruthful. D.M. testified that R.M. told him before their father's arrest that she was planning to lie about their father abusing her. The trial court allowed the State to ask D.M. whether he had been formally interviewed about his knowledge of the alleged crimes. D.M. replied he had not. The State then asked, without objection by Melendrez, whether D.M. ever told anyone, "'My sister told me she's going to make this up.'" D.M. again replied he had not.

"'[A] prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove that fact.'"[79] Melendrez asserts that the State implied the "prejudicial fact" that D.M. had interacted with the authorities after his father's arrest. Melendrez claims this prejudiced him because D.M. may not have had any interaction with those authorities and thus no opportunity to tell them what his sister had said. This was the subject of a lengthy colloquy in the trial court, in which the parties and the judge agreed the problem would be addressed if the State first asked whether any such conversations happened. This was exactly what the State did, without objection. Melendrez's argument at this stage is therefore meritless.

Finally, in its closing argument, the State said D.M. "didn't tell anybody" that R.M. told him she was going to lie "because it didn't happen." Melendrez contends that the trial court erred in allowing the State to directly state in closing that D.M. testified untruthfully.

A "defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict."[80] But "[t]he State is generally afforded wide latitude in

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[79] State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993) (quoting United States v. Silverstein, 737 F.2d 864, 868 (10th Cir.1984)).

[80] State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005).

making arguments to the jury."[81] A prosecutor can "draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence" but cannot opine about a witness's credibility.[82] The State's remark during closing arguments was not an opinion about D.M.'s credibility. Rather, the prosecutor asserted a reasonable inference based on the evidence in the case as a whole and on D.M.'s statements on cross-examination in particular.

CONCLUSION

Because Melendrez did not raise his Sixth Amendment challenge below and he does not show a manifest error, we decline to review it. Because the trial court did not force Melendrez to testify first and properly exercised its discretion to exclude irrelevant evidence and control the order of testimony, we reject Melendrez's Fifth Amendment claim. Because Melendrez had ample notice of the charges against him and there was no chance of "prejudicial surprise," the charging information was constitutionally adequate and the trial court did not abuse its discretion in denying Melendrez a bill of particulars. Because Melendrez makes no argument about Nurse Dippery's qualifications to present her expert opinions, he fails to show that the trial court abused its discretion in allowing her testimony. Because the trial court's question in the jury's custody

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[81] State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), overruled in part on other grounds by State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014).

[82] State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

was fleeting, inadvertent, and ambiguous, it did not abridge Melendrez's presumption of innocence. Because this court has already upheld a substantively identical Petrich instruction, the trial court's instruction made the legal standard "manifestly apparent to the average juror." And Melendrez's several pro se arguments are equally meritless. For all these reasons, we affirm.

Leach, J.

WE CONCUR:

Dwyer, J.

Schindler, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72210-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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