

NO. 48235-5-II

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

STATE OF WASHINGTON,

Appellant,

v.

RICKO FERNANDEZ EASTERLING,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00127-1

BRIEF OF APPELLANT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE ISSUES..... 1

III. STATEMENT OF THE CASE..... 1

A. PROCEDURAL HISTORY..... 1

B. FACTS OF THE OFFENSES..... 7

IV. ARGUMENT 8

THE TRIAL COURT’S DECISION TO DISMISS ALL CHARGES WAS A CLEAR AUBSE OF DISCRETION BECAUSE THERE WAS NO GOVERNMENT MISMANGEMENT AND NO PREJUDICE TO EASTERLING FOR THE LATE DISCLOSURE OF THE SANE EXAM 8

1. The trial court erred when it found that it was governmental mismanagement for the State not to request SANE examinations directly from SANE because SANE is an independent organization and does not investigate or work with the State in investigating child sexual abuse cases. 9

2. The trial court erred when it found Easterling was prejudiced by the late disclosure of the sane exam because the exam was not exculpatory and the record does not support a finding of actual prejudice. 15

3. The trial court’s decision to dismiss all counts was manifestly unreasonable because that dismissal was based on erroneous findings of government mismanagment and prejudice and was an extraordinary remedy outside the range of other acceptable and available remedies 20

V. CONCLUSION..... 24

TABLE OF AUTHORITIES

CASES

<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).....	3, 8, 12, 13, 21
<i>Lavallee v. Coplan</i> , 374 F.3d 41 (1st Cir. 2004).....	12
<i>People v. Uribe</i> , 162 Cal. App. 4th 1457, 76 Cal. Rptr. 3d 829 (2008).....	13, 14
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993).....	8, 20
<i>State v. Cannon</i> , 130 Wn.2d 313, 922 P.2d 1293 (1996).....	15
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	15
<i>State v. Michielli</i> , 132 Wn.2d, , 93 (1997).....	8
<i>State v. Oppelt</i> , 172 Wn.2d 285, 257 P.3d 653 (2011).....	20, 21
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	8
<i>State v. Stein</i> , 140 Wn. App. 1045, 187 P.3d 271 (2008).....	15

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it found that the Sexual Assault Nurse Examiner Department of Harrison Hospital (SANE) acted on behalf of the government in child sexual assault cases.
2. The trial court erred when it found that EEK's SANE exam was exculpatory.

II. STATEMENT OF THE ISSUES

1. Whether it was governmental mismanagement for the State to not request a SANE exam directly from the SANE program when SANE is an independent organization whose documents are not within the possession and control of the State?
2. Whether the late disclosure of the SANE exam was prejudicial to Easterling when the results of the exam were not exculpatory and therefore there was no impact on his right to a fair trial?
3. Whether the trial court's dismissal of all counts was manifestly unreasonable where it was based on erroneous findings of mismanagement and prejudice and was an extraordinary remedy outside the range of other available choices?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ricko Fernandez Easterling was charged by first amended

information filed in Kitsap County Superior Court with three counts of first-degree rape of a child of 10-year-old EEK and two counts of first-degree rape of a child of her sister, nine-year-old ALK. CP 6-10. Easterling was also charged with one count for each girl of communication with a minor for immoral purposes. CP 10-12. The girls referred to Easterling as “Dad.” CP 4.

Trial began on September 28, 2015, with opening statements occurring September 30, 2015. RP (9/30) 2-6. The next day, Easterling informed the court that Marian Kilby, the mother of the two victims (and his girlfriend), told him that morning she believed a sexual assault examination had been done on both girls. RP (10/1) 3. She provided Easterling with records from Peninsula Community Health Services that indicated a physical had been done on both girls on February 12, 2015 and a sexual assault examination was scheduled for the next day. RP (10/1) 4-5. The State again asserted that to its knowledge, exams had not been done and it had not been provided a rape kit or a SANE report, but that its office was looking further into the matter based on Ms. Kilby’s claim. RP (10/1) 3-4.

Later that same day, the State informed the court it had spoken with Kate Espy, a SANE nurse at Harrison Medical Center. RP (10/1) 10. Ms. Espy confirmed that both girls had undergone exams on February 13,

2015; copies of both exams were provided to Easterling and the Court. RP (10/1) 10-11. Easterling made an oral motion for dismissal of the charges pursuant to criminal rules (CrR) 4.7 and 8.3(b) and *Brady*.¹ RP (10/1) 11. The trial court permitted both sides to brief the issue and set a hearing for October 5, 2015. RP (10/1) 11-15.

At the hearing, in addition to the parties' briefing, the court considered testimony from Detective William Schaibly and Jolene Culbertson, the SANE nurse who had conducted the exam of both girls. RP (10/5) 5-19; 21-42.

Detective Schaibly was assigned to investigate Easterling's case. After watching the forensic interviews of both girls at the Kitsap County Special Assault Center on February 12, 2015, Schaibly placed them into protective custody with Child Protective Services and recommended that both get SANE exams. RP (10/5) 6-7. He did not contact Harrison Medical Center to determine if the exams were ever done and stated that normally, he would be notified if one had been conducted. RP (10/5) 7. Schaibly said that the State had asked him a few weeks prior to trial whether or not a SANE exam had been done on either girl. RP (10/5) 8-9. He told the State at that time that he was under the impression that no exams had been done. RP (10/5) 8-9. He therefore did not make any

¹ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

independent inquiry to SANE after his conversation with the State. RP (10/5) 16. It was not until the proceedings began in October that he realized he had been mistaken during that conversation with the State—when he said that there were no SANE exams done, he was speaking about a different case. RP (10/5) 9.

Jolene Culbertson, the SANE coordinator at Harrison Medical Center, testified that she was not employed by either law enforcement or the prosecutor's office, and that her first duty was to her patients. RP (10/5) 21.

Culbertson explained the SANE process. When a child comes in for an exam she first interviews the adult to obtain the child's medical history and a brief synopsis of what had happened to the child. RP (10/5) 23-24. She next does a physical exam on the child before moving on to the genital exam. RP (10/5) 23. If a person refuses a genital exam, then one is not done. RP (10/5) 26-27.

Culbertson did examinations on both of the girls. ALK declined the genital exam while EEK participated in all parts. RP (10/5) 27-31. ALK's demeanor during the physical portion of the exam was tearful and anxious. RP (10/5) 28. Because no genital exam had been done on ALK, Ms. Culbertson was not able to reach any findings or conclusions. RP (10/5) 28.

EEK's genital exam was characterized as a "negative exam" which did not mean that nothing had happened, but that nothing was noted. RP (10/5) 34. Culbertson found no scarring or acute injury. RP (10/5) 33. She stated that this finding could mean one of three things: nothing happened and therefore there was nothing to be seen; something happened and it healed without forming any scars; and something happened, but there was no injury. RP (10/5) 33-34.

Culbertson was aware that Kitsap Special Assault Investigations and Victims Services (SAIVS), a volunteer organization run through the Kitsap County Prosecutor's Office, had a written protocol. RP (10/5) 35. Nevertheless, SANE had its own protocol that it was required to follow. RP (10/5) 35. The SANE protocol consisted of statewide guidelines and was not written by SAIVS. RP (10/5) 35. The SANE protocol governed when SANE exams were done, how they were done, and who they were done on. RP (10/5) 35.

Culbertson was part of a team separate and apart from SAIVS that did medical examinations to determine that the children were okay. RP (10/5) 36. Harrison Medical Center's only role was to provide sexual assault exams, and that it was the role of others to determine whether or not that information would be used in a prosecution. RP (10/5) 36. All patients, even those that underwent SANE examinations, had privacy

interests and before any exam could be released, the patient (or their guardian) had to sign a consent form. RP (10/5) 22. Reports were not provided to law enforcement or the prosecutor's office in every case where an exam was conducted. RP (10/5) 37. If law enforcement or CPS was not involved, Harrison Medical Center did not routinely or automatically send copies of records out. RP (10/5) 41-42

The SAIVS protocol was created to provide guidance in the investigation of particular cases, including child sexual assault cases. CP 90. In its introductory statement, the SAIVS protocol explains its purposes:

These protocol[s] are not intended as legal authority for the admissibility or non-admissibility of evidence developed in the course of an investigation. These protocol[s] should not be used as the basis for the dismissal of any criminal charges arising from a report...of child sexual abuse.

CP 90. The protocol defines the key participants in these investigations, noting that any forensic medical examinations are referred to Harrison Medical Center's SANE program. CP 94. The primary purpose of a SANE evaluation is to "provide medical care to the patient/victim. Where appropriate, forensic evidence will be observed, documented, and collected." CP 102. Information collected by any of the covered agencies is to be shared "pursuant to the guidelines set forth in these protocol[s], according to each agency's departmental policies, Kitsap

County's CPOD procedures and as controlled by statute."² CP 107.

After hearing argument from both sides, the trial court orally dismissed all counts. RP (10/5) 63-69. The court subsequently issued a written ruling. CP 51-60.

B. FACTS OF THE OFFENSES

On February 2, 2015, ALK and EEK disclosed to their therapist that they had played a secret game with Easterling of strip poker using Uno cards. CP 4. Both girls were subsequently interviewed at the Kitsap County Special Assault Unit. CP 4.

EEK disclosed that she and her sister ALK had played strip poker on numerous occasions with Easterling. CP 4. According to EEK, if you won a hand, then you would be able to tell the other players which items of clothing to remove. CP 4. EEK stated that during several games, both she and ALK ended up completely nude. CP 4.

ALK disclosed that she and Easterling would also play a game called "naked horsey." CP 5. During the game, Easterling would have her get on her hands and knees with her pants down and he would stick his thumb in her butt like a tail. CP 5. ALK said it hurt when he would go deeper, and that it happened several times with both her and EEK. CP 5. She also stated that when they played this game, Easterling would ask her

² CPOD refers to "Collaboration, Preservation, Observation, & Documentation." CP 93.

if she wanted him to put his “wee wee” in her butt. CP 5. ALK stated that she also witnessed Easterling stick his thumb in EEK’s butt on several occasions. CP 5. The incidents occurred at their house in Port Orchard between August 2014 and February 2015. CP 4-5.

IV. ARGUMENT

THE TRIAL COURT’S DECISION TO DISMISS ALL CHARGES WAS A CLEAR ABUSE OF DISCRETION BECAUSE THERE WAS NO GOVERNMENT MISMANAGEMENT AND NO PREJUDICE TO EASTERLING FOR THE LATE DISCLOSURE OF THE SANE EXAM

The trial court clearly erred when it dismissed the charges in this case pursuant to CrR 8.3(b) and *Brady v. Maryland*. The standard of review is manifest abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for unreasonable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). In *State v. Rohrich*, 149 Wn.2d 647, 71 P.3d 638 (2003) the Supreme Court discussed the manifest abuse of discretion standard in the context of a CrR 8.3(b) motion to dismiss:

A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable

choices.

Rohrich, 149 Wn.2d at 654 (internal quotation marks and citations omitted).

The trial court first found that EEK's SANE report and the inferences that could be drawn it were exculpatory as to Counts I, II, III and VI. RP (10/5) 64. The court further found that the report was exculpatory in that "the jury could determine that there is a reason to doubt the allegations of [EEK] and, therefore, doubt all of the allegations pending against Mr. Easterling." RP (10/5) 64. The trial court applied the correct legal standard, noting that the defendant must show two things: arbitrary action or government misconduct and prejudice that affects a defendant's right to speedy trial. RP (10/5) 66. However, the court trial court's decision was manifestly unreasonable because it adopted a view no reasonable person would take, leading to a decision that was outside the range of acceptable choices available in this case.

1. The trial court erred when it found that it was governmental mismanagement for the State not to request SANE examinations directly from SANE because SANE is an independent organization and does not investigate or work with the State in investigating child sexual abuse cases.

The State has the duty to provide as discovery "material and information within the knowledge, possession, and control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). The SANE exams were

in the possession and control of Harrison Medical Center, an independent organization. The trial court erred when it found the State had mismanaged the case by not requesting the SANE exams directly from Harrison Medical Center.

Central to the trial court's ruling that there was governmental mismanagement was its finding that while SANE was not a department of the prosecutor's office or law enforcement, it had an agreed to be part of the SAIVS protocol therefore making it part of the "investigative team" for child sexual abuse cases. RP (10/5) 65. The trial court determined that as the only provider of SANE exams in Kitsap County, the department worked so closely with the prosecutor's office that it was acting on the government's behalf in both the general sense and in this particular case. RP (10/5) 65. It found that because the SAIVS protocol directs SANE to release any exams to law enforcement and the prosecutor's office, the State had an obligation to search out information from a party who was working in conjunction with the government, and it failed to do so here by not inquiring directly of SANE. RP (10/5) 64-5, 68. These findings mischaracterize the SAIVS protocol as well as the role SANE plays in the care of sexual assault victims.

First, the SAIVS protocol clearly states that it is not intended to provide legal authority or to be the basis of the dismissal of a case. CP 90.

Yet that it is precisely how the trial court used the protocol. Although SANE is referenced throughout the protocol as the provider of medical exams, there is nothing in the protocol that makes SANE part of the investigative team and therefore a governmental player.

The primary purpose of the medical exam is to provide medical care to the patient; prosecution of these cases is a secondary consideration. CP 102. Culbertson was clear that SANE's duty is to all patients and their privacy interests outweigh the release of any information to law enforcement. *See* CP 103-05. The protocol recognizes that any release of information is governed not just by its guidelines, but also by any statutes that may govern a particular agency. CP 107. SANE has its own guidelines and statewide protocol that it must follow in every case, and sexual assault cases are not an exception to that rule. The SANE protocol would certainly take precedence over the SAIVS protocol.

Ms. Culbertson testified that the purpose of both the physical and genital exam is to make sure the patient is okay. RP (10/5) 26. The patient decides what parts of the exam he or she will participate in. RP (10/5) 27. Additionally, if a patient is of post-pubertal age, she is offered Plan B for pregnancy prophylactic and medications to help prevent sexually transmitted diseases. RP (10/5) 27. It is clear that the focus of SANE is on the health and welfare of the patient and not every patient

who has a SANE exam is part of a criminal investigation. SANE is not acting as part of the investigative team or on behalf of the government when it performs these exams.

The trial court's finding is also inconsistent with legal precedent. Although there is no Washington case law directly on point, guidance can be found in two out-of-state cases. In *Lavallee v. Coplan*, 374 F.3d 41 (1st Cir. 2004), the lower court ordered the New Hampshire Division of Children, Youth and Families (DCYF) to turn over files related to its investigation involving the defendant. After the case had gone to the jury, but prior to a verdict, DCYF notified the prosecutor that some materials had been accidentally left out of the file. *Id.* at 43. The Court held that these files were not the type covered under the *Brady* doctrine and were clearly not files within the prosecutor's control:

[W]hile prosecutors may be held accountable for information known to police investigators, ... DCYF is neither the police nor the equivalent of the police assisting in the prosecution. DCYF was not the prosecuting agency and is independent of both the police department and the prosecutor's office.

Id. at 44-45. That same logic can be applied to the present case. Contrary to the trial court's finding, SANE's primary purpose is to provide medical care to victims of sexual assault. It does not act on behalf of the prosecutor's office or a police agency; rather, it is an independent organization conducting exams on anyone seeking one, not just those

patients that are part of a criminal investigation. Any materials within its possession are not within the State's control for purpose of a *Brady* analysis. In fact, if a patient chooses not to sign a consent form, then neither law enforcement nor the State would be entitled to the results of that exam.

In *People v. Uribe*, 162 Cal. App. 4th 1457, 76 Cal. Rptr. 3d 829 (2008), the court did find that the individual who conducted the examinations of sexual assault victims was acting on behalf of the government when it performed the exam of the victim. *Uribe*, 162 Cal. App. 4th at 1481. The court based its conclusion on several factors: in California, a sexual assault response team (SART) exam is initiated by police or social services; the examiner routinely takes a history from the investigative officer; and a "major purpose of the examination was to determine whether the allegation could be corroborated by physical findings." *Uribe*, 162 Cal. App. 4th at 1463-79. Moreover, the statutory scheme specifically addressed the function of SART exams in conjunction with criminal investigations. Although not controlling, *Uribe* provides guidance for courts seeking to classify SANE as a government actor and is clearly distinguishable from the present case.

Here, the primary purpose of the SANE examination is for the health of the patient. As Culbertson explained, her primary duty is to her

patient and the medical examinations are done to make sure a child is okay. RP (10/5) 21, 36. All patients who undergo a SANE exam have a privacy interest that can only be bypassed when a medical release is signed. RP (10/5) 22.

Unlike in *Uribe*, Culbertson is not mandated by law to automatically send a SANE exam to law enforcement. To the contrary, if the patient does not sign a consent form, the results will not be released. Additionally, any information about the child or the incident is obtained from the adult who brings the child in—law enforcement is not present at the exams. RP (10/5) 24.

Moreover, SANE exam results are not automatically sent to law enforcement because not all SANE exams are done for a criminal investigation—law enforcement is not always involved when an individual undergoes a SANE exam. RP (10/5) 21, 41. Culbertson made it clear that her role in SANE is separate and apart from what the prosecutor's office or law enforcement does—though SANE is included as part of the SAIVS protocol, the protocol followed by Harrison Medical Center and the SANE program is their own and that takes priority. RP (10/5) 39-40. SAIVS may certainly establish protocol that it wishes to be followed in the investigation of child sexual assault cases, but it is not controlling law and is subject to limitations.

SANE is not a governmental entity and the State was therefore not obligated to seek out information from it. Nor was it mismanagement by the State to ask its lead detective to determine whether or not SANE exams had been done on either victim; the usual process was to have SANE reports in active cases sent to the investigating law enforcement agency. Therefore, it was a manifest abuse of discretion for the trial court to find that there was governmental mismanagement. But even if the Court were to make that same finding, Easterling cannot meet the second part of the test.

2. The trial court erred when it found Easterling was prejudiced by the late disclosure of the sane exam because the exam was not exculpatory and the record does not support a finding of actual prejudice.

For a case to be dismissed pursuant to CrR 8.3(b) or CrR 4.7, a defendant must show that he has been prejudiced by the prosecutor's actions. *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). A defendant must show actual prejudice; the mere possibility of prejudice is not sufficient. *State v. Stein*, 140 Wn. App. 1045, 187 P.3d 271 (2008). To show actual prejudice, a defendant can show that either his right to speedy trial or his right to have adequately prepared counsel was jeopardized by the State's mismanagement. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

The trial court found that the mismanagement was prejudicial to

Easterling because his counsel was not permitted to adequately prepare for trial with the late disclosure of the exam. RP (10/5) 67. The court noted that in order to adequately prepare for its defense, counsel would have needed to, at a minimum, seek advice from an expert. RP (10/5) 67. The court also found that there may have been prior testimony by Culbertson that would have been helpful in cross-examination and that because the State was so specific about penetration in its opening statement, that bell could not be unrung and all counts had been dismissed. RP (10/5) 67-68. The trial court clearly abused its discretion in finding prejudice because the record does not support its finding that Easterling's right to a fair trial was affected.

Much of the trial court's finding of prejudice to Easterling relies on the premise that the SANE exams were exculpatory. This finding by the trial court fails to take into account what conclusions could actually be drawn from these exams and is speculative at best.

ALK refused the genital portion of the exam, and Culbertson noted that she appeared tearful and anxious. RP (10/5) 28. The trial court provided no reasoning as to why ALK's refusal could be considered exculpatory, simply including her counts into its overall dismissal of the case. The jury could certainly draw the inference that ALK refused because she knew nothing would be found, but they could also draw the

inference that she was scared and intimidated by the nature of the exam. And there is nothing in either inference that would be prejudicial to Easterling.

In its dismissal of ALK's counts, the trial court reasoned that the exculpatory nature of EEK's exam would cast doubt on the veracity of the charges against ALK. This reasoning is not supported by the record. The girls were interviewed separately and gave different accounts of what had occurred. The jury could easily differentiate between the two girls and make a separate credibility determination for both. The jury could have also believed one girl, but not the other. Juries are instructed to evaluate each count independent of the other counts and juries are presumed to follow instructions.

Moreover, the jury would not only be hearing evidence from ALK and EEK. It would also be hearing from Sasha Mangahas, the forensic interviewer who had spoken with ALK. RP (8/31) 74. The jury would have ample opportunity to evaluate the credibility and consistency of ALK's statements. Whether or not they found EEK to be truthful had no impact on the charges against ALK.

More troubling is the emphasis the trial court placed on what was classified as a normal genital exam of EEK. The trial court noted that one of the inferences that could be drawn from the exam was that the rapes did

not occur. But that is not the only inference that could be drawn—rather, it is one of only three options outlined by Ms. Culbertson. As she stated, a normal genital exam does not automatically mean that nothing occurred—it could also mean that there was an injury that did not scar or no injury at all. RP (10/5) 33-34. Further, there is no evidence on the record that either girl bled or hurt after one of these encounters which may support an inference that there had been some type of injury.

The trial court reasoned that the inference that this did not happen to EEK would also cast doubt on the communicating with a minor charge. CP 57. Yet it fails to explain why such an inference would be prejudicial to Easterling. Easterling was certainly free and likely would have argued at trial the many reasons it believed EEK was not a credible witness. A late disclosure of her SANE exam does not change this.

The trial court identifies the prejudice in this particular case as preventing Easterling from adequately preparing his case, noting that he would have to hire an expert to help explain the SANE findings and explore the possibility that there were transcripts of prior testimony by Culbertson that could be used for impeachment. CP 58; RP (10/5) 58. In its written findings, the trial court stated that Easterling had a choice to go to trial “without the benefit of his counsel having explored the possible transcripts of testimony and the possibility of an expert witness to consult

and/or testify at trial.” CP 58. The record does not support this conclusion.

There was no injury or scarring for a defense expert to examine and provide a different explanation for. It is speculative, at best, to say that defense would have pursued its own expert to explain a normal SANE exam. Because there were no findings in EEK’s exam, any expert that testified would be hypothesizing as to why these normal findings supported a conclusion that nothing had occurred, a conclusion that Culbertson would have already testified to. Additionally, only two of the three counts involving EEK alleged penile penetration; the third count referenced digital penetration witnessed by ALK. RP (10/5) 61. A defense expert would certainly be less helpful on the latter count, lessening the exculpatory nature of EEK’s exam.

It was also speculation for the trial court to presume that transcripts existed that could cast doubt on the testimony of Culbertson; the court itself acknowledged that it was not known if such evidence existed. RP (10/5) 67-68. A jury could still conclude that Easterling did not rape EEK based on Culbertson’s testimony. It is pure conjecture to assume that a defense expert was necessary to acquit. Speculation that Easterling’s rights could have been impacted by this “missing” information is not enough to equal actual prejudice.

The trial court also based its finding of prejudice on the fact that opening statements had been given and that during opening, the State specifically said that there had been penetration. But it is unclear how this was prejudicial to Easterling. The State was simply outlining the evidence that it expected the jury would hear, relying solely on the statements given by both girls. Easterling argued that his opening would have been different had he known about the SANE exams, but this possibility does not equate to prejudice. Opening statements are not evidence—rather, they are an outline of what the evidence that the parties anticipate the jury will hear. The jury is instructed on this point and again, juries are presumed to follow instructions. The trial court’s finding that Easterling was prejudiced by the late disclosure of the SANE exam is clearly error.

3. The trial court’s decision to dismiss all counts was manifestly unreasonable because that dismissal was based on erroneous findings of government mismanagement and prejudice and was an extraordinary remedy outside the range of other acceptable and available remedies

Our Supreme Court has “repeatedly stressed that dismissal of charges is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845P.2d 1017 (1993). In *State v. Oppelt*, 172 Wn.2d 285, 257 P.3d 653 (2011) the Supreme Court upheld a trial court’s discretionary ruling to deny a motion to dismiss pursuant to CrR 8.3(b) even where there was a finding of

prejudice to the defendant and misconduct on behalf of the State. In *Oppelt*, the defendant moved to dismiss charges after a six-year pre-accusatorial delay which resulted in the loss of potentially exculpatory information from one of the State’s witnesses. The trial court found that the delay was negligent, but refused to dismiss the case because the prejudice to the defendant was not severe enough to warrant dismissal. *Oppelt*, 172 Wn.2d at 288. In upholding the decision of the trial court, the Supreme Court held, “even where a defendant shows some actual prejudice and State misconduct, the judge may in her discretion refuse to dismiss under CrR 8.3(b) if the actual prejudice is slight and the misconduct is not too egregious.” *Oppelt*, 172 Wn.2d at 297.

Here, the trial court acknowledged that while there were remedies other than dismissal, it determined there was no other remedy in the present case that it could fashion to cure the prejudice. CP (10/5) 69. Although the State did not make an inquiry directly of SANE when asked by Easterling if an exam had been done, it did have a conversation with the detective assigned to the case and it relied on his assertion that no exams had been done. RP (10/5) 68. The State fulfilled its obligations under *Brady* by making this request, but the trial court disagreed, finding that the State should have sought the information directly from SANE because SANE was a party who was “working in conjunction or working

on behalf of the government.” RP (10/5) 68.

Similar to the situation in *Opelt*, even if the Court were to find governmental mismanagement and that some actual prejudice has been shown, these showings are minimal at best. This is not a situation where the State did nothing when asked if SANE exams had been done. The State clearly made an effort here to fulfill its discovery obligations and unfortunately had to rely on the faulty memory of the detective. The procedure followed by the State was consistent with the SAIVS protocol which directs SANE to send exams to law enforcement if they had been none. SANE is not part of the investigative team and conducts examinations for anyone, even individuals who choose not to report the assault to law enforcement. That is a clear indication that SANE is an independent organization working on behalf of the health of its patients; it is not acting as an investigative agency. The trial court’s finding of governmental mismanagement relies on a faulty finding making dismissal an unacceptable remedy.

Moreover, any prejudice found by the trial court is negligible in light of the path the trial court chose to follow. The trial court made no effort to explore other options, simply assuming that a recess for Easterling to consult with the expert would be take weeks, which it believed was too long to recess a jury. CP 58. Yet the trial court provided

no support for this assumption. It certainly could, and should have, recessed for a day to allow Easterling to explore whether or not he wanted to hire an expert and to determine how long it would actually take before making the decision to dismiss the charges.

More concerning is the trial court's decision to dismiss all counts instead of the counts that would have been affected by EEK's SANE examination. The trial court reasoned it would be inappropriate make an "arbitrary" choice as to which charge to keep and which to dismiss, reasoning that the violations cover all charges. CP 59. But it is clear here that the choice to dismiss some counts and keep others would not be an arbitrary one. The focus of the trial court's ruling is on the exculpatory nature of EEK's SANE examination because she is the only one who participated in the genital portion. Even with this finding, the more appropriate remedy would have been to dismiss Counts I, II, and III, the Rape of a Child in the First Degree charges that pertained solely to EEK. There is nothing in the record to support the trial court's conclusion that the alleged exculpatory nature of EEK's exam had an impact on either of the Communicating with a Minor charges or the Rape of a Child in the First Degree counts related to ALK. EEK's purported testimony would have focused only on the incidents related to her. Her testimony was not necessary for the jury to find Easterling guilty of the charges related to

ALK or for the Communicating with a Minor counts because the State had evidence on these counts that was separate and apart from EEK's statement. The jury would have been instructed to consider each count separately, an instruction it is presumed they would follow. Dismissing all counts is a clear indication that the trial court's decision here was a manifest abuse of discretion.

V. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court's order and remand the cause for trial on all counts.

DATED March 23, 2016.

Respectfully submitted,
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