No.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

96116-6

STATE OF WASHINGTON

Respondent

V.

LEROY F. SALSBERY

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

Division II of the Washington State Court of Appeals No. 48843-4-II

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Petitioner is LeRoy F. Salsbery, formerly defendant in Clark County Superior Court, and an appellant in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division Two, affirming his convictions in the Clark County Superior Court. A copy is attached as Appendix A to the petition.

III. ISSUES PRESENTED FOR REVIEW

A. Issue #1: Whether the accused is denied a fair trial under the Constitution of the State of Washington and the United States when the prosecution, during its closing argument, is permitted to replay to the jury the forensic interview of a child and to thereby give undue emphasis on that testimony over all other admitted testimony.

B. Issue #2: Whether the decision of the Court of Appeals is in conflict with decisions of the Supreme Court and the appellate courts, in holding that the risk of denying an accused a fair trial by permitting the reply of video testimony over live testimony applies only to jury deliberations and not during closing arguments of counsel.

IV. STATEMENT OF THE CASE

A. Superior Court Procedural History

On March 2, 2016 following a jury trial, Petitoner LeRoy Salsbery was convicted of two counts of Child Molestation in the First Degree and two count of Rape in the Second Degree.

B. Court of Appeals Decision

The Court of Appeals, Division II affirmed the convictions in an unpublished opinion filed on July 19, 2018.

C. Facts Presented at Trial

Leroy ("Roy") Salsbery was 65 years old in the summer of 2013. CP 239. He had no criminal history. CP 287. In July 2013, GM accused him of sexually abusing her. 6 VRP 675-676. Based solely on GM's accusations, the State charged him by fourth amended Information with a total of four counts; two counts of Rape of a Child in the First Degree charging Child Molestation in the First Degree as an alternative; and two counts of Child Molestation in the First Degree. CP 239.

As the result of several pretrial hearings, the trial court held that GM's hearsay statements to the following people were admissible under RCW 9A.44.120; Darcy McFarland, Elizabeth Sledge, Arlene Howard, Kathy Butler and Detective Thad Eakins. CP 154. The trial court held that GM's hearsay statements made to Amy Morris were admissible as statements for the purpose of medical diagnosis or treatment. 10 VRP 1074, 1075.

Based solely on the statements of GM, the jury convicted Mr. Salsbery of two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. CP 254-261. He was sentenced to 279 months-to-life in prison. CP 287. This timely appeal follows. CP 296.

GM was nine years old in July of 2013. 7 VRP 710. When she was 6 months old, her biological mother abandoned her at a Russian orphanage. 12 VRP 1145. The conditions of the orphanage were not good. 11 VRP 1340. GM lived in the orphanage for two years before being adopted by Charon and Richard McFarland. 11 VRP 1254, 12 VRP 1145-1147. Mrs. McFarland did not want to have children and resisted the adoption

of GM. 11 VRP 1260, 9 VRP 986. During GM's life, Mrs. McFarland continually struggled with a having a maternal bond with her. 11 VRP 1260.

The McFarland's, including GM's brother who is four years older than her, lived in Dallas, Oregon. 11 VRP 1303. Richard and Charon argued frequently about parenting GM. 11 VRP 1288- 1289. GM did not get along with her brother. 7 VRP 748. GM thought her mom favored her brother. 7 VRP 749, ln 2-8. Mrs. McFarland was distant, cold and hurtful toward GM. 7 VRP 824-825. Mrs. McFarland described her daughter as demanding excessive attention, having a poor attention span, hyperactive, and engaging in lying, defiant, and manipulative behavior that was destructive to the family. 11 VRP 1296-1297. According to Mrs. McFarland, since the time of her adoption, GM was 'overly' affectionate with males. 11 VRP 1294, ln 11-18.

Sharon Babcock and LeRoy ('Roy") Salsbery had been life partners for twenty years and were living in Washougal, Washington. 9 VRP 960. Sharon Babcock and Charon McFarland had been friends for over thirty years, since high school. 11 VRP 1255, ln 11-14. Due to their friendship, Mrs. McFarland and GM spent random weekends at the Babcock-Salsbery residence. 11 VRP 1256. GM occasionally visited Sharon and Roy alone from 2012 to 2013. 11 VPR 1257. GM would spend nights with them because of conflict and jealousy between GM and her brother, or to give Mrs. McFarland a break. 11 VRP 1258, VPR 989. In July 2013, when Mr. and Mrs. McFarland's marital conflict resulted in their separation, GM went to stay for a few days with Mrs. Babcock and Mr. Salsbery. 11 VRP 1285.

On the last night of her stay with Ms. Babcock and Mr. Salsbery in July 2013, GM told Mr. Salsbery that she wanted to live with him. RP 1023-1024. He told her that

although they loved having her stay with them, she had her own family. Id. at 1024. GM replied that "her family hated her." Id. at 1024 Mr. Salsbery explained that her father was working on making it better, her mom might be getting some help, and that it was possible a nanny would also help. GM again stated that "she wanted to live with them", that Mr. Salsbery "could get her if he wanted to", but "you just don't want me."

Richard McFarland's sister Darcy McFarland and his mother Arlene Howard lived together in Klamath Falls, Oregon. 6 VRP 673. As planned, GM left the Babcock-Salsbery residence the following day, to go to Klamath Falls to stay with her paternal grandmother and her aunt. 11 VRP 1262, 9 VRP 989. Darcy was aware of the absence of a strong maternal bond between GM and her mom, and that her mom favored her brother. 7 VRP 705. While GM was staying with Ms. Babcock and Mr. Salsbery, Darcy was concerned enough about the McFarland's marital issues and GM's home life that she initiated a call to discuss the same with Mrs. Babcock. 7 VRP 693, 706, 707. Darcy also had concerns that GM craved attention all her life. 7 VRP 701. She described GM as having shown inappropriate affection toward men since she was a small child. Prior to the accusations against Mr. Salsbery, Darcy talked to GM about her concerns regarding GM's relationship with her mother. 7 VRP 693. Darcy knew GM wanted to go live at the Babcock-Salsbery residence. 7 VRP 677.

Darcy testified that during GM's visit to Klamath Falls, GM asked her grandmother in their presence to call Roy to ask him to "stop doing something." 7 VRP 676. Following that comment, GM stated that Mr. Salsbery had been touching her private parts. 7 VRP 676, ln 17. GM said he made her watch 'yucky' movies.

7 VRP 683. She told them that she watched the movies "on his phone". Mrs. Howard called her son Richard to tell him what GM said. 9 VRP 943.

Immediately after receiving the telephone call from his mother, Richard McFarland called his friend Betty Sledge to tell her the news of GM's statements. 7 VRP 776. The two of them met in Dallas, Oregon the same day to discuss Ms. Howard's call. Ms. Sledge suggested to Richard that he go pick up GM from Klamath Falls, a three hour drive, and to bring her back to her house.
7 VRP 777. GM arrived with her father at Ms. Sledge's home around 10:30 p.m. 7 VRP 778. Richard left his daughter to spend the night with Ms. Sledge.

Very soon after GM arrived, Ms. Sledge asked GM what she had told her grandmother. 7 VRP 778. Ms. Sledge immediately took GM into her computer room so she could type everything GM was saying. 7 VRP 778-779. Ms. Sledge did this because she "knew immediately that it was going to end up in court." 7 VRP 780. During her direct testimony, the prosecutor asked Ms. Sledge if she remembered "verbatim" what GM had told her and she answered no. 7 VRP 781. Without further questioning regarding Ms. Sledge's potential lack of recollection, the prosecution presented the typed notes she took during her questioning of GM and asked her to read them to the jury. Id. 7 VRP 781 The defense objected and without any further foundation from the witness regarding her recollection or lack thereof, the trial court allowed the State to have Ms. Sledge read her notes to the jury. 7 VRP 781-785. According to Ms. Sledge, GM described Mr. Salsbery touching her with his finger in her private up to his first knuckle, having GM touch his penis, and washing each other in the shower. 7 VRP 786, 785, 787.

GM described a movie they watched that did not include any mention of blood, penetration or intercourse. 7 VRP 837.

The morning following her sleep over with Ms. Sledge, she and Mr. McFarland brought GM to the Washougal Police Department. 7 VRP 797. Washougal Detective Eakins met with GM and taped a video interview of her. 12 VRP 1424. In the video, GM describes Roy grabbing her hand and putting it inside of her pants. 12 VRP 1449. She describes him touching her in her privates. 12 VRP 1451. GM describes having showered with him three times total and describes the touching as having happened three time total. 12 VRP 1455, 1459. She described the movie they watched as normal TV. 12 VRP 1460. She did not describe the movie as having shown blood of any kind.

Detective Eakins referred GM to the Liberty House for further investigation and approximately one month later she was examined by physician assistant Kathy Butler. 8 VRP 875, 876. During the examination, Ms. Butler asked GM if someone had made her touch something. 8 VRP 880, ln 6-11. GM responded that 'Roy" had her touch his personal part and take showers with him. Id. 8 VRP 875, 876. GM stated to Ms. Butler that Roy touched her personal part to his first knuckle (pointing to the knuckle closest to the tip of the finger). 8 VRP 883. GM never said she was touched on the 'inside' of her private. 8 VRP 921. Ms. Butler assumed that Roy had put the tip of his finger inside her genital area. 8 VRP 884. Ms. Butler testified that based on the facts of this case, she would not expect to find physical signs of trauma. 8 VRP 920.

During trial, GM testified that Mr. Salsbery touched her on the "outside" of her private. 7 VRP 723. GM testified that she went to take a bath and he pulled her into the shower and made her wash him. 7 VRP 721-722. After the shower he wanted to take a

nap and they went into his bedroom. 7 VRP 714, 756. He took his finger, pulled down her pants and underwear and started rubbing her in her private. 7 VRP 716. During direct, in response to being questioned if the touching was on the outside of her body, the inside of her body, or something else, again she stated "it was on the outside." 7 VRP 716.

In response to the prosecutor's question whether the movie they watched "had blood in it", she replied that there was blood coming from out of the female. 7VRP 723, 724. When confronted on cross examination, GM testified that the movie had "lots of blood, all over the floor." 7 VRP 734. She said the blood was coming from the girl's private. 7 VRP 738. During cross, when confronted with whether she had told the same story to the other people, GM testified that she had told everyone she talked to about the allegations the same story, nothing different. 7 VRP 740, 741. For the first time, she testified that Mr. Salsbery threatened her that if she told anyone he would kill her. 7 VRP 743. When confronted about this new disclosure, she again testified that she had told everyone about that threat.

The State called licensed mental health counselor Amy Morris as a witness to testify about her interactions with GM. Mrs. McFarland sought mental health counseling for GM and met with Ms. Morris without her daughter in August 2013. RP 1106. Ms. McFarland was concerned about GM seeking attention, the conflict between them, conflict between GM and her brother, and GM's issues with truthfulness. RP 1107. Mrs. McFarland also sought help for GM's poor social skills and lying, manipulation and defiance. RP 1139, 1140. Counselor Morris described Ms. McFarland as seeking help

for GM's behaviors at home that were affecting the entire family and also noted that GM had disclosed sexual abuse in the past month. RP 1108.

After her intake with Mrs. McFarland, Ms. Morris met with GM for the first time in September 2013. 10 VRP 1113. Ms. Morris intentionally did not asked GM about her allegations of sexual abuse, because she was waiting for the evaluation from the Liberty House. 10 VRP 1112. During a counseling session on September 24, 2013, GM did not discuss Mr. Salsbery with Ms. Morris, but talked of her resentment toward her brother because of the special attention he got. 10 VRP 1175. Ms. Morris saw GM again on October 3, 2017 wherein she witnessed Mrs. McFarland being highly critical of GM. 10 VRP 1176. GM told Ms. Morris that her mom does not like her. 10 VRP 1120, 1176. During their next session on October 17, 2013, Ms. Morris observed GM glaring at her mom as she described continued conflict in the home between them and GM and her brother. 10 VRP 1179. During this October session, only after Ms. Morris discussed with GM mom's concerns about her sitting in her brother's lap did GM talk in depth about Mr. Salsbery. 10 VRP 1122, 1179.

Ms. Morris testified that after only one session with Charon McFarland and one session with GM, she diagnosed GM her as having Post Traumatic Stress Disorder (PTSD). 10 VRP1134, 1135, 1138. She described PTSD as a disorder that occurs "after an individual has been exposed to, confronted with, witnessed events that....deals with injury, that deals with a threat to physical integrity." 10 VRP 1135.

During cross regarding Ms. Morris' diagnosis of PTSD, the defense attempted to examine her regarding behaviors exhibited by GM that were not consistent with a diagnosis of PTSD. 10 VRP 1160–1174. This included GM's history of aggression

toward animals, her desire to not want to be around her mother, and her lack of empathy. Id. 10 VRP 1160–1174. The trial judge prohibited the defense from cross-examining Ms. Morris regarding those behaviors. Id. 10 VRP 1160–1174.

On cross examination, Ms. Morris testified that Reactive Attachment Disorder is when a child under the age of five has experienced pathological care, including a lack of affection and not having their physical and emotional needs met. 10 VRP 1195, 1196. She further testified that GM had two hallmark symptoms of RAD; no bonding with her adoptive mother for the first 13 years of her life and overly affectionate behavior toward males. 10 VRP 1198, 1199, 1020. Ms. Morris testified that RAD requires a psychologist to diagnose and that she was not comfortable doing it. 10 VRP 1206. Ms. Morris saw signs of RAD in GM, but she never pursued a referral to a psychologist to evaluate GM further. 10 VRP 1211, 1210.

The defense called Christopher Kirk Johnson, Ph.D. as a clinical psychologist with expertise in child psychology. 13 VRP 1636, 1639. The defense theory was that Ms. Morris had wrongly diagnosed GM with PTSD and that her behavior and symptoms were more consistent with RAD. 13 VRP 1605-1606, 1608-1616. One symptom of people who suffer RAD is lying. 13 VRP 1611. Dr. Johnson testified that lying is not a symptom of PTSD. 13 VRP 1650.

Prior to Dr. Johnson's testimony, the defense moved the trial judge for reconsideration of an order that in June made a formal complaint to Child Protective Services regarding McFarland's in June 2013, excluding evidence of GM's history of physical aggression toward her mother, brother and animals, and statements GM made to Ms. Babcock she wanted to "stab her parents and watch the blood run out." 13 VRP

1604-1605. The trial judge previously ruled the defense could not cross-examine Ms. Morris regarding these symptoms to impeach her diagnosis of PTSD, to elicited evidence regarding these behaviors from these witnesses, and to have Dr. Johnson testify how these symptoms fit within RAD diagnosis. 13 VRP 1608-1611.

Dr. Johnson testified that a child with RAD can go into "crisis mod" if rejected by adults and caregivers and become angry and vengeful toward those rejecting them. 14 VRP 1693-1695. He further testified that if a child of any age with RAD feels rejected, they can respond with revenge and behave in manners design to have power and control. 14 VRP 1695. He rendered the opinion that GM's behavior is more consistent with RAD than PTSD. 14 VRP 1698. On cross examination of Dr. Johnson, the State questioned him about whether he knew of GM having told any "crazy lies". 14 VRP 1698 He did not however the defense proffered evidence from Ms. Babcock about crazy stories GM told her in July 2013 during her visit. 14 VRP 1740-41. GM accused her parents of dragging her by her hair, refusing to feed her, and locking her outside of her home for hours. Id. at 1740. The defense moved to recall Ms. Babcock; however the judge refused to allow introduction of the proffered testimony. 14 VRP 1747.

In pretrial hearings Mr. Salsbery objected to the admissibility of GM's hearsay statements to Detective Eakins and to the admission of the video interview. 6 VRP 533-542. The trial judge ruled that GM's statements were reliable and admissible under 9A.44.120. He also ruled that the forensic interview could be played for the jury. 6 VRP 542.

During trial, the State moved not only to publish the video interview of GM during trial, but to admit it as an exhibit. The trial judge agreed. EX 29, CP 264, 12 VRP 1439, 14 VRP 1754.

Before summation, Mr. Salsbery moved the court to preclude the use of the video in closing as repetitious and unfair. 13 VRP 1543, 15 VRP 1844. The prosecutor argued that the video is "the most central piece of evidence". 15 VRP 1844. The trial judge denied the defense motion and ruled that the video was part of the evidentiary package the jury was entitled to and that either side was entitled to use and highlight the video. 15 VRP 1845, 1846. The prosecutor played the video in its entirety during closing argument, pausing throughout to highlight portions of GM's statements and to make arguments in support of believing her. 15 VRP 1916-1956.

The jury returned verdicts of guilty of two counts rape of a child and child molestation. Leroy Salsbery was sentenced to 23.5 years to life in the penitentiary. CP 287. Mr. Salsbery was found by the trial judge to be indigent post conviction. CP 296.

D. Verdicts and Sentence

The jury convicted Petitioner of all four counts on March 2, 2016. On March 25, 2016, the trial court judge sentenced Petitioner to a minimum sentence of 279 months and a maximum sentence of life. CP 287. Petitioner was found the trial judge to be indigent post conviction. CP 296.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Supreme Court should accept discretionary review of the case under RAP 13.4 (b):

(1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court , or;

(2) The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, or;

(3) There is a significant question of law under the Constitution of the State of Washington or United States Constitution involved.

A. Issue #1: Whether the accused is denied a fair trial under the Constitution of the State of Washington and the United States when the prosecution, during its closing argument, is permitted to replay to the jury the forensic interview of a child and to thereby give undue emphasis on that testimony over all other admitted testimony.

B. Issue #2: Whether the decision of the Court of Appeals is in conflict with decisions of the Supreme Court and the appellate courts, in holding that the risk of denying an accused a fair trial by permitting the reply of video testimony over live testimony applies only to jury deliberations and not during closing arguments of counsel.

A defendant has the constitutional right to a fair trial and impartial jury. U.S. Const. Amend 6, 14; WA. Const. Art. 1, sec. 22. Both the state and federal constitutions mandate that courts exercise great care in providing safeguards to prevent the undue emphases of testimony to avoid due process violations and to ensure the accused receives a fair trial. When an accused faces the loss of liberty based on a complainant's statements, with no physical or other evidence, there is grave risk of unfair prejudice if the jury is exposed to testimony for a second time. The probability of the State securing a conviction in this type of trial is dependent upon the jury's assessment of the credibility of the complainant. Therefore, if the issue to replay testimony arises, the trial court has a responsibility to exercise great care in determining whether it is proper to allow the jury to replay video of the child's hearsay.

There is legal precedence established in appellate, Supreme Court cases, and federal cases that recognizes the grave risk involved in exposing a jury to undue emphasis of some witness's testimony over other testimony. The case law supports the use of specific procedures and balancing tests to be used by the trial judge in analyzing if a jury is allowed to view video testimony for a second time and if so, safeguards that are required to prevent undue emphasis on the video testimony.

The issue in Petitioner's case concerns the replay of the video testimony of the child complainant made during the forensic interview with the investigating detective. The video testimony was played for the jury during the prosecution's case in chief, then again, during the prosecution's closing argument. The prosecution was allowed to stop the replay at anytime during closing and to interject argument regarding the credibility of the complainant. In essence, the jury heard for a second time the entirety of the substance of the testimonial statements made by the complainant in the video, that were in conflict with her testimony during trial.

The Court of Appeals held that cases cited in support of Petitioner's argument are not applicable because there is a distinction between the replaying of video testimony during closing argument verses the replaying of video testimony during jury deliberations.

Petitioner respectfully urges this Court to hold that in weighing and determining the prejudicial impact of allowing a jury to view video testimony a second time during the course of a trial, there is no distinction as to whether the viewing occurred during arguments of counsel or during deliberations. The constitutional issue involved is whether an accused is denied a fair trial when the jury is exposed to one piece of

testimonial evidence because of video recording, and not to all of the other testimonial evidence received during the trial. The prejudice to the accused occurs with the emphasis of one piece of testimony over another, regardless of the point in the trial when the error took place.

The identified error (the undue emphasis of testimony) is the same, whether it occurred during deliberations or during the prosecution's closing argument. The prejudice to the defendant (violation of right to fair trial and impartial jury) is the same; the prejudice inheres to the jury when the testimony is repeated. Petitioner argues that indeed; if it would have been error to allow the jury access to the reply of the video testimony during deliberations, then it was equally a violation of his constitutional rights to allow the prosecutor to repeat the testimony in its entirely and to comment on it as it played during the State's closing argument.

A trial court's determination to allow a rehearing of testimony must be based on the particular fact and circumstances of the case and undue emphasis of particular testimony should not be permitted. U.S. v. Richard, 504 F.3d 1109 (2007). In contrast to a mere reciting of the testimony of a witness, playback of a video to a jury can be much more prejudicial to a defendant,; video gives the jury a second view of the cadence, tone and voice of the witness, including their gestures and body language. "Videotaped testimony is unique...it enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness." U.S. v. Binder, 769 F.2d 595, 600, (9th Cir. 1985). In Binder, the defendant was on trial for child molestation and the jury, during deliberations, asked to rehear the testimony of the complaining witnesses. Binder, 769 F.2d at 600. The trial court allowed a replay of the

video testimony. The court reversed the convictions holding that credibility was a crucial issue since there was no physical evidence and the only evidence of acts of molestation was presented through the children's testimony. Binder, 769 F.2d. at 600-01. Under this circumstance, the replay of the video allowed the jury to see and hear testimony a second time and unduly emphasized their testimony. Id. at 600-01. Videotaped testimony has been held to be unique because it enables the jury to both observe the demeanor and to hear the testimony of the witness. U.S. v. Binder, 769 F.2d 595, 601(9th Cir.1985). It serves as the functional equivalent of a live witness. Binder, 769 F.2d at 601. When credibility of a witness is a crucial issue, videotaped testimony may...take on great significance. Binder, 769 F.2d at 601. The 9th Circuit stated:

> "Permitting the replay of the videotaped testimony in the jury room during deliberation was equivalent to allowing a live witness to testify a second time in the jury room. The same consideration and procedures should be employed for videotaped testimony as are employed in the rereading of live testimony. If it is appropriate to allow the jury to hear the testimony of a witness a second time at all, the preferred procedure would require the preparation of a transcript of videotaped testimony and a rereading of that testimony to the jury in the courtroom with all parties present."

Binder, 769 F.2d at 601.

Washington and federal courts have held that: 1) testimonial exhibits are different than other physical evidence; 2) testimonial exhibits are different than recordings of crime in progress or a confession; 3) video is different than audiotapes or transcripts; 4) the trial court must consider the risk of undue emphasis of when considering whether to allow a jury to reply testimony; and 5) in the event it is appropriate to allow the jury to view the testimony a second time, the trial court must use procedures to control manner of the jury's exposure to safeguard against the undue emphasis of that testimony in light of all other testimony.

Our Supreme Court discussed the difference between audiotapes of a crime in progress verses audio or videotapes of prior testimony. In St. v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353(1997), the Court opined more than once in that opinion that the trial court must find that the exhibit sought to be replayed is not unduly prejudicial. Castellanos, 132 Wn.2d at 96. More importantly, the Court found that the requested tapes were not testimonial, but rather substantive evidence containing contemporaneous recordings of drug transactions. Castellanos, 132 Wn.2d at 97. By their nature, the recordings of the ongoing crime are different that testimonial evidence. Castellanos, 132 Wn.2d at 101-102.

Washington courts have distinguished the difference between playback of a defendant's audio confession and evidence such as depositions, which "are said to be too susceptible of undue emphasis beyond the scope of ordinary testimony." St. v. Frazier, 99 Wn.2d 94, 97-102, 61 P.2d 126 (1983). Testimonial evidence is different as it contains subtleties including cadence, demeanor and body language. St. v. Koontz, 145 Wn.2d 650, 654, 658, 41 P.3d 475(2002). An audio of ongoing crime is inherently more reliable and less likely to put the accused at risk of undue emphasis to testimony, than a recording of child hearsay statements where there is body language, time to reflect, and potential viewer sympathy.

Repetition of a particular witness testimony in any form should always be disfavored due to obvious danger the jury will unduly emphasize such testimony at the expense of the other evidence. State v. Koontz, 145 Wn.2d 650, 654, 658, 41 P.3d 475 (2002). It "is seldom proper to replay the entire testimony of a witness." Koontz, 145 Wn.2d at 657. Additionally, Courts have consistently reasoned that the trial judge must

first weigh the evidence and find that the recording not only bears directly on the crime, but is not unduly prejudicial. Frazier, 99Wn.2d 105; Elmore, 139 Wn.2d at 255. When confronted with the issue of replaying testimony, the trial court should start with the proposition that replay of testimony is disfavored because of the possibility the jury will place undue emphasis on such testimony at the expense of the other evidence produced at trial. St. v. Koontz, 145 Wn.2d 650, 654, 658, 41 P.3d. 475 (2002); citing U.S. v. Portac Inc., 869 F.2d 1288, 1295 (9th Cir. 1989); U.S. v. Montgomery, 150 F.3d 983, 999 (9th Cir.), cert. denied, 525 U.S. 917 (1998). Given this starting point and potential for prejudice, it is "seldom proper to replay the entire testimony of a witness." Koontz, 145 Wn.2d at 657.

In order to safeguard the accused from undue emphasis on certain testimony, the trial court is required to weigh factors, such as the proportion of the proffered repetitious testimony to the total amount of testimony presented. State v. Morgensen, 148 WnApp.81, 197 P.3d 715 (Div2 2008), rev. denied, 166 Wn.2d 1007, 208 P.3d 1125(2009). Mr. Salsbery's trial lasted two weeks, consisting mainly of witnesses recounting what GM said to them. The duration of the trial and nature of the presented evidence increased the risk of prejudice by emphasizing only one part of GM's testimony over other testimony and of her out of court statements.

To secure a conviction against Mr. Salsbery, the prosecution had to rely solely on the statements of GM. Although, the State called several different adults to testify to GM's out of court statements, it is clear throughout the record that her statements were inconsistent. GM's credibility was the key to an acquittal of conviction. In this case, there is evidence that GM's multiple out-of-court statements were wildly inconsistent

with each other and in conflict with her trial testimony. The prosecution's theory of rape and molestation was based on GM's version of events as she depicted in her video tapes statements to Detective Eakins. Because of the significant inconsistencies to other witnesses, there existed a tremendous lure for the prosecution to have the jury view the video of her interview with Detective Eakins for a second time.

Before the State's closing argument, Mr. Salsbery moved to limit the republishing of the video during the State's closing argument. 13 VRP 1543, 15 VRP 1844. Clearly, there was no question by this time in the proceedings that Mr. Salsbery's defense was focused upon GM's many inconsistent hearsay statements and varied stories that had been admitted as evidence throughout the trial. Over Mr. Salsbery's objection, the court allowed the State to play the video to the jury in its entirety during closing arguments. 15 VRP 1845-46. This exercise of discretion was untenable and manifestly unreasonable.

A trial court's failure to expressly weigh the decision to allow the jury to revisit testimony has been held to reversible error. St. v. Monroe,107 Wn.App. 637, 645-646, 27 P.3d 1249 (2001). In Monroe, the trial court committed reversible error in allowing the jury to review a witness transcript in the jury box when there was no expression of concern regarding the undue emphasis of the testimony. Monroe, 107 Wn.App. at 646.

In Mr. Salsbery's trial, during the prosecutor's plea to use the video as he wished during closing, he summed it up best when he said, "the video is our most central piece of evidence." 15VRP 1844. During his closing, the prosecutor used the video as a guidepost for his closing argument, stopping the video several times to emphasize the credibility of GM. The end result was that the replay of GM's video unfairly allowed the repetition of the government's case.

To avoid error based on an abuse of discretion, the court must conduct individualized consideration on the record regarding the potential for prejudice to the defendant. St. v. Naicker, 144 Wn.App. 1029 (Div. 1 2008). In Naicker, the jury requested replay of video testimony. The court gave careful consideration to the request and instituted a strict procedure, controlling the locations of the playback and precluding the parties from any further comment or argument. Naicker, 144 Wn.App. at 1034 In Mr. Salsbery's trial, there is no record of the court having given any consideration to the due process concerns surrounding the undue emphasis of one piece of testimony. 15 VRP 1845-46. The trial judge summarily 'denied' Mr. Salsbery's motion to limit the use of the video during closing and ruled that the video was part of the evidentiary package the jury was entitled to. Naicker, 144 Wn.App. at 1846. No safeguards were implemented or adhered to. A decision of the trial court is untenable when there are no grounds or reasons to support the ruling or the ruling is manifestly unreasonable.

In Mr. Salsbery's trial, the judge ruled that either side was entitled to use and to "highlight" the video during closing. 15 VRP 1845, 1846. The acknowledgment of the availability of the video for use by either party was not the fair 'balancing test' required to ensure safeguards against violation of Mr. Salsbery's right to a fair trial. It is the emphasis of one witness' testimony over another that runs the risk of undue prejudice.

In addition to giving undue emphasis to testimony, replaying the video also likely caused unfair prejudice by arousing the emotional response of the jurors rather than rational decision-making. See, St. v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1997). There is grave risk that the jury was unfairly influenced by seeing GM's interview with Detective Eakins, verses her trial testimony, because her hearsay statements were made in

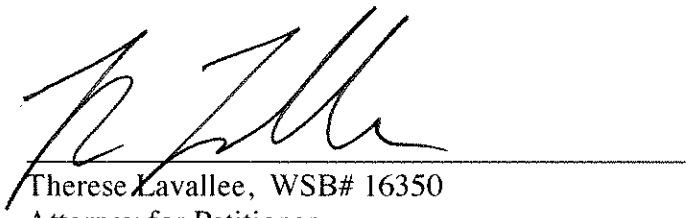
July 2013 during the heat of significant conflict in her home, at a time when she was insecure in knowing what adult would care and provide for her, and under the pressure of having been brought to the police by her father and his friend.

The question of GM's credibility was both the sword and the shield in the State's prosecution of Mr. Salsbery. It was the admission of the video as an exhibit, in addition to it being played during the case-in-chief that paved the road to the State's use of the video in closing. Mr. Salsbery does not argue that the publishing of a video that is otherwise admissible was in error. However, to allow the State to highlight and emphasize GM's out-of-court statements, with no safeguards in place and no limiting instruction, was highly prejudicial and denied Mr. Salsbery his constitutional right to a due process and a fair trial. His convictions should be reversed.

VI. CONCLUSION

Petititoner is entitled to a new trial.

DATED this 19th day of July, 2018.



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Filed
Washington State
Court of Appeals
Division Two

June 19, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEROY F. SALSBERY, Appellant.	No. 48843-4-II UNPUBLISHED OPINION

MELNICK, J. — Leroy "Roy" Salsbery appeals from convictions for two counts of rape of a child in the first degree and two counts of child molestation in the first degree. Salsbery argues the trial court abused its discretion by allowing the State to replay a video recording, which had been admitted into evidence, during closing argument. He also claims the court violated his rights to present a defense and to confrontation. Salsbery further contends insufficient evidence supports his convictions and that cumulative errors denied him a fair trial.[1] We affirm.

FACTS

In July 2013, GM, then nine years old, accused Salsbery, a 65 year old friend of her parents, of molesting and raping her. GM often stayed the night at the home Salsbery and his girlfriend, Sharon Babcock, shared.

On July 23, 2013, after visiting Salsbery and Babcock, GM went to stay with her grandmother, Arlene Howard, and her aunt, Darcy McFarland. GM asked Howard to call Salsbery

[1] Salsbery asks us to deny appellate costs. Pursuant to RAP 14.2, we defer to the commissioner if the State files a cost bill and Salsbery objects.

and tell him to stop touching her on and in her vagina. GM then described the touching and added that Salsbery made her touch his penis.

Howard then spoke with GM's father and told him what GM said. GM's father picked up GM and took her to Elizabeth Sledge's home. Sledge is GM's godmother and a former child therapist. GM told Sledge that Salsbery touched her vagina about ten times and that it hurt her because Salsbery stuck his "whole finger in." 7 Report of Proceedings (RP) at 785. She showed Sledge her index finger up to the first knuckle to describe how Salsbery touched her. GM also told Sledge that Salsbery made her shower with him, and would "put soap on his hand, and put his hand in [her vagina] and rub hard." 7 RP at 787. Sledge contemporaneously typed everything GM said on her computer.

The next day, Sledge and GM's father took GM to the Washougal Police Department. Detective Thad Eakins interviewed GM and videotaped it. GM told Eakins she came to the police station "[b]ecause of what Roy did to [her]." 12 RP at 1446. She said Salsbery babysat her and added that, the last time he babysat, he "grabbed [her] hand and put it inside his pants" and made her grab his penis. 12 RP at 1449. GM also told Eakins that Salsbery put his finger in her vagina three times, and he made her shower with him. Eakins asked GM how she knew Salsbery put his finger in her, and GM responded "[b]ecause I could see it." 12 RP at 1482.

The State charged Salsbery with two counts of rape of a child in the first degree or, in the alternative, child molestation in the first degree, and two counts of child molestation in the first degree.

A month later, Kathy Butler, a physician's assistant at a child abuse assessment center, examined GM and asked her about Salsbery's conduct. GM iterated that Salsbery took showers with her and made her touch his penis. GM also said Salsbery touched her vagina with his finger

up to his first knuckle, which Butler understood to mean Salsbery inserted his finger into GM. Butler's examination did not reveal physical evidence of abuse, but she did not expect to find such evidence given GM's description of the acts.

In October 2013, Amy Morris, a licensed mental health counselor provided counseling for GM. GM disclosed Salsbery's sexual abuse to Morris. GM said Salsbery touched her vagina while she sat in a recliner in his living room. GM also told Morris about Salsbery touching her vagina and putting his fingers inside of her vagina a tiny bit when Babcock was not home.

I. GM'S HEARSAY STATEMENTS AND TESTIMONY

The court held a pretrial hearing, pursuant to RCW 9A.44.120, on the admissibility of the aforementioned out-of-court statements GM made to Howard, McFarland, Sledge, Eakins, and Butler The court entered written findings of fact and conclusions of law and ruled that the State could admit the hearsay statements if GM testified at trial. The court found GM was credible and told many of the State's witnesses substantially the same account spontaneously in response to non-leading questions. Salsbery does not challenge any of those findings or conclusions.

The matter proceeded to jury trial. The jury heard Howard, McFarland, Sledge, Butler, and Morris testify that GM said Salsbery touched her vagina, inserted his finger in her vagina, and made her touch his penis. The court admitted the video of Eakins interview with GM during the State's case-in-chief. The jury heard and saw the entire video, except one irrelevant portion. It showed GM making substantially the same hearsay statements to Eakins as GM made to Howard, McFarland, Sledge, Butler, and Morris.

GM testified. She told the jury she was in court "[b]ecause Roy did something bad to [her]." 7 RP at 713. GM provided details of Salsbery kissing her, touching her on her private spot where she went "pee," and pulling her inside the shower and making her wash him. 7 RP at 714.

GM described going into Salsbery's bedroom with him and him pulling down her pants and underwear and rubbing the outside of her vagina. In one incident, Salsbery put GM's hand inside his shorts and made her rub his penis. GM then testified Salsbery "told me to never tell [about the touching] or he would kill me." 7 RP at 726.

GM testified she talked about the touching with Howard, McFarland, Sledge, and Eakins. GM told Howard "a lot of stuff about it." 7 RP at 728. GM said she "told [Sledge] . . . everything and then we went to the computer and I told her everything again[, and] then she typed it up." 7 RP at 729. GM said she told Eakins everything.

On cross-examination, GM said she told Howard, McFarland, Sledge, and Eakins everything she testified to on direct examination. She also told Howard, McFarland, and Sledge about Salsbery saying "I'm going to kill you if you tell." 7 RP at 743. GM said Salsbery touched her vagina five or ten times, kissed her one time, and showered with her one time. GM told the jury about taking a nap with Salsbery and that he touched her vagina.

GM never referred to Salsbery by his last name at trial. She called him "Roy." GM told the jury that Babcock was not home when Salsbery sexually abused her, and that she had not "gone back to . . . Babcock and Roy's house" since she told Howard about the abuse. 7 RP at 730.

Babcock later testified she lived with Salsbery during the relevant period, and that Salsbery and GM were alone at their shared home on June 24, 2013, and on three days between July 12 and July 20. Babcock also referred to Salsbery as "Roy" when testifying, and she identified him in the courtroom at trial.

II. EXCLUSION OF SPECIFIC INSTANCES OF GM'S BEHAVIOR

Salsbery attacked GM's credibility. He argued that GM suffered from reactive attachment disorder (RAD) from not having her needs met by her mother, rather than from post-traumatic stress disorder (PTSD) because of sexual abuse by Salsbery.

As pertinent to this appeal, Salsbery sought to elicit testimony about GM's prior bad behavior from Morris and from Dr. Christopher Kirk Johnson. Salsbery made an offer of proof that GM exhibited behavior more consistent with RAD than with PTSD. This behavior included GM's "physical aggression . . . towards her brother, her mother, and animals[,]" and a statement that GM allegedly made to "Babcock, to the effect that she wanted to stab her parents and watch the blood run out." 13 RP at 1604-05.

Morris, testified that GM's mother sought counseling for GM because she had shown "[a]gression towards [her] b[r]other and mother." 10 RP at 1139. Morris also testified that she noted GM was "aggressive" on an intake form. 10 RP at 1161. The State objected when Salsbery asked Morris if GM's mother expressed a concern about GM's "aggression toward animals and her brother;" the trial court sustained the objection. 10 RP at 1163.

Outside the jury's presence, the court clarified that Salsbery could not ask Morris questions about specific instances of GM's aggression toward animals, her mother, or her brother. The court did say that Salsbery could ask Morris questions about PTSD and whether aggression is part of the diagnosis.

Morris told the jury about her counseling sessions with GM, and opined that GM showed symptoms of PTSD. Morris acknowledged that aggression could also be involved with RAD, and that she saw elements of RAD in GM.

Salsbery wanted Johnson, a clinical psychologist with expertise in evaluating and treating sex offenders, to discuss GM's behaviors because they were relevant to his testimony about RAD. He also argued Johnson's testimony on these subjects would rebut the State's evidence that GM may have suffered from PTSD.

The trial court disallowed this evidence. It ruled the proffered testimony was irrelevant, not indicative of truthfulness or untruthfulness, and overly prejudicial. The court ruled Johnson could testify about RAD generally.

Johnson, who had not evaluated or treated GM, testified that he did not agree with Morris's opinion that GM suffered from PTSD. Instead, Johnson believed GM's behaviors were more consistent with RAD than with PTSD. He also stated that GM demonstrated "aggression towards [her] brother and mother." 13 RP at 1648. However, the court sustained the State's objection to this testimony and struck it from the record. Johnson then testified that GM's aggressive behavior and lack of empathy were symptomatic of RAD.

III. CLOSING ARGUMENT

Prior to closing argument, Salsbery moved to preclude the State from replaying the video interview of GM during the State's closing argument. Salsbery argued that use of the video in closing would be unduly repetitious, unfair, and prejudicial because it would overemphasize GM's statement. The court denied Salsbery's motion, stating that the video had been admitted into evidence and nothing prohibited either side from using the tape in closing. The State played the video interview of GM during closing argument.

IV. GUILTY VERDICT

The jury convicted Salsbery of two counts of rape of a child in the first degree and two counts of child molestation in the first degree.

ANALYSIS

I. RIGHT TO FAIR TRIAL

Salsbery argues the trial court violated his right to a fair trial and an impartial jury by allowing the State to play Eakin's video interview of GM during closing argument.

We review a trial court's evidentiary ruling for an abuse of discretion. *State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013); *State v. Blair*, ___ Wn. App. ___, 415 P.3d 1232, 1235 (2018). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State v. Lord*, 161 Wn.2d 276, 283–84, 165 P.3d 1251 (2007).

A trial court has broad discretion to control courtroom proceedings, including closing argument. ER 611; *Dye*, 178 Wn.2d at 547-48. During closing argument, parties may utilize evidence admitted at trial and discuss reasonable inferences that arise from the evidence. 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4501, at 284 (3rd ed. 2004).

The trial court properly exercised its discretion in allowing the State to replay the admitted evidence for the jury. This situation is different from a situation where a trial court allows audio or video recordings to be played for jurors when they are already in deliberations.

Cases cited by Salsbery all involve procedural protections used to avoid a jury placing undue emphasis on testimonial audio or video evidence that was replayed for jurors during deliberations.

In *State v. Koontz*, 145 Wn.2d 650, 653, 41 P.3d 475 (2002), the defendant challenged the trial court's decision to permit a jury to review video of witnesses' trial testimony during jury deliberations. The jury asked the court to review the video of trial testimony to break a deadlock. *Koontz*, 145 Wn.2d at 651. The presiding juror told the judge the video would help the jurors

consider "facial expressions." *Koontz*, 145 Wn.2d at 652. The judge played the video in open court, after instructing the jury not to place undue emphasis on the testimony. *Koontz*, 145 Wn.2d at 652.

Koontz reviewed the court's actions for abuse of discretion, but did discuss the defendant's right to a fair and impartial jury. 145 Wn.2d at 653, 658. However, in remanding the case for a new trial, the Supreme Court concluded insufficient procedural protections existed because the video showed more than the testifying witnesses. *Koontz*, 145 Wn.2d at 660-61. It included multiple perspectives, shot by different cameras, showing the prosecutor, defense counsel, defendant, and the trial court judge as the witnesses testified. *Koontz*, 145 Wn.2d at 652-53.

Koontz relied on *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997). 145 Wn.2d at 655-56. In *Binder*, the court concluded that a trial court judge abused his discretion by letting the jurors replay a video of child victims' testimony in the jury room, rather than in open court. 769 F.2d at 598. The parties had consented to substituting the children's prerecorded video testimony for live testimony at trial. *Binder*, 769 F.2d at 598. The jurors asked to replay the video during deliberations, and the defendant was not present when the jurors replayed the video in the jury room. *Binder*, 769 F.2d at 598. The trial court allowed the jury to "skip preliminary portions" of the video when it replayed the video. *Binder*, 769 F.2d at 598.

Binder concluded that replaying the video "in the jury room during deliberations placed prejudicial emphasis on the complaining witnesses' testimony." 769 F.2d at 600. The court noted that "the only evidence of molestation was presented through the children's videotaped testimony," and the replay "was equivalent to allowing a live witness to testify a second time in the jury room." *Binder*, 769 F.2d at 600, 601 n.1. Notably, the only authority cited in *Binder* on the video replay

issued was *United States v. Nolan*, 700 F.2d 479 (9th Cir. 1983), a case finding no abuse of discretion in refusing to reread testimony and stating that trial courts are "given great latitude" in the area. 769 F.2d at 600-03.

In *State v. Frazier*, 99 Wn.2d 180, 187, 661 P.2d 126 (1983), the defendant consented to the State playing his tape recorded statement to the police in open court, and to the State giving jurors copies of a transcript of the tape while it played. However, the defendant objected when the State offered the tape as an exhibit. The defendant argued that, if admitted, the jury could replay the tape during deliberations. *Frazier*, 99 Wn.2d at 187-88. The court held that "admission of a tape recording as an exhibit" does not "overly emphasize the importance of that evidence" and is not "an impermissible comment on the evidence by the judge." *Frazier*, 99 Wn.2d at 190.

Frazier stated that, because a jury can review admitted tapes "in open court with the trial judge's permission," there is "no reason to automatically prevent the jury from taking such exhibits into the jury room." 99 Wn.2d at 190. However, the court cautioned that the trial court should "continue to be aware of the potential for overemphasizing the importance of such evidence and should prevent such exhibits from going to the jury [during deliberations] if unduly prejudicial." *Frazier*, 99 Wn.2d at 190.

Salsbery also attempts to distinguish this case from *State v. Morgensen*, 148 Wn. App. 81, 83, 197 P.3d 715 (2008), where the court found no abuse of discretion when a trial court judge granted the jurors' request to replay a thirty-five minute audio recording of the entire trial testimony in open court. There, we stated that the right to a fair and impartial jury "requires that the trial court balance the need to provide the jury with relevant portions of testimony to answer a specific inquiry against the danger of allowing a witness to testify a second time." *Morgensen*, 148 Wn. App. at 88. Salsbery argues that, unlike in *Morgensen*, the trial court abused its discretion

because it did not take "proper precautions prior to playing audio testimony to the jury," and that it overly emphasized only part of the evidence. Br. of Appellant at 22.

We conclude that replaying recordings during jury deliberations is different from replaying them during closing argument. When responding to a jury request to review evidence during deliberations, a trial court's discretion is constrained by CrR 6.15(f)(1), which provides that courts may grant a jury's request to "replay evidence, but *should* do so in a way that . . . is not unfairly prejudicial and . . . minimizes the possibility that jurors will give *undue weight* to such evidence." (Emphasis added). We do note that even in the context of jury deliberations, no abuse of discretion arises from a trial court's decision to permit the replay of testimonial evidence one time outside the jury room. *Morgensen*, 148 Wn. App. at 89.

Here, the trial court allowed the State to replay the video, an admitted trial exhibit, one time during closing argument. The trial court did not abuse its discretion in so ruling.

II. RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE

Salsbery argues the trial court violated his constitutional rights to confront adverse witnesses and to present a defense. First, he argues the trial court violated his confrontation rights by admitting GM's hearsay statements because she did not testify about them. Second, he argues the trial court violated his confrontation rights and right to present a defense when it excluded evidence of GM's behaviors toward her parents, sibling, and animals. We disagree with Salsbery.

A. Legal Principles

Criminal defendants have a constitutional right to present a defense. U.S. CONST, amends. V, VI, XIV; WASH. CONST. art. 1, § 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). A criminal defendant's right to present a defense is satisfied if the defendant had "'a fair opportunity

to defend against the State's accusations.'" *Jones*, 168 Wn.2d at 720 (quoting *Chambers*, 410 U.S. at 294. It includes a "right to introduce relevant evidence" and to confront adverse witnesses through "meaningful cross-examination." *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002).

Alleged violations of the right to present a defense, including confrontation rights, are generally reviewed de novo. *State v. Tyler*, 138 Wn. App. 120, 126, 155 P.3d 1002 (2007). We review de novo whether admission of hearsay statements violates a criminal defendant's confrontation right. *State v. Kinzle*, 181 Wn. App. 774, 780, 326 P.3d 870 (2014). Similarly, an absolute bar on cross-examination by a criminal defendant is reviewed de novo. *Jones,* 168 Wn.2d at 719.

However, where a defendant premises an alleged constitutional violation on a trial court's evidentiary ruling, we review for abuse of discretion. *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316 (2017). We review a limitation on the scope of cross-examination by a criminal defendant for abuse of discretion. *State v. Arredondo*, 188 Wn.2d 244, 266, 394 P.3d 348 (2017). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Lord*, 161 Wn.2d at 283–84.

B. Admission of Child Hearsay Statements

Salsbery argues the court violated his right of confrontation by admitting GM's hearsay statements to Howard, McFarland, Sledge, and Eakins. He claims that because the State failed to elicit testimony from GM at trial about what she told those witnesses regarding the abuse, he could not confront GM with inconsistencies between the hearsay statements and her trial testimony.

The legislature created RCW 9A.44.120 as an exception to the hearsay rule, and drafted it to avoid right to confrontation problems. *State v. Rohrich*, 132 Wn.2d 472, 476, 939 P.2d 697

(1997). RCW 9A.44.120 provides that the statement of a child under the age of ten describing acts of, or attempts at, "sexual conduct performed with or on the child" are admissible in criminal proceedings, if the trial court concludes, after a hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability[,]" and the child "[t]estifies at the proceedings." Whether a child victim "testifies" as required by RCW 9A.44.120 depends on whether the child's testimony at trial was sufficient to satisfy the defendant's right of confrontation. *State v. Price*, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006).

A defendant's confrontation rights are not violated by admission of a child victim's hearsay statements if the child testifies and "is subject to 'full and effective cross-examination.'" *Kinzle*, 181 Wn. App. at 780 (quoting *Price*, 158 Wn.2d at 640). "Full and effective cross-examination is possible only if the State asks the [child] during direct examination about the incident and his or her prior statements about the incident." *Kinzle*, 181 Wn. App. at 780.

The State must elicit such testimony from the child before the hearsay statements are admitted. This procedure avoids putting a criminal defendant "in a 'constitutionally impermissible Catch-22' of calling the child for direct or waiving his confrontation rights." *Kinzle*, 181 Wn. App. at 781 (quoting *State v. Rohrich*, 132 Wn.2d at 478).

In *Rohrich*, 132 Wn.2d at 478, the court reversed the defendant's conviction because the State did not sufficiently elicit testimony from the child victim to provide the defendant an opportunity to fully and effectively cross-examine her about the alleged abuse. The State did not ask the child victim of rape and molestation any questions about the abuse or the hearsay statements when she testified at trial. *Rohrich*, 132 Wn.2d at 474. Instead, the State only asked her questions on topics such as her birthday and her cat's name. *Rohrich*, 132 Wn.2d at 474.

In *Kinzle*, 181 Wn. App. at 783-84, a defendant's right to confrontation was violated because the State did not ask one of two child victims about hearsay statements she made accusing the defendant of molesting her. There, two sisters under the age of ten testified, but the State only asked the older sister to identify the defendant and describe the alleged abuse. *Kinzle*, 181 Wn. App. at 778-79. When the younger sister testified, the State did not ask any direct questions about the defendant or the alleged abuse. *Kinzle*, 181 Wn. App. at 779. The younger sister volunteered that her older "sister told them," but the State did not ask her to explain what that meant. *Kinzle*, 181 Wn. App. at 779. The court noted that it was "impossible to infer that [the younger victim] did not recall" the abuse or making the hearsay statement "because she was not asked." *Kinzle*, 181 Wn. App. at 783. The court only reversed the defendant's conviction for molesting the younger sister because of a violation of the defendant's right to confrontation. *Kinzle*, 181 Wn. App. at 784.

However, there is no confrontation violation if the state directly asks the child victim about making the hearsay statements and the acts alleged in those statements. *Kinzle*, 181 Wn. App. at 782. Even if the child is unable to remember the charged events or the prior statements, the defendant can cross-examine the child "about the truth of [the] statements or her lack of memory of the details." *Kinzle*, 181 Wn. App. at 782-83 (quoting *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 18, 84 P.3d 859 (2004)). "[J]urors then have the opportunity to evaluate whether they believe the child forgot or whether she was evading for some other reason," and the defendant's right of confrontation is satisfied. *Kinzle*, 181 Wn. App. at 784.

In *Price*, 158 Wn.2d at 633, 650, the court concluded no confrontation violation occurred, despite the testifying child victim's lack of memory. The child victim of molestation testified at trial, identified the defendant by his first name only, and then testified that she forgot what the

defendant did to her and forgot what she told others about the alleged abuse. *Price*, 158 Wn.2d at 635-36. The court concluded that, because the State asked the victim about the events and the hearsay statements, the defendant had a sufficient opportunity to cross-examine the victim. *Price*, 158 Wn.2d at 650.

Similarly, in *Grasso*, 151 Wn.2d at 9, 17-18, the court concluded that a child victim's response of "I can't remember" to questions about alleged sex abuse and hearsay statements was "a constitutionally acceptable response." There, the defendant could cross-examine the victim about her lack of memory. *Grasso*, 151 Wn.2d at 17-18.

Salsbery concedes he had a sufficient opportunity to cross-examine GM on the charged acts, but claims he was unable to fully cross-examine GM about the content of the hearsay statements.

Here, unlike in *Rohrich*, GM testified in the State's case-in-chief that she told Howard "a lot of stuff about [the touching]," and that she told Sledge and Eakins "[e]verything that happened." 7 RP at 728, 730. She testified on cross-examination that she told Howard, McFarland, Sledge, and Eakins "everything" she testified to earlier. 7 RP at 741.

The State asked GM about her statements to Howard, McFarland, Sledge, and Eakins. The State asked GM if she talked "about touching" with Howard, McFarland, Sledge, and Eakins respectively, and GM responded in the affirmative each time. GM also testified she told Howard that Howard needed to call Roy. She then told Howard and McFarland details about the touching. GM said she could not remember why she wanted Howard to call Roy. GM further testified that she "told [Sledge] . . . everything and then we went to the computer and I told her everything again[, and] then she typed it up." 7 RP at 729. GM also said she told Eakins about the abuse and that she told him "[e]verything that happened." 7 RP at 73.

GM's statements are more detailed than those of the child victims in *Price* and *Grasso*.

We conclude that the trial court did not violate Salsbery's right to confrontation. The State elicited testimony from GM on direct examination about the hearsay statements in a manner sufficient to provide Salsbery with an opportunity to fully and effectively cross-examine GM.

C. Limitation on Evidence of GMs Prior Bad Acts

Salsbery also argues the trial court prevented him from presenting his defense that GM suffered from RAD and not from PTSD. He bases this claim on the court's decision to exclude evidence of GM's alleged "physical aggression toward her mother and brother, her aggression toward animals, her lack of empathy, and her statements that she wanted to 'stab her parents and watch the blood run out.'" Br. of Appellant at 27. We disagree with Salsbery.

We review the trial court's limitations on the scope of direct and cross-examination on GM's prior bad acts for abuse of discretion. *Arredondo*, 188 Wn.2d at 267.

A criminal defendant's right to present a defense includes "'the right to a fair opportunity to defend against the State's accusations.'" *Jones*, 168 Wn.2d at 720 (quoting *Chambers*, 410 U.S. at 294). However, the right to present a defense, including the right to confront adverse witnesses, is not absolute. *Jones*, 168 Wn.2d at 720. The right does not extend to presenting irrelevant or otherwise inadmissible evidence. *Darden*, 145 Wn.2d at 620-21; *Lozano*, 189 Wn. App. at 126. Instead, the right "is subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *State v. Lizarraga*, 191 Wn. App. 530, 553, 364 P.3d 810 (2015) (quoting *Chambers*, 410 U.S. at 294).

The scope of direct and "'cross-examination is within the discretion of the trial court.'" *Arredondo*, 188 Wn.2d at 266 (quoting *State v. Russell*, 125 Wn.2d 24, 92, 882 P.2d 747 (1994)). A trial court may limit the scope of direct or cross-examination by a criminal defendant if the

excluded testimony is irrelevant, or relevant but "so prejudicial" it "disrupt[s] the fairness of the fact-finding process," or is relevant and not unduly prejudicial, but the "State's interest in withholding that information" outweighs the defendant's need for the information. *Arredondo*, 188 Wn.2d at 266.

We conclude the trial court did not abuse its discretion in limiting the testimony of Morris or Johnson about GM's behaviors based on established rules of evidence. The trial court ruled that specific acts of GM's aggression and lack of empathy were inadmissible prior bad acts that were both irrelevant and unduly prejudicial. The court permitted general questioning of Morris and Johnson on GM's aggression toward others, lack of empathy, and on the consistency of those behaviors with RAD and PTSD respectively. There was nothing manifestly unreasonable about this exercise of discretion, given the issues in the case, the established rules of evidence, and the holding in *Arredondo*.

We also note that the trial court allowed Salsbery to present evidence and an opinion that GM more likely than not suffered from RAD and not PTSD. Salsbery's right to present a defense was not violated.

III. SUFFICIENT EVIDENCE OF IDENTITY AND PENETRATION

Salsbery argues insufficient evidence supports his two convictions for rape and his two convictions for molestation. We disagree.

When a defendant challenges the sufficiency of the evidence supporting his conviction, we examine the record to decide whether any rational fact finder could have found that the State proved each element of the offense beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Additionally, we deem the State's evidence admitted, and draw all reasonable inferences from that evidence in the State's favor. *State v. Caton*, 174 Wn.2d 239, 241,

273 P.3d 980 (2012). Direct and circumstantial evidence carry the same weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). "Credibility determinations are for the trier of fact" and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Appellate courts do not reweigh the evidence. *State v. Ramos*, 187 Wn.2d 420, 453, 387 P.3d 650 (2017).

A. Sufficient Evidence Exists of Salsbery's Identity as the Abuser

Salsbery argues insufficient evidence supports all his convictions for rape and molestation because GM did not identify him as her abuser while testifying at trial. We disagree.

The identity of the abuser is an essential element of both rape of a child in the first degree and molestation of a child in the first degree. RCW 9A.44.073(1); RCW 9A.44.083(1).

Drawing all reasonable inferences in the State's favor, we conclude that GM did identify Salsbery as her abuser while testifying at trial.

When the State asked GM why she was in court, she responded that she was there "[b]ecause Roy did something bad to [her]." 7 RP at 713. While GM testified, she referred to her abuser as "Roy." GM also testified that Babcock was not at home when Salsbery sexually abused her. GM said she had not returned to Babcock and Salsbery's house since she told Howard about the abuse. Babcock subsequently testified to living with Salsbery during the relevant period. She added that Salsbery and GM were alone at their shared home on June 24, 2013 and on three days between July 12 and July 20, 2013. Babcock also referred to Salsbery as "Roy," and she identified him in the courtroom at trial. Moreover, multiple witnesses testified that GM told them Salsbery sexually abused her.

From this evidence, a reasonable factfinder could conclude that sufficient circumstantial evidence existed to prove Salsbery's identity as GM's abuser.

B. Sufficient Evidence of Penetration Exists

Salsbery argues insufficient evidence supports his rape conviction because of an alleged lack of evidence that Salsbery penetrated GM's vagina with his finger. We disagree.

"A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old . . . and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073(1). Sexual intercourse includes even "slight" penetration of the victim's vagina. RCW 9A.44.010(1)(b); *State v. Snyder*, 199 Wash. 298, 301, 91 P.2d 570 (1939).

Viewed in the light most favorable to the State, sufficient evidence of penetration exists. Multiple witnesses testified that GM told them Salsbery penetrated GM's vagina with his finger.

IV. CUMULATIVE ERROR

Salsbery argues that, cumulatively, effects of the errors at trial were so prejudicial that they denied him his right to a fair trial.

"Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). Cumulative error "does not apply where the errors are few and have little or no effect on the trial's outcome." *Venegas*, 155 Wn. App. at 520.

Because we conclude there was no error, Salsbery is not entitled to relief under the cumulative error doctrine.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, J.

Maxa, C.J.

THERESE LAVALLEE

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