Replaces petition filed on 2/14/20

98174-4

SUPREME COURT NO.
COURT OF APPEALS NO. 51699-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

DAVID ROQUE GASPAR,

Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Timothy Ashcraft, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, David Roque Gaspar, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals Decision filed January 13, 2020, affirming his conviction. A copy of the Court's unpublished opinion is attached as Appendix A. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW

A. Were Mr. Gaspar's Confrontation rights violated by the granting of the State's motion in limine number 5 pursuant to the Rape Shield Statute, when the statute does not apply to the evidence the State sought to omit in this case?

B. Was Mr. Gaspar's right to present a defense compromised by the Court's delay and later reversal of it's decision on Plaintiff's motion in limine number 5?

C. Were Mr. Gaspar's rights under the 5th Amendment of the United States Constitution and article 1, section 7 of the Washington State Constitution violated by the coercive interrogation that resulted in Mr.

Gaspar giving officers an inculpatory statement?

D. Were Mr. Gaspar's due process rights violated by the inclusion in Plaintiff's closing argument of a slide containing the word "guilty" in yellow lettering?

E. Should counsel's objections to the State's misconduct during closing have been granted, and a curative instruction given, when the State violated a prior order of the court in its closing argument?

IV. STATEMENT OF THE CASE

The State of Washington charged David Roque-Gaspar with four counts of rape of a child in the first degree in Pierce County Superior Court. CP 3-4. The alleged victim, Mr. Roque-Gaspar's cousin Adriana Gaspar, claimed that that Mr. Roque-Gaspar raped her in the home shared by their families when beginning when she was 9 and Mr. Roque-Gaspar was 15, and continuing for two years. RP 571,578. Ms. Gaspar did not disclose the alleged behavior until she was 14, and Mr. Roque Gaspar was 20. CP 3-4.

In pursuing the allegations, detectives sought to "interview" Mr. Roque-Gaspar, claiming they had some questions about some things his cousin had said. RP 466. Mr. Roque-Gaspar was not alerted that the detectives were investigating a criminal matter in which he was the suspect, or that he may want to be accompanied by an attorney during the

interrogation. RP 48, 49, 55, 56. At the commencement of the recorded investigation, Mr. Roque-Gaspar waived his rights and immediately declared his innocence, telling detectives no activity of the type Ms. Gaspar had described had occurred. RP 551, 1186 - 1187. The detectives rejected his statements of innocence, instead providing various alternative versions of the events, each establishing varying degrees of guilt. RP 550. Mr. Roque-Gaspar continued to protest his innocence but began to change his story to comport with the detectives' claims. RP 57, 58. Mr. Roque-Gaspar would later testify that he believed that he would not be allowed to leave unless he cooperated with detectives, which in his understanding meant agreeing to at least one of their varied versions of Ms. Gaspar's story. RP 1187-89. Mr. Roque-Gaspar eventually gave detectives sufficient confirmation of Ms. Gaspar's claims to charge him with seven counts of Rape of a Child.

Pretrial motions in State v. David Roque-Gaspar began on January 25, 2018. RP 3. The defense brought a motion to suppress Mr. Roque-Gaspar's statement, arguing that it was coerced and was conducted utilizing Reid Interrogation Methods. RP 91-95. The Court denied the defense's motion to suppress. RP 101. The jury was impaneled on January 31, 2018, and the opening statements were conducted on February 1, 2018. RP 409, 439-450.

Prior to trial, the Court reserved ruling on the State's motion in limine #5, which sought exclusion of evidence or argument suggesting that the victim "was promiscuous or that she received text messages from several boys." RP 669, CP 16 (State's trial brief). The Court finally ruled on this issue on February 5, 2018, during the testimony of the State's third witness, when the Court partially granted the State's motion in limine, allowing only the question "were you talking with boys and your father didn't like that?" but precluding any other questions without the defense obtaining prior Court permission. RP 670.

By this juncture, the State had already established through her testimony that Ms. Gaspar had experienced sexual intercourse with someone other than Mr. Roque-Gaspar. RP 636. The State had likewise elicited testimony from Ms. Gaspar that between the ages of 9 and 11, Mr. Mr. Roque-Gaspar raped her numerous times, which she finally disclosed to family when she was 14. RP 629, 678.

The defense was precluded from cross-examining Ms. Gaspar regarding her known association with several boys in the neighborhood, whether those affiliations were romantic or not, and family perception that Ms. Gaspar was involved with at least one neighborhood boy, as well as cross-examining the lead detective regarding her perceptions regarding the family's attitude toward Ms. Gaspar's alleged promiscuity. RP 109-117.

This in turn substantially restrained the ability of the defense to argue that Ms. Gaspar's father had not only imposed strict rules on Ms. Gaspar but had cancelled her quinceañera in response to his perception of her behavior. RP 990-994. Though Ms. Gaspar testified that the party had been cancelled, she denied it was due to any actions on the part of her father, or any displeasure with her behavior. RP 677.

In the defense case in chief, Francisco Gaspar, Mr. Roque-Gaspar's uncle and Adriana Gaspar's father, attempted to testify that he had caught his daughter "flirting with a boy." RP 990. The State's immediate objection was sustained over defense arguments that the testimony did not violate the Court's ruling on State's motion in limine number 5. RP 1000 - 1001.

Ms. Gaspar's father then testified that after he saw her kissing a boy, he canceled her quinceañera, and that Ms. Gaspar's allegations of rape against Mr. Roque-Gaspar, who was at that time still living in the family home where Ms. Gaspar resided with her father and siblings, had followed the week after. RP 1006, 1008, 1103. Ms. Gaspar's father likewise testified that Ms. Gaspar had wanted to move back to Arizona, where her mother lived, for some time, due to the fact he had disciplined her for kissing a boy by cancelling her quinceañera. RP 1006-7, Ms. Gaspar's father had denied permission for the move, wanting her instead to be settled in one school for more than a year at a time. RP 690, 1011. When Ms. Gaspar made rape

allegations, her mother bought her a ticket to go back to Arizona the next day. RP 1010, 1011.

Later that day, during the second defense witness's direct testimony, the Court reversed its earlier ruling on the State's motion for limine #5, ruling that the defense could ask the question eliciting the response that the victim's father saw her "kissing a boy." RP 1005. By this time, Ms. Gaspar had already testified, as had her father and other relatives. Ms. Gaspar was no longer in the state or subject to recall for additional cross-exam.

On February 14, 2018, the jury returned guilty verdicts on all four counts of rape against Mr. Gaspar. RP 1373, 1377 - 1378. He was sentenced to 23 years imprisonment. RP 1406.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The erroneous application of the rape shield statute to exclude evidence crucial to the defense raises a significant constitutional question and an issue of substantial public import for review. RAP 13.4(b)(3), (4).

A defendant has a right under the Sixth Amendment to confront witnesses against him. While Washington's Rape Shield statute, RCW 9A.44.020, allows exclusion of evidence relating to past sexual behavior of the victim, it does not, and was not meant, to "preclude introduction of evidence to show that a victim has made prior false accusations of rape

because it bears on the victim's credibility." *State v. Lee*, 188 Wn.2d 473, 503, 396 P.3d 316, 332 (2017).

The rape shield statute was in fact created *only* "for the purpose of ending an antiquated common law rule that 'a woman's promiscuity somehow had an effect on her [credibility]" and thus may not be interpreted to bar *all* evidence of past sexual conduct, regardless of probative value. *State v. Jones*, 168 Wn.2d 713, 723, 230 P.3d 576 (2010). Further, evidence is not prejudicial, and therefore inadmissible, merely because it is impeaching. *Wilson v. Olivetti N. Am., Inc.*, 85 Wn. App. 804, 814, 934 P.2d 1231 (1997) ("[e]vidence is not inadmissible under ER 403 simply because it is detrimental or harmful to the interest of the party opposing its admission; it is prejudicial only if it has the capacity to skew the truth-finding process")

Error in excluding evidence that the defense seeks to introduce through cross-examination is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

As is the case with most sexual abuse allegations, there were no other witnesses to the alleged crimes, and the jury was tasked with determining the credibility of the accuser versus the credibility of the

accused. While this determination cannot be disturbed on appeal, whether or not the jury was in fact given all of the evidence necessary to make this determination in the first place may be re-examined. Here, that did not occur.

Instead, the defense case was hamstrung by erroneous court rulings from providing the entirety of its evidence indicating that the alleged victim was likely fabricating her story. The Court of Appeals indicated in its opinion that there was no evidence that the defense had proffered an offer of proof that there was such evidence. Respectfully, that evidence was clear in the transcript of the trial in this case, and Petitioner intends to demonstrate to the Court that the defense had and produced an offer of proof that would have demonstrated the likely falsehood of the victim's allegations to the jury. Despite this, the defense was prevented from giving all of the evidence in its possession to the jury by the court's erroneous application of rape shield laws to the facts of this case.

An opinion plainly and clearly delineating the limits and parameters of the application of the rape shield statute would be invaluable to defense and prosecution alike in future cases similar to this one, where the only witnesses are the accused and the accuser, and where external evidence of sexual activity of the accuser may shed light on a motive to fabricate a claim. Review of this case should be granted to provide such guidance.

B. The deprivation or Mr. Roque-Gaspar's Sixth Amendment right to present a defense due to an unreasonable delay in ruling on State's motion in limine #5 raises a significant constitutional question and an issue of substantial public import for review. RAP 13.4(b)(3), (4).

In order to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy, the Sixth Amendment gives the accused the right to present a defense. Consistent with this right, the Sixth Amendment requires deference to the defendant's strategic decisions. The Sixth Amendment guaranties of compulsory process, confrontation, and the assistance of counsel help ensure fair trials. See *Faretta v. California*, 422 U.S. 806, 818-21, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Washington v. Texas,* 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). These assurances safeguard the truth-seeking function of criminal trials. In holding the State to its burden of proof, a defendant may call witnesses, cross-examine the State's witnesses, and have the assistance of counsel, thereby guarding against a wrongful conviction. *See, e.g., Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) ("[P]artisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

A defendant's right to present a defense extends to his opening statement, subject only to the requirement that the evidence is relevant and admissible. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

The defense here was prevented from making his opinion statement in its entirety due to the Court's failure to fully rule on State's motion in limine #5 prior to commencement of the trial. The Court of Appeals does not dispute that the evidence was suppressed but claims that there was no showing that the evidence was relevant to the defense theory, finding that whether Ms. Gaspar was texting boys had no bearing on Mr. Roque-Gaspar's defense theory. Petitioner respectfully posits that this finding was in error. Though the mere fact that Ms. Gaspar was texting boys may not, in isolation, have been relevant, the defense did not seek to enter this fact into evidence in isolation.

To the contrary, this evidence was part and parcel of a larger picture. Here, it was the fact that Ms. Gaspar had unsanctioned contact with members of the opposite gender that enraged her father and resulted in the cancellation of her quinceañera and her father's tightening of rules and restrictions regarding who Ms. Gaspar could speak to and contact. The texting itself was part and parcel of behavior that triggered a reaction that in turn made Ms. Gaspar seek a return to her mother's house in Arizona, where the rules were not as strict.

By barring the defense from entering into evidence the full spectrum of Ms. Gaspar's behavior, the defense was hamstrung from exhibiting the entirety of its defense theory. Unless the jury were to understand exactly

what Ms. Gaspar was doing to anger her father, they would likely see the father's response to this as an overreaction, and would be more willing to believe that Ms. Gaspar was truthful and reasonable in her desire to escape her father's strict rules. This in turn makes Ms. Gaspar more credible overall to the jury, who is then more likely to believe the entirety of her story.

Contrary to the Court of Appeals ruling, Mr. Roque-Gaspar was not able to present his whole defense theory. He was able to present only a fractured and truncated version of that theory. Several key pieces were erroneously suppressed by the trial court and prevented the defense from presenting its theory in its most effective form – whole and unredacted.

Additionally, the late ruling by the Court allowing cross-examination on certain aspects of Ms. Gaspar's behavior made it impossible for defense counsel to fully cross-examine Ms. Gaspar or her mother, who had already testified, returned to Arizona, and were not subject to recall for additional cross-examination. Had the Court but ruled in a timely manner, defense would have at a minimum had an opportunity to fully explore the defense theory of the case with these crucial witnesses on cross-exam.

Petitioner will be able to demonstrate further in briefing specific instances in which the court's evidentiary rulings meaningfully impacted his ability to present a full defense, thus violating his Sixth Amendment

right to a fair trial. Review should be granted to ensure that Mr. Roque-Gaspar's right to a fair trial is protected.

C. The violation of Mr. Gaspar's Fifth Amendment and article 1, section 7 rights by the erroneous entry into evidence of a confession obtained after coercion during a police interrogation raises a significant constitutional question and an issue of substantial public import for review. RAP 13.4(b)(3), (4).

The test applied in determining whether a waiver of *Miranda* rights was knowing and intelligent is set forth in *Moran v. Burbine,* 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410, (1986):

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. at 421 (citing *Fare v. Michael C.,* 442 U.S. 707, 725, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979)).

Voluntariness of a defendant's waiver of Constitutional rights must be established by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477 (1972); *United States v. O'Looney*, 544 F.2d 385, 389 (9th Cir.) *cert denied*, 429 U.S. 1023 (1976); *State v. Braun*, 82 Wn.2d 157, 162, 509

P.2d 742 (1973). A reviewing court will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding. *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

As was demonstrated in the trial on this matter, Mr. Roque-Gaspar was 20, and had a clean criminal record, at the time of the interrogation in this case. He was taken by surprise, arriving at the police station for what was supposed to be a mere conversation, only to be read his rights and interrogated for over an hour about allegations he had no idea had been made.

Counsel provided evidence showing Mr. Roque-Gaspar had an outsized fear of authority, that he had been held back a year in school and was highly susceptible to the psychological coercion applied in this case. Further, evidence adduced in the suppression hearing demonstrated that the detective interrogated Mr. Roque-Gaspar using the Reid Technique, presenting Mr. Roque-Gaspar with two alternatives as to how the crime was

committed, and employing repeated pressure to encourage him to change his assertion of innocence to fit the story detectives had presented.

The rapidly evolving field of juvenile law has recognized in recent years that the juvenile brain is not fully developed until at least age 25, and until then is more suggestible and easily influenced. While Mr. Roque-Gaspar was not a juvenile at the time of the interrogation, he was only 20, and had no prior contact with police that would inform such an interrogation. His will was easily overborne by the two seasoned detectives who interrogated him.

Petitioner will demonstrate in this case that he was coerced into giving detectives a false confession. Review of this case involves a significant public policy question, as it demonstrates the need to extend juvenile interrogation practices to older suspects, whose brains are still developing and who continue to require the type of care heretofore generally demonstrated with those under the age of 18. In fact, the artificial cut-off date of 18 years for juvenile practices and procedures is not supported by science and should be disregarded. Review of this case can help to establish this fact.

D. The State's use of a Power Point slide containing Mr. Gaspar's picture with the word "guilty" in yellow lettering underneath it constituted prejudicial prosecutorial misconduct that raises an issue of substantial public import for review. RAP 13.4(b)(4).

The Pierce County Prosecutor's Office has been cited for Prosecutorial Misconduct based on inappropriate statements and inaccurate statement of law in PowerPoint presentations during opening and closing arguments on several occasions. These cases include *State v. Jungers,* 125 Wn. App. 895, 106 P.3d 827 (2005); *State v. Hecht,* 179 Wn. App. 497, 319 P.3d 863 (2014); *State v. Walker,* 182 Wn.2d 463, 341 P.3d 976 (2011), *State v, Allen,* 182 Wn.2d 346, 314 P.3d 268 (2015) all of which have resulted in a reversal of a conviction.

While a prosecutor is certainly allowed to argue for a defendant's guilt, the presentation of that conclusion in writing on a slide that is put in front of the jury for an extended period of time can constitute prejudicial misconduct. *See In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012); *Hecht*, 179 Wn. App. at 497.

In the majority of these cases, the sensational nature of the slides was particularly problematic. *E.g., Walker*, 182 Wn.2d at 468 (100 slides captioned with "Defendant Walker Guilty of Premeditated Murder"). However, the Court in those cases held that the act of superimposing the "guilty" them on a large number of slides, the prosecutor had conveyed his

personal opinion of the defendant's guilt. *Id.* This also altered the pictures and exhibits to which that caption was added. *Id.*

While this case involved a single slide, instead of the 100 slides used in *Walker,* the trial court nevertheless erred in finding that the slide used in this case was admissible. The slide in question printed the word "guilty" in yellow and was before the jury for a protracted period. The slide drew sufficient attention to the prosecutor's personal opinion as to Mr. Roque-Gaspar's guilt, and as such was an impermissible comment on guilt and should not have been admitted into evidence.

The mere fact that the prosecutor limited his misconduct to a single slide in this case does not render it any less prejudicial. The evidence in this case was a calculated device designed to manipulate the jury's deliberation, and undermined Mr. Roque-Gaspar's right to a fair trial.

E. The Court should have given a curative instruction in response to defense objections to the State's misconduct during closing.

A prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record. *State v. Claflin,* 38 Wash.App. 847, 850-51, 690 P.2d 1186 (1984), *review denied,* 103 Wash.2d 1014 (1985). This rule is closely related to the rule against pure appeals to passion and prejudice because appeals to the jury's passion and

prejudice are often based on matters outside the record. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (prosecutor appealed to jury's passion and prejudice by addressing defendant's ties to group that prosecutor characterized as terroristic based on facts outside the evidence); Claflin, 38 Wash.App. at 850-51, 690 P.2d 1186 (prosecutor in rape trial read poem to jury that appealed to jury's passion and prejudice and referred to matters outside the evidence). Improper arguments are particularly likely to be prejudicial when the case is a pure credibility contest. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011).

In *State v. Pierce*, 280 P. 3d 1158 (Div. II 2012), the Court found a prosecutor's argument, made in the first person singular and attributing repugnant and amoral thoughts to the defendant based purely on speculation, was an improper appeal to the passion and prejudice of the jury. *Pierce*, 280 P.3d at 1170. The Court relied on a Second Circuit opinion involving the use of the first person singular through the victim's eyes, noting, "The first person singular rhetorical device had the dual effect of placing the prosecutor in the victim's shoes and turning the prosecutor into [the victim's] personal representative." *Pierce, supra, quoting Hawthorne v. United States*, 476 A.2d 164, 172 (D.C.1984).

Here, the State, in addition to the prejudicial slide introduced in closing, made several arguments that assumed facts not in evidence.

Defense counsel objected to each and was overruled each time with the statement by the Court that the jury would determine the facts.

First, the State argued that Ms. Gaspar had been "consistent about telling her rape, about her rapes over time." RP 1335. The defense objected. The objection was overruled. Next, the State claimed that defense counsel had told the jury that Ms. Gaspar had "put herself in a position to be raped," and commented, "[t]hat's the quote." RP 1339. Again, defense counsel objected. Again, the objection was overruled.

In both cases, the State introduced evidence as part of argument that was nowhere in the trial record. First, the State improperly vouched for Ms. Gaspar's consistence and credibility, plainly a matter for the jury. Then, the State placed highly inflammatory words into defense counsel's mouth; words that defense counsel had not and would not have said. Neither objection was sustained. The jury was never given a curative instruction to ignore the State's impermissible statements in its deliberations.

The jury then went back to deliberate, having heard that the victim was consistent and credible, and that defense counsel was attempting to blame her for being raped. The statements are sufficient, and sufficiently inflammatory, to have denied Mr. Roque-Gaspar his right to a fair trial. The trial court's failure to issue a curative instruction was prejudicial error.

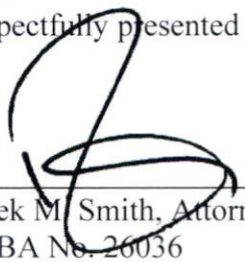
Such instructions are too often not issued by courts in response to

improper closing arguments, and prosecutors have been emboldened by this failure, continuing to push at the envelope of acceptable behavior to secure a conviction. A decision on this issue is in the public interest and concerns a substantial constitutional concern.

VI. CONCLUSION

For the reasons stated herein, Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully presented this 13th Day of February 2020



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Filed
Washington State
Court of Appeals
Division Two

January 13, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID DORRANCE ROQUE GASPAR, Appellant.	No. 51699-3-II UNPUBLISHED OPINION

WORSWICK, J. — David Roque Gaspar appeals his convictions for four counts of first degree child rape of his cousin, A.G. Roque Gaspar argues that the trial court violated his right to present a defense by excluding evidence supporting his theory that A.G. fabricated the rape allegations in order to move away from her father's strict rules. He also argues that the trial court erred by admitting the video of his interrogation following a CrR 3.5 hearing, because his statements were involuntary. We disagree and affirm.

FACTS

A.G. lived in Washington with her family when she was between the ages of 9 and 11 years old. During that time she lived in a house with her parents, four sisters, A.G.'s aunt, Graciela, and her husband, Graciela's four children, and Graciela's father. When A.G. was 11 years old, her parents separated, and she moved to Arizona with her mother. Two years later, A.G. moved back to Washington to spend time with her father, Francisco.[1] When A.G. was 14

[1] Because several people in this document share a last name or part of a last name, this opinion refers to some people by their first names for clarity. We intend no disrespect.

years old, she disclosed to her Aunt Rosa that Graciela's son, Roque Gaspar, had sexually abused her when she had previously lived in Washington. Shortly after, A.G. moved back to Arizona to live with her mother.

Upon returning to Arizona, A.G. disclosed the sexual abuse to a nurse, who contacted Arizona law enforcement. Eventually, Detective Patricia Song of the Tacoma Police Department was assigned to the case. Detective Song contacted Roque Gaspar, who agreed to a recorded interview with Detective Song and her colleague. The interview lasted about an hour and forty minutes. The State ultimately charged Roque Gaspar with four counts of first degree child rape.

The trial court held a CrR 3.5 hearing regarding the admissibility of Roque Gaspar's statements to police. In Roque Gaspar's memorandum concerning the CrR 3.5 hearing, he conceded that *Miranda* warnings were properly given, but argued that his statements constituted an involuntary confession due to the detective's interrogation strategies.

At the CrR 3.5 hearing, Detective Song testified that the interview occurred in an interview room at the criminal investigations division. Detective Song began the interview by reading two forms to Roque Gaspar—permission to record the interview and an advisement of his rights. Roque Gaspar waived his rights and signed the permission to record form.

At one point during the interview, Detective Song told Roque Gaspar he would be "in a world of hurt." Verbatim Report of Proceedings (VRP) at 41. Detective Song explained that she meant that Roque Gaspar would appear dishonest in the interview recording and "might have to pay for what he did in court." VRP at 41. At no point did Detective Song or her colleague directly threaten Roque Gaspar. Roque Gaspar was not placed in handcuffs or other restraints during the interview. Detective Song acknowledged using deception during the interview, such

as presenting the scenario to Roque Gaspar that perhaps he had engaged in a consensual sexual relationship with A.G., despite that A.G. was nine years old at the time.

Roque Gaspar testified at the CrR 3.5 hearing as follows. Roque Gaspar graduated from high school after being held back a year as a sophomore because he failed to do his homework. He did not have a learning disability and was pretty smart. After high school, he worked at a farm as a warehouse worker. After witnessing police arrest his uncle, Roque Gaspar developed a fear of authority. During his interview at the police station, the detectives read Roque Gaspar his constitutional rights. Roque Gaspar originally told detectives that he had not had intercourse with A.G. but later admitted to some sexual activity between the two because the detectives made it seem as though it would be okay compared to the original accusations. No one made any threats or promises to him during his interview.

The trial court failed to file written findings of fact and conclusions of law as required by CrR 3.5, but instead issued oral findings and conclusions. The trial court noted that there were no disputed facts, and that the parties agreed that *Miranda* warnings were appropriately given. The trial court concluded that the deceptive statements made by Detective Song, such as suggesting that Roque Gaspar possibly had a consensual relationship with nine-year-old A.G., did not rise to the level of overcoming Roque Gaspar's free will. The trial court also concluded that Detective Song did not induce Roque Gaspar to make any statements. The trial court stated, "[T]his was not a case where the detectives were overbearing. They were not in the defendant's face. They were not loud. I did not find them aggressive. They were relatively gentle, I would say, in their questioning of the defendant." VRP at 100. The trial court further concluded that

the length of the interrogation was not unduly long and that the location of the interrogation at the police station was not unduly coercive.

The trial court concluded that Roque Gaspar's condition, maturity, education, physical condition, and mental health was sufficient for him to knowingly, voluntarily, and intelligently waive his constitutional rights. Finally, the trial court concluded that the statements made by Roque Gaspar during his interrogation were admissible.

The State filed a motion in limine to "[e]xclude any evidence or argument suggesting that A.G. was promiscuous or that she received text messages from several boys." Clerk's Papers (CP) at 16. This was based on discovery evidence that A.G.'s aunt, a defense witness, "did not believe A.G.'s disclosure because she was receiving a lot of texts from different boys." CP at 16. Roque Gaspar opposed the State's motion in limine, arguing that he should be permitted to admit evidence that "A.G.'s motive for making her allegations against the defendant and requesting that she be flown back to her mother's home in Arizona was her unhappiness with her father's accusations that she was socializing with boys too often." CP at 72.

At a hearing on the motion, Roque Gaspar opposed the State's motion in limine, explaining his intention to offer testimony from A.G.'s aunt that A.G. had been receiving text messages from boys around the time she made her allegations, which led to conflict between A.G. and her conservative family, giving her motive to fabricate rape allegations. The trial court reserved ruling on the issue and instructed Roque Gaspar to bring up the issue outside the presence of the jury before raising the topic with any witness.

Prior to opening statements, the parties and the trial court attempted to clarify the trial court's position on the State's motion in limine. The trial court explained:

> I think what we need to do for opening . . . is avoid those issues, because I'm not going to rule on those before opening. And so the issue of promiscuity, whether this comes from text messages or comes from—there's at least one statement I remember in the disputed video about—where Detective Song, I believe, said that—I haven't made rulings on that, so I think that needs to be avoided in opening statement.

VRP at 431.

In his opening statement, Roque Gaspar argued that A.G. made up the story of him raping her in order to move away from her father's strict home.

> She was looking forward to a coming-out party . . . it's called a quinceanera. And what happened was, over a period of time . . . her family—they're very conservative, and they had some concerns about her behavior . . . . She was upset with her father, with her—and with her aunts because she felt like she was under surveillance. She was unhappy—she was happy when she came back, but then she became unhappy, and it was at that time that she came up with this story about being raped by [Roque Gaspar].

VRP at 446. He continued, "These rapes never happened. This was an unhappy adolescent, unhappy with where she was. She wanted to get out of living up here. She has not been back since. She's—now she gets what she wants." VRP at 450.

Prior to Roque Gaspar's cross-examination of A.G., the parties and the trial court revisited the pending motion in limine. Roque Gaspar explained that he intended to elicit testimony from A.G. that she was talking to boys and that her father was not happy about it. The trial court ruled that line of questioning admissible. On cross-examination, Roque Gaspar asked A.G. whether her father questioning her about a neighborhood boy upset her. A.G. said it did not.

A.G.'s father, Francisco, testified in Roque Gaspar's defense. He testified that he canceled A.G.'s quinceanera after he saw her kissing a boy. Francisco recalled that a week or two after he cancelled the quinceanera, A.G. made her allegations against Roque Gaspar.

Roque Gaspar presented his closing argument:

> Her father starts putting some very strict rules on her. And frankly they were a little bit—I mean, they weren't—it wasn't a 21st century approach to this, I would have to say that. Father is telling her, "I'm going to watch you and I don't want you to do certain things." It had to do with boys, but that's got really nothing to do with—the reason isn't important. What's important is that he was restricting who she could associate with, and he was—he was watching her, and Aunt [Rosa] was watching her. Rosa . . . was watching her too. So the father says at a point, "I'm going to cancel the quinceanera."
>
> . . . .
>
> Now, when the father—when he told her that that quinceanera was cancelled because of her behavior, what he thought was bad behavior on her part—it's kind of restrictive, to be honest—she was just—anyway. Then she indicated, "I want to go back to Arizona. If that's the way you feel, Dad, I want to go home." And then he says, "I can't have you flying back and forth. You need to stay here." You know. So he reveals to her he's changing the custody arrangement. He wants her to stay here. She—and she's now unhappy about staying here, and then she has the—then she has her Aunt Rosa also chastising her for what she's doing. "I've seen you walking into a house with a boy." So at that point she—she says—and it's interesting. This is when she starts talking about being raped. It's after she's been told that the quinceanera's cancelled, and that made her angry, and that father insists on having her stay in—with him. So then she says, "I want to go home."
>
> . . . Once she revealed the rapes—the alleged rapes—her story, then within a couple of days, father's taking her to the airport, flying her back to Arizona, and then she's lived there ever since. She's out of this restrictive environment where certain things can't—where her life is circumscribed. And so there's—there's a possible motive.

CP at 1359-62.

The jury found Roque Gaspar guilty of all four charges. Roque Gaspar appeals.

ANALYSIS

I. RIGHT TO PRESENT A DEFENSE

Roque Gaspar argues that the trial court erred by excluding evidence supporting his theory that A.G. fabricated the rape allegations in order to move away from her father's strict rules and as a result, violated his right to present a defense. We disagree.

A. *Legal Principles*

Criminal defendants have a constitutional right to present a defense. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). This includes the right to, in the opening statement, refer to admissible evidence expected to be presented at trial. *See State v. Piche*, 71 Wn.2d 583, 585, 430 P.2d 522 (1967). However, "[t]his right is not absolute." *State v. Arredondo*, 188 Wn.2d 244, 265, 394 P.3d 348 (2017). It does not extend to irrelevant or inadmissible evidence. *State v. Wade*, 186 Wn. App. 749, 764, 346 P.3d 838 (2015). "Defendants have a right to present only relevant evidence." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The defendant's right to present a defense is subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302; *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919 (2015).

"Whether the exclusion of testimony violated the defendant's Sixth Amendment right to present a defense depends on whether the omitted evidence evaluated in the context of the entire record creates a reasonable doubt that did not otherwise exist." *State v. Duarte Vela*, 200 Wn. App. 306, 326, 402 P.3d 281 (2017), *review denied*, 190 Wn.2d 1005 (2018). To prevail on a claim that he was deprived of his Sixth Amendment right, the defendant must at least make some plausible showing of how the excluded evidence would have been both material and favorable to his defense. *State v. Gonzalez*, 110 Wn.2d 738, 750, 757 P.2d 925 (1988); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982).

We review de novo whether the trial court violated a defendant's Sixth Amendment right. *State v. Arndt*, No. 95396-1, slip op. at 12 (Wash. December 5, 2019) http://www.courts.wa.gov/opinions/. However, we review a trial court's evidentiary rulings under an abuse of discretion. *Arndt*, No. 95396-1, slip op. at 12. Accordingly, we apply this two-step review process to review the trial court's evidentiary rulings for an abuse of discretion and to consider de novo the constitutional question of whether these rulings deprived Roque Gaspar of his Sixth Amendment right to present a defense. *Arndt*, No. 95396-1, slip op. at 12.

B. *No Abuse of Discretion*

Roque Gaspar contends that the trial court erred by originally reserving ruling on the State's motion in limine because it prevented him from giving specific examples of A.G.'s behavior during his opening statement and by limiting his ability to cross-examine A.G. But the record does not support Roque Gaspar's contention.

A court has discretion to control the content of opening statements. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). We review a court's exercise of that discretion for abuse.

Kroll, 87 Wn.2d at 835. While a defendant's right to present a defense extends to his opening statement, he has no constitutional right to refer to irrelevant and inadmissible evidence. *Jones*, 168 Wn.2d at 720; *Piche*, 71 Wn.2d at 585.

Prior to opening statements, the trial court attempted to clarify its ruling and advised Roque Gaspar to avoid the issue of promiscuity or text messages during his opening statement. On appeal, Roque Gaspar argues that he should have been permitted to reference that A.G. had been seen texting boys in order to fully present his defense theory. But Roque Gaspar fails to show that the evidence was relevant and admissible. Whether A.G. was texting boys had no bearing on Roque Gaspar's defense theory. Accordingly, we hold that the trial court's instruction to avoid the reference during opening arguments was not an abuse of discretion.

Additionally, the record does not show that the trial court limited Roque Gaspar's cross-examination of A.G. When the parties and the trial court revisited the motion in limine prior to Roque Gaspar's cross-examination of A.G., the trial court did not place any limitations on what Roque Gaspar indicated he would attempt to elicit. During cross-examination, Roque Gaspar asked A.G. about how her father's lecturing and questioning her about boys made her feel, and she responded that it did not upset her.

Similar discussions surrounding the motion in limine and potential witness testimony occurred outside the presence of the jury during the testimonies of Francisco and Aunt Rosa. In both instances, the trial court inquired as to what evidence Roque Gaspar expected to elicit. And

at no time did Roque Gaspar make an offer of proof for any relevant evidence that the trial court ruled inadmissible.[2]

We conclude that the trial court exercised appropriate discretion in navigating the motion in limine throughout trial. "We are mindful that '[t]he trial court has a gatekeeping function under the rules of evidence,'" which "necessarily entails making judgment calls as to what the jury may hear." *Arndt*, No. 95396-1, slip op. at 29 (alteration in original) (quoting *State v. Ellis*, 136 Wn.2d 498, 540, 963 P.2d 843 (1998)). Because the trial court's decisions were based on tenable grounds, it did not abuse its discretion.

C. *Sixth Amendment Right To Present a Defense*

Because a defendant's constitutional right to present a defense is not absolute, the State's interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted. *Arndt*, No. 95396-1, slip op. at 29. In some instances, evidence is of such high probative value that no State interest can be compelling enough to preclude its introduction consistent with constitutional principles. *Arndt*, No. 95396-1, slip op. at 29.

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[2] Roque Gaspar argues that the trial court erred by apply the rape shield statute to this case because the evidence at issue was of A.G.'s behavior *after* the incidents and therefore did not qualify as "past sexual behavior." Br. of Appellant at 2. The rape shield statute limits the ability of either party to introduce evidence of the past sexual behavior of a complaining witness. RCW 9A.44.020(2). The admissibility of evidence under the rape shield statute is within the discretion of the trial court. *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010). But because Roque Gaspar cannot point to any relevant evidence that was excluded from trial, we do not address this issue. However, we note that "[t]he purpose of the rape shield statute is to prevent prejudice arising from promiscuity and by suggesting a 'logical nexus between chastity and veracity.'" *State v. Sheets*, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005) (quoting *State v. Peterson*, 35 Wn. App. 481, 485, 667 P.2d 645 (1983)). Given the policy purpose of the rape shield statute, it logically follows that the statute would extend to sexual behavior after the incident forming the basis of the charges.

Here, the trial court's rulings and comments did not preclude Roque Gaspar from presenting his defense theory. As Roque Gaspar acknowledges on appeal, he was able to introduce his defense theory in his opening statement, introduce evidence that A.G. was seen going into a house with a boy, introduce evidence that A.G. was seen kissing a boy, introduce evidence that A.G.'s father canceled her quinceanera because of her interactions with boys, and argue during closing argument that A.G. fabricated the rape allegations because she wanted to move away from her father's strict rules. Roque Gaspar fails to show how the trial court's evidentiary rulings meaningfully impacted his ability to present his defense theory. *Cf. Jones*, 168 Wn.2d at 721 (holding that the trial court prevented Jones from presenting a meaningful defense by excluding essential facts of high probative value whose exclusion effectively barred Jones from presenting his entire defense theory).

Accordingly, we hold that the trial court did not abuse its discretion by exercising its gatekeeping function and did not deprive Roque Gaspar of his Sixth Amendment right to present a defense.

II. INTERROGATION VIDEO

Roque Gaspar also argues that the trial court erred by admitting the statements he made during his police interrogation. We disagree.

We review the trial court's decision after a CrR 3.5 hearing to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support

the conclusions of law.[3] *State v. Hughes*, 118 Wn. App. 713, 722, 77 P.3d 681 (2003). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Further, we review the trial court's conclusions of law de novo. *Solomon*, 114 Wn. App. at 789.

Both the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution protect a person from being compelled to give evidence against himself. *State v. Unga*, 165 Wn.2d 95, 100-01, 196 P.3d 645 (2008). To be admissible, a defendant's statements must be voluntary. *Unga*, 165 Wn.2d at 100. We consider the totality of the circumstances to determine whether a defendant's statements were voluntary. *Unga*, 165 Wn.2d at 100. Generally, "'coercive police activity is a necessary predicate'" to finding that a defendant's statements are not made voluntarily. *Unga*, 165 Wn.2d at 101 (quoting *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)). We will not overturn the trial court's determination that statements were voluntarily made if there is substantial evidence in the record from which the trial court could find voluntariness by a preponderance of the evidence. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991).

> Circumstances that are potentially relevant in the totality-of-the-circumstances analysis include the "crucial element of police coercion;" the length of the interrogation; its location; its continuity; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant

[3] The trial court's failure to reduce its CrR 3.5 findings and conclusions to writing is harmless if the trial court's oral findings in the record are sufficient to allow appellate review. *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). Here, the trial court rendered detailed oral findings of fact and conclusions of law. Neither party disputes that these oral findings and conclusions are sufficient to facilitate this court's review.

> of the rights to remain silent and to have counsel present during custodial interrogation.

Unga, 165 Wn.2d at 101 (quoting *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)). A detective's psychological ploys during interrogation may play a part in a suspect's decision to confess, "'but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.'" *Unga*, 165 Wn.2d at 102 (quoting *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir.1986)). The primary question is whether the interrogating detective's statements were so manipulative or coercive that they deprived the suspect of his ability to make an unconstrained, autonomous decision to confess. *Unga*, 165 Wn.2d at 102.

Here, Roque Gaspar contends that because he was held back a year in high school, afraid of authority, and interrogated in a police interview room he was more susceptible to the psychological coercion of the detective's questioning. He likens this case to *United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014). There, the Ninth Circuit held that the use of coercive interrogation methods on a suspect with "severe intellectual impairment" resulted in an involuntary confession. *Preston*, 751 F.3d at 1027-28. However, the facts of *Preston* are easily distinguished from the facts of this case.

Preston was 18 years old with an IQ of 65 at the time of his interrogation. *Preston*, 751 F.3d at 1020. His intellectual impairment was so clear to the investigating officers that they asked him if he was "disabled," but Preston had to ask for an explanation of the meaning of "disabled." *Preston*, 751 F.3d at 1020-21. A psychological evaluation of Preston revealed that Preston had

> a "very impaired" ability to understand "everyday interpersonal exchanges as well as . . . formal legal" exchanges. "[A]ny English verbal material must be repeated, reinforced, and then revisited." Without such repetition, "he may easily confuse the content of a conversation and give . . . spurious responses" or be misled. Thus, "[h]is relatively poor verbal linguistic fluency is likely to result in misunderstanding of directions or translate into delayed, unconventional, or inappropriate responses in verbal settings." Preston also finds "complexity . . . confusing" and has trouble understanding abstract terms. He has difficulty following "simultaneous communication," such as from two individuals speaking at once. Where there are two messages, Preston has trouble "sorting . . . out" what they are saying "and deciding how to respond." "[T]o set up the potential for him to understand something, you have to use rather simple, concrete terms."

Preston, 751 F.3d at 1021 (alterations in original). In contrast, Roque Gaspar testified at the CrR 3.5 hearing that he was "a pretty smart person," who had been held back during his sophomore year of high school due to not doing his homework. RP at 60. Roque Gaspar was gainfully employed and self-sufficient. The record supports the trial court's conclusion that Roque Gaspar's condition, maturity, physical condition, and mental health provided him the ability to knowingly, voluntarily, and intelligently waive his constitutional rights.

The record further supports the trial court's conclusion that the location, duration, and methods of the interrogation were not so manipulative or coercive that they deprived Roque Gaspar of his ability to make unconstrained, autonomous decisions. The interrogation lasted approximately one hour and forty minutes. As seen in the interrogation video, this included breaks and many long pauses between questions. The video shows that the detectives were not overbearing or loud. And although Detective Song warned Roque Gaspar that he would be in a "world of hurt" if he did not admit to having intercourse with A.G., considering the totality of the circumstances, the trial court did not err when it ruled that Detective Song's tactics were not so

manipulative or coercive that they deprived Roque Gaspar of his ability to make an autonomous decision to confess.

Accordingly, we hold that the trial court did not err by concluding that the statements made by Roque Gaspar during his interrogation were admissible and denying Roque Gaspar's motion to suppress.

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.

Worswick, P.J.

We concur:

Sutton, J.

Cruser, J.