

NO. 62899-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEREK LEWIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY I. YU

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

STEPHEN P. HOBBS  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

**FILED**  
**COURT OF APPEALS DIV. #1**  
**STATE OF WASHINGTON**  
**2018 APR 19 PM 4:37**

## TABLE OF CONTENTS

I.	<u>ISSUES PRESENTED</u> .....	1
II.	<u>STATEMENT OF THE CASE</u> .....	2
	A. PROCEDURAL BACKGROUND .....	2
	B. FACTUAL BACKGROUND .....	3
	1. D.L.'s preliminary disclosures of abuse .....	3
	2. Derek Lewis's confession to detectives .....	9
	3. D.L.'s trial testimony .....	15
III.	<u>ARGUMENT</u> .....	16
	A. THE TRIAL COURT CORRECTLY FOUND THAT FROST DID NOT COMMENT ON D.L.'S CREDIBILITY AND PROPERLY DENIED A MOTION FOR A MISTRIAL .....	16
	1. Relevant facts: alleged comment on credibility .....	17
	2. The court correctly denied the motion for mistrial .....	19
	3. Any error in admitting Frost's statement was harmless .....	23
	B. THE TRIAL COURT CORRECTLY FOUND THAT LEWIS VOLUNTARILY ABSENTED HIMSELF FROM TRIAL .....	25
	1. Legal standard: voluntary absence .....	25
	2. Factual background: Lewis's absence from trial .....	29

3.	Lewis voluntarily absented himself from the trial proceedings.....	37
C.	COUNT III DOES NOT CONSTITUTE THE SAME CRIMINAL CONDUCT AS COUNTS I AND IV; THE STATE CONCEDES THAT COUNT I AND IV CONSTITUTE THE SAME CRIMINAL CONDUCT.....	40
1.	Legal standard: same criminal conduct.....	40
2.	Relevant facts: same criminal conduct.....	42
3.	Count III (child molestation) does not constitute the same criminal conduct as counts I (rape of a child) and IV (rape of a child) .....	45
4.	The State concedes that Counts I and IV constitute the same criminal conduct.....	47
IV.	<u>CONCLUSION</u> .....	49

## TABLE OF AUTHORITIES

### Table of Cases

#### Federal:

<u>Crosby v. United States</u> , 506 U.S. 255, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1993).....	27
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938) .....	26
<u>Taylor v. United States</u> , 414 U.S. 17, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973).....	26
<u>United States v. Gagnon</u> , 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).....	25

#### Washington State:

<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	22
<u>State v. Anderson</u> , 92 Wn. App. 54, 960 P.2d 975 (1998).....	41
<u>State v. Bland</u> , 71 Wn. App. 345, 860 P.2d 1046 (1993).....	42
<u>State v. Casteneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74 (1991).....	19
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	19, 20, 22
<u>State v. Dunaway</u> , 109 Wn.2d 207, 743 P.2d 1237 (1987).....	41, 46
<u>State v. Garza</u> , 150 Wn.2d 360, 77 P.3d 347 (2003).....	28

<u>State v. Garza-Villarreal</u> , 123 Wn.2d 42, 864 P.2d 1378 (1993).....	41
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	23
<u>State v. Haddock</u> , 141 Wn.2d 103, 3 P.3d 733 (2000).....	41
<u>State v. Hammond</u> , 121 Wn.2d 787, 854 P.2d 637 (1993).....	26
<u>State v. Hernandez</u> , 95 Wn. App. 480, 976 P.2d 165 (1999).....	46
<u>State v. Jerrels</u> , 83 Wn. App. 503, 925 P.2d 209 (1996).....	19, 21, 22
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	23
<u>State v. LaBelle</u> , 18 Wn. App. 380, 568 P.2d 808 (1977).....	28
<u>State v. Lessley</u> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	41
<u>State v. Padilla</u> , 69 Wn. App. 295, 846 P.2d 564 (1993).....	19
<u>State v. Palmer</u> , 95 Wn. App. 187, 975 P.2d 1038 (1999).....	41
<u>State v. Porter</u> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	41
<u>State v. Rice</u> , 110 Wn.2d 577, 757 P.2d 889 (1988), <u>cert. denied</u> , 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989).....	26
<u>State v. Saunders</u> , 120 Wn. App. 800, 86 P.3d 232 (2004).....	20, 22, 23

<u>State v. Sponburgh</u> , 84 Wn.2d 203, 525 P.2d 238 (1974).....	23
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 864 P.2d 426 (1994).....	19
<u>State v. Sutherby</u> , 138 Wn. App. 609, 158 P.3d 91 (2007), <u>affirmed on other grounds</u> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	20, 21
<u>State v. Thomson</u> , 123 Wn.2d 877, 872 P.2d 1097 (1994).....	26, 28
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	48
<u>State v. Vike</u> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	41, 46
<u>State v. Walden</u> , 69 Wn. App. 183, 847 P.2d 956 (1993).....	48
<u>State v. Washington</u> , 34 Wn. App. 410, 661 P.2d 605, <u>remanded</u> , 100 Wn.2d 1016, 671 P.2d 230 (1983), <u>rev'd on other grounds on remand</u> , 36 Wn. App. 792, 677 P.2d 786, <u>review denied</u> , 101 Wn.2d 1015 (1984).....	27, 28
 <b>Other Jurisdictions:</b>	
<u>State v. Staples</u> , 354 A.2d 771 (Me.1976).....	28

**Constitutional Provisions**

**Washington State:**

Const. art. I, § 22 (amend. 10) ..... 25

**Statutes**

**Washington State:**

RCW 9.94A.400 ..... 41  
RCW 9.94A.589 ..... 40, 41  
RCW 9A.44.073 ..... 47  
RCW 9A.44.083 ..... 46

**Rules and Regulations**

**Federal:**

FR 43 ..... 27

**Washington State:**

CrR 3.4 ..... 26, 30  
CrR 3.5 ..... 9

## I. ISSUES PRESENTED

1. Was a statement by the mother of the four-year-old victim that she had discussed the difference between telling the truth and telling a lie with her daughter an impermissible comment on the victim's credibility?

- a. Did the trial court properly deny the defense motion for a mistrial?
- b. Was any error harmless where the defendant confessed that he had committed the three crimes for which he was convicted?

2. Did the trial court properly conclude that the defendant had voluntarily absented himself from the proceedings after he failed to appear on the final day of trial and after the court continued the matter five days in order for defense counsel to locate the defendant or to allow the defendant the opportunity to appear?

3. Was Count III (Child Molestation in the First Degree) separate criminal conduct from Counts I and IV (both Rape of a Child in the First Degree), when the events underlying Count III occurred at a different place and different time than Counts I and IV and where the crimes have a different criminal intent?

4. Should the court accept the State's concession that Counts I and IV (both Rape of a Child in the First Degree) constitute the same criminal conduct when it is possible that the events underlying the counts occurred in the same place, that one event furthered the other, that one event followed closely in time after the other, and where the criminal intent for both counts is the same?

## II. STATEMENT OF THE CASE

### A. PROCEDURAL BACKGROUND.<sup>1</sup>

Defendant Derek Lewis was charged by amended information with Rape of a Child in the First Degree (Count I), Rape of a Child in the First Degree (Count II), Child Molestation in the First Degree (Count III), and Rape of a Child in the First Degree (Count IV). CP 37-38. A jury found Lewis guilty as charged on Counts I, III, and IV. CP 78, 80-81; 11RP 52-53. The jury acquitted Lewis on Count II. CP 79. Lewis received a sentence within the

---

<sup>1</sup> The State will refer to the verbatim report of proceedings as follows:

**Pre-Trial Motions:** 1(A)RP (Oct. 28, 2008); 1(B)RP (Oct. 29, 2008); 2RP (Oct. 30, 2008); 3RP (Oct. 30, 2008); 4RP (Nov. 3, 2008); 5(A)RP (Nov. 4, 2008); 5(B)RP (Nov. 4, 2008). **Jury Selection:** 6RP (Nov. 5, 2008). **Jury Trial:** 7RP (Nov. 6, 2008); 8RP (Nov. 10, 2008); 9RP (Nov. 12, 2008); 10RP (Nov. 13, 2008); 11RP (Nov. 17, 2008). **Sentencing:** 12RP (Jan. 16, 2009). **Restitution Hearing:** 13RP (June 18, 2009).

standard range. CP 103-12. Lewis has filed a timely appeal.

CP 96-97.

**B. FACTUAL BACKGROUND.**

**1. D.L.'s preliminary disclosures of abuse.**

The defendant, Derek Lewis, and Wendy Frost knew each other in high school. 9RP 4-5. They dated off and on after high school and married in March of 2002. 9RP 5. Lewis and Frost had a child together, D.L., born August 12, 2002. 9RP 5. At the time of the events described below, D.L. was four years old.

Lewis watched D.L. during the day, while Frost was at work. One day in April, 2007, Frost told Lewis she was going to play bingo with her mother after work. 9RP 35. When she got home from work, D.L. was in the bathroom and was crying. 9RP 35. Lewis said that D.L. had a hard time going to the bathroom. 9RP 35. Frost saw that D.L.'s bottom was red. She gave D.L. a bath and put some cream on what she thought was a rash. 9RP 35-36. D.L. continued to cry but did not say anything to Frost at this time. 9RP 35.

About two weeks later, on May 9, 2007, Frost was watching a "National Lampoon" movie that Lewis and she had rented. When D.L. awoke from her afternoon nap, Frost turned the movie off. 9RP 8, 37-38. D.L. told Frost that she (Frost) shouldn't watch that

movie. 9RP 8-9. D.L. then said she had watched the movie with her father. 9RP 8-9. D.L. was able to describe to Frost a scene in the movie that involved sexual conduct. 9RP 9. D.L. told Frost that, when she watched the film with Lewis, he had fast forwarded to the “corny” parts. 9RP 9-10. Frost later realized that D.L. was referring to the parts of the movie that involved sex. 9RP 10.

Frost was concerned that Lewis had let their four-year-old daughter watch an R-rated movie. 9RP 10. She asked Lewis why he had watched the movie with D.L. 9RP 10-11. D.L. was present when this conversation occurred. 9RP 12. D.L. then disclosed that she had looked at a pornographic magazine with Lewis. 9RP 12. D.L. then told Frost that Lewis had “put his leg” “right here” and “pointed to her butt.” 9RP 12-13.

Frost was upset and asked Lewis what was going on. Lewis responded that he had “tried to tell her for a while.” 9RP 13-14. Lewis then told Frost that it “felt like it wasn’t me. I felt like I wasn’t in the apartment.” 9RP 14. Lewis told Frost that he “didn’t think” he put “it all the way in” D.L.’s butt, that he “just put the head in.” 9RP 14. During this conversation Lewis told D.L. that he was “sorry.” 9RP 14.

Frost called her mom and asked her to come and pick up D.L. and her so they could leave the apartment. 9RP 14. Lewis asked

her not to leave and said that he would get “help” and “counseling.”  
9RP 14-15. He asked Frost not to call the police. 9RP 15. When her mother arrived, Frost gathered up a few clothes and took D.L. to stay with an aunt, Cheryl Cadman. 8RP 127-30; 9RP 15.

Before they went to sleep that night, Frost asked D.L. why she hadn't told her what had happened. 9RP 16-18. D.L. said that Lewis had told her not to tell and that if she did she would get in trouble. 9RP 16-18. D.L. said that she (D.L.) was afraid that Frost would think she was one of the bad girls like in the magazine. 9RP 16-18. D.L. made it clear that Lewis had said that if she told anyone what had happened then her mother (Frost) would think she was a bad girl, like the women in the magazines. 9RP 18-20.

That same night, Frost told her aunt Cadman what D.L. had revealed to her. 8RP 127-30; 9RP 15-17. Cadman, who had known Lewis for ten years, called Lewis and demanded to know what he was thinking when he had done these things. 8RP 130. Lewis responded by saying that he “didn't know why he did what he did.” 8RP 130.

The next day, D.L. disclosed to Frost more information about what her father had done to her. D.L. said that Lewis put “his leg in my butt” and that it “hurt” and she “cried.” 9RP 21-22.

D.L. also said that when Lewis looked at the magazines she had “touched his leg.” D.L. said that she usually did the rubbing and that Lewis would make the “white oil” come out. 9RP 23-24. She said that the “white oil” was supposed to go in her mouth but it went on her hand. 9RP 24.

D.L. also told her mom about a purple vibrator (a “purple leg”) and said that she (D.L.) had put the vibrator in her mouth. 9RP 45. D.L. also said that Lewis had put the vibrator on her private area, and pointed to her vagina. 9RP 45-46. Frost confirmed that she does have a light purple vibrator. 9RP 44.

D.L. also said that, when Frost had been sleeping on the “little bed,” Lewis had put a red bandana over her eyes and put the vibrator by her private area. 9RP 46, 64. Frost testified that D.L. referred to a mattress on the floor as the “little bed” and that it had been replaced by a frame bed sixth months or so before D.L.’s disclosures. 9RP 45-46.

Frost spoke with Lewis after the additional disclosures by D.L. Frost was angry and wanted to confront Lewis. 9RP 25-26. Lewis repeatedly told Frost he was sorry. 9RP 26-27. Lewis again said he didn’t think he “put it all the way in.” 9RP 24. Lewis said that D.L. was crying when it happened. 9RP 24. Lewis claimed that

“something took over his body” and also stated that he had been “high.” 9RP 24-25.

The day after D.L.’s disclosures, Frost visited a King County Sheriff’s storefront office and reported D.L.’s allegations to the deputy on duty there. 8RP 72-76; 9RP 29-30.

On May 15, 2007, D.L. was interviewed in the King County Prosecutor’s Office by Child Interview Specialist Carolyn Webster. 7RP 123-24. Webster’s interview with D.L. was videotaped and transferred to DVD. 7RP 121-22, 131. The DVD was admitted into evidence and played for the jury. 7RP 131-33, 135 (Exhibit 11 and Exhibit 12).<sup>2</sup>

D.L. disclosed during the interview that Lewis had put his “leg in her butt” and that it did not hurt at first and it felt “good” but that she asked him to stop when he “put it in all the way” because it felt “bad.” Exhibit 11, p. 7, 9-12. She also disclosed that Lewis had put the “purple leg” in her vagina. Exhibit 11, p. 12, 15-16. D.L. said that it moved because it has batteries and made a buzzing sound. Exhibit 11, p. 14-16. D.L. said that she rubbed the defendant’s “leg” and was “playing with it.” D.L. said that Lewis told her not to tell her mom.

---

<sup>2</sup> Exhibit 12 is the DVD of the interview with D.L. Exhibit 11 is the transcript of that interview which was provided to the jury while they watched the DVD.

Exhibit 11, p. 17-19. D.L. showed how she was playing with her dad's "leg" and made a hand motion back and forth, simulating masturbation. Exhibit 11, p. 19. D.L. also talked about watching a "boobie movie" with Lewis and looking at a magazine with him and that she danced for her dad "like the bad girls" in the rap videos. Exhibit 11, p. 7-8, 22-23. D.L. said that Lewis told her not to tell her mom about what had happened. Exhibit 11, p. 8, 12.

On May 16, 2007, D.L. was taken to Harborview Medical Sexual Assault Center for an examination. Joanne Mettler, ARNP, conducted an exam of D.L. 8RP 77. D.L. was extremely reluctant to undergo a physical exam, and did not want to talk to Mettler about what Lewis had done to her. 8RP 85-89. D.L. did say that her dad had done some bad things to her. 8RP 86. Mettler was able to do a physical exam of D.L.'s outer genital area and anus. 8RP 89-90. D.L.'s exam was normal. 8RP 91. A normal exam does not mean, however, that no assault has occurred; indeed, it is usual not to observe signs of trauma in children or adult victims of sexual assault. 8RP 91-92.

## **2. Derek Lewis's confession to detectives.**

On May 17, 2007, King County Sheriff's detectives went to Lewis's home.<sup>3</sup> 7RP 20-22, 66; 8RP 12-13. They informed Lewis that they were there to speak to him about D.L. and he invited them inside. 7RP 23; 8RP 13-14. Lewis was read his constitutional rights and agreed to speak with the detectives. 7RP 26-27; 8RP 16-17. Lewis was cooperative, but embarrassed and apologetic. 7RP 27; 8RP 15.<sup>4</sup>

Lewis's version of events slowly evolved during the interview. 8RP 32-33. He initially denied remembering what had happened, stating that he had been given a pill at work that affected his memory. 7RP 73; 8RP 18-19. Subsequently, Lewis admitted to the detectives that he did remember what had happened and that he was just having trouble admitting it to the detectives. 7RP 73.

Lewis began by stating that his wife, Frost, had said that D.L. had said that she (D.L.) had danced naked for Lewis. 7RP 27; 8RP 16-17. Lewis denied this had occurred. 7RP 27-28; 8RP 17.

---

<sup>3</sup> Three detectives went to interview Lewis: Det. Elias, Det. Priebe-Olson, and Det. McCurdy. Det. Priebe-Olson (7RP 14-62) and Det. Elias (8RP 5-66) conducted the primary interview. Det. McCurdy (7RP 63-98) was present during some of the interview.

<sup>4</sup> A pre-trial hearing was held pursuant to CrR 3.5 concerning the admissibility of Lewis's statements. The court held that Lewis's statements to the detectives were admissible and this ruling has not been challenged on appeal. 4RP 83-86.

Lewis then said that D.L. had complained that her butt was hurting her. 7RP 29. Lewis stated that D.L. had found his wife's vibrator. 7RP 27-28. Lewis claimed that D.L. had put the vibrator in her mouth. 7RP 28. Lewis denied having put the vibrator in D.L.'s mouth or anywhere on her body. 7RP 28.

Lewis then said that at first he did not remember what had happened. Lewis claimed that D.L. said that he had turned the lights off, but all he remembered was crying. 7RP 31. Lewis told the detectives that he had apologized to D.L. and to his wife. 7RP 31. Lewis stated that he had done something but he couldn't remember what it was. 7RP 31. Lewis said that D.L.'s butt was hurting and he didn't remember what had happened. 7RP 31.

When the detectives asked what he used on D.L.'s butt, Lewis said he was "50/50" sure he "either put his finger or his penis on her butt." 7RP 31-32, 71-72; 8RP 19. The detectives asked whether he had put the vibrator on D.L.'s butt and Lewis said he had not done that. 7RP 31.

The detectives sought to clarify whether Lewis had penetrated D.L.'s butt or her vagina. 7RP 32. Lewis said that he knew the difference between "vagina and butt hole" and that he did not put his penis or finger in D.L.'s vagina. 7RP 32. Lewis said he had put his

penis or finger in D.L.'s "butt hole." 7RP 32, 72. When asked how far he had inserted his penis or finger, Lewis showed the detectives half his fingernail. 7RP 32, 72; 8RP 21. Lewis then said he had put the head of his penis in D.L.'s "butt hole." 7RP 32, 72; 8RP 21.

Detectives questioned Lewis about the timing of these events, and he identified three different points in time: bingo night, a month or so before bingo night, and a month or so before that. 7RP 32-33.

On the "bingo night" incident, Lewis was watching D.L. while Wendy went out to play bingo. 7RP 33, 73-74. Lewis said he and D.L. were running around "playing swords" when suddenly D.L. was on the couch with her leg in the air and "all of a sudden he was putting his finger in her butt hole." 7RP 33-34, 73-74; 8RP 22. Lewis said that D.L. was moaning like she enjoyed it. 7RP 33-34; 8RP 21. Lewis said he felt really bad and went to his room and cried. 7RP 33-34; 8RP 32. Detectives asked Lewis if he had put his penis in D.L.'s butt hole at that time as well. Lewis said that he did, stating that he pulled his penis out of his basketball shorts and put it in her butt hole about to the end of the tip of his penis.<sup>5</sup> 7RP 33-34, 74-76; 8RP 29.

---

<sup>5</sup> Note that the fact that Lewis put his finger in D.L.'s "butt hole" was new information, not provided to detectives by either D.L. or Frost. 8RP 60.

Lewis described another incident that happened before bingo night. 7RP 34. Lewis said he had a pornography magazine and that D.L. had found the magazine. 7RP 34-35. Lewis was clear that this was a different incident than the events that occurred on bingo night. 8RP 39.

Detectives confronted Lewis with D.L.'s allegation that he had ejaculated on her. 7RP 35. Lewis said that may have happened on the night that she found the magazine. 7RP 35-36. Lewis said he was lying in bed with the magazine and a "feeling" came over him. 7RP 36; 8RP 24-25, 35-36. Lewis said he did not rape his daughter but that a "sexual feeling came over him that he called a lust demon." 7RP 36. Lewis said he was "probably" lying on the bed masturbating when D.L. came in and touched his penis. 7RP 36; 8RP 24. Lewis said he did not stop her and he continued until he ejaculated on her hand. 7RP 36, 79-80; 8RP 24, 35. Lewis told D.L. that semen was called "white oil." 7RP 36, 79-80; 8RP 24. Lewis claimed that he had only let D.L. touch his penis one time; that she had tried to touch it other times but he would not let her. 7RP 38; 8RP 38

Lewis admitted that he had watched a movie with D.L. that had sex scenes in it. 7RP 37. The movie was either a National Lampoon movie or a film with Paris Hilton in it. 7RP 37. Lewis

claimed that while watching the movie D.L. asked him if it was okay for two girls to kiss and he said no. 7RP 38, 78. Lewis said that while watching the movie he controlled his urges to have sex with D.L. 7RP 38.

Lewis told the detectives that D.L. was "semi-curious" and asked what do "guys have down there." Lewis told her that it was called a "leg." 7RP 39, 77; 8RP 24, 26. Lewis also claimed that D.L. would "play with herself." 7RP 47.

Lewis said that D.L. asked him what the purple thing was for and Lewis told her it was a vibrator and that women used it. 7RP 39; 8RP 27. Lewis claimed that he had seen D.L. using the vibrator on herself. 7RP 76. When D.L. asked why it wasn't moving anymore, Lewis told her it was probably the batteries. 7RP 39; 8RP 27-28. Lewis denied using the vibrator on D.L. 7RP 76; 8RP 27.

Lewis also said that D.L. asked him why people had sex in the butt. 7RP 39. Lewis said he told D.L. that that was wrong and that it was "sodomy." 7RP 39. Lewis claimed that D.L. then asked him "not to tell." 7RP 39-40.

Lewis said he may have put his finger in D.L.'s vagina once while "wiping her" after she went to the bathroom. 7RP 62; 8RP 27.

Lewis initially denied that his daughter had ever worn one of his bandanas. 7RP 41-42. He then said that she had worn his yellow bandana. Lewis said D.L.'s DNA would probably be on the yellow bandana, but he didn't know where it was. 7RP 42, 79; 8RP 37-39. Lewis denied that he had ever blindfolded his daughter with the bandana. 7RP 42.

Lewis denied that any of the above events had happened in front of others and insisted that they had occurred "behind closed doors." 7RP 44, 81. Lewis told detectives that he had apologized both to his wife and to D.L. about what he had done. 7RP 44-45, 81; 8RP 23, 33-34. Lewis claimed it would never happen again because once he does something wrong it doesn't happen again. 8RP 34.

When asked whether he had ever had sex with D.L., Lewis stated that one time D.L. had gotten on top of him but that "he didn't do that again." 7RP 47. He denied having sex or oral sex with D.L. 8RP 26-27, 56, 61-62.

When asked about the day that Wendy and D.L. had left the house, Lewis said he remembered that D.L. had said: "[R]emember, you asked me if it felt good, daddy"? 7RP 48, 80; 8RP 29-30. Lewis said he didn't remember saying that. 7RP 81; 8RP 30.

About a third of the way through the interview, the detectives asked Lewis if he wanted to give a recorded statement, but he declined to do so. 7RP 40-41, 54, 57-58, 96-97; 8RP 23. When the interview ended, Lewis was taken into custody. 7RP 45, 82.

During the execution of the search warrant, detectives found a purple vibrator from a dresser in the bedroom. 7RP 8-87. The vibrator was analyzed by the Washington State Patrol Crime Lab. 7RP 145-61. There was no identifiable DNA belonging to D.L. on the vibrator. 7RP 160.

### **3. D.L.'s trial testimony.**

D.L. was six years old when she testified at trial. 9RP 75. She was clearly nervous, upset, and scared about testifying and found it difficult to directly answer the questions put to her. D.L. sometimes had to be led or offered the option of multiple choice answers. D.L. sometimes preferred to indicate her answer in the form of a drawing. Nevertheless, D.L. consistently confirmed the disclosures she had already made to her mother and to the child interview specialist.

Specifically, D.L. testified that Lewis did "bad things" to her. 9RP 79-80. D.L. stated that Lewis touched her "front privates on top" and her "back privates." 9RP 82-84. When asked to draw the "leg" that Lewis touched her back private with, D.L. drew a penis on the

diagram. RP 84-85 (Exhibit 2). D.L. confirmed that she looked at a “sex” magazine with Lewis and that it depicted men and women without clothes. 9RP 89-91. D.L. testified that she touched her dad’s “leg” and that “oil” came out. 9RP 92-94. D.L. stated that Lewis put the “purple leg” in her mouth and on her front and back privates. 9RP 95-97. She said that it hurt when he did this. 9RP 97. D.L. stated that it hurt when her dad put “his leg” in her butt. 9RP 98. D.L. said that Lewis had put a bandana on her head and then put his leg on her “privates.” 9RP 99-101.

A jury convicted Lewis of two counts of Rape of a Child in the First Degree (Count I and IV) and one count of Child Molestation in the First Degree (Count III). CP 78, 80-81; 11RP 52-53. The jury acquitted Lewis on a third count of Rape of a Child in the First Degree (Count II). CP 79.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT CORRECTLY FOUND THAT FROST DID NOT COMMENT ON D.L.’S CREDIBILITY AND PROPERLY DENIED A MOTION FOR A MISTRIAL.**

Lewis argues that the trial court abused its discretion in refusing to grant a motion for a mistrial based on an alleged comment by Wendy Frost that D.L. had testified truthfully. There was no such comment. Rather, Frost simply testified that D.L.

“knows it’s better to be honest than to lie.” This was not a comment that D.L. had testified truthfully and the trial court correctly denied the motion for a mistrial based on this testimony. In any event, any error in this record was harmless.

**1. Relevant facts: alleged comment on credibility.**

During the testimony of Wendy Frost, the following questioning occurred during the prosecutor’s direct examination:

**MS. KAAKE:** Now, you have talked with [D.L.] about telling the truth and telling lies?

**FROST:** Yes.

**MR. ARALICA:** Objection.

**MS. KAAKE:** What have you talked with her about?

**THE COURT:** Overruled. Go ahead.

**MS. KAAKE:** What have you talked with her about relating to that?

**FROST:** Just she knows it's better to be honest than lie, and that she --

**MR. ARALICA:** Objection. Vouching. May we approach?

**THE COURT:** You may approach.

(Side bar proceedings held.)

**MS. KAAKE:** So you've talked with [D.L.] about telling the truth?

**FROST:** Yes.

**MS. KAAKE:** And she understands that it's best to tell the truth and not to lie?

**FROST:** Yes. She hears it almost every Sunday at church.

9RP 39-40.

At this point in his brief on appeal, Lewis skips three pages in single ellipses and continues with the following portion of the examination:

**MS. KAAKE:** Did you ever tell [D.L.] -- or tell Deborah Smith [Lewis's mother] that [D.L.] was lying about what had happened?

**FROST:** No.

...

**MS. KAAKE:** Now, at that point [D.L.] had gotten along with Deborah Smith?

**FROST:** Yeah.

**MS. KAAKE:** You had taken her to visit a couple of times even while this was all going on?

**FROST:** Yeah, twice. Once before the school clothes. I mean, she missed her grandparents but they thought -- I mean, obviously they don't believe her so I just --

9RP 43-44. This exchange clearly deals with the assertion made by Lewis's mother (Deborah Smith) that Wendy Frost had told her that D.L. was lying about the allegations. 3RP 14.

Outside the presence of the jury, Lewis's attorney moved for a mistrial alleging that Frost was "directly providing an opinion at this point regarding [D.L.'s] ability to tell the truth or a lie." 9RP 48. The court heard argument on this motion. 9RP 47-51. The court rejected Lewis's motion for a mistrial, stating:

First of all, I'm denying the motion for a mistrial, and specifically I don't find that the question was phrased to elicit testimony that would be commenting on credibility or trying to even make a comment as to this individual's character at all. It was not about this individual's reputation, *it was simply whether or not this child, given how old she is, as to whether or not she understands the difference between a lie and the truth.* And frankly, this court in this context of all of the evidence and the testimony of this mother found the question appropriate. I'm not finding that it was an effort to somehow bolster her credibility in front of the jury. So, again, this court is denying your motion.

9RP 51 (emphasis added).

**2. The court correctly denied the motion for mistrial.**

It is undisputed that it is improper for a prosecutor to compel a witness' opinion as to whether another witness is telling the truth. State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994); State v. Padilla, 69 Wn. App. 295, 299, 846 P.2d 564 (1993); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Such questioning invades the jury's province and is unfair and misleading. State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991); see also State v. Jerrels, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996).

In determining whether a statement is improper opinion testimony, courts consider the totality of circumstances in the case, including: "(1) the type of witness involved, (2) the specific nature of

the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” State v. Saunders, 120 Wn. App. 800, 813, 86 P.3d 232 (2004) (quoting Demery, 144 Wn.2d at 759).

However, no improper comment on credibility occurred in the present case. The prosecutor never asked Wendy Frost whether D.L. had testified truthfully or whether or not she believed D.L.’s allegations. Rather, the questions simply established whether D.L. – who was four years old at the time of the allegations and six years old at the time of trial – understood that it was important to tell the truth and not to lie. Understanding the difference between truth and lying is an essential prerequisite for a child witness to testify. The jury was entitled to be informed that D.L. met this threshold requirement, so long as the questioning did not involve Frost asserting that she believed D.L. was telling the truth about the allegations at issue.

An example of questioning that is improper is provided in State v. Sutherby, 138 Wn. App. 609, 616, 158 P.3d 91 (2007), affirmed on other grounds, 165 Wn.2d 870, 204 P.3d 916 (2009). In Sutherby, the prosecutor engaged in the following exchange with the mother of a child victim:

Q. Can you tell when she has told a fib?

A. Yeah.

Q. How do you tell that?

A. She makes kind of a – tries not to smile, but makes a half smile when she is telling a fib.

Q. Ever seen that face or reaction when she was talking about what happened with [Sutherby]?

A. No.

Id. at 616-17. The Court of Appeals properly held that this was “improper and deprived [Sutherby] of his right to have the jury determine E.K.’s credibility.” Id. at 617. Sutherby illustrates the line across which the State may not step: a direct comment by the parent that she could tell when her child was lying and that the child was credible when she related what had happened to her. Sutherby also emphasized that the answer gave the jury an improper yardstick (the “half smile”) for measuring whether the victim was telling the truth when she testified. Id. This is fundamentally different from a mother testifying that she has spoken with her child about not telling lies.

The cases Lewis relies upon on appeal are distinguishable for similar reasons. In particular, State v. Jerrels, 83 Wn. App. 503, 925 P.2d 209 (1996), is not on point. In Jerrels, the prosecutor repeatedly asked the defendant's wife whether she believed her

children were telling the truth when they reported that their father sexually assaulted them. Id. at 507-08. Similarly, in State v. Saunders, 120 Wn. App. 800, 813, 86 P.3d 232 (2004), the Court of Appeals appropriately held that it was improper opinion testimony when a police officer stated that the defendant failed to give truthful answers when questioned. Id. at 813.

Unlike the present case, both Jerrels and Saunders involved direct comments by a witness on whether another witness was telling the truth. This is the threshold question that determines whether the testimony is or is not proper. Contrary to Lewis's assertion on appeal, these cases do not hinge on the identity of the person who made the comment. Rather, this is simply one factor to be considered in determining whether the comment was improper and whether it was prejudicial. Jerrels, 83 Wn. App. at 508; Saunders, 120 Wn. App. at 813.

Ultimately, the trial court has significant discretion when admitting evidence and its evidentiary ruling will not be disturbed absent an abuse of discretion. Demery, 144 Wn.2d at 758. Abuse occurs when the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775

(1971). The appellant bears the burden of showing abuse of discretion. State v. Sponburgh, 84 Wn.2d 203, 210, 525 P.2d 238 (1974); see also Saunders, 120 Wn. App. at 811. In this case, the trial court did not abuse its discretion in concluding that the prosecutor did not ask, and Frost's answer did not, elicit a comment on D.L.'s credibility.

**3. Any error in admitting Frost's statement was harmless.**

Assuming for the sake of argument that the prosecutor's question was improper, the alleged error was harmless beyond a reasonable doubt. Admission of improper testimony is reviewed under the constitutional harmless error standard of review. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); Saunders, 120 Wn. App. at 813. Constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." Id. at 425.

The overwhelming untainted evidence in this case (as outlined above) establishes Lewis's guilt on the three counts for which he was convicted. The three sentences devoted by Lewis to this issue on appeal do nothing to undermine the validity of the convictions. To briefly recap, four-year-old D.L. reported the abuse, in detail, to her mother shortly after it happened. In an interview with a child interview specialist days later, she maintained her allegations. Two years later, at trial, she related (albeit reluctantly) the same version of events. This is not a case in which the victim recanted, or a case in which the victim's story changed or evolved over time.

Ultimately, however, Lewis's suggestion on appeal that "[a]bsent D.L.'s testimony there was simply no other evidence presented to support the convictions" is simply ludicrous in light of Lewis's detailed confession to three detectives that he placed his finger in D.L.'s rectum, that he placed his penis in D.L.'s rectum, and (in a separate incident) that he allowed D.L. to touch him while he masturbated and then ejaculated on her hand. Given Lewis's specific and detailed confession, any error in admitting Wendy Frost's statement that D.L. knew the difference between a truth and a lie is harmless beyond a reasonable doubt.

**B. THE TRIAL COURT CORRECTLY FOUND THAT LEWIS VOLUNTARILY ABSENTED HIMSELF FROM TRIAL.**

Lewis was not in custody during the trial. After eight days of trial, shortly before he was scheduled to testify, Lewis chose not to return to court. The trial court carefully gave his attorney every opportunity to locate Lewis, continuing the trial for several days, before determining that Lewis had voluntarily absented himself from the proceedings. At sentencing (after Lewis was subsequently located by the FBI Fugitive Task Force), Lewis was unable to provide any credible reason for his failure to appear at trial. Accordingly, Lewis's claim on appeal that his "constitutionally protected right to be present at trial was violated" is without any merit.

**1. Legal standard: voluntary absence.**

The right to be present at trial derives from the confrontation clause of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484, 84 L. Ed. 2d 486 (1985) (per curiam). The Washington State constitution also provides "the accused shall have the right to appear and defend in person, or by counsel ... [and] to meet the witnesses against him face to face." Const. art. I, § 22 (amend. 10).

However, the state and federal constitutional rights to be present at trial may be waived, provided the waiver is voluntary and knowing. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 146 A.L.R. 357 (1938); State v. Rice, 110 Wn.2d 577, 619, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). A voluntary absence after trial has begun operates as a waiver of the right to be present. Rice, 110 Wn.2d at 619, 757 P.2d 889 (citing Taylor v. United States, 414 U.S. 17, 19-20, 94 S. Ct. 194, 195-96, 38 L. Ed. 2d 174 (1973) (per curiam)).

Similarly, the state and federal rules of criminal procedure require the defendant's presence at trial, but provide for continuing with trial despite the defendant's voluntary absence as long as the defendant was present when trial began. CrR 3.4(b) explicitly provides:

. . . the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. . . .

See State v. Hammond, 121 Wn.2d 787, 854 P.2d 637 (1993) (CrR 3.4 construed consistently with its federal counterpart to permit trial

to continue when defendant leaves midtrial); Crosby v. United States, 506 U.S. 255, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1993) (Federal Rule of Criminal Procedure (FR) 43 treats midtrial flight as a knowing and voluntary waiver of the right to be present).

Under the voluntary waiver approach, the trial court only need answer one question: whether the defendant's absence is voluntary. A voluntary absence operates as an implied waiver of the right to be present. If the court finds a waiver of the right to be present after trial has begun, the court is free to exercise its discretion to continue the trial without further consideration. Whether a voluntary waiver has occurred is determined by the totality of the circumstances. State v. Washington, 34 Wn. App. 410, 413, 661 P.2d 605, remanded, 100 Wn.2d 1016, 671 P.2d 230 (1983), rev'd on other grounds on remand, 36 Wn. App. 792, 677 P.2d 786, review denied, 101 Wn.2d 1015 (1984).

In evaluating the totality of the circumstances to determine whether the defendant's absence is voluntary, the trial court should:

- (1) [make] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary,
- (2) [make] a preliminary finding of voluntariness (when justified), and

(3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.

Washington, 34 Wn. App. at 414 (quoting State v. Staples, 354 A.2d 771, 776 (Me.1976)); see also State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). The court will indulge a presumption against a waiver of the right. State v. LaBelle, 18 Wn. App. 380, 389, 568 P.2d 808 (1977).

The Washington Supreme Court has made clear, however, that the “presumption against waiver” does not mean the State has the burden of proving that the absence was voluntary. State v. Garza, 150 Wn.2d 360, 367-68, 77 P.3d 347 (2003). Instead, the presumption against waiver must be the overarching principle throughout the inquiry.<sup>6</sup> Id. at 368.

---

<sup>6</sup> Garza presented a fact pattern in which the trial court did not make the “presumption against waiver” the overarching principle:

Garza called ahead to say he was on his way and warn his attorney he was going to be late, something he had not previously done. When Garza did not arrive at the appointed time, the judge could reasonably have presumed that something outside Garza's control was delaying him. Indulging this presumption the judge should have waited a more reasonable time than five minutes for Garza to arrive. Instead, the judge immediately deemed Garza's absence voluntary. This hasty determination of voluntary absence does not satisfy the Thomson court's requirement that the trial court sufficiently inquire into the circumstances of a defendant's absence. The court's decision to proceed after only five minutes was manifestly unreasonable. Therefore, the determination of voluntary absence without reference to the presumption against waiver was an abuse of discretion.

Garza, 150 Wn.2d at 368.

**2. Factual background: Lewis's absence from trial.**

Lewis was out-of-custody during the proceedings below. On the first day of pre-trial motions, Lewis arrived late and the court warned him that it was necessary and important for him to appear in court on time. 1(A)RP 19.

At the conclusion of the defense case, after all witnesses for the defense had testified, Lewis requested additional time to decide whether he wanted to testify in his own defense. 9RP 141-44. The court carefully outlined Lewis's options and then agreed, in an abundance of caution, to continue the matter to the following day to give Lewis more time to make up his mind. At the conclusion of this colloquy, Lewis clearly indicated he understood he had to return to court the following morning:

**THE COURT:** You know what, Mr. Lewis? I previously indicated to your attorney that time was up, but I'm going to give you the extra time because this is important.

**MR. LEWIS:** Yes.

**THE COURT:** I'm going to do that. It is late in the day. I'm still going to keep the lawyers here because I'm going to look at some other things with them, but I'm going to give you overnight to think about it. Then you need to be here tomorrow morning.

**MR. LEWIS:** Nine o'clock?

**THE COURT:** I would like to have you here before 9:00 so that you have an opportunity to talk with

Mr. Aralica and advise the Court about whether or not you're testifying.

**MR. LEWIS:** 8:30.

9RP 141-42.

The following morning (a Thursday), defense counsel informed the court that Lewis had not appeared and that a defense counsel investigator was trying to contact Lewis. 10RP 2-3. In response the Court stated:

**THE COURT:** He's been here every single day, on time if not early. I'm just going to assume that maybe something came up that might be weather-related or not. I hope it has nothing to do with the fact that the Court gave him additional time to consider whether or not he was going to testify. I'm not going to make any assumptions just now. I'm going to give him a few more minutes, but then we're going to have to make a decision here about whether or not he is coming or whether he has deliberately made himself absent.

Probably both of you would know that this court has the option of proceeding in his absence. We don't need to get there but let's just see if you hear something from your investigator, okay?

10RP 3.

Later that morning, at approximately 9:25, defense counsel still had not had any contact with Lewis. 10RP 3-5. The Court then made the following observations on the record:

**THE COURT:** Let me say a couple of things. First of all, the rule that comes into play is 3.4 in terms of the presence of the defendant at trial and the effect of voluntary absence. There is a body of case law that

requires the Court to at least make a preliminary determination as to whether or not a defendant's absence is voluntary.

I want to proceed with caution here. We've all invested an enormous amount of time. I want to give everybody the benefit of every doubt that we could possibly conceive of at this point. I would agree that avoiding a retrial is important. I don't want to just extend it to 1:30 because I want everybody to act with due diligence at this point. And what I would like to do -- and that's correct, there's a bail bondsman who's involved as well in terms of that individual knowing the whereabouts and being responsible. So there's a lot of people who are possibly invested.

I don't know also in terms of whether or not there could be a deputy sent out to the home to see whether or not he's there. I think there's a lot of things we can do, but I want everybody to act in an expedited fashion.

We're going to keep checking in this morning. I'm not -- let's just say I'm going to give you at least another hour and then I want some feedback. We're just going to stay on this.

10RP 5-7. Defense counsel asked for more time to return to his office to try and contact Lewis. The Court agreed:

**THE COURT:** I'm willing to do that because he has been here consistently. And frankly, Mr. Aralica, I trust you're going to undertake this with all seriousness. I'll go ahead and we'll take an hour, hour and a half. Don't feel like you have to run back here if you're still making calls and you're in the middle of doing your investigation. Call the Court, we'll put you on a speakerphone, we'll ask Ms. Kaake to come up and then we'll take this one step at a time, okay?

10RP 8. The court did not release the jury, telling them there was a slight delay in the proceedings. 10RP 8.

Perhaps an hour later, Lewis still had not appeared. At that time the court heard from the defense investigator, who stated that she had spoken with Lewis's parents and that they were afraid he was going to hurt himself. 10RP 9-10. Defense counsel requested that the court issue a bench warrant in an effort to locate Lewis.

10RP 11. The court concurred, stating:

**THE COURT:** Yes, I would agree that I would like to take a more conservative approach. You know, the larger context of this is what has me concerned in terms of Mr. Lewis on his own really in some sense engaging the Court in a discussion yesterday about wanting some additional time. And it's all in that larger circumstance that I have to admit I'd rather give it some more time, but it seems to me possibly the evidence is something that was contemplated. I'm not ready to draw the conclusion that Mr. Lewis has taken his life so much as taken flight.

He has been here the whole entire time. There have been frankly a lot of issues raised on his behalf by counsel that I would have thought at least gave him some hope of how the jury might come back or not. I didn't see anything about him yesterday that made him appear to be unstable. Of course I haven't had extensive discussions with him, but he by all appearances seemed to be very rational. Again, he engaged the Court in a very reasonable discussion about wanting some more time to think through the options of whether or not he would testify. He never appeared to the Court to be distraught.

I, again, would like to give it the additional time. I would also want to get things moving so I will go ahead and issue a bench warrant. I'd like to get that into the system as quickly as we can. We can reconvene at 1:30 and perhaps at that time we will have more information.

10RP 12-13. A no bail warrant was issued. 10RP 14.

Court reconvened at 1:30 p.m. Defense counsel still had no contact with Lewis. 10RP 16-17. The court then made the following preliminary findings:

**THE COURT:** . . . We've looked at all the case law. We're not beginning this case, we've started the case. As you've indicated, we've been in trial for a couple of weeks, and we were ready to conclude yesterday but for the defendant convincing me that he needed just a little more time to think about whether he would testify or not. Because as you recall, at the side bar I had indicated to Mr. Aralica time is up, he's got to decide this. It was only after I frankly was persuaded by Mr. Lewis himself.

We're at the end of the case. When I review the case law we're looking at something extraordinary because it seems to me that most of the case law deals with individuals at the front end of the case, some in between, and clearly it's after the fact that there was evidence that they did not voluntarily absent themselves from trial. Somebody being detained in the jail and somebody being arrested, those are circumstances that in the end the Court of Appeals finds that really wasn't necessarily voluntary.

Here we have an individual who's been here every single day religiously. Early, in fact. And now that we have additional information about the conversations that he had with his parents, it seems to me that we either can speculate that he took his life and he's gone or he took off with someone and is gone

because that seems to be what his parents might be suggesting that those were the choices that he felt were in front of him.

At this point I don't know how we can come to any other conclusion that he has made that conscious choice to waive his right to be here for the remainder of the trial. We've had no contact from him, counsel has had no contact from him. Today was the day that I was going to be asking him whether he wanted to testify or not. He's heard the entire case of the State and even your rebuttal. So unless I have some other indication I can't help but almost come to the conclusion that he's waived his presence to be here in the final stages and that is to hear closing remarks, because he was also aware of the fact there was no evidence left for him to present other than for him to make a choice.

So I want to make it clear I'm not doing this just because it would be a convenience to the jury or inconvenience to the jury. I just think this case is finished. I'm not quite sure what evidence anybody could provide to me that would merit waiting until Monday.

At some point if I don't have additional information then I'll go ahead and make some findings on the record in regard to Mr. Lewis making himself voluntarily absent from these proceedings and that's because I have to look at the totality of circumstances and I will do so. At this point I'm going to give you a little time.

10RP 18-20.

In response, defense counsel moved to continue the proceedings until the following Monday. 10RP 20. The State supported this motion. 10RP 21. The court agreed to do so, stating:

**THE COURT:** Well, I still haven't gotten to the path where I'm convinced that he is so mentally distraught that that's where he is. I mean, I understand how difficult this must be for anybody to be accused of any crime much less this kind of crime, but I never have seen or had any evidence on the record in front of me at all that would indicate this individual was mentally distraught. The conversation was so logical and so persuasive that I changed my mind to give him additional time.

I honestly don't know what to think. I really don't. I don't want to rush this case, but I also don't want to prolong what already has been a long time for everyone. The two of you are both making a motion that the Court wait until Monday, which for me is persuasive that both of you would agree that we might give him additional time.

10RP 21-22. The jury was excused and the trial continued until Monday, November 17. 10RP 26-30.

When trial resumed on Monday, Lewis did not appear and counsel had no information as to his whereabouts. 11RP 3. At this time, the court reiterated its findings that Lewis had voluntarily absented himself from the proceedings. 11RP 3-5. The case proceeded with jury instructions and closing argument.

Lewis was subsequently apprehended with the assistance of the FBI Fugitive Task Force. 12RP 5. Sentencing occurred on January 16, 2009. The court gave Lewis an opportunity to explain his absence from the proceedings. Lewis gave the following explanation for his absence:

**MR. LEWIS:** When I left that Wednesday I had got dropped off at the bus stop. There was a black truck that rolled up on me and said if I showed up in court my family would be in danger. I called him [my defense attorney] but when I called him I didn't tell him what it was because I didn't know how it would turn out since when I was in court it wasn't going in my favor anyways.

...

**THE COURT:** Did you ever make any effort subsequent to that to contact the Court?

**MR. LEWIS:** Not this court. I was supposed to speak to him as far as I know.

**THE COURT:** And then where did you end up going because, you know, I actually continued and gave everybody some time to try to locate you.

...

**MR. LEWIS:** That being said, at the time it felt like the only thing that I was worried about was the house. So instead of making someone feel stressed out about it I took stress -- tried to take the stress out of my home at that point.

**THE COURT:** Where is it that you went?

**MR. LEWIS:** My wife's house. My fiancée.

**THE COURT:** Anything else?

**MR. LEWIS:** No, no ma'am.

12RP 3-5.

The court found that Lewis's explanation for his absence was not credible and reaffirmed its previous finding that he had voluntarily absented himself from the proceedings:

**THE COURT:** Well, Mr. Lewis, at the time I made a finding that you had made yourself voluntarily absent

from trial because we had already started trial. And of course I wanted to give you the benefit of every doubt that perhaps you had gotten sick or something occurred. No one heard from you, your parents indicated they did not know where you were either. I went over the weekend and waited because I really wanted to give you an opportunity to appear. Eventually this court issued a bench warrant. The records speaks for itself in terms of how that was issued, when it was executed, and when you were subsequently arrested.

I have to tell you, Mr. Lewis, that I do not believe you. I find what you are telling me today is not credible -- ... -- at all. And so I will make a finding that, again, you made yourself voluntarily absent from trial once we had started it. That under the law is an implied waiver. So at this point we'll go ahead and continue on to the hearing that we're here for today and that is to proceed to sentencing.

12RP 6-7.

**3. Lewis voluntarily absented himself from the trial proceedings.**

The factual background outlined above demonstrates that the trial court properly concluded that Lewis voluntarily absented himself from the proceedings.

As a preliminary matter, Lewis was present when trial began and had attended eight days of the proceedings before he chose not to appear. This is not a case in which trial was commenced without the defendant being present.

First, the court made a considered inquiry into the circumstances of Lewis's absence, considering information from defense counsel and the defense investigator who was trying to locate Lewis. This inquiry included communications from Lewis's family, as well as the court's own observations as to Lewis's demeanor and behavior during the trial.

Second, the trial court made a preliminary finding that Lewis had voluntarily absented himself from the proceeding. Specifically, the court noted that there was no indication, from the court's perspective, that Lewis was mentally distraught to the point where he would be likely to have taken his own life.

Third, the court gave Lewis an opportunity to explain his absence prior to sentencing. Lewis's explanation (the mysterious passenger in the black car who threatened his family if he returned to court) was not credible. By his own admission, Lewis admitted that he had simply chosen to not return to court. Instead, Lewis admitted that he had gone to his fiancée's house and stayed there without contacting the court or his attorney. This is not a case in which the defendant had been arrested, or injured, or otherwise physically unable to come to court. Lewis simply chose not to return to trial.

Finally, the trial court made the presumption against waiver the overarching principle throughout its inquiry. The court did not immediately conclude that Lewis had absented himself when he failed to appear for trial on Wednesday but gave counsel an opportunity to locate Lewis. When counsel had been unable to do so by the afternoon of the first day Lewis had failed to appear, the court excused the jury and continued the trial until the next day. When Lewis still had not appeared the following morning, the court agreed to continue the trial until Monday, giving Lewis three more days to contact his attorney or to appear in court. Thus, the court consistently presumed that Lewis had not waived his right to be present and gave Lewis every opportunity to return to the trial.

In these circumstances, the court appropriately concluded that Lewis had voluntarily absented himself from the proceedings. There was no error and Lewis's claim on appeal that his three convictions should be reversed because he voluntarily absented himself from the proceedings should be rejected.

**C. COUNT III DOES NOT CONSTITUTE THE SAME CRIMINAL CONDUCT AS COUNTS I AND IV; THE STATE CONCEDES THAT COUNT I AND IV CONSTITUTE THE SAME CRIMINAL CONDUCT.**

Lewis asserts that the trial court abused its discretion when it found that the three convictions did not constitute the same criminal conduct for the purpose of sentencing. Lewis's argument fails as regard to Count III (child molestation) because the events supporting this charge occurred at a different time and place, and involved a different intent, than those in Counts I and IV. However, because it is unclear which events supported the conviction on Count IV, the State must concede that Count I and IV do constitute the same criminal conduct.

**1. Legal standard: same criminal conduct.**

Under the Sentencing Reform Act multiple current offenses generally count separately in determining a defendant's offender score. RCW 9.94A.589(1)(a). However, if the sentencing court finds that two or more offenses encompass the "same criminal conduct" those offenses count as a single offense for offender score purposes. RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same

victim.” RCW 9.94A.589(1)(a). The absence of any one of these prongs – intent, time or place, or victim – prevents a finding of “same criminal conduct.” State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts narrowly construe the statute to disallow most assertions of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

A sentencing court’s same criminal conduct determination will be reversed only where there is a clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). Review for abuse of discretion is a deferential standard. State v. Anderson, 92 Wn. App. 54, 61-62, 960 P.2d 975 (1998); State v. Garza-Villarreal, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993); State v. Porter, 133 Wn.2d 177, 184-86, 942 P.2d 974 (1997). A trial court does not abuse its discretion when the facts in the record are sufficient to support a finding either way on the presence of any of the three elements that constitute “same criminal conduct.” RCW 9.94A.400(1)(a); Anderson, 92 Wn. App. at 61-62; State v. Dunaway, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987).

**2. Relevant facts: same criminal conduct.**

A prosecutor may elect in closing which facts the State is relying on to support the charged counts. See State v. Bland, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (State's closing argument, clarifying the particular act for each count, is one of the ways State elects to tell the jury which act it relied on for a conviction). In the present case, the State elected which acts it was relying on for each count during closing argument.

The prosecutor began by stating, "It's important for you to understand that each count relates to a different act." 11RP 10. The prosecutor then provided the following overview of the acts that it was electing to rely on for each count:

[D.L.] described to you multiple acts that the defendant did to her, his own daughter. She describes the defendant putting his leg in her butt and that's Count I. [D.L.] describes a purple leg, which you saw, going into her vagina and that's Count II. Count III is when [D.L.] described to you how she touched her dad's penis until the white oil came out, and Count IV, Rape of a Child in the First Degree you heard [D.L.] describe how the defendant put his leg in her vagina and also the defendant's statement that he put his finger in her butt.

11RP 10. After discussing the undisputed elements of these crimes, the prosecutor addressed each charge specifically.

*Count I: Rape of a Child in the First Degree.* The prosecutor emphasized that this count stemmed from D.L.'s statement in the "DVD interview with Carolyn Webster about the defendant putting his leg in her butt, and she talked about how it felt good at first and then hurt." 11RP 11. As discussed above, when D.L. said "leg," she was referring to Lewis's penis. The prosecutor emphasized that on this count Lewis had admitted to placing his penis in D.L.'s rectum, stating: "I don't think I put it all the way in. I think it was just the head." 11RP 11-12. The prosecutor also emphasized evidence supporting this count included Wendy Frost's discovery of what she believed was a rash on D.L.'s, bottom and that D.L. had complained of pain in her rectum. 11RP 12.

The testimony at trial established that this event occurred on or near a day that Frost went to play bingo. 7RP 33-34, 73-74. Lewis admitted, this event occurred on the couch in the living room of the apartment. 7RP 33-35; 8RP 39.

*Count II: Rape of a Child in the First Degree.* The prosecutor stated that this count was for the allegation that Lewis had put the purple vibrator ("purple leg") in D.L.'s vagina. 11RP 12. The jury acquitted on this count.

*Count III: Child Molestation in the First Degree.* The prosecutor stated that this count “relates to masturbation” and was based on D.L.’s testimony, and Lewis’s admission, that the defendant had D.L. touch “his leg” and made the “white oil” come out. 11RP 14. The prosecutor emphasized that D.L. testified about this in court (11RP 14), that she had told her mother that it had happened (11RP 14), that she had again related this event to Carolyn Webster (11RP 15), and that the defendant had admitted to detectives that this had in fact happened (11RP 15).

Lewis admitted that the masturbation incident occurred in the bedroom (not on the couch in the living room) and prior to the time he put his penis in D.L.’s rectum. 7RP 36; 8RP 24-25, 35-36.

*Count IV: Rape of a Child in the First Degree.* The prosecutor told the jury that this count could be proved by two alternate means, and that the jury had to agree which means was committed. 11RP 16. The first possible basis for this crime was D.L.’s allegation that Lewis covered her eyes with a bandana and put “his leg” in her vagina. On this event, the prosecutor emphasized that D.L. had corrected Carolyn Webster, the child interview specialist, and said D.L. was clear that Lewis had put his penis “in, not by” her vagina. 11RP 16-17. D.L. said this happened on the little bed. 9RP 64.

Wendy Frost was clear that this bed was replaced several months before D.L.'s admissions, which occurred shortly after bingo night. 9RP 46.

The second alternative basis for this crime was Lewis's admission that he put his finger in D.L.'s butt. 11RP 17. The prosecutor emphasized that this was something D.L. had not spoken about, but which Lewis had independently told the detectives had occurred. 11RP 17. By Lewis's admission, this event had happened after D.L. and he were playing swords and D.L.'s leg was in the air. 11RP 17. Lewis told the detectives that this event happened shortly before he put his penis in D.L.'s butt. 7RP 33-34, 74-76; 8RP 29.

At sentencing, Lewis's attorney argued that the crimes should be considered the same criminal conduct. 12RP 11-17, 21-22. The prosecutor disagreed. 12RP 17-22. Both parties filed briefs on this issue. The trial court concluded that the three crimes did not constitute the same criminal conduct. 12RP 22-23.

**3. Count III (child molestation) does not constitute the same criminal conduct as counts I (rape of a child) and IV (rape of a child).**

Contrary to Lewis's claim on appeal, Count III (child molestation in the first degree) does not constitute the "same criminal conduct" as Counts I and IV (both rape of a child in the first

degree). The State agrees that the victim in all three charges is the same: four-year-old D.L. Lewis's claim fails, however, because the child molestation count occurred at a different time and place, and involved a different intent, than the rape of a child counts.

First, and most clearly, Count III (Child Molestation in the First Degree) was a distinct and separate event from those times in which Lewis placed his finger and/or penis in D.L.'s rectum. This event occurred in the apartment bedroom, not on the couch. 7RP 36; 8RP 24-25, 35-36. The events leading up to this incident, by Lewis's own admission, were different than the other crimes. Finally, Lewis told detectives that this event occurred about a month before "bingo night." 7RP 36; 8RP 24-25, 35-36. Count III unequivocally occurred at a different time and place than Counts I and IV.

Moreover, the intent required for Count II was different than that required for Counts I and IV.<sup>7</sup> The intent required for Child Molestation in the First Degree (Count III) is to have sexual contact for the purpose of sexual gratification with a child. RCW 9A.44.083.

---

<sup>7</sup> The Washington Supreme Court has held that in construing the "same criminal intent" prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). As a preliminary matter, the underlying statute is objectively considered to determine whether the required intents are the same or different for each count. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999).

By contrast, the intent required for Rape of a Child in the First Degree (Count I and IV) is the intent to engage in “sexual intercourse” with a child. RCW 9A.44.073. As discussed above, crimes with differing intents do not constitute the same criminal conduct. The trial court properly concluded that Count III did not constitute the same criminal conduct as Counts I and IV.

**4. The State concedes that Counts I and IV constitute the same criminal conduct.**

The State is forced to concede that Counts I and IV constitute the same criminal conduct. Given the record below, it can not be determined which of the two alternate means elected by the prosecutor to support Count IV was relied upon by the jury. Thus, it is possible that the jury convicted on Count IV based upon the second alternate means relied upon by the State: to-wit, that Lewis placed his penis in D.L.’s rectum. The record establishes that this event occurred at the same time and place, and involved the same criminal intent as Count I. In light of controlling Washington Supreme Court precedent, Counts I and IV must be considered the same criminal conduct for the purpose of establishing Lewis’s offender score.

Briefly, D.L. testified that Lewis placed his "leg" in her rectum while she was on the couch. 9RP 98. Lewis told detectives that D.L. and he were running around "playing swords" when suddenly D.L. was on the couch with her leg in the air and "all of a sudden he was putting his finger in her butt hole." 7RP 33-34, 73-74; 8RP 22. Detectives asked Lewis if he had put his penis in D.L.'s butt hole at that time as well. Lewis said that he did, stating that he pulled his penis out of his basketball shorts and put it in her "butt hole" about to the end of the tip of his penis. 7RP 33-34, 74-76; 8RP 29. These events occurred on Wendy Frost's bingo night. 7RP 33-34, 73-74.

The resolution of the same criminal conduct issue as to these two counts is controlled by State v. Tili, 139 Wn.2d 107, 119-20, 985 P.2d 365 (1999). In Tili, the Washington Supreme Court has held that a defendant's conduct in committing three separate rapes of the same victim was the same criminal conduct. This was because the three penetrations of the victim were continuous, uninterrupted, and committed within a time frame of approximately two minutes. Tili, 139 Wn.2d at 124; see also State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) (defendant's actions in dragging child victim into woods and forcing

him to perform fellatio upon him and then unsuccessfully attempting to perform anal intercourse constituted "same criminal conduct").

Likewise, in the present case, the victim of these two actions used in Counts I and IV was the same. The place was the same (the couch in Lewis's apartment), and the time was the same (bingo night, with one event apparently following closely upon the other). Finally, both crimes involved the same criminal intent: sexual intercourse (as defined by statute) with D.L. The two rapes (finger and then penis) occurred in close temporal proximity.

Thus, if the jury convicted on Count IV based on Lewis placing his penis in D.L.'s rectum, it involved the same criminal conduct as Count I. The State reluctantly concedes that these two crimes constitute the same criminal conduct. Accordingly, the matter should be remanded for resentencing to correct this error.

#### **IV. CONCLUSION**

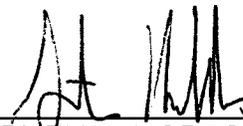
The State of Washington respectfully requests that Lewis's two convictions for Rape of a Child in the First Degree (Counts I and IV) and his conviction for Child Molestation in the First Degree (Count III) be affirmed. The State concedes that the matter must be remanded for resentencing with the sentencing court to consider

Counts I and IV as the same criminal conduct for purpose of calculating Lewis's offender score.

DATED this 19<sup>th</sup> day of April, 2010.

Respectfully submitted,

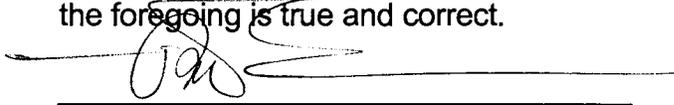
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
STEPHEN P. HOBBS, WSBA #18935  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to , the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE v. DEREK QUENTIN LEWIS, Cause No. 62899-2-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

04-19-2010  
Date

STATE OF WASHINGTON  
APR 19 4:38 PM '10