

NO. 63206-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES A. HARGITT,

Appellant.

2009 SEP 11 11:19:48
COURT OF APPEALS
DIVISION I

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court err in admitting a statement that does not constitute hearsay because it rebutted a charge of later fabrication, is not an assertion of fact, and even if hearsay, was nonetheless admissible under the “state of mind” exception?

2. If a hearsay statement was improperly admitted, is a new trial warranted where the statement was merely cumulative of other properly admitted evidence and did not affect the verdict?

3. Did the trial court err in refusing to give a limiting instruction where the contested statement does not constitute hearsay and was not susceptible to improper use by the trier of fact?

4. Did the trial court err in the process of admitting a prior statement of a witness inconsistent with her at-trial testimony, where the witness denied making the previous statement and was afforded an opportunity to explain the previous statement both before and after its admission?

5. If the process of admitting a prior inconsistent statement requires the witness have an opportunity to explain or deny the statement before introducing evidence of the statement, is a new

trial warranted where that opportunity was provided afterward and defendant did not suffer prejudice by that delay?

6. Is a new trial warranted because of the State's closing where the argument was not improper, caused no prejudice, and trial counsel failed to object?

II. STATEMENT OF THE CASE

Defendant was charged with four counts of Child Molestation in the First Degree, occurring between the spring of 1997 and mid 2003. CP 100-01. The victim is R.H. and the charging window reflects a period when she was between the ages of five and eleven. CP 108-09.

During the relevant time frame, R.H. and her brother E.H. (approximately 18 months older than R.H.) lived with, and were raised by Mary Addleman. 2RP 182. R.H. and E.H. did not see their parents except on brief occasions. 2RP 181-83.

Ms. Addleman had previously been married to the defendant. The two had long since divorced, however, defendant remarrying Christine Hargitt. Addleman and the Hargitt's were still on sufficiently good terms, however, that E.H. and R.H. visited them frequently. In fact, a "casual arrangement" existed whereby the children would spend every other weekend at the Hargitt's house.

2RP 184-85. Defendant was only there on approximately half those weekend visitations, however; he was often away at sea, working in the fishing industry. 2RP 103-04.

R.H. testified that for a long period she liked spending time at the defendant's. 2RP 47-48. Beginning when she was approximately six, however, the defendant began to molest her.

A number of the instances occurred when her defendant and his wife would say their good nights, tucking the children into bed. E.H. and R.H. shared separate rooms, and the adults would visit them separately. When defendant came in, R.H. would be lying in bed. He would lift up her nightgown, go under her underwear, and rub his fingers between the child's labia. He would usually lick his fingers sometime during the process. He would tell her to keep it a secret and ask the child to "pinkie promise." 2RP 48-53; 60-63.

R.H. also recalled a number of episodes occurring in the living room of defendant's house. The family would usually gather there to watch rented movies in the evening. E.H. would be splayed out on the floor in front of the T.V. and Ms. Hargitt on a loveseat. R.H. and the defendant shared a couch. 2RP 57. The pair would be covered by blankets. Ms. Hargitt would frequently fall asleep. When that happened, with E.H. glued to the T.V.,

defendant, hidden by the blankets, would slide his hand under R.H.'s nightgown and fondle the child's labia. 2RP 55- 59; 71-73.

The molestations occurred, to the best of her estimates, 30 to 40 times, the incidents in the bedroom happening somewhat more frequently than those in the living room. 2RP 73-74. At the time, she did not realize there was anything wrong with his actions. They did not physically hurt. 2RP 62; 76. To the extent she thought about it, it was "our secret." 2RP 74. She felt that defendant was simply "caring for me." 2RP 76.

When she was approximately 9 or 10, however, she had "good touch/bad touch" at a school assembly and began to realize what he was doing was wrong. 2RP 74-75. She recounted one of the final episodes occurring during this time frame. 2RP 118.

On this occasion she and the defendant went to his boat at the marina. They were alone together. 2RP 122. While he was working on the vessel, she discovered some pornographic magazines he kept below deck. Defendant asked her to put them away. On the drive back to his house, R.H. was seated in the van's front passenger seat. Defendant leaned over, unbuttoned her jeans, reached under her underwear and began to fondle her. 2RP 69. She remembered looking out the window as the defendant

molested her, anxious as to whether anyone could see up high enough into the van. 2RP 68-71.

As R.H. came to realize what defendant was doing was wrong, she began visiting the Hargitt's less frequently, trying to avoid being alone with him. She noted that if she would go over to spend the night, it was only when she knew he would be away on one of his frequent work trips. Nonetheless, she did not want Ms. Hargitt or the defendant to know that the reason she was not coming as often was because she did not want to. 2RP 75; 151-52.

R.H. did not tell anyone of defendant's actions for many years. She described how her brother idolized him and how she did not want "to tear up my family." 2RP 76 Finally, in eighth grade, she told J.S., a schoolmate and close friend. She described how after school, she and J.S. had been talking. J.S. mentioned to her how people can be "sick and perverted." 2RP 81. With that prompting, she told him what the defendant had done. Afterward, she asked him not to tell anyone. 2RP 81-82. At a later school related event, J.S. counseled her to tell Ms. Brick, her teacher. She did. 2RP 84. Ms. Brick reported the matter to the authorities. 2RP 132. Both J.S. and Ms. Brick testified. Their recollection was largely consistent with R.H.'s. 2RP 255-60; 266-75.

E.H.'s testimony was also largely consistent with R.H.'s – the description of their separate rooms, the Hargitt's separately tucking them in. 2RP 161; 165-67. He also confirmed the family would frequently watch movies in the living room, defendant and R.H. sharing a couch, Ms. Hargitt often falling asleep. 2RP 159-60.

While he did not observe any molestation, he did confirm there came a point when he saw a change in his sister's attitude toward visiting the Hargitt's. She began to avoid going to the house for the weekend. He described it as a gradual change, beginning, to the best of his recollection, when she was around 10 or 11. 2RP 168-69; 178.

Ms. Addleman also confirmed this change in R.H. She described how early on R.H. very much enjoyed visiting the defendant. 2RP 187. When R.H. was approximately eight or nine, however, she started telling her she did not want to go to the house. 2RP 188-89. Ms. Addleman recounted one episode wherein R.H. told her this directly and asked her to make up a story to tell them as to why she was unable to visit. 2RP 190.¹ Addleman went on to describe how, after that period, when R.H.

¹ The relevant testimony is examined in more detail in the appropriate argument section, *infra*.

and defendant would be in the same location, it appeared to her that R.H. was avoiding him. 2RP 191.

Christine Hargitt testified for defense. A good portion of her testimony centered on the children's sleeping arrangements when they stayed over. Ms. Hargitt claimed the children were sleeping in the same room during a period when R.H. testified she slept alone and defendant would come in and molest her at bedtime.²

To the extent she noticed R.H. visiting less, she recalled that *both* R.H. and E.H. stopped coming as frequently when they got older. 2RP 303. Ms. Hargitt also submitted various photos showing, she claimed, that R.H. was still visiting after the period when R.H. testified she was not visiting as often. Ms. Hargitt claimed that the photos each depicted a day in which R.H. would have spent the night. 2RP 311-22.

Defendant testified as well. He confirmed his wife's account of the children sharing a single bedroom until 2000. 2RP 357. His testimony consisted centrally, however, of a claim that the incident at the marina could not have happened as she testified. This was because they were not alone. E.H. had accompanied them. Defendant remembered this well because, on the occasion R.H.

found the magazine, E.H. had been with them and accidentally damaged defendant's skiff. 2RP 363-71.

Det. Donald Denevers testified, however, that, in a prior interview, defendant had admitted that on the occasion R.H. found the pornographic magazine, only he and R.H. had been at the marina. 2RP 390.

E.H. was recalled for rebuttal. He remembered an occasion when he damaged the skiff, but on that occasion he had been alone with the defendant. R.H. had not accompanied them. 2RP 420-21.

The matter was submitted to the jury. They returned guilty verdicts on all counts. CP 59-62.

III. ARGUMENT

A. THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING R.H.'S STATEMENT TO ADDLEMAN.

Testimony from R.H. and J.S. both confirmed that her initial disclosure was made to J.S., and occurred when she was approximately 14 years old, in the eighth grade. 2RP 125; 268. Prior to trial, defense announced its theory of the case was that this

² The relevant testimony is examined in more detail in the appropriate argument section, *infra*.

initial disclosure was a lie – one she would subsequently have to maintain:

In this case, [defendant] asserts that all of [R.H.'s] allegations are untrue, that he never molested her, and that her motive to falsify began when she and [J.S.] were discussing sexual abuse. It is the defense contention that [R.H.] made up a story, perhaps to curry favor with [J.S.]

CP 69, 70. See also 2RP 23-24.

Defense would make good on this announced tactic, cross examining R.H. extensively on her disclosure to J.S., including why she did not tell anyone of the molestation before that disclosure. 2RP 127 - 33. It explicitly returned to the 'caught up in a lie to J.S.' theory in closing:

Now, I'm not here to tell you that the reason she came in and lied is because she got caught up in this story with [J.S.] I'm here to suggest to you that's one possible reasons why she got caught up in a lie.

2RP 484.

Years prior to revealing the molestation to J.S., however, R.H. had begun exhibiting reluctance to visit the defendant's house when he was there. This was supported by testimony from R.H., without objection, that when she began to realize the touching was wrong, she had stopped spending the night, at least when defendant was there.

Q: Okay. So what did you do as a result, if anything [once you] start[ed] to think that it was wrong?

A: I wouldn't go up there as much or I would go up there when he wasn't there, when he was away.

2RP 75.

This change occurred when she was approximately 9. 2RP 136. And though she no longer wanted to visit overnight, she testified that she not want the Hargitt's to know her not visiting was due to her own preference. 2RP 151-52.

Testimony from her brother, E.H., corroborated that she stopped going as often, not wanting to visit overnight as frequently. 2RP 168-69. Mary Addleman also corroborated this, remembering that R.H. began stating to her that she did not want to spend the weekend at defendant's when she was around 8 or 9.

Q: Okay was there a time when she started saying she didn't want to go?

A: Yes.

Q: Okay. Do you remember when that was?

A: She was probably around 8.

Q: Okay and is it possible she was 9?

A: Yes.

2RP 188-89.

Addleman's testimony above was not objected to as hearsay. Immediately afterward, however, the following exchange occurred:

Q: Okay. And how did you know that she didn't want to go anymore?

A: She would ask –

[Defense Counsel]: Objection, Your Honor. I'm going to object that this question calls for a hearsay answer.

[Prosecutor]: Your Honor, it's not offered for the truth of the matter asserted.

[Defense Counsel]: It's not relevant then.

The Court: Overruled. She may answer.

A: I distinctly recall one weekend Chris had called and asked for the kids to come up. And I asked the kids, and [R.H.] said, well, **I don't want to go, could you say we have something else planned?** And I told her no, I wouldn't lie for her.

[Defense Counsel]: Objection, Your Honor. I'd ask for a limiting instruction.

The Court: Overruled. Please proceed.

2RP 189-90 (emphasis added).

Defense now contests, as prejudicial hearsay warranting retrial, admission of R.H.'s statement to Addleman, "I don't want to go, could you say we have something else planned?"

1. The Court Did Not Err In Admitting The Statement.

A trial court has broad discretion regarding the admissibility of evidence and will not be reversed absent manifest abuse of discretion. City of Spokane v. Neff, 152 Wn.2d 91, 93, P.3d 158 (2004). Abuse of discretion occurs only when the decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The burden of proving an abuse of discretion rests on the appellant. State v. Williams, 137 Wn. App. 736, 743, 154 P.3d 322 (2007).

Defendant claims the court improperly admitted the statement because it was hearsay. Hearsay is ordinarily not admissible except pursuant to specified exceptions. ER 802 – 804. To prove the court abused its discretion, defendant carries the burden of showing both: (1) the statement was hearsay; and (2) no exception to the hearsay rules permitted its admission.

a. The statement was not hearsay.

i) R.H.’s statement “I don’t want to go” was not hearsay because it rebutted an express or implied charge of recent fabrication.

A statement is not hearsay if –

(1) Prior Statement by Witness. The declarant

testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is... (ii) consistent with the declarant's testimony and offered to rebut an express or implied charge of against the declarant or recent fabrication or improper influence or motive...

ER 801(d)(1)(ii).

Here, defendant pursued a strategy claiming that R.H., when 14, fabricated the allegations to curry favor with a friend. Contrary to this position, however, was the fact that years prior to the claimed initial fabrication, R.H. no longer wanted to spend the night at defendant's house when defendant was present.

Evidence of this reluctance, including the contested statement to her Addleman, was consistent with her claim of molestation and assisted in rebutting defendant's claim that she invented the allegations years later.

R.H. was available for cross-examination on this issue, testifying at trial in the State's case in chief and in rebuttal. Thus, under ER 801(d)(1)(ii), the statement was a prior consistent statement rebutting a charge of more recent fabrication. It was thus not hearsay.

ii) R.H.'s request "Could you say we have something else planned?" is not hearsay because it is not an assertion of fact.

R.H.'s request that Ms. Addleman make up a story so that she would not have to go to defendant's does not constitute hearsay.

"Hearsay" is a *statement*, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c) (emphasis added).

Statement, as used above, has a particular limited legal meaning:

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, *if it is intended by the person as an assertion*.

ER 801(a) (emphasis added).

Washington courts have recognized that an "assertion" necessarily involves an assertion *of fact*. This court has rejected defendant's contention that a non-testifying witness's request constituted an assertion, and was therefore hearsay. State v. Fish, 99 Wn. App. 86, 96, 992 P.2d 505 (1999) ("Baxter's requests to 'pull over and drop them off' were not assertions of fact, but commands.")

That a request or command is not hearsay also comports with the traditional understanding of the rule.

According to traditional hearsay analysis, at least, the definition of hearsay includes only statements describing an event or condition in the past. It does not include... questions, requests and statements of advice. The latter statements could be recounted in court by a witness without violating the hearsay rule.

Tegland, 5B Washington Practice: Evidence § 801.3 at 320 (5th ed.)

This understanding of hearsay also conforms to the definition under the Federal Rules of Evidence. This is particularly relevant given Washington ER 801 was taken directly from Fed. Rule ER 801. "Rule 801 was adopted in 1979 as part of the original adoption of the Federal Rules of Evidence in Washington."

Tegland, 5B Washington Practice: Evidence § 801.1 at 317 (5th ed.)

Using the same rule and definitions, Federal courts also hold hearsay does not include utterances that are not intended as assertions of fact:

The effect of this definition is to remove from the operation of the hearsay rule "all evidence of conduct, verbal or nonverbal, not intended as an assertion." Fed.R.Evid. 801(a) advisory committee's note. While "assertion" is not defined in the rule, the term has the connotation of a positive declaration. See Webster's Ninth New Collegiate Dictionary 109 (1985 ed.). The questions asked by the unknown caller, like most questions and inquiries, are not hearsay because they do not, and were not intended to, assert anything.

U.S. v. Lewis, 902 F.2d 1176, 1179, (5th Cir. 1990).

Here, R.H.'s request that Ms. Addleman make up a story was not intended an "assertion of fact" and is therefore not objectionable as hearsay.

b. Even if hearsay, R.H.'s statement was admissible as an exception under ER 803(a)(3) as a declaration of her then existing state of mind.

Even if this court found R.H.'s statement constituted hearsay, it was nonetheless still admissible as a "statement of the declarant's then existing state of mind" -- a qualified *exception* to the hearsay rule. ER 803(a)(3).

Under this exception "evidence of the victim's state of mind must be relevant to a material issue of fact before the jury." State v. Haack, 88 Wn. App. 423, 428-29, 958 P.2d 1001 (1998).

Here, R.H.'s changed reluctance to spend the night at defendant's house was directly relevant. It tended to disprove defendant's claim of later fabrication as discussed *supra*.

It was also relevant because it tended to corroborate, generally, R.H.'s testimony regarding the circumstances of her molestation and when she became aware it was wrong.

Corroborating statements are particularly relevant and granted heightened leeway in child sexual assault matters.

Cases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged and the child asserts their commission. An attack on the credibility of these witnesses, however, slight, may justify corroborating evidence.

State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984).

Cases involving alleged child sex abuse make the child's credibility an inevitable, central issue. Where the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony.

State v. Kirkman, 159 Wn.2d 918, 933, 155 P.3d 1215 (2007).

Defendant appears to anticipate the "state of mind" exception and argues it is inapplicable because "Addleman's state of mind was not an issue in controversy and therefore was not relevant." Br. of Appellant p. 17. *Addleman's* state of mind is not revealed by the statement. R.H.'s is, however, and is relevant for the reasons as detailed above. The court did not abuse its discretion in admitting the statement.

2. Even If The Statement Was Hearsay and No Hearsay Exception Applied, Any Error in Admitting the Statement Does Warrant Reversal.

Any claimed error is non-constitutional given both R.H. (declarant) and Addleman (recipient) testified and were cross-examined.

An error in admitting evidence is non-constitutional if the hearsay declarant and recipient testify and are cross-examined.

State v. Floreck, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002).

The non-constitutional error test “requires that an error be found harmless unless, within reasonable *probability*, the error materially affected the outcome of the trial.” State v. Jones, 101 Wn.2d 113, 124, 677 P.2d 131 (1984) (emphasis added).

Here, admission of the statement did not materially affect the verdict. This is largely so because the information contained in the statement was merely cumulative of other previous testimony.

While the testimony admitted was clearly hearsay... nevertheless it was cumulative of competent testimony given by other witnesses, and could not have been prejudicial.

McKay v. Seattle Elec. Co., 76 Wn. 257, 262, 136 P. 134 (1913).

See also State v. Haack, 88 Wn. App. 423, 438, 958 P.2d 1001 (1998). (“[T]he error was harmless beyond a reasonable doubt, in that the testimony was essentially cumulative of that of Proefrock which came in without objection...”)

R.H. testified on direct and cross that there came a point when she did no longer wanted to go to the Hargitt's house. Her brother testified to the same. Mary Addleman repeated his point as well:

Q: Okay was there a time when she started saying she didn't want to go?

A: Yes.

2RP 188-89.

All of the above was admitted without objection. The further statement that R.H. told Addleman "I don't want to go, could you say we have something else planned?" even if hearsay, is merely a repetition of what was already properly in evidence from multiple sources. Admission of the statement did not introduce new evidence to the trier of fact.

Given that prior admitted testimony and the evidence as a whole, it cannot be said admission of the statement, even if it constituted hearsay without an exception, had anything approaching a probable, material effect on the verdict.

3. The Court Did Not Err In Refusing To Give A Limiting Instruction.

The rule as to limiting instructions is detailed in ER 105:

When evidence which is admissible... for one purpose but not admissible... for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Here, the statement was not admitted for a limited purpose given it was not hearsay (as argued *supra*). It was thus admissible the same as any other testimony with no special limitation. A limiting instruction was inappropriate.

Moreover, even if hearsay, but admissible as a “state of mind” exception, a limiting instruction was still inappropriate.

Defendant cites to State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980) and State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003). Both cases concerned situations wherein the particular out of court statements, admitted under the “state of mind” exception, were susceptible to use by the jury as more than evidence of the *victim’s* state of mind – they were also out of court, non testifying party’s direct assertions as to a violent characteristic of *defendant*. Parr concerned the admission of a murder victim’s prior out-of-court statements that she feared defendant (her boyfriend) and wanted to leave him, but was afraid of what he might do. Redmond concerned statements made to an assault victim by unnamed third parties that the defendant was angry and planned to confront him.

The statement in the instant matter, however, (“I don’t want to go, could you say we have something else planned?”) does not need a limiting instruction because it is not susceptible to such improper use. It is a straightforward statement of the victim’s/declarant’s state of mind admitted to show that state of mind.

A limiting instruction in such circumstances is not warranted.

As commentators have noted:

The need for a limiting instruction under the [state of mind exception] is less than obvious. The statements are not being admitted for any particular limited purpose under the instant rule. They are simply admitted as direct evidence of the declarant’s state of mind because the declarant’s state of mind is somehow relevant in the context of the case.

Tegland, 5C Washington Practice: Evidence § 803.12 at 41 (5th ed.)

Given the statements here are not susceptible as evidence of anything other than declarant’s state of mind, the purpose for which they were admitted, ER 105 does not require a limiting instruction. Moreover, the prosecutor’s did not use the statement in closing for any purposes beyond the above appropriate, permissible use – as evidence of R.H.’s state of mind as to visiting the defendant. 2RP 457-58; 496-97.

The court did not abuse its discretion in refusing defendant's request and defendant was not prejudiced.

B. THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING CHRISTINE'S PRETRIAL STATEMENT THAT R.H. AND E.H. SLEPT IN SEPARATE BEDROOMS AS EARLY AS 1997, PRIOR TO THE PURCHASE OF THE RED BUNK BEDS.

R.H. recounted episodes of molestation occurring at bedtime at the defendant's house. She testified that her room had a set of black bunk beds. She slept on the top bunk. During the episodes, when fondling her labia, the defendant would stand on the bottom empty bunk. 2RP 58-60.

R.H. also testified that she and her brother slept in separate bedrooms. She could not recall a time when they shared the same room there. E.H.'s room had a set of red bunk beds. He had a different bed in his room prior, but she could not recall its description. 2RP 58-60.

She was "around 6" when these episodes began. 2RP 59. They occurred multiple times, ending when she was "about 8 or 9." 2RP 64. Given she was born in April of 1992, the molestation in her bedroom would have started around 1998. 2RP 43.

E.H. testified much the same. He recalled spending alternate weekends at defendant's when he and his sister "were

little.” 2RP 157. They slept in separate rooms. He could not remember a time when they shared the same room. 2RP 166. Her room had a black bunk bed. His room had a red bunk bed. At one point he slept on a futon in his room, though he could not remember if that came before or after his red bunk bed. 2RP 165-66.

Christine Hargitt, the wife of defendant, testified that the molestation at bedtime could not have happened as early as R.H. recalled. This was because E.H. and R.H., when spending the night, initially slept in the same room. While during this period, E.H. would, on occasion, sleep on a futon in an extra room, this was only in the rare instance when guest overflow necessitated a change from their sharing a bedroom. 2RP 285-86.

Ms. Hargitt testified the shared bedroom arrangement continued until 2000 when she purchased a red bunk bed, placed it in the separate room, and E.H. moved in there. Ms. Hargitt testified she was able to date the purchase of the red bunk bed in E.H.’s room to 2000 because she had bought it after responding to a classified ad in the newspaper. In preparing for trial, she had tracked down the specific ad from the paper’s records and brought a copy. 2RP 286-88; Ex. 42.

During a lunch break that fell during Ms. Hargitt's direct examination, the State requested that she review portions of an audio recorded interview she had given to the State prior to trial. The State indicated its intention to impeach her with statements she made therein. 2RP 304-05.³ Ms. Hargitt listened to the recording during the lunch hour with defense counsel. 2RP 326.

During cross examination, the State referred Ms. Hargitt to questioning in that previous interview wherein she stated that the children were regularly sleeping in separate rooms as early as 1997 or 1998, Erik on the futon, prior to the purchase of the red bunk beds:

Q: And I asked you how long [E.H] and [R.H.] slept together in the same room, and you said that when [E.H.] was 8, 7 or 8,⁴ he moved to the futon [in the separate room]; do you remember that?

A: *No, I don't recall.*

Q: Okay would it help you if I played that portion of the interview for you?

A: I believe, yeah.

(Pause.)

[Defense Counsel]: I'm going to object, Your Honor. She can play it for her but its not appropriate to play it

³ The interview was not transcribed. 2RP 306.

⁴ E.H. was born in August, 1990. 2RP 155.

for anyone else if she's using it to refresh her memory.

The Court: What's your intention, Ms. Larsen?

[Prosecutor]: I was just intending to play it for the jury.

[Defense]: It's not admissible to be played to the jury, and I'd have an objection to that unless she denies making a statement.

The Court: Have you asked her something that is inconsistent with what she says on the tape?

[Prosecutor]: Yes. At the time – would you like to have a sidebar?

The Court: Yes. Why don't we have a sidebar.

[Prosecutor]: Okay.

(Sidebar conference held off the record.)

(The tape is played for the jury.)

Q: So that's what you said in that interview; correct?

A: (Witness nods.)

Q: Okay.

A: I was just in err.

2RP 336-37 (emphasis added.)

1. The Court Did Not Abuse Its Discretion In Admitting The Prior Inconsistent Statement.

Here, the contested statements were admitted as prior inconsistent statements. Since adoption of the Washington Rules of Evidence, admissibility of such statements has been governed by ER 613(b):

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

A court's decision to admit or exclude such statements under ER 613 is reviewed on an abuse of discretion standard. State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987). The burden of proving an abuse of discretion rests on the appellant. Williams, 137 Wn. App. at 743.

a. ER 613(b) does not require the witness be provided with an opportunity to explain or deny the inconsistent statement *prior* to its introduction.

Defense contends that the court erred in admitting the inconsistent statement without the witness being provided an opportunity to explain or deny the prior inconsistent statement

before extrinsic evidence of the statement was introduced. Defendant's claim relies on a misunderstanding of the law.

A plain reading of ER 613 reveals no requirement that the opportunity to explain or deny necessarily come *before* the inconsistent statement is introduced. Indeed, while pre-rule evidentiary considerations required such foundation be established beforehand, ER 613 purposefully removed this requirement.

The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposing party an opportunity to examine on the statement, *with no specification of any particular time or sequence...*

State v. Horton, 116 Wn. App. 909, 914, 68 P.3d 1145 (2003)

(emphasis original).

Under ER 613(b), however, it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross examination or after the introduction of extrinsic evidence. The traditional "foundation questions" on cross-examination are now an optional tactic rather than a mandatory requirement.

State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998).

Commentators agree:

The rule... specifies no particular time or sequence. ... The witness's opportunity to admit, deny, or explain the statement need not occur before the

extrinsic evidence is introduced. The requirements of Rule 613 are satisfied if the party originally calling the witness is afforded an opportunity to recall the witness to explain or deny the statement at a later time.

Tegland, 5A Washington Practice: Evidence § 613.13 at 600 (5th ed.)

State v. Dixon, 159 Wn.2d 65, 147 P.3d 991 (2006), contrary to defendant's assertion, does not reverse the standard to the pre-rule practice. There, counsel gave the opportunity to "explain or deny" prior to introduction of the statement. The court, in passing, states that this was "consistent with the requirements of ER 613(b)." Id. at 76. The court does not state that offering the opportunity to explain or deny afterward would have been *inconsistent*. Indeed, counsel can be said to have been acting consistently with ER 613(b) in that an opportunity was provided at all, regardless of when. ER 613 does not require an opportunity be provided beforehand. It only requires an opportunity be provided as some point.

Here, the opportunity to explain or deny was afforded before the admission of the inconsistent statement (*infra*). It was also afforded afterward, and the witness explained that her statement was "err[or]." Also, on rebuttal, defense counsel's first questions

called on her to expand on how she could have made the “error” in her interview with the prosecutor, and how she came to know her initial statement was incorrect. 2RP 344. The witness answered this question at length. 2RP 344-46.

The witness was provided abundant opportunity to explain or deny the statement and did so. The court did not abuse its discretion or violate ER 613 in admitting extrinsic evidence of the inconsistent statement.

b. Even if ER 613(b) required an opportunity to explain or deny *before* introducing the inconsistent statement, such opportunity was afforded here and her claim that she could not recall constitutes a denial permitting admission of the statement.

The prosecutor notified the witness and defense prior to cross-examination that it intended to impeach her with statements she made during an earlier interview. 2RP 304-05. She was provided with the audio recording of that interview. She listened to it beforehand over the lunch hour with her husband’s attorney. 2RP 326. During cross-examination, before playing the prior inconsistent statement, the state directed her to the particular statement. In response, Hargitt claimed she did not recall making the statement: 2RP 336.

Her response that she did not recall the statement constitutes a denial permitting its subsequent admission:

When the witness does not deny making a contradictory statement, but simply cannot recall making it, the statement may be offered for impeachment within the general rule.

State v. Stepp, 18 Wn. App. 304, 310, 569 P.2d 1169 (1977). See also State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968):

The witness said that she could not remember her prior inconsistent testimony and the state was permitted to introduce that testimony. ... Where a party seeks to impeach an adverse witness, the rule is that the mere failure of the witness to recollect, when asked the preliminary questions, does not preclude the impeacher from offering it.

Both defendant's trial and appellate counsel seem to claim that once the witness indicated she could not recall the statement, she should have been allowed to refresh her recollection by listening to the audio recording outside the presence of the jury. While such may be the preferred method of refreshing a witness's recollection under ER 612, here the state was seeking to impeach the witness's trial testimony under ER 613. Her claimed lack of memory in response to the prosecutor's referring her to the

statement, *after already listening to the statement over the lunch period*, constitutes a denial sufficient to admit the statement.

There is no requirement in Washington jurisprudence that the state was required to *further* refresh her recollection by having the statement played for her once again outside the presence of the jury. The court did not abuse its discretion in allowing the State to impeach the witness with her prior inconsistent statement even if the traditional pre-ER 613 rules applied.

2. Even If The Court Erred In Admitting The Previous Statement *Before* The Witness Had An Opportunity To Explain Or Deny, Such Error Did Not Prejudice The Defendant's Right To A Fair Trial.

a. The claimed court error does not mean that evidence of the inconsistent statement was improperly before the trier of fact.

Ms. Hargitt made a prior statement inconsistent with her in-court testimony on a material matter. Given this, evidence as to the prior statement was necessarily going to be admitted as impeachment. Defendant's claim that the court erred in failing to ensure her an opportunity to explain or deny was provided beforehand only affected the *form* that impeaching evidence was going to take. This is because if Ms. Hargitt had had the opportunity to explain or deny prior, her admission to the inconsistent statement would have precluded the extrinsic evidence

(the recording). See e.g. U.S. v. Greer, 806 F.2d 556, 558-59 (5th Cir. 1986).

In either case, however, evidence of that prior inconsistent statement would have been before the jury (either in the form of her at-trial admission as to the prior statement, or the audiotape of her prior statement). Thus, defendant was not prejudiced by the fact the jury learned of her prior inconsistent statement. Thus, the court did not improperly *admit* a prior inconsistent statement.

Defendant's claims of prejudice (assuming the traditional pre ER 613 rule was to be followed) involve solely prejudice that can be attributed to the court from failing to follow a procedural timeline as to the admission of that prior inconsistent statement preferred by defendant.

b. Any court error in admitting evidence of the inconsistent statement before the witness was provided an opportunity to explain or deny did not prejudice the defendant.

As noted above, prior to the adoption of ER 613, the witness had to be provided with the opportunity to explain or deny the inconsistent statement before it was introduced by extrinsic evidence. The purposes of the traditional requirement were:

(1) to avoid unfair surprise to the adversary; (2) to save time as an admission by the witness may make extrinsic proof unnecessary; and (3) to give the

witness in fairness a chance to explain the discrepancy

Tegland, 5A Washington Practice: Evidence § 613.13 at 600, fn. 1. (5th ed.)

Examining (1) above, the prosecutor took care to ask the witness to review the statement during lunch. She did so with defendant's counsel. She directed her specifically to the statement prior to asking her questions. There was no unfair surprise.

With regard to (2), it is hard to see how the fact that time may not have been saved prejudiced the defendant's right to a fair trial.

With regard to (3) above, defendant cannot claim he was prejudiced in that his witness was denied the opportunity to explain or deny the inconsistency. Even if this court found the prosecutor did not afford the opportunity prior, defense counsel's redirect was comprised almost solely of questions eliciting the reason for the inconsistency. 2RP 344-46.

Ultimately, even if the traditional rule were still in effect, defendant's claim of prejudice reduces to a claim he was prejudiced in that the witness was denied the opportunity to explain or deny

the inconsistency *when* defendant would have preferred. This cannot be said to have prejudiced his right to a fair trial.

c. Defendant was not prejudiced by the prosecutor's closing argument.

A prior inconsistent statement is generally admissible as impeachment evidence but not as substantive evidence of what the prior inconsistent statement asserts. State v. Clinkenbeard, 130 Wn. App. 552, 123 P.3d 872 (2005).

Defendant's claim the State improperly argued impeachment evidence is entirely separate and distinct from the claimed court's error above. This is not a situation involving analysis of a claim of potentially *compounded* prejudice - i.e. a situation where the court admitted evidence it should not have, then prejudice from such is compounded by a party relying on that improper evidence heavily in closing. (Again, the inconsistent statement was going to be before the jury in some form.) Thus, the claim that the prosecution went on to use the inconsistent statement improperly as substantive evidence and not just as impeachment is a separate and distinct claim of prejudice

Moreover, that claim of prejudice is unfounded. A review the State's closing reveals that, while the State argued there was

substantive evidence that E.H. and R.H. were sleeping in separate rooms as early as 1997 to 1998, it did so based on the direct testimony of E.H. and R.H. *themselves*. While Christine Hargitt's prior out of court statements consistent with this time frame were also mentioned during the same argument, those statements were used appropriately by the prosecutor as impeachment of her in-court statements to a contrary time frame. 2RP 461-63; 490. The record simply does not reveal the statements were used improperly.

Also, even if the State did improperly argue her statements, the record reveals trial counsel did not object. Given the minimal impact such argument could have had, especially where there was other substantive evidence as to the timeframe from R.H. and E.H., the failure to object waives any claim of prejudice. State v. Dhaliwal, 150 Wn.2d 559, 560, 79 P.3d 432 (2003). More generally, any prejudice that the jury used the statements substantively was also waived by defense's failure to request a limiting instruction as to their limited impeachment use. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) ("Myers never requested a limiting instruction. And, absent a request for a limiting

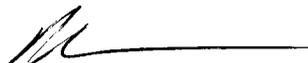
instruction, evidence admitted as relevant for one purpose is deemed relevant for others.") Defendant was not prejudiced.

IV. CONCLUSION

For the foregoing reasons, defendant's appeal should be denied.

Respectfully submitted on September 9, 2009.

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