

64141-7

64141-7

NO. 64141-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

IGNACIO ARIAS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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COURT OF APPEALS OF THE STATE OF WASHINGTON

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A. ISSUES PRESENTED

1. Whether substantial evidence supports the jury's conclusion that the 13-year-old child sexual abuse victim was not married to the 27-year-old defendant where the evidence was undisputed that the defendant was the live-in boyfriend of the victim's mother.

2. Whether the trial court exercised sound discretion in ruling that the circumstances surrounding the victim's disclosure of sexual abuse to her mother was relevant evidence that should be considered by the jury, regardless of when the disclosure was made.

3. Whether the trial court exercised sound discretion in ruling that the victim's mother could not be cross-examined on collateral matters that were far more prejudicial than probative where the mother was not a critical witness for the State and there was other evidence that could be used to impeach her.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Ignacio Arias (dob 7/26/80), with the following crimes:

Count I: Child Molestation in the Third Degree
(victim A.M.L., dob 11/9/91);

Count II: Rape of a Child in the Second
Degree (victim F.M.L., dob 1/27/94);

Count III: Child Molestation in the Second
Degree (victim F.M.L.);

Count IV: Communication with a Minor for
Immoral Purposes (victim J.M.G., dob 8/5/92).

CP 1-5.

A jury trial on these charges was held in July 2009 before the Honorable Bruce Heller. As will be discussed further below in the relevant argument sections, the trial court ruled pretrial 1) that A.M.L., F.M.L., and their mother, Silvia L., would be allowed to testify as to the circumstances of the girls' disclosure of abuse to their mother; and 2) that the defense would not be allowed to cross-examine Silvia L. regarding allegations that Silvia L. had purportedly used a false Social Security number to apply for DSHS benefits to which she was not entitled because she was an illegal immigrant. RP (7/8/09) 3-12.

At the conclusion of the trial, the jury acquitted Arias of count I, the alleged molestation of A.M.L, but convicted Arias of counts II, III and IV as charged. CP 80-84; RP (7/15/09) 2-5. The

trial court imposed a standard-range sentence. CP 100-13;
RP (9/4/09) 15-17. Arias now appeals. CP 87-99.

2. SUBSTANTIVE FACTS

Silvia L. has three daughters: A.M.L., F.M.L., and M.M.L., who were 17, 15, and 11 (respectively) at time of trial in July 2009. Silvia L. separated from the girls' father in 2003. RP (7/9/09) 39-40. Silvia L. met Arias in December 2005, and shortly thereafter, they began a dating relationship. RP (7/9/09) 44.

In early 2006, Arias, Silvia L., and the three girls moved into an apartment in Federal Way. A few months later, they all moved to a large house in Auburn. J.M.G., a school friend of A.M.L.'s, moved into the house with them because she was having trouble at home. RP (7/9/09) 48-50. In the late summer or early fall of 2006, A.M.L. and J.M.G. had a falling out, and J.M.G. moved out of the house in Auburn. RP (7/13/09) 13. Shortly thereafter, A.M.L. went to live with her father because she and Silvia L. were not getting along. RP (7/13/09) 14.

Arias, Silvia L., F.M.L., and M.M.L. moved out of the Auburn house and moved to a trailer in SeaTac. RP (7/13/09) 14. Then, in March 2007, Arias and Silvia L. moved to a different trailer in Kent,

and the remaining two girls went to live with their father in Renton. RP (7/9/09) 55-58. In May 2007, Silvia L. went to Mexico for a while; she claimed that she went to visit her family, but F.M.L. stated that she went there to get help for a drinking problem. RP (7/9/09) 58, 171.

Although A.M.L. and F.M.L. thought that Arias was nice at first, they both noticed undesirable changes in their mother during the time that they were living with him. RP (7/9/09) 101-04; RP (7/13/09) 16, 18-22. Both girls noticed that Silvia L. acted as though Arias was more important than they were, and that Silvia L. was frequently abusing alcohol. RP (7/9/09) 103-04, 161; RP (7/13/09) 18-22. The girls grew to dislike Arias because of this. RP (7/9/09) 103-04; RP (7/13/09) 18-19.

A.M.L. testified that on several occasions during the summer of 2006, when they were living in the house in Auburn, Arias had crept into her room in the very early morning when she was sleeping, and had slipped his hand under her clothing and fondled her vagina. RP (7/13/09) 24-33. A.M.L. did not tell anyone because she was afraid that no one would believe her. RP (7/13/09) 35. She did not tell her younger sisters because she did not want to scare them. RP (7/13/09) 40.

During that same time frame, J.M.G. had an encounter with Arias at the Auburn house when no one else was home. J.M.G. went into the bedroom that Arias shared with Silvia L. to ask Arias for a cigarette. RP (7/13/09) 108. Arias was lying on the bed under a sheet, watching a pornographic movie. RP (7/13/09) 109. J.M.G. could tell that Arias had an erection. RP (7/13/09) 113. Arias told J.M.G. that she could stay and smoke her cigarette in the bedroom, and J.M.G. did so, although she was very uncomfortable. RP (7/13/09) 110. While J.M.G. was smoking her cigarette, Arias asked her if she would masturbate him. RP (7/13/09) 112. J.M.G. was shocked, and left the room as quickly as possible. RP (7/13/09) 115-16.

As noted above, both J.M.G. and A.M.L. were living elsewhere by the time the others moved to the trailer in SeaTac. RP (7/13/09) 13-14. At this point, Arias began sexually abusing F.M.L. RP (7/9/09) 107. The first time that it happened, Arias, F.M.L., and Silvia L. had been sleeping on a mattress in the living room after watching TV. RP (7/9/09) 107. F.M.L. woke up to discover that Arias was lying next to her, and that he had his "hands on [her]." RP (7/9/09) 109. Eventually, Arias slipped one of his hands inside F.M.L.'s underwear. F.M.L. pretended to be

asleep because she was afraid. RP (7/9/09) 111. Arias penetrated F.M.L.'s vagina with his finger. F.M.L. pretended that she was waking up, but Arias did not stop what he was doing. Arias continued to digitally rape F.M.L. for about 5 minutes. RP (7/9/09) 112-13. At the time, F.M.L. thought that perhaps Arias had mistaken her for her mother. F.M.L. told her best friend, A.S., what Arias had done the next time she saw her. RP (7/9/09) 115.

The next time that Arias abused F.M.L., she was sleeping on the living room couch. Arias and Silvia L. had been sleeping in their bedroom. RP (7/9/09) 115. F.M.L. had tried to stay awake all night to prevent Arias from abusing her, but she was not successful. RP (7/9/09) 116. She awoke to Arias's footsteps coming towards her. RP (7/9/09) 118. Arias knelt next to the couch and put his hand inside F.M.L.'s pants. RP (7/9/09) 121. As F.M.L. felt Arias's hand go "deeper in between [her] thighs," she moved and Arias ran away. RP (7/9/09) 123-25. He tried to come back and do it again, but F.M.L. crossed her legs so that he could not. RP (7/9/09) 125, 127-30. F.M.L. told A.S. about this incident also; in fact, F.M.L. confided in A.S. each time that Arias abused her. RP (7/9/09) 132.

The next time that Arias molested F.M.L., she was sleeping on a different couch in the living room. RP (7/9/09) 133. F.M.L.'s memory of this incident was hazy; she described the experience as "dreamlike," and "like a blur." RP (7/9/09) 133-34. She recalled that this incident was also in the early morning, before it was light outside, and that Arias had fondled her in a similar manner. RP (7/9/09) 134.

The fourth time that Arias abused F.M.L., she was having a sleepover with three of her friends, including A.S. RP (7/9/09) 134. The four girls were sleeping on a mattress in the living room. Arias came in, put his hand in F.M.L.'s pants, and briefly fondled her vagina over her underwear. RP (7/9/09) 135. Although A.S. was pretending to be asleep, she could "feel the blankets moving" and stated that it was "pretty obvious" what Arias was doing to F.M.L. RP (7/14/09) 26. Both F.M.L. and A.S. recalled that F.M.L. squeezed A.S.'s hand while Arias was fondling her. RP (7/9/09) 136; RP (7/14/09) 26.

F.M.L.'s memory of the last time Arias assaulted her was also fairly vague; she said that she felt drowsy and drugged, and that the experience felt like it could have been a dream. RP (7/9/09) 147.

On one occasion where Arias did not succeed in abusing F.M.L., F.M.L. was visiting her mother at the trailer in Kent. F.M.L. brought A.S. with her because she did not want to stay overnight with Arias and her mother alone. RP (7/9/09) 149. Very early the next morning, Arias came into the room where F.M.L. and A.S. were sleeping; he seemed startled to discover that both girls were awake. RP (7/9/09) 149; RP (7/14/09) 28-29. Arias said something about going to the store to buy milk and quickly left the house. When he returned, he did not have any groceries with him. A.S. observed that this behavior was awkward and strange. RP (7/9/09) 149; RP (7/14/09) 29-33.

Another awkward moment occurred when F.M.L. dressed up in a blouse, skirt, and heels to attend a funeral, and Arias told her that she looked pretty. F.M.L. found the compliment awkward because Arias was talking to her "like [she] was a grown up person." RP (7/9/09) 154-55.

A.M.L. felt guilty about moving out and leaving her younger sisters behind with Arias, particularly because their mother seemed to be drunk or asleep most of the time. RP (7/13/09) 46-47. Finally, in the summer of 2008, A.M.L. told F.M.L. that Arias had touched her, and she demanded to know if Arias had touched

F.M.L. as well. F.M.L. eventually admitted that he had. RP (7/9/09) 160-61; RP (7/13/09) 48, 52-53. The girls decided at that point that they had to tell Silvia L. what had happened. RP (7/13/09) 54. Silvia L. was no longer in a relationship with Arias at this point, although they continued to live together. RP (7/9/09) 89.

On July 24, 2008, A.M.L. and F.M.L. took a trip to the mall with their mother. On the way home, Silvia L. lamented that the girls never came over to visit her anymore. A.M.L. and F.M.L. then told their mother what Arias had done to them. RP (7/13/09) 54-55. Silvia L. was shocked and did not know what to do; A.M.L. said that they needed to contact the police. RP (7/13/09) 55, 59. Because they had lived in several different jurisdictions during the relevant time frame, Silvia L. and the girls went to several different police stations before a King County Sheriff's deputy finally took statements from them and referred the case to a detective. RP (7/8/09) 38-43; RP (7/13/09) 60.

Additional facts will be discussed further below as necessary for argument.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S DETERMINATION THAT F.M.L. WAS NOT MARRIED TO ARIAS.

Arias claims that the evidence is insufficient to support the jury's verdicts on counts II and III. More specifically, Arias claims that the evidence did not prove that he and the 13-year-old victim, F.M.L., were not married. Appellant's Opening Brief, at 6-10. This claim should be rejected because there was ample circumstantial evidence from which the jury very reasonably concluded that Arias and F.M.L. were not married.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational juror could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 921 P.2d 1068 (1992).

Circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a jury verdict. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Furthermore, the reviewing court must defer to the jury's determination as to the weight and credibility of the evidence and its resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. Under these deferential standards, any question as to the meaning of the evidence should be resolved in favor of the conviction whenever such an interpretation is reasonable.

The State need not present direct evidence that the victim and the perpetrator were not married in cases where a lack of marriage is an element of the crime. Rather, circumstantial evidence is sufficient to prove this element. See, e.g., State v. Rhoads, 101 Wn.2d 529, 532, 681 P.2d 841 (1984) (testimony that the victim and the rapist were strangers proved they were not married); State v. Shuck, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983) (evidence of a one-month acquaintance between the victims and the defendant, the fact that the victims were in ninth grade, and the fact that they had never spent the night at the defendant's house proved a lack of marriage); State v. May, 59 Wn. 414, 415,

109 P. 1026 (1910) (evidence that the victim was under 14, lived with her parents, used her maiden name, and was "a mere school girl" established that she was not married to the defendant). Such is the case here.

Silvia L., F.M.L. and A.M.L. all testified that Arias was Silvia L.'s live-in boyfriend. RP (7/9/09) 43-59, 100-04; RP (7/13/09) 6-15. In fact, F.M.L. testified that the first time Arias sexually assaulted her, she thought that perhaps Arias had mistaken her for her mother. RP (7/9/09) 115. This fact alone supports the jury's verdicts, as the jurors could reasonably infer that F.M.L. was not married to her mother's boyfriend. Moreover, F.M.L. was 13 years old when Arias abused her. RP (7/9/09) 39, 44-53, 156; CP 67, 69. This is circumstantial evidence that F.M.L. was not married to anyone, Arias included.

In addition, F.M.L. testified that she lived with either her mother or her father during the relevant time frame, and that she lived with her father while her mother was in Mexico whereas Arias continued to live in his trailer in Kent. RP (7/9/09) 93, 156. This is further circumstantial proof that F.M.L. was not married to Arias.

F.M.L. also described the incident where she had dressed up to go to a funeral and Arias told her that she looked pretty.

F.M.L. stated that this compliment made her uncomfortable because Arias had acted "like [she] was a grown up person." RP (7/9/09) 154-55. F.M.L. also testified that she and A.M.L. "hated" Arias because he had touched them inappropriately and had caused undesirable changes in their mother. RP (7/9/09) 175. These aspects of F.M.L.'s testimony are inconsistent with the notion that F.M.L. could be married to Arias.

In sum, the evidence produced at trial is more than sufficient to support the jury's reasonable conclusion that F.M.L. was not married to Arias. Accordingly, this Court should affirm Arias's convictions for counts II and III.

2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING "FACT OF COMPLAINT" EVIDENCE, BUT EVEN IF ANY ERROR OCCURRED, IT WAS HARMLESS.

Arias next claims that the trial court erred in admitting evidence under the "fact of complaint" doctrine. More specifically, Arias argues that the trial court should not have allowed testimony from Silvia L. and F.M.L. regarding the disclosure of abuse to Silvia L. because the disclosure was not made in a timely manner.

Appellant's Opening Brief, at 6-18. This argument should be rejected for two reasons. First, the "fact of complaint" doctrine as it currently exists should not require a timely disclosure in order to admit testimony regarding the circumstances of a disclosure. In addition, even if this Court were to conclude that evidence regarding the circumstances of F.M.L.'s disclosure to Silvia L. was not admissible, any possible error is harmless. This Court should reject Arias's claim, and affirm.

Evidentiary rulings are addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

The "fact of complaint" doctrine stems from the feudal "hue and cry" doctrine, and allows the admission of "hearsay"¹ that a sexual assault victim complained after being assaulted. State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949); State v. Hunter, 18 Wn. 670, 672-73, 52 P. 247 (1898). Under these doctrines, Washington courts have long held that the fact that the victim complained is admissible because it bears upon the victim's credibility. See, e.g., Murley, 35 Wn.2d at 237; Hunter, 18 Wn. at 672-73; State v. Alexander, 64 Wn. App. 147, 151-52, 822 P.2d 1250 (1992). The parameters of such testimony were described as follows by the Washington Supreme Court in 1940:

We think the rule in this and the majority of states is well established that, in cases of this kind, the prosecuting witness may testify that she made complaint after the assault, and where, to whom and under what circumstances, but she may not detail the story that she told in making such complaint; and the person to whom she made complaint may also testify that she complained, and may state the time, place, and circumstances under which the complaint was

¹ Although the case law refers to the "fact of complaint" doctrine as a hearsay exception, evidence admitted under this doctrine is not actually hearsay. See ER 801(c) ("hearsay" defined as a statement offered to prove the truth of the matter asserted). As the name implies, "fact of complaint" evidence is not offered to prove the truth of the complaint. Indeed, the doctrine expressly prohibits the admission of any details regarding the complaint itself. Rather, "fact of complaint" evidence is admitted to prove only the fact that a complaint was actually made.

made, but not what she said concerning the circumstances and details of the assault.

State v. Smith, 3 Wn.2d 543, 550, 101 P.2d 298 (1940) (citing Hunter, *supra*, and State v. Griffin, 43 Wn. 591, 86 P. 951 (1906)).

Arias is correct that these doctrines have traditionally required that the victim's complaint be timely in order for testimony regarding the fact of the complaint to be admissible. See, e.g., Griffin, 43 Wn. at 598 (holding that "evidence of the complaint should be excluded whenever from delay or otherwise it ceases to have corroborative force"); Alexander, 64 Wn. App. at 151 (noting that "this narrow exception allows only evidence establishing that a complaint was timely made"). But the underlying rationale for this timeliness requirement is both antiquated and offensive, i.e., that a woman who has been raped would certainly raise her "hue and cry" immediately, and that the failure to do so suggests that a rape did not occur:

If the witness be of good fame; if she presently discovered the offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed, was where it was possible she might have been heard,

and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.

Griffin, 43 Wn. at 597-98 (quoting William Blackstone, 4 Commentaries, *213); see also Murley, 35 Wn.2d at 237 (noting that the "hue and cry" doctrine "rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person," and thus, the failure to complain promptly supports an inference that the allegations are fabricated).

On the other hand, this Court has previously recognized that expert testimony that child sexual abuse victims often delay reporting their abuse may be properly admitted for the jury's consideration. State v. Graham, 59 Wn. App. 418, 422-25, 798 P.2d 314 (1990). As this Court correctly found, such evidence is admissible because it is helpful to the jury in assessing the victim's credibility -- the same reason, incidentally, for admitting "fact of complaint" evidence. Id. at 425.

Accordingly, if *expert* testimony is admissible to explain that child sexual abuse victims often delay in reporting their abuse because such testimony bears on credibility, it makes little sense to perpetuate an antiquated rule that *factual* testimony regarding the circumstances of the victim's disclosure is relevant and admissible

only if the victim's report is timely. Indeed, it is difficult to imagine a child sexual abuse case where evidence regarding the circumstances of the victim's disclosure would *not* be relevant to the issue of the victim's credibility.

Thus, it is not surprising that courts in other jurisdictions have recognized this conundrum and rejected the timeliness requirement for "fact of complaint" evidence, especially in child sexual abuse cases. For example, in Woodard v. Commonwealth, 19 Va. App. 24, 27-28, 448 S.E.2d 328 (1994), the 13-year-old victim did not report that the defendant had raped her until several months after the rape. Despite the delay, the trial court admitted evidence of the circumstances of her disclosures under Virginia's "recent complaint" rule. Woodard, 19 Va. App. at 26.

On appeal, the Virginia appellate court observed that the traditional "hue and cry" rule is "now discredited," and that evidence of the victim's complaint should be excluded for lack of timeliness only if the delay "*is unexplained or inconsistent with the occurrence of the offense.*" Id. at 27 (emphasis in original). The court further noted that the issue of timeliness is addressed to the sound discretion of the trial court, and thereafter, is a matter for the jury to consider. Id. Moreover, in holding that evidence of the victim's

complaint was properly admitted in spite of the delay, the court observed:

The victim's delay was not "unexplained" or "inconsistent with the occurrence of the offense." To the contrary, her delay is explained by and completely consistent with the all too common circumstances surrounding sexual assault on minors -- fear of disbelief by others and threat of further harm from the assailant. The decision whether to admit or suppress evidence of the fact of the victim's complaint of Woodard's assault was a matter committed to the discretion of the trial judge, and upon its admission, the timeliness of the complaint became a matter for the jury to consider in weighing the evidence.

Id. at 28. See also State v. P.H., 179 N.J. 378, 393, 840 A.2d 808 (2004) (noting that "fresh complaint guidelines had to be applied flexibly to children who allegedly have been sexually abused in light of the reluctance of children to report a sexual assault and their limited understanding of what was done to them").

These considerations should apply in this case as well. As in Woodard, F.M.L.'s delayed disclosure to her mother was not "unexplained" or "inconsistent with the occurrence of the offense." Woodard, 19 Va. App. at 27. Rather, F.M.L. testified that she did not want to disclose the abuse "because [she] was scared of like what would happen and stuff," she "was scared of telling [her] parents," and she "didn't want to like deal with everything that was

to come if [she] did say something about it." RP (7/9/09) 160, 162, 163. As recognized by this Court in Graham, F.M.L.'s response is a common response to child sexual abuse. Moreover, the circumstances of F.M.L.'s disclosure to her mother are clearly relevant, if for no other reason than it was this disclosure that prompted the police investigation. RP (7/9/09) 70-71.

Given that the underlying rationale for the timeliness requirement of the traditional "fact of complaint" rule is outdated and flawed, and given that the circumstances of F.M.L.'s disclosure to her mother are relevant, the State asks this Court to find that this evidence was properly admitted. As the trial court found in ruling on this issue, the traditional "hue and cry" doctrine has been discredited, and "current knowledge and understanding of how sex crimes affect victims" runs contrary to a requirement that a complaint be made in a timely manner in order to be admissible. RP (7/8/09) 3-5. The trial court exercised sound discretion in this regard. This Court should adopt the Virginia court's rationale in Woodard, and affirm.

But even if this Court were to conclude that the trial court erred in admitting Silvia L.'s and F.M.L.'s testimony under the "fact

of complaint" rule due to a lack of timeliness, a new trial is still not warranted because any error was harmless.

Erroneous evidentiary rulings are reviewed under the non-constitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Under this standard, an erroneous ruling is reversible only if there is a reasonable probability that the error materially affected the outcome of the trial. State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997). Arias cannot meet that standard here because F.M.L. also made timely disclosures to her friend, A.S., and both F.M.L. and A.S. testified regarding these disclosures. RP (7/9/09) 115, 132; RP (7/14/09) 16-17. In addition, A.S. was present during one of the incidents where Arias fondled F.M.L., and she corroborated that the abuse occurred. In fact, both F.M.L. and A.S. testified that F.M.L. squeezed A.S.'s hand while Arias was fondling her. RP (7/9/09) 136; RP (7/14/09) 25-26. In light of this testimony, there is no reasonable probability that the outcome of the trial would have been different if the circumstances of F.M.L.'s disclosure to Silvia L. had not been admitted. This Court should affirm Arias's convictions on this basis as well.

3. THE TRIAL COURT EXERCISED SOUND DISCRETION IN LIMITING CROSS-EXAMINATION OF SILVIA L. ON COLLATERAL MATTERS.

Arias also claims that the trial court erred in limiting his cross-examination of Silvia L. on matters unrelated to the crimes for which he was tried. More specifically, Arias claims that he should have been allowed to question Silvia L. regarding allegations that she had possibly used a false Social Security number and applied for benefits from DSHS to which she was not entitled. Appellant's Opening Brief, at 18-32. These arguments are without merit. The trial court properly exercised its discretion in ruling that these matters were collateral, that the evidence offered to support them was vague, and that questioning on these matters would be far more prejudicial than probative in the context of this case.

Accordingly, this Court should affirm.

A criminal defendant has the right to confront the witnesses against him through cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). But this right is not unfettered. To the contrary, the trial court retains the authority to set limits on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only

marginally relevant." Id. at 679. Put another way, "[a] trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative." State v. Classen, 143 Wn. App. 45, 58, 176 P.3d 582, rev. denied, 164 Wn.2d 1016 (2008).

In sum, the trial court is vested with considerable discretion to limit the scope of cross-examination for impeachment purposes, and the trial court's decision is reviewed only for manifest abuse of that discretion. State v. Aguirre, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010). A reviewing court will find an abuse of discretion only if no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

In this regard, "[f]ailing to allow cross-examination of a state's witness under ER 608(b)," which governs impeachment via specific instances of misconduct, "is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment." State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). On the other hand, "[t]he need for cross-examination on misconduct diminishes with the significance of the witness to the State's case." Id. Moreover, if there is other

available impeachment evidence, "there is less need for further impeachment on cross-examination." Id. Also, the trial court should exclude impeachment evidence if it is only marginally relevant and the potential for prejudice is great. State v. Carlson, 61 Wn. App. 865, 875-76, 812 P.2d 536 (1991), rev. denied, 120 Wn.2d 1022 (1993).

The facts of Carlson are instructive. In Carlson, the defendant was convicted of raping and molesting his young granddaughter. The defendant alleged at trial that the victim's mother had fabricated the allegations of abuse in order to retain custody of the child and to obtain money in a civil suit against the defendant. Carlson, 61 Wn. App. at 868. Among various claims raised on appeal, the defendant contended that the trial court erred by not allowing him to cross-examine the victim's mother about her cocaine usage. Id. at 875. In rejecting the defendant's claim, primarily on grounds of waiver, this Court observed that the mother's alleged cocaine use occurred before the allegations came to light, "and thus had little, if any, bearing on her motive to make those allegations." Id. at 876. Therefore, "the evidence's probative value was vastly outweighed by its unduly prejudicial effect." Id. The same is true in this case.

In this case, the defense wanted to question Silvia L. about having a false Social Security number and applying for benefits from DSHS. In support of its position, the defense had a credit report and a photocopy of a Social Security card reflecting two different Social Security numbers, an application for DSHS benefits, and a paycheck stub for income earned in Mexico.² RP (7/7/09) 6-7. Accordingly, the defense argued that Silvia L. had applied for the DSHS benefits fraudulently because she had used a false Social Security number, and she was not entitled to the benefits because of her immigration status.³ RP (7/7/09) 8-9.

In ruling that the defense would not be allowed to ask Silvia L. about these matters, the trial court correctly observed that the supporting evidence was vague, and that any questioning would lead to a "minitrial" on collateral issues. RP (7/8/09) 9. The trial court also correctly found that Silvia L. was not a central witness in the State's case. RP (7/8/09) 10. Indeed, Silvia L. could testify only to the fact that she and her daughters lived with Arias in

² None of these items would have been admissible, however, as ER 608(b) prohibits the use of extrinsic evidence for impeachment.

³ According to the prosecutor, Silvia L. had only a tourist visa, but had been in the United States for approximately 10 years. RP (7/7/09) 7-8.

several locations during the charging period, and that her daughters eventually disclosed abuse -- all of which was corroborated by other witnesses.

In addition, the court found that the probative value of this evidence was not as strong with respect to Silvia L.'s credibility as it potentially could be in a different case. More specifically, the court found that Silvia L. may have used a false Social Security number because she is an illegal immigrant, not because she is a dishonest person in general. RP (7/8/09) 10-11. The court also found that the issue of Silvia L.'s immigration status would be particularly prejudicial due to widespread hostility towards illegal immigrants among the general public, and aptly described the proposed impeachment evidence as a "Pandora's Box." RP (7/8/09) 11.

Lastly, the court ruled that the defense would be allowed to cross-examine Silvia L. about her alcohol usage, and that F.M.L. and A.M.L. could be questioned about this topic as well. RP (7/8/09) 12. In this regard, Silvia L. denied that she had abused alcohol, whereas her own daughters contradicted her and described severe alcohol abuse. RP (7/9/09) 82, 161, 171; RP (7/13/09) 20, 22, 46.

Based on the authorities set forth above, the trial court acted well within its considerable discretion in disallowing cross-examination on collateral matters for purposes of impeachment. As the trial court found, Silvia L. was not a central witness for the State, the matters sought to be addressed were collateral, the evidence supporting the defense theory was vague, and whatever minimal probative value this evidence may have had was substantially outweighed by the danger of unfair prejudice. In addition, there was other impeachment evidence, i.e., alcohol abuse, with which to argue that Silvia L. was not a reliable witness. The trial court's ruling was thoughtful and sound, and Arias has not demonstrated an abuse of discretion. Accordingly, this Court should affirm.

Nonetheless, Arias argues that the trial court erred, citing State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991). But as the trial court found, Wilson is not on point. In Wilson, the defendant was convicted of raping his wife's 13-year-old sister. The defendant's wife testified on his behalf that he lived with her during the charging period, and that she surely would have known if the defendant was raping her sister. Wilson, 60 Wn. App. at 889. The State impeached her with DSHS public assistance forms, in which

she had stated under oath that the defendant was not a member of her household. Id. at 891.

In affirming the trial court's ruling allowing the impeachment, Division Two of this Court observed that the prior false statement was "relevant to veracity," and "also germane to the issue of sexual abuse because [the wife] testified that Wilson could not have committed sexual abuse." Id. at 893. In other words, the impeachment was directly probative of the central issue in the case, and called into question the wife's testimony that the defendant could not have committed the crimes in question. In this case, by contrast, Silvia L.'s testimony neither confirmed nor contradicted F.M.L.'s and A.M.L.'s allegations of abuse, and the proposed impeachment of Silvia L. did not relate in any way to the charges against Arias. Put another way, whereas the undisputedly false statement in Wilson concerned the crux of the witness's testimony (i.e., whether Wilson was living with the witness and whether the crimes were committed), the purported impeachment evidence against Silvia L. was speculative and wholly collateral. Accordingly, the trial court was correct in finding Wilson distinguishable.

Lastly, Arias argues that because he had a constitutional right to cross-examine Silvia L., the State bears the burden of showing harmlessness beyond a reasonable doubt if this Court were to find that the trial court erred. The State's response to this argument is twofold. First, although a criminal defendant has the constitutional right to cross-examine witnesses, the defendant has no right to present irrelevant evidence and, even if the evidence is relevant, the defendant still may not present it if the danger of unfair prejudice would disrupt the truth-seeking function of the trial. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 713 (2010). Second, under any standard, the exclusion of this evidence is harmless for the same reasons that its exclusion was proper: because it concerned the impeachment of a non-critical witness on wholly collateral matters that were far more prejudicial than probative. In sum, there are no grounds upon which to reverse Arias's convictions, and his claim should be rejected.

4. ARIAS'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.

Lastly, Arias claims that the cumulative effect of the errors he alleges warrant a new trial, even if they do not justify a reversal individually. Appellant's Opening Brief, at 33-34. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny the defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997). But reversals due to cumulative error are justified only in rather extraordinary circumstances.⁴ As addressed above, no error occurred that warrants a new trial, either individually or cumulatively. Therefore, Arias's convictions should be affirmed.

⁴ See, e.g., Perrett, 86 Wn. App. at 323 (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

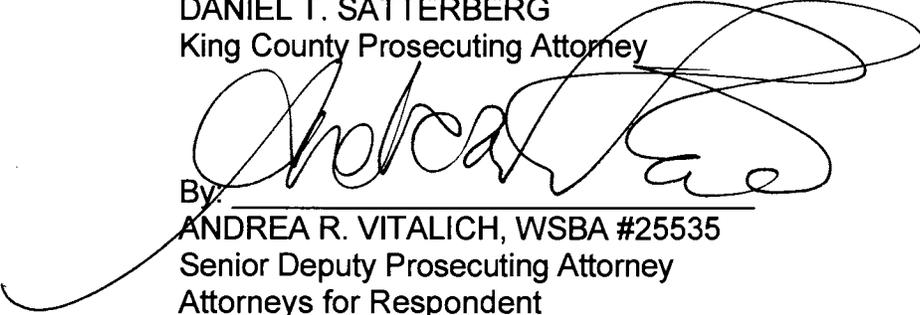
D. **CONCLUSION**

The evidence supports the jury's verdicts, and the trial court's evidentiary rulings were sound. For all of the reasons set forth above, this Court should reject Arias's claims, and affirm.

DATED this 14th day of July, 2010.

Respectfully submitted,

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