

NO. 64598-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LESLIE STEPHENSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

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2006  
COURT OF APPEALS  
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MS

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**A. ISSUES PRESENTED**

1. Whether Stephenson opened the door to evidence of a prior incident of child sexual abuse when he testified that he "would never do anything like" sexually abusing a child, "never, ever, ever, never."

2. Whether the trial court exercised sound discretion in admitting evidence regarding the circumstances of the victim's disclosures of abuse, given that Stephenson did not object to this testimony at trial and given that it was relevant and probative of material issues in the case.

3. Whether the trial court exercised sound discretion in admitting a series of text messages exchanged between Stephenson and the victim during the time frame when the victim disclosed the abuse as relevant, highly probative evidence showing the nature of Stephenson's relationship with the victim.

4. Whether Stephenson's claims of prosecutorial misconduct in closing argument should be rejected because the remarks in question are neither improper nor prejudicial.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Leslie Stephenson (dob 3/14/52), with rape of a child in the first degree (count I), child molestation in the first degree (count II), and rape of a child in the second degree (count III) based on his abuse of M. (dob 6/6/96) in 2007 and 2008. CP 1-5. A jury trial on these charges was held before the Honorable Michael J. Fox in October 2009. At the end of the trial, the jury found Stephenson guilty of first-degree child molestation as charged in count II, but could not reach a verdict on counts I and III.<sup>1</sup> CP 53-55. Stephenson received an indeterminate sentence of life with a mandatory minimum term of 64 months. CP 66-75. Stephenson now appeals. CP 56-65.

**2. SUBSTANTIVE FACTS**

M. and her mother, Dicksie Auer, met Stephenson at a street fair in Ballard when M. was 10 years old. Auer suffers from physical disabilities and takes several medications; she cannot work and lives on public assistance. Stephenson quickly befriended both Auer and M.; he helped Auer run errands, he

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<sup>1</sup> Counts I and III were dismissed at sentencing. CP 67.

provided Auer with marijuana, and he bought gifts and school supplies for M. 2RP (10/14/09) 7-9, 18, 44. He also gave M. a \$20 weekly allowance. 2RP (10/14/09) 65. Some of the gifts Stephenson bought for M. included clothing, a skateboard, a video camera, an iPod, and a "smart phone" with text messaging and internet capabilities. 2RP (10/14/09) 54-57, 62.

As their relationship continued, M. spent more and more time with Stephenson; she often spent the night at his apartment, even when her mother was not there. M. liked staying with Stephenson because he had cable and high-speed internet. 2RP (10/14/09) 19, 38, 58. Stephenson took M. to the movies, and he took M. and her best friend J. to a concert in Aberdeen. 2RP (10/14/09) 89. Stephenson even discussed getting "partial custody" of M. so that he could put her on his insurance plan so that she could get braces. 2RP (10/14/09) 88.

The first time that Stephenson molested M., she was 11 years old. M. and Stephenson were on Stephenson's bed, watching a movie. He put his hand under her shirt and bra and touched her breasts. M. got up and walked into the living room and sat on the couch in the dark. Stephenson came out and asked her

why she was sitting there; M. did not answer "[b]ecause it was a stupid question." 2RP (10/14/09) 67-69.

Stephenson soon began touching M.'s vagina as well. 2RP (10/14/09) 71-72. M. recalled a specific incident that occurred when she and Stephenson were babysitting a friend's toddler. M. was sitting on the floor with the child; Stephenson reached over and touched M.'s crotch on the outside of her pants. 2RP (10/12/09) 72. After that, Stephenson began reaching under M.'s clothes to touch her vagina. 2RP (10/14/09) 73-74.

Stephenson began having penile-vaginal intercourse with M. while she was still 11 years old, and he continued to have sex with her until August 2008, when she was 12 years old. 1RP (10/13/09) 152; 2RP (10/14/09) 76-82. Stephenson told M. that both of them would die if she told anyone about the abuse. 2RP (10/14/09) 83.

On September 26, 2008, M. and Stephenson had an argument about money. 2RP (10/14/09) 86-87. According to Stephenson, M. wanted money to go shopping, but he would not give it to her because he was saving it to buy her a laptop computer for school. 3RP (10/19/09) 125-27. After the argument, M. sent text messages to a school friend, M.K., and told him that her "dad" was abusing her. 2RP (10/14/09) 83-86; Exs. 1-3. M. told J. about

the abuse shortly after she sent the text messages to M.K. J. then told her mother, Leslie Stewart. 2RP (10/14/09) 92. M. was afraid she might be pregnant, so Stewart helped M. take a home pregnancy test. It was negative. 2RP (10/14/09) 92-93. Stewart then took J. and M. to talk to Dicksie Auer; Stewart told Auer what M. had disclosed, and she told Auer they needed to go to the police. 2RP (10/14/09) 13-15.

Stewart and her fiancé drove Auer, J., and M. to the police station on October 5, 2008. SPD Officer Jessica Taylor<sup>2</sup> spoke to M. and took a report, which she referred to the Sexual Assault Unit. 2RP (10/14/09) 170-72. Detective Christopher Young investigated the case and spoke with all the relevant witnesses, including M. 1RP (10/13/09) 125-30. M. gave her cell phone to Detective Young because it contained text messages exchanged between M. and Stephenson on September 27, 28, and 29, and October 1, 4, and 5, 2008. 1RP (10/13/09) 130-32; Exs. 13-119. As will be discussed in detail below, these text messages were admitted over Stephenson's objections. 1RP (10/13/09) 85.

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<sup>2</sup> Officer Taylor is referred to on the record as both "Officer Taylor" and "Officer Traverso." This brief uses "Taylor," because that is how the officer identified herself at trial. 2RP (10/14/09) 169.

M. was examined by Dr. Rebecca Wiester, a pediatrician specializing in cases of child sexual assault. 1RP (10/13/09) 139-43. M. told Dr. Wiester that "Leslie" had "touched [her] private parts, and he also raped" her. 1RP (10/13/09) 151-52. M. described the sexual acts in some detail, and said that it was painful sometimes. 1RP (10/13/09) 152-53. M. told Dr. Wiester that Stephenson said he would take her and run away if she told anyone. 1RP (10/13/09) 154. M.'s physical examination was normal, which is not uncommon in cases of child sexual abuse. 1RP (10/13/09) 159-60.

When Stephenson learned that M. had told others what he had done, he sent M. text messages indicating that he was trying to kill himself. Exs. 27-35. Stephenson also showed up at Leslie Stewart's house. He claimed that he was M.'s legal guardian and demanded to take M. with him. Stewart's fiancé would not allow Stephenson to take her; Stephenson became "abrupt and rude," and then left. 4RP (10/20/09) 19-21. Stephenson was eventually arrested by United States Marshalls in North Dakota; he testified that he went there to visit family, and claimed that he was not evading the authorities. 3RP (10/19/09) 181-82.

During his testimony, Stephenson unequivocally stated that he "would never do anything like" sexually abusing a child, "never, ever, ever, never." 3RP (10/19/09) 140. As a result of this testimony, the trial court ruled that Stephenson had "opened the door" to an incident from 1983 in which Stephenson was accused of sexually abusing another 11-year-old girl.<sup>3</sup> 3RP (10/19/09) 144-49. Stephenson was cross-examined regarding this incident. 3RP (10/19/09) 171-73. The victim, C.H., also testified as a rebuttal witness. 4RP (10/20/09) 34. C.H. testified that Stephenson had come into her bedroom, said "SHHH," unbuttoned her pants, and put a finger inside her vagina. 4RP (10/20/09) 37-39. It was made clear to the jury during both Stephenson's cross examination and C.H.'s testimony that Stephenson had been acquitted at trial. 3RP (10/19/09) 173; 4RP (10/20/09) 55.

Additional facts will be discussed below as necessary for argument.

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<sup>3</sup> The trial court had ruled prior to trial that the incident was inadmissible under RCW 10.93.090 and ER 403. 1RP (8/27/09) 18-24.

**C. ARGUMENT**

- 1. STEPHENSON OPENED THE DOOR TO A PRIOR INCIDENT OF CHILD SEXUAL ABUSE WHEN HE TESTIFIED THAT HE "WOULD NEVER DO ANYTHING LIKE THAT," "NEVER, EVER, EVER, NEVER."**

Stephenson first argues that the trial court abused its discretion in ruling that Stephenson had opened the door to evidence of the 1983 incident involving C.H. when Stephenson testified that he "would never do anything like" sexually abusing M. Stephenson argues that the trial court correctly excluded this evidence pretrial, and that Stephenson's trial testimony was not sufficient to trigger the "open door" doctrine. Alternatively, Stephenson argues that even if his testimony opened the door, the prior incident was still inadmissible under ER 403 and RCW 10.58.090. Brief of Appellant, at 15-27.

These arguments should be rejected. The open door doctrine is an equitable principle that prevents a party from leaving the jury with a false or misleading impression regarding a material issue. If a party raises an issue that can be refuted by evidence that would otherwise be inadmissible, that party has "opened the door" to that evidence, despite the fact that it would be inadmissible in other circumstances. In this case, Stephenson's testimony that

he "would never do anything like" sexually abusing M., "never, ever, ever, never," created the false impression that he was the sort of person who would "never, ever, ever, never" do "anything like" sexually abusing a child. As such, Stephenson's testimony opened the door to evidence of the incident involving C.H., the trial court's pretrial ruling of inadmissibility notwithstanding. The trial court exercised sound discretion in admitting this evidence in accordance with the open door doctrine, and this Court should affirm.

Evidentiary rulings are matters 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 in deciding whether evidence is admissible 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 "open door" doctrine is an equitable evidentiary principle whereby a party may "open the door" to the introduction of otherwise inadmissible evidence by the adverse party. 5 K. Tegland, Wash. Prac., Evidence § 103.14, at 66-67 (5th Ed. 2007).

Under this well-established doctrine, the trial court has the discretion to admit evidence that otherwise would have been inadmissible when a party raises a material issue and the evidence in question bears directly on that issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Put another way, "once a party has raised a material issue, the open door doctrine dictates that the opposing party is permitted to explain, clarify, or contradict" the evidence regarding that issue. Berg, 147 Wn. App. at 939.

The Washington Supreme Court explained the equitable rationale underlying the open door doctrine over 40 years ago as follows:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

The open door doctrine applies in many contexts, and the evidence that may be properly admitted in accordance with this doctrine is often highly prejudicial. See, e.g., State v. Hartzell, 156 Wn. App. 918, 933-34, 237 P.3d 928 (2010) (defendant opened the door to hearsay testimony by detective that the victim said the defendant threatened to kill her); State v. Berg, 147 Wn. App. 923, 938, 198 P.3d 529 (2009) (defendant opened the door to testimony by detective that, in his experience, it was not uncommon for family members to be unsupportive of child sexual abuse victims and supportive of the offender); State v. Ortega, 134 Wn. App. 617, 626-27, 142 P.3d 175 (2006), rev. denied, 160 Wn.2d 1016 (2007) (defendant opened the door to a prior assault conviction); State v. Warren, 134 Wn. App. 44, 138 P.3d 1081 (2008), aff'd, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied sub nom Warren v. Washington, 129 S. Ct. 2007 (2009) (defendant opened the door to evidence of molestation of a different child victim).

The facts of Warren are instructive here. In Warren, the defendant was accused of sexually abusing his stepdaughters, S.S. and N.S. In his first trial, the defendant was convicted of molesting S.S., but the jury could not agree on the rape charges involving N.S. At a later trial on the rape charges involving N.S., the

defendant testified that there were "areas" on N.S.'s body that he would not touch "because of, you know, being like she is a girl." Warren, 134 Wn. App. at 64. The trial court ruled that this testimony gave the jury the impression that "he wasn't the type of person who would touch the sexual parts of a girl." Id. As this Court found, the trial court exercised sound discretion in allowing the prosecutor to introduce the defendant's conviction for molesting S.S. to refute the defendant's testimony. Id. at 64-65. A similar case presents itself here.

In this case, the trial court ruled, after weighing the relevant factors, that the prior incident involving C.H. was not admissible in the State's case-in-chief under RCW 10.58.090. 1RP (8/27/09) 18-24. During the defense case-in-chief, however, Stephenson testified as follows at the end of his direct examination:

Q: Mr. Stephenson, in the time you have known [M.], have you ever touched her inappropriately?

A: No, ma'am.

Q: In a sexual way?

A: *No, I would never do something like that, never.*

Q: Have you ever seen [M.] naked?

A: No, ma'am.

Q: Mr. Stephenson, did you force [M.] to have intercourse with you?

A: *No, ma'am. I would never do anything like that. Never, ever, ever, never.*

3RP (10/19/09) 140 (emphasis supplied). Based on this testimony, the trial court ruled that Stephenson had opened the door to the prior incident involving C.H., because "the message [of this testimony] was, 'I'm not the type of person who would do this,'" and thus, that Stephenson had placed his character directly at issue.

3RP (10/19/09) 146. Although the trial court reiterated its belief that its pretrial ruling regarding this evidence was correct, the court found that the evidence was now admissible due to "a situation created by the defendant himself." 3RP (10/19/09) 149.

In accordance with the trial court's ruling, the prosecutor cross-examined Stephenson about the incident involving C.H. 3RP (10/19/09) 171-73. In addition, C.H. testified as a rebuttal witness, and described how Stephenson had put his finger in her vagina when she was 11 years old. 4RP (10/20/09) 36-41. During both Stephenson's cross examination and C.H.'s testimony, it was made clear to the jury that this occurred in 1983, and that Stephenson was acquitted at trial of charges involving C.H. 3RP (10/19/09) 173; 4RP (10/20/09) 55.

The trial court exercised sound discretion in ruling that the incident involving C.H. became admissible under the open door doctrine, because Stephenson's testimony created a false or misleading impression that he was not the sort of person who would do "anything like" sexually abusing a child, "never, ever, ever, never." In fact, Stephenson's testimony opened the door in a far more obvious way than the testimony at issue in Warren, which also involved another incident of child sexual abuse. Indeed, it is difficult to imagine a clearer case of opening the door than this one. This Court should reject Stephenson's arguments to the contrary, and affirm.

Nonetheless, Stephenson argues that the trial court should not have admitted the prior incident involving C.H., the open door doctrine notwithstanding, because he claims that this evidence was still more prejudicial than probative under ER 403 and not admissible under RCW 10.58.090. As support for this argument, Stephenson relies heavily on State v. Ortiz, 34 Wn. App. 694, 664 P.2d 1267, rev. denied, 100 Wn.2d 1017 (1983). Ortiz is inapposite.

In Ortiz, the defendant was charged with aggravated murder for raping and murdering an elderly woman. He presented primarily

an alibi defense, but he also presented substantial evidence that he had a very low IQ, and thus, a very limited ability to premeditate and plan. In rebuttal, the State presented evidence that the defendant had threatened a bank teller with a knife, and that he had threatened to rape a neighbor. This evidence was offered under the theory that these incidents rebutted the defendant's contention that he lacked the ability to premeditate and plan. On appeal, the court held that the State's rebuttal evidence was far more prejudicial than probative under the circumstances. Ortiz, 34 Wn. App. at 696-97.

The problem with the rebuttal evidence in Ortiz is fairly apparent: its value for purposes of showing that the defendant had the capacity to premeditate and plan was relatively minimal in light of its obvious prejudicial effect. Put another way, there was very little connection between the rebuttal evidence itself and the stated purpose for which it was offered. In this case, by contrast, the evidence at issue was highly relevant and probative because it was directly contradictory to Stephenson's emphatic statements that he "would never do anything like" sexually abusing a child, "never, ever, ever, never." In addition, Ortiz does not address the open

door doctrine,<sup>4</sup> which specifically concerns evidence that would be inadmissible under any other circumstances.

Also, the fact that a defendant has been acquitted of charges associated with prior conduct does not preclude its admission for an appropriate purpose at a later trial. See Dowling v. United States, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). The jury in this case was fully informed, both during Stephenson's cross examination and during C.H.'s testimony, that the jury had acquitted Stephenson of abusing C.H. Moreover, the jury was unable to reach a verdict on the two counts of child rape, which strongly indicates that the jury was not unduly or unfairly prejudiced by the evidence regarding C.H.

In sum, the trial court exercised its discretion properly in ruling that Stephenson had opened the door to the prior incident by categorically denying that he was the sort of person who could ever sexually abuse a child. This Court should reject Stephenson's claim, and affirm.

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<sup>4</sup> Stephenson suggests in his brief that Ortiz is an open door doctrine case. Brief of Appellant, at 23. This is incorrect. Ortiz concerns evidence offered in rebuttal, not in accordance with the open door doctrine. This distinction is critical, as the open door doctrine is specifically addressed to the admission of evidence that would otherwise be inadmissible, and not simply rebuttal evidence generally.

**2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING RELEVANT EVIDENCE REGARDING THE CIRCUMSTANCES OF M.'S DISCLOSURES OF ABUSE.**

Stephenson next argues that the trial court erred in admitting evidence regarding M.'s disclosures of abuse under the "fact of complaint" doctrine. His arguments are twofold: 1) the "fact of complaint" doctrine is antiquated and sexist, and as such, it should be abolished; and 2) assuming the doctrine still exists, it applies only when the victim's complaint is timely. Brief of Appellant, at 28-37. These arguments should be rejected for two reasons.

First, Stephenson's claims are waived under RAP 2.5 because he did not preserve these issues by objecting at trial.

Second, although the State agrees that the "fact of complaint" doctrine is grounded in antiquated, sexist notions of how rape victims should behave, this is not a basis to abolish the doctrine. Rather, it is a basis to dispense with the timeliness requirement, as other jurisdictions have done. Moreover, from a purely evidentiary standpoint, a victim's disclosure of sexual abuse is relevant evidence bearing on the victim's credibility in almost every case, particularly in child sexual abuse cases. Accordingly,

the trial court exercised sound discretion in admitting this evidence, and this Court should affirm.

a. The Claim Regarding Dr. Wiester's Testimony Is Both Improperly Framed And Waived.

As a preliminary matter, Stephenson argues that M.'s statements to Dr. Wiester should not have been admitted because they exceeded the scope of testimony permitted under the fact of complaint doctrine. Brief of Appellant, at 35-36. But Dr. Wiester's testimony was not offered under the fact of complaint doctrine. Rather, it was admitted under ER 803(a)(4), the hearsay exception for statements made for purposes of medical diagnosis or treatment. CP 84-86; 1RP (10/12/09) 39. Furthermore, Stephenson did not object to the admission of Dr. Wiester's testimony at any point in the trial. CP 7-27; 1RP (10/12/09) 39; 1RP (10/13/09) 138-63. Accordingly, in addition to being improperly framed, Stephenson's claim regarding M.'s statements to Dr. Wiester is waived. RAP 2.5(a).

b. The Claims Regarding Other "Fact Of Complaint" Witnesses Are Also Waived.

In addition, the record shows that Stephenson waived his claims regarding "fact of complaint" testimony from M.K., Leslie Stewart, Dicksie Auer, Officer Taylor, Detective Young, and M.

Admittedly, Stephenson raised this issue in his trial brief, and he initially argued against the admission of any fact of complaint testimony on grounds that M.'s disclosures were not timely.

CP 23-25; 1RP (10/12/09) 36-37. However, when the trial court suggested admitting fact of complaint testimony in a very limited way, without any detail, for the purpose of explaining why certain actions were taken based on the disclosures, Stephenson agreed that there would not be "any problem with that[.]" 1RP (10/12/09) 38.

Accordingly, Stephenson did not object to any of M.K.'s direct testimony, during which he stated that M. sent him text messages indicating that she had been abused. 1RP (10/13/09) 109-15. In fact, Stephenson elicited more detail about these text messages during his cross examination of M.K. 1RP (10/13/09) 117-21.

Although Stephenson initially objected to Leslie Stewart's testimony regarding M.'s disclosure, he did not object to this testimony after the court and the parties excused the jury to discuss precisely how the prosecutor should phrase her questions in an appropriately limited way. 3RP (10/15/09) 64-69. After this discussion outside the presence of the jury, Stephenson did not object when Stewart then testified that M. disclosed that she had been abused, and that Stewart then told Dicksie Auer about M.'s disclosure in M.'s presence. 3RP (10/15/09) 70-71.

Stephenson also did not object when Dicksie Auer testified that Stewart told her that "something inappropriate" had happened between Stephenson and M. In fact, Stephenson reiterated during Auer's cross examination that Leslie Stewart told her what M. had disclosed, and that M. was present when this occurred. 2RP (10/14/09) 35-36.

Stephenson did not object during Officer Taylor's testimony, during which she described speaking with M. and writing a report. 2RP (10/14/09) 171-74. Again, Stephenson asked Officer Taylor to describe her contact with M. in more detail on cross examination. 2RP (10/14/09) 174-78. Stephenson also did not object during Detective Young's testimony that he interviewed Leslie Stewart, M.,

Dicksie Auer, and M.K. after reading Officer Taylor's report describing M.'s disclosures. RP (10/13/09) 126-37.

Finally, Stephenson did not object to M.'s testimony regarding her disclosures to M.K.,<sup>5</sup> J., Leslie Stewart, Dicksie Auer, Officer Taylor, and Detective Young. 2RP (10/14/09) 83-86, 88, 92-95, 97.

Stephenson's agreement that this limited testimony was permissible and his failure to object to the testimony at issue constitutes a waiver of these claims on appeal. RAP 2.5(a).

But even if this Court were to consider these claims despite the fact that Stephenson has waived them, this Court should still affirm because this evidence is relevant and admissible.

c. This Evidence Is Relevant And Admissible  
Whether Or Not The Disclosures Are Timely.

As previously stated, evidentiary rulings are addressed to the sound discretion of the trial court. Atsbeha, 142 Wn.2d at 913-14. A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds.

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<sup>5</sup> Stephenson objected to the admission of M.'s text messages to M.K. on grounds of insufficient foundation, not on the basis of their content. 2RP (10/14/09) 85.

Enstone, 137 Wn.2d at 679-80. 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"<sup>6</sup> 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). 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

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<sup>6</sup> 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. Rather, "fact of complaint" evidence is admitted to prove only that a complaint was made.

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 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)).

Stephenson is correct that these doctrines have traditionally required the complaint to be virtually immediate 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 as Stephenson notes in his brief, the underlying rationale for this 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 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 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 made immediately. 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 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").

In sum, the antiquated and sexist aspects of the "fact of complaint" doctrine – the notion that a true rape victim would raise a "hue and cry" immediately – does not justify the abolition of the doctrine, as Stephenson suggests. Rather, the far better approach is to abolish the immediacy requirement, as other jurisdictions have

done. This approach acknowledges the inescapable fact that the circumstances surrounding a child sexual assault victim's disclosure is highly relevant evidence, whether that disclosure is timely or not. This case is no exception.

In this case, the evidence showed that Stephenson began abusing M. when she was 11 years old, and that the abuse continued until August 2008, when M. was 12 years old. 1RP (10/13/09) 151-52; 2RP (10/14/09) 67, 82. M. first disclosed to M.K. in September 2008, and the other disclosures followed shortly thereafter. 2RP (10/14/09) 83-86, 88, 92-97. M. admitted that she disclosed the abuse after having an argument with Stephenson about money. 2RP (10/14/09) 86-87. Stephenson emphasized this fact in his closing, and argued that it proved that M.'s allegations were false. 4RP (10/20/09) 94-95. On the other hand, M. testified that Stephenson told her they would both die if she told anyone. 2RP (10/14/09) 83. Also, M. was afraid that the police would not believe her. 2RP (10/14/09) 95.

The evidence of the circumstances surrounding M.'s disclosures was relevant evidence bearing on M.'s credibility. Indeed, the defense used evidence of these circumstances to argue that M. was not credible. Moreover, as the trial court

suggested, evidence of the fact that M. made disclosures to others was necessary to explain what occurred in the wake of those disclosures. 1RP (10/12/09) 35-36. In sum, the trial court appropriately exercised its discretion in allowing limited testimony that M. made these disclosures to particular persons within a particular time frame. This Court should affirm.

**3. THE TRIAL COURT PROPERLY ADMITTED TEXT MESSAGES EXCHANGED BETWEEN STEPHENSON AND M. AS EVIDENCE PROVING THE NATURE OF STEPHENSON'S RELATIONSHIP WITH M.**

Stephenson next claims that the trial court erred in admitting text messages exchanged between him and M. Stephenson challenges their admission on three bases: 1) the text messages that Stephenson sent to M. were "private affairs," and the police violated his right to privacy under the state constitution by viewing the messages on M.'s phone without a warrant; 2) the text messages M. sent to Stephenson were inadmissible hearsay; and 3) all of the text messages were irrelevant, cumulative, and more prejudicial than probative.

These arguments are without merit. First, the text messages Stephenson sent to M. were not "private affairs," because once Stephenson had relinquished control of them by sending them to

M., M. was free to share them with other people, including the police. Second, the text messages M. sent were not hearsay because they were not offered for the truth of the matters asserted. Third, the text messages provided insight into the nature of Stephenson and M.'s relationship in a way that could not be duplicated by any other evidence, and their relationship was a central issue in the case. Accordingly, this evidence was relevant, not cumulative, and probative. The trial court properly admitted these text messages, and this Court should affirm.

a. The Text Messages Were Not "Private Affairs."

The Washington Constitution protects citizens from governmental intrusion into their "private affairs." Const. art. 1, § 7. As Stephenson correctly notes, the Washington Constitution is generally more protective of individual privacy than the United States Constitution. City of Pasco v. Shaw, 161 Wn.2d 450, 458-59, 166 P.3d 1157 (2007). However, it is axiomatic that the state constitution protects "private affairs" from *governmental* intrusion; in other words, there must be *state action* that results in a violation of privacy in order to raise a constitutional claim. Shaw, 161 Wn.2d at 459-60. Moreover, "[i]t is the party asserting the

unconstitutionality of an action that bears the burden of establishing that state action is involved." Id. at 460.

It is equally axiomatic that the state action in question must have intruded upon "*private* affairs." Accordingly, a defendant cannot challenge the search of an area in which he has no personal privacy interest.<sup>7</sup> State v. Hayden, 28 Wn. App. 935, 939-40, 627 P.2d 973, rev. denied, 95 Wn.2d 1028 (1981). Also, there is no privacy interest when one party to a private conversation consents to recording that conversation; in such circumstances, "any privacy protection afforded defendants' conversations. . . must be found in the Privacy Act," not the constitution. State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996).

In this case, there is no state action and there are no private affairs. There is no state action because the police did not intercept the text messages; rather, Stephenson sent the messages to M.'s phone, and M. gave her phone to Detective Young so that he could read them. There are no private affairs because once Stephenson

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<sup>7</sup> The only exception to this general principle is the doctrine of "automatic standing." See State v. Williams, 142 Wn.2d 17, 22-23, 11 P.3d 714 (2000). In order to claim automatic standing under Article 1, section 7, two requirements must be met: 1) the defendant must be charged with a crime "that involves possession as an essential element," and 2) the defendant must be in actual or constructive possession "of the subject matter at the time of the search or seizure." State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). Obviously, automatic standing does not apply in this case, as neither requirement is met.

sent the text messages, he relinquished control over them, and M., as the recipient of the messages, was free to share them with anyone she chose. In addition, Stephenson had no personal privacy interest in M.'s phone; therefore, he has no standing to challenge a search of M.'s phone, even if there were a constitutional basis to raise such a challenge.

In fact, even if this Court were to analyze Stephenson's claim under the Privacy Act rather than the state constitution – an issue Stephenson has not raised – this claim would still fail, despite the fact that the Privacy Act is more protective of private communications than the state constitution. In State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), the court adopted this Court's conclusion that a person who sends an email consents to the "recording" of that email by the computer of the addressee:

A person sends an e-mail message with the expectation that it will be read and perhaps printed by another person. To be available for reading or printing, the message first must be recorded on another's computer memory. Like a person who leaves a message on a telephone answering machine, a person who sends an e-mail message anticipates that it will be recorded. That person thus implicitly consents to having the message recorded on the addressee's computer.

Townsend, 147 Wn.2d at 676 (quoting State v. Townsend, 105 Wn.

App. 622, 629, 20 P.3d 1027 (2001)). For purposes of this analysis, a text message is the same as an email, as a text message must be recorded on the recipient's phone in order to be read. If there is no Privacy Act violation in these circumstances, there is clearly no constitutional violation, either. See Clark, 129 Wn.2d at 221.

Although the technology involved was different, this Court considered a claim similar to Stephenson's in State v. Wojtyna, 70 Wn. App. 689, 855 P.2d 315 (1993), rev. denied, 123 Wn.2d 1007 (1994). In Wojtyna, the police seized a pager incident to the arrest of a cocaine dealer. The police monitored the pager's incoming calls, and, as the result of an incoming call from the defendant, the police arranged a controlled buy with the defendant and arrested him. Wojtyna, 70 Wn. App. at 691.

The defendant claimed that the police violated his right to privacy by monitoring the pager and thereby obtaining his phone number. Id. In rejecting the defendant's claim under a Fourth Amendment analysis, this Court held that "when a person sends a message to a pager, he runs the risk that either the owner or someone in possession of the pager will disclose the contents of his message," and thus, no privacy interest exists. Id. at 694

(quoting United States v. Mariwether, 917 F.2d 955, 959 (6th Cir. 1990)). Additionally, in the context of analyzing a Privacy Act claim, the Washington Supreme Court cited Wojtyna with approval for the following proposition:

A communication is not private where anyone may turn out to be the recipient of the information or the recipient may disclose the information.

Clark, 129 Wn.2d at 227.

The same principle applies in this case. When Stephenson sent text messages to M.'s phone, he ran the risk that M., or someone else in possession of M.'s phone, would disclose the contents of the text messages. In fact, Stephenson had no guarantee when he sent the text messages that the phone would actually be in M.'s possession at all. Moreover, Stephenson would have no basis to claim that M. could not forward his text messages to others; once the messages were received by M., she was free to share them with anyone. In sum, Stephenson had no constitutional right to privacy in text messages he sent to M.'s phone.

Nonetheless, Stephenson argues that he had such a right, relying mainly on State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) (holding that a person has an expectation of privacy in garbage as it sits on the curb awaiting pickup by sanitation

workers), and State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007) (holding that a person has an expectation of privacy in bank records). Neither case is applicable here. In Boland, the court held that a person has a privacy expectation in garbage because the person places it on the curb "in expectation that it would be picked up by a licensed garbage collector," not the police. Boland, 115 Wn.2d at 578. A person has no such expectation regarding a text message, which the recipient may forward to others with impunity, including the police. In Miles, the court held that the defendant's bank records were improperly obtained via an administrative subpoena to the bank. Miles, 160 Wn.2d at 249. Bank records, which are heavily regulated and protected by numerous laws, are in no way analogous to text messages, which may be forwarded by the recipient to anyone. Indeed, both Boland and Miles would have been decided very differently if the defendants in those cases had willingly given their garbage or their bank records to another person, who in turn gave the garbage or bank records to the police.

The trial court correctly ruled that Stephenson's right to privacy was not violated when M. gave her cell phone to Detective

Young so that he could read the text messages contained in it, and this Court should reject Stephenson's arguments to the contrary.

b. M.'s Text Messages Were Not Hearsay.

By definition, hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." ER 801(c). Accordingly, statements admitted at trial for purposes other than proving the truth of the matters asserted are not hearsay. State v. Iverson, 126 Wn. App. 329, 336-37, 108 P.3d 799 (2005).

In this case, M.'s text messages to Stephenson were not admitted to prove the truth of the matters asserted. Indeed, in many of them, there is no "matter asserted."<sup>8</sup> Rather, the trial court admitted the messages as evidence of M. and Stephenson's relationship. 2RP (10/14/09) 104, 106. Specifically, the court admitted them "for the purpose of establishing what the nature of their relationship was . . . and what dates they were having these communications." 2RP (10/14/09) 106. Stephenson's hearsay claim is without merit.

Nonetheless, Stephenson's brief identifies three of M.'s text messages in particular in support of the argument that M.'s

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<sup>8</sup> See, e.g., Exs. 13, 19, 23, 30, 31, 37, and 57.

messages are inadmissible hearsay. Brief of Appellant, at 42-43. The content of these three messages defeats the notion that M.'s messages were hearsay, as the truth of the matters asserted has nothing to do with the relevance of the messages.

Three of the messages that M. sent to Stephenson on September 27, 2008 – the day after she disclosed abuse to M.K. via text message – were as follows:

"Because im a teenage who hates life and u didnt make it any better." Ex. 16.

"Maybe the opposite place cindi went. Cindi didnt rape ppl either." Ex. 20.

"Because it was true. I needed to tell someone anyway. Im busy. Stop texting me." Ex. 24.

Whether M. hated life or not, whether Stephenson made M.'s life better or worse, whether Cindi raped anyone, and whether M. actually needed to tell someone about "it" were not the reasons these messages were admitted. Rather, these messages, along with all the other messages, were properly admitted to show the nature of M. and Stephenson's relationship, and the nature of their communications immediately following M.'s disclosure of abuse. M.'s text messages were not hearsay, and Stephenson's claim to the contrary should be rejected.

c. The Text Messages Were Relevant,  
Non-cumulative, And Probative.

As previously stated, evidentiary rulings are addressed to the sound discretion of the trial court. Atsbeha, 142 Wn.2d at 913-14. A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. Enstone, 137 Wn.2d at 679-80. 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.

Evidence is relevant if it tends to make any fact of consequence either more or less probable. ER 401. Relevant evidence is generally admissible. ER 402. Relevant evidence may be excluded, however, if it is needlessly cumulative of other evidence or "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. The trial court exercised sound discretion in admitting the text messages in accordance with these basic evidentiary principles.

The text messages in this case were direct communications between Stephenson and M. on September 27, 28, and 29, and on October 1, 4, and 5, 2008 -- the time frame during which M. disclosed Stephenson's abuse. It is difficult to imagine how direct

communications between a child and her abuser at such a critical point in their relationship would not be relevant under ER 401. The text messages are also not cumulative of other evidence. The messages showed, in a way that witness testimony could not, how manipulative Stephenson was in his relationship with M.<sup>9</sup>

Furthermore, the text messages provided a window into the nature of this relationship, and provided the jury with insight it otherwise would not have had. The dynamics of the relationship between Stephenson and M. was a material issue in the case, because it helped the jurors understand how and why Stephenson was able to continue to abuse M. over an extended period of time. Also, the fact that Stephenson sent so many text messages in such an obsessive manner in just a few days' time was admissible to rebut the defense's claims that M. fabricated her allegations of abuse and that Stephenson's relationship with M. was a healthy one. The probative value of this evidence outweighed any danger of unfair prejudice. In addition, the fact that the jury was unable to

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<sup>9</sup> For example, Stephenson told M. he was going to kill himself after M. indicated that she had told someone about what he had done to her, but he then told M. that he was going "to get [his] stomach pumped." Exs. 27, 29. In addition, Stephenson would send numerous messages to M. demanding that she call him and threatening to turn off her phone, and then he would offer to buy her a Sony PlayStation. Exs. 67-76, 89-96, 100-05.

reach a verdict on two out of the three counts weighs against Stephenson's argument that the jury was unfairly prejudiced.

In sum, Stephenson cannot show that the trial court abused its discretion in admitting text messages exchanged between Stephenson and M. The Court should reject Stephenson's claim, and affirm.

**4. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT AND REBUTTAL WERE NEITHER IMPROPER NOR PREJUDICIAL.**

Stephenson also claims that prosecutorial misconduct during closing argument deprived him of his right to a fair trial. More specifically, he claims that the prosecutor improperly told the jurors that they should find the truth, suggested that they had to find that the State's witnesses were lying in order to acquit, vouched for M.'s credibility, and appealed the jurors' passions and prejudices. Brief of Appellant, at 46-54. These claims should be rejected. None of the arguments Stephenson complains of were improper. Moreover, all of these arguments were made without objection, and none were so flagrant and ill-intentioned that an instruction from the trial court would have failed to neutralize any possible prejudice.

Stephenson's claims fail.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Moreover, a defendant who did not make a timely objection has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments

go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). Moreover, the prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561. Stephenson's claims of misconduct fail in light of these standards.

Stephenson argues that several of the prosecutor's remarks in closing argument were improper. For instance, he argues that the prosecutor tried to inflame the jurors' emotions by stating that when M. looks back on her childhood, she will remember being sexually abused rather than "trips to Disneyland or camping with her family," and that the abuse will leave "a scar that's not going to go away." 4RP (10/20/09) 60. Stephenson also takes issue with the prosecutor's arguments that it took courage for M. to take the stand and testify in front of a room full of strangers, and that if the jurors believed M.'s testimony, they were convinced of Stephenson's guilt beyond a reasonable doubt. 4RP (10/20/09) 71. Stephenson also suggests that the prosecutor argued improperly when she said that M. had no motive to lie, and when she urged the jurors to "find in the words of [M.] the truth, and to "[f]ind in her

voice proof beyond a reasonable doubt." 4RP (10/12/09) 79-80, 83-84. Stephenson argues that this error was compounded because while the prosecutor argued that the State's witnesses had no motive to lodge false allegations against Stephenson, she also argued that Stephenson had a strong motive to lie, and referred to Stephenson as a "manipulator." 4RP (10/20/09) 80, 78-79, 82.

Stephenson also takes issue with two of the prosecutor's remarks in rebuttal argument. First, Stephenson argues that the prosecutor committed misconduct when she said that the jury's "job is to search for the truth[.]" 4RP (10/20/09) 115. Lastly, he contends that the prosecutor improperly appealed to the jury's emotions when she stated that "Leslie Stephenson really took [M.'s] childhood away from her," and that she "will never get that back." 4RP (10/20/09) 116.

As previously noted, Stephenson did not object to any of these remarks. In fact, Stephenson did not object at all during the prosecutor's closing or rebuttal. 4RP (10/20/09) 59-84, 110-16. Therefore, Stephenson bears the burden of showing that the remarks were so flagrant and ill-intentioned that no instruction from the trial court could have cured the resulting prejudice. Brown, 132 Wn.2d at 561. The failure to object "strongly suggests to a

court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

None of the remarks Stephenson highlights were improper. For instance, it was not improper to state that Stephenson took M.'s childhood, that M. will bear an invisible scar, and that when M. looks back on her childhood she will remember having sex with Stephenson rather than trips to Disneyland or going to birthday parties. These are reasonable inferences from the evidence; any reasonable person would recognize that prolonged sexual abuse by a trusted family friend would impact the child victim negatively, now and in the future. Moreover, it is not improper for a prosecutor to describe a horrible crime as "horrible," and to discuss its impact on the victim. State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). In addition, Stephenson's claim that the prosecutor was trying to inflame the jury fails in light of the argument as a whole. The comments relating to the effect of the crime on M. were brief, and the bulk of the arguments were devoted to an examination of the evidence. 4RP (10/20/09) 59-84, 110-16.

For similar reasons, it was not improper for the prosecutor to state that M. had to muster her courage to describe the abuse she

experienced to a room full of complete strangers. Far from an improper appeal to the jury's passion and prejudice, this is merely a statement of the obvious, i.e., that it takes courage for a 13-year-old sexual abuse victim to take the stand and testify. This Court should reject the notion that this argument was misconduct.

In addition, there was nothing improper about arguing that if the jurors concluded that M. was telling the truth, then they were convinced of Stephenson's guilt beyond a reasonable doubt. In this case, as in most child sexual abuse cases, this argument is entirely *true*, for if the jurors believed M.'s testimony, then Stephenson was guilty beyond a reasonable doubt. This argument is not the same, as Stephenson suggests, as the improper argument that in order to acquit the defendant, the jurors must find that the State's witnesses are lying. See State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991). The problem with that argument is that it is *untrue*, for to acquit a defendant the jurors need only "entertain a reasonable doubt" as to an element of the crime. Barrow, 60 Wn. App. at 875-76. Stephenson's argument in this regard is based on a logical fallacy, and as such, it fails.

There is also nothing improper about the prosecutor's arguments that M. and the other State's witnesses had no motive to

lie, and that the jury should find the truth in M.'s testimony.

Contrary to Stephenson's arguments, a prosecutor does not improperly vouch for a witness's credibility unless he or she expresses a personal opinion that the witness is telling the truth.<sup>10</sup> Warren, 165 Wn.2d at 30. Accordingly, arguments that a witness's testimony has a "ring of truth" are not improper if tied to the evidence and instructions, and if not stated as an opinion of personal belief in the testimony. Id. In this case, M.'s credibility was a pivotal issue. Accordingly, it was proper for the prosecutor to argue that there was no evidence of a motive to lie, and to urge the jurors to find M.'s testimony credible.<sup>11</sup>

Similarly, there was nothing wrong with the prosecutor's statements that Stephenson had a strong motive to lie, and that his testimony should not be believed. Indeed, it is not improper for a

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<sup>10</sup> Stephenson cites State v. Jones, 114 Wn. App. 284, 292-94, 183 P.3d 307 (2008), for the proposition that the prosecutor's remarks in this case constituted improper vouching. But Jones specifically addresses police witnesses, and holds that "it is generally improper for prosecutors to bolster a *police witness's* good character even if the record supports such an argument." Id. at 293 (emphasis supplied). Thus, Jones is not applicable in this case.

<sup>11</sup> Stephenson cites State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), for the proposition that the prosecutor's remarks were improper. But the problem in Fleming was that the prosecutor stated that "*for you to find the defendants . . . not guilty . . . you would have to find either that [D.S.] lied about what occurred in that bedroom or that she was confused; essentially, that she fantasized what occurred back in that bedroom.*" Id. (emphasis in original). As previously discussed, such "in order to acquit the defendant" arguments are clearly improper, but in no way resemble what the prosecutor said in this case.

prosecutor to describe a defendant's testimony as "preposterous," so long as such statements are grounded in the evidence and are not stated as a personal opinion. Anderson, 153 Wn. App. at 430-31. The fact that Stephenson had a motive to lie in this case is obvious from the seriousness of the charges against him. This Court should reject his suggestion that it is misconduct to state the obvious in this regard.

Further, it was not improper for the prosecutor to describe Stephenson as a "manipulator" because this was a reasonable inference from the evidence, which showed that Stephenson manipulated both Dicksie Auer and M. in order to gain unsupervised access to M. Stephenson ingratiated himself with both Auer and M. by buying them gifts, taking them out, and helping them with errands. Auer was particularly vulnerable to Stephenson's manipulations due to her disabilities and her poverty. 2RP (10/14/09) 7-10. Also, Stephenson's text messages reveal that he constantly demanded M.'s attention, and threatened to turn off her phone if she did not contact him immediately. *See, e.g.*, Exs. 66-76. In short, the evidence showed that Stephenson was

manipulative, and it was proper for the prosecutor to argue this to the jury.<sup>12</sup>

It was also not improper for the prosecutor to state in rebuttal that the jury's job is to search for the truth. Indeed, it *is* the jury's job to "search for the truth." See United States v. Goodapple, 958 F.2d 1402, 1410 (7th Cir. 1992) (noting "the jury's calm and detached search for the truth"). Nonetheless, Stephenson cites State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), in which Division 2 of this Court found that it was improper to argue that the jury should "declare the truth" with its verdict because "[a] jury's job is not to 'solve' a case," but to decide whether the elements of the charge have been proved beyond a reasonable doubt.<sup>13</sup> Anderson, 153 Wn. App. at 429.

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<sup>12</sup> Stephenson cites State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), for the proposition that it is improper to call the defendant a "liar and manipulator." But in Reed, these remarks were arguably the most proper things the prosecutor said. See Reed, 102 Wn.2d at 143 ("*Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?*") (emphasis in original). Reed is clearly not on point.

<sup>13</sup> Nonetheless, the Anderson court found that this remark was not prejudicial (even under a less stringent standard, since the defendant in Anderson objected) because the remark was relatively isolated and the jury was properly instructed. Id.

Stating that the jury's verdict should "declare the truth" is not at all the same as stating that the jury should "search for the truth." The former statement is arguably a misstatement of the law, as the jury's verdict is a finding on the elements of the crime beyond a reasonable doubt, not a declaration of truth. The latter statement, on the other hand, is simply a way of urging the jury to evaluate the evidence and to determine which witnesses were credible. Anderson is not on point.

Lastly, Stephenson has failed to show how any of the challenged remarks in closing or rebuttal were so flagrant and ill-intentioned that they would cause irreparable prejudice that could not have been cured with an instruction if a timely objection had been made. Indeed, the jurors' failure to reach a verdict on two of the three charges demonstrates that they were not prejudiced by the prosecutor's arguments. This Court should affirm.

**5. STEPHENSON'S CLAIM OF CUMULATIVE ERROR SHOULD BE REJECTED.**

Lastly, Stephenson claims that even if the errors he alleges to not warrant reversal individually, that their cumulative effect deprived him of a fair trial. Brief of Appellant, at 54-55. This claim

should be rejected, because the errors Stephenson alleges do not warrant reversal either individually or cumulatively.

The cumulative error doctrine is limited to cases where there have been several trial errors that, standing alone, may not justify reversal; when combined, however, they may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As argued above, Stephenson's claims on appeal are without merit. Accordingly, there is no trial error to cumulate in this case. See State v. Hodges, 118 Wn. App. 668, 674, 77 P.3d 375 (2003) (where defendant has identified no errors, cumulative error doctrine does not apply). Stephenson's cumulative error claim fails.

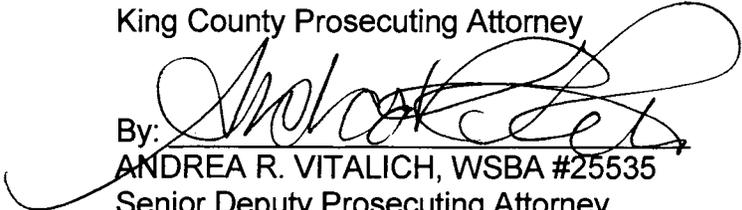
**D. CONCLUSION**

For all of the reasons stated above, this Court should affirm Stephenson's conviction for child molestation in the first degree.

DATED this 20<sup>th</sup> day of October, 2010.

Respectfully submitted,

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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 Lila Silverstein, 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. LESLIE STEPHENSON, Cause No. 64598-6-I, 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.

U Brane  
Name  
Done in Seattle, Washington

10/20/10  
Date

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