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NO. 64731-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN A. BINNS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Whether Defendant's failure to raise any objection in the trial court regarding the State's *voir dire* questioning bars consideration on appeal of his claim that the prosecutor asked improper questions?
2. Whether Defendant has shown any prejudice based on the jury's composition when he accepted the jury as constituted without exhausting his peremptory challenges?
3. Whether Defendant has shown that the prosecutor's *voir dire* questions were both improper and prejudicial in the context of the entire record and circumstances at trial?
4. Whether Defendant has shown that the trial court abused its discretion and substantially prejudiced Defendant by not *sua sponte* limiting the scope of *voir dire*?

II. STATEMENT OF THE CASE

A jury found Justin Binns, Defendant, guilty on three counts and acquitted him on one count of child molestation in the first degree of the eleven year old daughter of his girlfriend. CP 42-45.

A. PROCEEDURAL.

An information charging Justin Binns with two counts of first degree child molestation was filed on September 15, 2008.

Defendant was arraigned on October 7, 2008, and entered pleas of not guilty. On February 13, 2009, Defendant stipulated to the admissibility of his statements. Defendant was arraigned on amended information charging four counts of first degree child molestation on April 10, 2009, entering pleas of not guilty. A three day jury trial was held on October 5 – 7, 2009. CP 68-69; RP 10/7/09; RP 2/13/09; CP 66-67; RP 4/10/09.

1. Voir Dire.

At the start of jury selection the court read the four count information to the prospective jurors. The court then instructed the prospective jurors:

Keep in mind that these charges are only accusations. The filing of a charge is not evidence that the charge is true. Your eventual decision as jurors must be made solely upon the evidence presented during these proceedings. To these charges, the Defendant has entered pleas of not guilty. These pleas mean that you, the jury, must decide whether the State has proved every element of the crimes charged. The State has the burden of proving each element of crimes charged beyond a reasonable doubt. The Defendant has no burden of proving that a reasonable doubt exists. The Defendant has no duty to call witnesses, produce evidence, or testify.

The defendant is presumed innocent. The presumption of innocence continues throughout the entire trial. The presumption means that you must find the Defendant not guilty unless you conclude, at the end of your deliberations, that the evidence has

established the Defendant's guilt beyond a reasonable doubt. A reasonable doubt is one for which a reason exists. It may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.

Ladies and gentlemen, we are now going to be proceeding to the *voir dire* or jury selection process.

RP1¹ 19-20.

The prospective jurors were then sworn. The court then read a brief instruction regarding the jury selection process that stated in part:

In order that this case be tried before an impartial jury, the lawyers and I will ask you questions, not to embarrass you or to pry into your private affairs, but to determine if you are unbiased and without preconceived ideas which might affect this case.

* * *

It is presumed that when the jury has been selected and accepted by both sides, each of you will keep an open mind until the case is finally submitted, will accept the instructions of the Court and base any decision upon the law and the facts, uninfluenced by any other considerations. The purpose of the questions on *voir dire* is to determine if you have that frame of mind.

RP1 21-22.

¹ RP1 refers to the two volume Report of Proceedings, October 5 & 6, 2009. RP2 refers to the Report of Proceedings October 7, 2009.

The court then asked some preliminary questions of the prospective jurors. One question the court asked was: "Have any of you, yourselves, or do you have any close friends or family who have been involved with a personal experience similar to that in this case?" Seven jurors responded in the affirmative. All seven were individually questioned about their experience by counsel. RP1 23, 68-90.

Jury selection was conducted by both the "struck" method, where each counsel is allotted a block of time to question the venire members as a group, and individual questioning of jurors who stated that either they personally or a close friend or family member had been involved in a situation similar to this case. RP1 14-17, 21-23, 58-92.

At the start of the State's *voir dire* questioning of the venire as a group the prosecutor stated:

The goal here is to have a fair trial. What we want to do, both [defense counsel] and I, in the next little while, is find out if there's something in this case or in your own life experience that would prevent you from being fair or impartial to either side in this case. I'd like to talk to you now to find out what that thing or experience might be.

RP1 29-30.

The prosecutor asked the *voir dire* panel questions regarding the following topics:

- a) Whether any juror had pressing issues in their life that would prevent them from devoting their full attention to the case. RP1 30-33.
- b) Whether any juror had served prior jury duty. RP1 33-36.
- c) Whether any juror had testified in court before. RP1 37-39.
- d) Whether any juror could think of a reason for a 30-year-old man to touch an 11-year-old girl in a sexual way. RP1 39-40.
- e) Whether any juror had ever heard of a 30-year-old man touching an 11-year-old girl in a sexual way and whether any juror thought it was a problem in society. RP1 40.
- f) Whether any juror thought it was okay for a 30-year-old man to touch an 11-year-old girl in a sexual way. RP1 40-41.
- g) Whether there are boundaries with young daughters that fathers should not cross. RP1 41-43.
- h) Whether any juror thought it would be easy for a 13-year-old girl to testify in a room full of unknown adults. RP1 43-44.
- i) Whether any juror hated public speaking. RP1 44-45.
- j) Whether any juror thought, in general, that 13 year olds were less credible than adults or adults were less credible than 13 year olds. RP1 45-47.
- k) Whether any juror thought, in general, it would be difficult for a 13-year-old girl to talk about something that was done to her sexually by an adult in her life. RP1 47-48.
- l) Whether any juror watched CSI. RP1 48-49.
- m) How much of CSI was reality and how much fiction. RP1 50.
- n) Hypothetically, whether CSI could prove that a man touched a child's private parts with his fingers after several weeks had passed and the child had bathed several times. RP1 50-51.
- o) Whether any juror knew someone who had been accused of child molestation or a related offense. RP1 55.
- p) Whether any juror had ever been accused of a crime. RP1 55-57.
- q) Whether any jurors, because of their own beliefs, did not think it was appropriate for them to reach a verdict in a criminal case. RP1 57.

Defense counsel began his *voir dire* stating,

I listened very carefully to the questions [the prosecutor] asked and to answers. The good part about it is, I don't have to redo it all. [The prosecutor] is right, we're here trying to determine whether we can get an unbiased jury.

* * *

Can every one here promise me that they can listen to all of the evidence, both what the State introduces and what I introduce for Mr. Binns, prior to making up your mind whether Mr. Binns is not guilty or guilty of the crime that he is charged with? Can everybody here make that promise?

[The prosecutor] was asking people very good questions trying to get at your inner workings, about if you absolutely won't do that, we need to know about it right now.

* * *

Well, as you've heard before, this is a case about an accusation of child molestation. I can tell from your answers that everyone here takes that kind of serious. Is there anyone here who feels that their passion in this case would override their ability to remain impartial throughout the trial?

RP1 51-52.

Defense counsel then questioned prospective jurors about whether their passion in the case would override their ability to remain impartial throughout the trial. Defense counsel asked the prospective jurors if they would want an impartial jury if they were sitting where the defendant was sitting. RP1 53-54.

After *voir dire*, ten jurors were excused for cause or hardship. RP1 63, 71, 75, 81, 86, 88, 90, 96, 97. The State used

six of its seven available peremptory challenges. RP1 16, 22, 97-100. Defendant used only two of his seven peremptory challenges. RP1 16, 22, 97-100.

After the jury was selected and sworn the court instructed the jury regarding the procedure that would be followed during the trial. Those instructions included the following:

It is your duty as a juror to decide the facts in the case based upon the evidence presented to you during the trial.

* * *

The only evidence you are to consider consists of testimony of witnesses and exhibits admitted into evidence.

* * *

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

* * *

You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation. As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

RP1 106-111.

2. Jury Instructions.

After the parties presented evidence, the court read instructions to the jury. RP2 47. Instruction no. 1, WPIC 1.04, included the following:

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

* * *

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

* * *

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 47-49.

3. Verdicts And Sentence.

The jury found Defendant guilty of child molestation in the first degree on counts B, C and D, and acquitted him on count A. CP 42-45.

Defendant was sentenced within the standard range of 98 to 130 months, on each count, to a minimum term of 114 months with a maximum term of life, all counts to run concurrent. CP 21-36.

B. FACTS.

1. Background And Living Arrangements.

Prior to their divorce in 1999, Kim and Danny Dodd had two daughters, K.D. (dob: 06/01/1992) and E.D. (dob: 09/03/1996). After the divorce K.D. and E.D. did not see their father very often. When E.D. heard that she had to go live with her father in Yakima, she ran away without her shoes. RP1 127, 139, 192-93, 184; RP2 24.

Kim met Defendant in June of 2006, and moved into his Marysville house with her two daughters, K.D and E.D., in June 2007. Defendant was 30 years old at that time. Defendant's mother also lived in the house at that time. Defendant's two daughters stayed there every other weekend. RP1 129-31, 182, 185; RP2 25-27.

Kim and Defendant shared a bedroom upstairs; Defendant's daughters shared a bedroom upstairs on weekends; Defendant's mother had a separate bedroom downstairs; and K.D. and E.D. shared a bedroom downstairs with a bunk bed. K.D. slept on the bottom bunk and E.D. slept on the top bunk. Every Wednesday night K.D. slept at her friend's house in Bothell. RP1 131, 133, 185, 190-91; RP2 26-27.

2. Incidents.

E.D. had a good relationship with Defendant when she first moved in to Defendant's house; they got along well and she called him Dad. The relationship changed after an incident in late 2007, referred to as the nap incident. RP1 187-89; RP2 26, 28, 32, 36.

One evening in December 2007, both E.D. and Defendant were asleep in Kim and Defendant's bed. E.D. woke up to find Defendant had his hand between her legs over her clothes, touching her private area. E.D. was laying on her side and Defendant was on his side behind her, snoring. E.D. was afraid to move and laid there for 10–15 minutes. E.D. became upset and angry and rolled over and fell out of the bed. E.D. left the room and told her mother about what happened. RP1 133-36, 167-68; RP2 28.

Kim spoke with Defendant about the incident and they concluded it had been accidental. K.D. was not part of the decision. There was no family meeting regarding whether Defendant touched E.D. There was a later discussion between Kim, K.D. and E.D. regarding the incident where Kim told the girls if anything like that ever happened, to be sure and tell her. The preventive measure taken at that time was Defendant was not allowed to go into K.D.'s and E.D.'s room. RP1 189, 198-201; RP2 28-29, 36.

The bed time routine after the nap incident was that typically, around 9:00 p.m. Kim and Defendant would together tuck E.D. and K.D. into bed downstairs. Kim and Defendant would then go upstairs. Almost every night, Defendant would go back downstairs alone and check on the girls again. During the later check Defendant would be gone from a couple of minutes to up to fifteen minutes. The later check was to make sure the girls were in bed with the lights off. According to Kim, the night time checking had nothing to do with whether E.D. had wet the bed. RP2 29-32.

About three months after the nap incident, in March 2008, Defendant started touching E.D. at night, twice a week until she told her coach on May 18, 2008. The first incident in March occurred

around 11:00 p.m. E.D. heard the door open and saw Defendant reach across, pull the blanket out from under her and start touching her in the same place where he touched her in December, only this time he was touching her under her clothes. Defendant put his hand under E.D.'s pajama bottoms, touching her private area for 10–15 minutes. E.D. pretended to be asleep, so Defendant would not hurt her. E.D. told Defendant that she had to use the bathroom and when she returned to the bedroom Defendant was gone. K.D. was in the room asleep. K.D. described herself as a heavy sleeper. K.D. saw Defendant in her room late at night a few times. E.D. was afraid to tell anyone because her mom's happiness would be taken away. RP1 141, 143-47, 189-190; RP2 5.

The same thing happened two nights later when K.D. spent the night at her friend's house in Bothell. That time Defendant stopped when E.D. rolled over and pulled the blanket over her. It happened again the following Monday night when K. D. was asleep in bed. That time Defendant stopped, pulled the cover back over E.D., pretended to talk to the cat and left the room. RP1 148-152.

One time when Defendant was standing next to her bed, E.D. heard K.D. asked him what he was doing and Defendant said that he came in to see if E.D. had an accident. K.D. recalled an

incident when she saw Defendant in her bedroom late at night reaching up in E.D.'s bed and he told her that he was checking to see if E.D. had an accident. E.D. said that if someone came in to check if she had an accident they did not need to touch her because they could tell by the smell when they walked into the room. RP1 153-54, 189-90.

3. Investigation.

E.D. eventually told her running coach, who she trusted, what Defendant was doing. The coach contacted Child Protective Services (CPS) and an investigation began. As is typical for child sexual abuse cases, there was no sign of trauma to E.D.'s genitals. RP1 154-56, 221, 227-228, 230-31; RP2 7-9

Detective Shackleton called Defendant on May 21, 2008, and he agreed to come to the Marysville Police Station for an interview the next day. Defendant knew why he was there. Initially, Defendant denied that E.D. had accused him of improperly touching her on an earlier occasion. After being read Kim's statement Defendant stated he did remember the prior incident. When asked at the beginning of the interview if he went into E.D.'s bedroom at night, Defendant said he did not go in to E.D.'s bedroom at night, but then said that they had a prowler outside their

house, so he was going to check on them more recently at night. Later in the interview Defendant said he would check on E.D. to see if she had wet the bed when he woke up for work, but he would check on her at night, not to touch or anything. Defendant said he did put his hand on the sheet to see if it was wet, but normally he would be able to tell just by opening the door and smelling. Defendant said he did not touch E.D.'s body or pajamas when checking to see if she wet the bed. Towards the end of the interview Defendant said he would go into E.D.'s room between midnight and one o'clock just to wake her up so she could go to the bathroom. Defendant said it was E.D.'s idea for him wake her up so she could go to the bathroom at night. RP1 230-238.

III. ARGUMENT

A. DEFENDANT UNTIMELY ASSERTS HIS CLAIM THAT THE PROSECUTOR ASKED IMPROPER QUESTIONS OF JURORS WHEN HE FAILED TO OBJECT TO SUCH QUESTIONS IN THE TRIAL COURT AND ACCEPTED THE JURY AS EMPANELLED WITHOUT EXHAUSTING HIS PEREMPTORY CHALLENGES.

Defendant argues for the first time on appeal that the prosecutor's *voir dire* questions to potential jurors were improper thus denying his right to due process and a fair trial. Defendant did not object to any of the prosecutor's *voir dire* questions at trial and

did not exhaust his peremptory challenges before accepting the jury as impaneled.

Defendant's failure to raise any objection in the trial court about the State's *voir dire* questioning of potential jurors bars consideration on appeal. State v. Elmore, 139 Wn.2d 250, 277, 985 P.2d 289 (1998); *citing* State v. Tharp, 42 Wn.2d 494, 501, 256 P.2d 482 (1953)(selection of the jury is procedural and error regarding same not timely raised to trial court bars its consideration on appeal); State v. Gentry, 125 Wn.2d 570, 615-16, 888 P.2d 1105 (1995)(*voir dire* involves compliance with procedural court rule rather than constitutional issue and challenge regarding same may not be raised for first time in capital appeal).

Additionally, Defendant accepted the jury as constituted without exhausting his peremptory challenges. He therefore cannot show any prejudice based on the jury's composition. Elmore, 139 Wn.2d at 277; Tharp, 42 Wn.2d at 500 (defendant must show the use of all his peremptory challenges or he can show no prejudice arising from the selection and retention of a particular juror and is barred from any claim of error in this regard); State v. Kender, 21 Wn. App. 622, 626, 587 P.2d 551 (1978)(The law presumes that each juror sworn in a case is impartial and above legal exception,

otherwise, he would have been challenged for cause.); State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957)(no prejudicial error regarding prosecutor's questioning of panel where defendant accepted the jury while having available four peremptory challenges; nor did he challenge the panel); Gentry, 125 Wn.2d at 616 (where defendant participated in selecting and ultimately accepted jury panel, his constitutional right to an impartial jury selected by him was not violated). A claimed irregularity does not result in an unfair trial where the defendant failed to timely assert such irregularity. State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981).

It is obvious Defendant did not feel greatly prejudiced by the prosecutor's *voir dire* questions until after the adverse verdict. The defense made a tactical decision to proceed, "gambled on the verdict", lost, and thereafter asserted that the prosecutor's questions were improper as a reason for a new trial. This is impermissible. Elmore, 139 Wn.2d at 278; Williams, 96 Wn.2d at 226. Defendant's untimely assertions that the State asked improper questions of jurors when he failed to object to such questions in the trial court and accepted the jury as empanelled should be denied.

B. THE PROSECUTOR'S QUESTIONS DURING VOIR DIRE WERE NEITHER IMPROPER NOR PREJUDICIAL IN THE CONTEXT OF THE ENTIRE RECORD AND CIRCUMSTANCES AT TRIAL.

Defendant argues that questions asked by the prosecutor during *voir dire* were misconduct requiring reversal. At trial, Defendant did not object to any of the prosecutor's *voir dire* questions.

In a prosecutorial misconduct claim, the appellant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). If an appellant establishes that a prosecutor's conduct was improper, it is prejudicial only if there is a substantial likelihood the misconduct affected the jury's verdict. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). The absence of an objection "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). Where the defense fails to object to alleged misconduct during trial, the error will not be reviewed "unless the comment 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." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

1. The Voir Dire Questions Were Not Improper.

Defendant argues that the following questions asked by the prosecutor, without objection, during *voir dire* were improper and constituted misconduct:

- 1) The prosecutor stated that the court had just read the charges that Defendant was charged with "sexually touching an 11-year-old girl," and then asked the potential jurors whether they could "think why a 30-year-old man might want to touch an 11-year-old girl in a sexual way?" RP1 39.
- 2) The prosecutor asked if any of the potential jurors "think it's okay for a man of that age to be touching a child of that age in a sexual way? Because there are some folks out there that think that's okay. Anyone in this room think along those lines?" RP1 40-41.
- 3) The prosecutor stated that the girl in the case was now 13 years old and asked, "Do you think it's easy for a 13-year-old girl to communicate in a room full of adults that she doesn't know?" RP1 43.
- 4) The prosecutor asked, "Does anyone think that a 13-year-old is any less credible or any less believable than an adult in general? We're just talking in general here." RP1 45.
- 5) The prosecutor stated, "Let's talk about a 13-year-old talking about something that was sexually done to her by a grownup in her life." The prosecutor then asked "do you think that would be difficult for a child of that age to talk about, generally speaking?" RP1 47-48.

The prosecutor's questions were not improper; they were calculated to explore the potential jurors' attitudes towards a child molestation case. The primary purpose of *voir dire* is to give litigants the opportunity to explore potential juror attitudes for juror challenges. Lopez-Stayer v. Pitts, 122 Wn. App. 45, 51, 93 P.3d 904 (2004). In the present case, following *voir dire* eighteen jurors were excused; ten jurors were excused for cause and eight were peremptorily excused, six by the State and two by the defense.

Not only did Defendant not object to the prosecutor's questions, Defense counsel pursued a similar line of questioning. During *voir dire* Defense counsel stated, "Well, as you've heard before, this is a case about an accusation of child molestation. I can tell from your answers that everyone here takes that kind of serious." Defense counsel then asked the potential jurors, "Is there anyone here who feels that their passion in this case would override their ability to remain impartial throughout the trial." Five potential jurors responded that they would have difficulty being impartial; none of the five were seated as a juror. The *voir dire* questions were proper. The questions were asked to explore the attitudes and potential biases of the prospective jurors.

2. Defendant Was Not Prejudiced By The Voir Dire Questions.

Additionally, Defendant has not shown how he was prejudiced by the *voir dire* questions. Defendant cannot show any prejudice based on the jury's composition because he did not challenge the panel and accepted the jury as constituted without exhausting his peremptory challenges. Tharp, 42 Wn.2d at 500; Collins, 50 Wn.2d at 744.

Even if the prosecutor's questions were improper, they were not so flagrant and ill-intentioned as to be incurable. Courts have found even improper remarks curable. See generally State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116 (1989)(prosecutor exhorted jury to send a message to society about the general problem of child sexual abuse); State v. Jones, 71 Wn. App. 798, 806, 863 P.2d 85 (1993)(prosecutor applauded society's concern for children and criticized the fact that they are made to "to walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups whom they don't know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them"); see also Adkins v. Aluminum Company of America, 110 Wn.2d 128, 141-42, 750 P.2d 1257, 756 P.2d 142 (1988)(holding that

arguments asking jurors to put themselves in the defendant's shoes are generally curable).

The trial court has broad discretion in determining the scope and extent of *voir dire*. CrR 6.4(b); State v. Brady, 116 Wn. App. 143, 146-47, 64 P.3d 1258 (2003); State v. Frederiksen, 40 Wn. App. 749, 752-53, 700 P.2d 369 (1985). Any error resulting from the prosecutor's questions was harmless beyond a reasonable doubt. Had Defendant objected to the questions, the trial court could have corrected any error by either limiting the scope of the questions or giving a curative instruction.

In fact, the court's instructions were curative in the present case. The court instructed the prospective jurors:

It is presumed that when the jury has been selected and accepted by both sides, each of you will keep an open mind until the case is finally submitted, will accept the instructions of the Court and base any decision upon the law and the facts, uninfluenced by any other considerations. The purpose of the questions on *voir dire* is to determine if you have that frame of mind.

RP1 21-22. After the jury was selected the court instructed the jury:

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must

disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

RP1 107. Jurors are presumed to follow instructions given. State v. Brown, 132 Wn.2d at 592.

The cases cited by Defendant, Holedger, Horst, and Clafin, involved far more egregious questions and comments and are inapposite here. Holedger and Horst both addressed *voir dire* questions to prospective jurors regarding the testimony of specific witnesses based on the witnesses' religion. "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." Evidence Rule 610.

In State v. Holedger, 15 Wash. 443, 46 P. 652 (1896), the court upheld the trial court's sustaining the State's objection to questions propounded to a prospective juror. The questions were: "Would you attach more importance or credibility to the word of a preacher outside of court than any other gentleman?" And, "Would you attach more credence to the testimony of Dr. McInturff, a minister of the gospel, than that of any one else?" The court found; "These questions are so apparently improper and irrelevant that we

do not feel called upon to enter into a discussion of them.” Holedger, 15 Wn. at 448. In Horst v. Silverman, 20 Wash. 233, 55 P. 52 (1898) the court found it was proper for the trial court to permit the question of whether the juror entertained any prejudice against the people of the Jewish faith. However, the court upheld the trial court’s sustaining an objection to the ensuing question “Would the testimony of witnesses who professed that faith receive as much credit as members of any other faith?” Horst, 20 Wn. at 234.

In State v. Clafin, 38 Wn. App. 847, 690 P.2d 1186 (1984) the court addressed the prosecutor’s reading of a poem during closing argument in a case involving multiple counts of rape, assault, and indecent liberties. The poem described the emotional effect of rape on victims and contained numerous prejudicial allusions to matters outside the evidence. The court held:

Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, ... the poem contained many prejudicial allusions to matters outside the actual evidence against Clafin. In short, the reading of the poem was so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors.

Clafin, 38 Wn. App. at 850-51 (citations omitted).

In the present case, the prosecutor's *voir dire* questions were proper and did not prejudice Defendant.

C. THE COURT WAS NOT REQUIRED TO LIMIT THE SCOPE OF VOIR DIRE SUA SPONTE.

The trial court has broad discretion in determining the scope and extent of *voir dire*. CrR 6.4(b); State v. Brady, 116 Wn. App. at 146-47; State v. Frederiksen, 40 Wn. App. at 752-53. The trial court's discretion is limited only by the need to assure a fair trial by an impartial jury. Brady, 116 Wn.2d at 147; Frederiksen, 40 Wn. App. at 752. The trial court's ruling on the scope of *voir dire* will only be reverse for an abuse of discretion if the defendant shows the abuse substantially prejudiced him. State v. Brady, 116 Wn. App. at 147; State v. Davis, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000), review denied, 150 Wn.2d 1035, 84 P.2d 1230 (2004)(the court found no abuse of discretion where the trial judge did not *sua sponte* question jurors about potential racial bias, even though the State and defense did not). Defendant has not shown that he was prejudiced by the prosecutor's *voir dire* questions. See B.2 above.

The primary purpose of *voir dire* is to give litigants the opportunity to explore potential juror attitudes for juror challenges. Lopez-Stayer v. Pitts, 122 Wn. App. 45, 51, 93 P.3d 904 (2004).

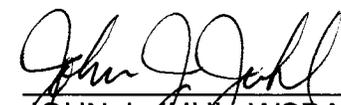
Because of the nuances and subtleties presented by *voir dire*, the trial judge is vested with considerable latitude in ruling on the limits and extent of *voir dire*. State v. Davis, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000); Murray v. Mossman, 52 Wn.2d 885, 887, 329 P.2d 1089 (1958); State v. Frederiksen, 40 Wn. App. 749, 753, 700 P.2d 369 (1985). Following *voir dire* in the present case, eighteen prospective jurors were excused. The prosecutor's questions were calculated to explore the potential jurors' attitudes towards a child molestation case and to determine whether any juror was biased or had preconceived ideas that would inhibit the juror's ability to be impartial. The prosecutor's *voir dire* questions were proper and did not prejudice Defendant. See B.1 above.

IV. CONCLUSION

For the reasons stated above, Defendant's conviction should be upheld.

Respectfully submitted on September 3, 2010.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

JUSTIN A. BINNS,

Appellant.

No. 64731-8-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 3rd day of September, 2010, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

LENELL NUSSBAUM
ATTORNEY AT LAW
MARKET PLACE ONE, SUITE 330
2003 WESTERN AVENUE
SEATTLE, WA 98121

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 3rd day of
September, 2010.


DIANE K. KREMENICH
Legal Assistant/Appeals Unit