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NO. 66574-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SWEET,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

BRIEF OF RESPONDENT

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DANIEL T. SATTERBERG
King County Prosecuting Attorney

JEFFREY C. DERNBACH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

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

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A. ISSUES

1. Evidence Rule 404(b) allows the State to offer testimony about prior misconduct to explain a victim's state of mind, to help the jury assess her credibility, and to help the jury evaluate her recantations or delayed reports of abuse. The State offered evidence that the victim was afraid of Sweet because she witnessed him abuse her mother and siblings. Did the court properly exercise its discretion by allowing the jury to consider evidence that Sweet physically and psychologically abused the victim's siblings and mother?

2. A defendant alleging prosecutorial misconduct must show the conduct in question was both improper and prejudicial. In this case, the prosecutor honored the trial court's rulings on motions in limine, and properly argued that Sweet's prior misconduct explained the victim's state of mind. Sweet has also failed to show a substantial likelihood the prosecutor's remarks affected the verdict. Did the prosecutor commit misconduct that prejudiced Sweet?

3. A court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. The jury properly

heard testimony that Sweet had physically and psychologically abused the victim's siblings under ER 404(b). During the trial, a witness testified, without objection, that Sweet had been arrested for "child abuse." The trial court gave a strongly worded instruction to the jury to disregard the remark. Jurors are presumed to follow the trial court's instructions. Did the trial court properly deny Sweet's request for a mistrial?

4. Sweet was charged with two counts of sexual exploitation of a minor under RCW 9.68A.040(c). While the evidence would have been sufficient to convict Sweet under subsection (b), must the State concede, in accordance with Supreme Court precedent, that the evidence was insufficient under the charged subsection (c)?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Kenneth Sweet, was initially charged with child molestation in the first degree, rape of a child in the third degree, and assault in the fourth degree. CP 1-6. The State alleged that Sweet sexually abused his stepdaughter, L.A., over

several years and physically assaulted his stepson J.S.¹ CP 4-5. While the charges were pending, police found video footage of Sweet having sex with his stepdaughter. RP 26-27.² At trial, the State charged Sweet with eleven counts: four counts of rape of a child in the first degree (counts 1-4), four counts of rape of a child in the third degree (counts 5-8), two counts of sexual exploitation of a minor (counts 9-10), and one count of assault in the fourth degree (count 11). CP 40-48. All the counts related to sexual abuse of L.A., except for the final count of assault in the fourth degree that alleged physical abuse of J.S. CP 40-48. In addition, the State alleged aggravating factors that Sweet used his position of trust to commit the crimes, and that there was a pattern of domestic violence and sexual abuse for counts one through eight. CP 40-48.

The trial court severed the assault in the fourth degree charge for J.S. and Sweet later pled guilty. RP 96, CP 138-147. The jury found Sweet guilty of all counts as charged. CP 56, 60, 64, 68, 72, 76, 80, 86, 89, 90. The jury also found all of the

¹ The victim and minor children's initials are used in an effort to protect their privacy, and to distinguish between family members that have the same last name.

² There are five consecutively paginated volumes of verbatim report of proceedings referenced as "RP."

aggravating factors. CP 57-59, 61-63, 65-67, 69-71, 73-75, 77-79, 81-85, 88. The court sentenced Sweet on January 7, 2011. CP 216-27. The court imposed an indeterminate sentence with a minimum term of 318 months confinement. CP 220.

2. SUBSTANTIVE FACTS

Sweet sexually abused his stepdaughter, L.A., when she was in the fourth grade until 2009, when she was 15 years old. L.A. was 17 years old when she testified at trial. RP 484. She had two siblings: A.A. (male, 18 years old), B.A. (male, 14 years old), and J.A. (male, 12 years old). RP 361. L.A.'s biological father left the family when she was young and has since passed away. RP 361, 386, 488. L.A.'s mother, Penny Arneson, married the defendant, Kenneth Sweet, in 2000. RP 364. Sweet and Arneson had four more children together. RP 361, 363, 369. Sweet worked out of the home as an investment broker and their finances were poor. RP 367-68. In 2005, one of Arneson and Sweet's young children died from ingesting magnetic toys. RP 369-70. The family received a settlement as a result of their son's death, and moved into a spacious home in Carnation. RP 370-72. Sweet had security cameras installed in the home and told the family they

were for security. RP 380-81, 513. However, the family later discovered additional cameras hidden throughout the home. RP 391, 513.

Sweet began sexually abusing L.A. when she was in the fourth grade, while she was between 10 and 11 years old. RP 497. While they were alone watching a movie together Sweet placed his fingers inside L.A.'s vagina. RP 497-98. The next time they watched a movie together Sweet again placed his finger in her vagina. RP 501. L.A. testified that the sexual abuse continued through her fourth grade year, and usually occurred once or twice each week. RP 501. She also explained that she did not tell anyone about the abuse: "[A]fter awhile I just started letting him do it, and I just -- I mean I was scared, but I didn't have any -- like anyone to tell, like or to talk to." RP 501.

During L.A.'s fifth grade year the abuse continued, but not as frequently. RP 503. L.A. testified that there were approximately ten incidents during her fifth grade year when Sweet would put his fingers in her vagina or touch her breasts. RP 503. Sweet would also shower with her and would touch her. RP 503-04.

When L.A. was in the sixth grade her younger brother died. RP 506. The abuse stopped for awhile, but resumed when they

moved into their new house in Carnation after the family received their settlement. RP 512. L.A. had not told anyone about the sexual abuse because she thought she would get into "trouble." RP 507. L.A. described that meant "I would get yelled at, or I would get hurt because that's just all that happened around my house." RP 507-08. L.A. described how Sweet physically and psychologically abused other members of the family. RP 488-93. He would yell at her mother and siblings and would physically assault them. RP 488-93.

During L.A.'s sixth grade year, in 2006, she confided in a friend named A.W. RP 117, 508-09. L.A. was at school and told A.W. that her stepfather was raping her. RP 479. A.W. told her father about the disclosure. RP 469. A.W.'s father was a Seattle Police officer, and a mandatory reporter. RP 470, 481. A.W.'s father called the school to inform them about L.A.'s disclosure. RP 471. The school, in turn, contacted the King County Sheriff's Office and Child Protective Services (CPS). RP 117-10. Detective Mike Mellis, and personnel from CPS interviewed L.A. RP 128-30. L.A. felt "extremely scared" and worried she would get into "trouble." RP 509, 510. L.A. recanted her disclosure, and told Mellis that she had told her friends things that were not true.

RP 131, 511. That night, Sweet called A.W.'s residence to yell at A.W.'s father for reporting the disclosure. RP 472-74.

Sweet continued to fight with Arneson and physically abuse L.A.'s brothers after they moved to the new home in Carnation. RP 413-14. However, Sweet treated L.A. noticeably different from the others in the family. RP 442. For example, Sweet would take L.A. shopping. RP 414-15. L.A. was very self-conscious about her skin and freckles, and she wanted tanning treatments like other girls at her school. RP 515-16. Sweet obtained a spray tan treatment and volunteered to apply the spray. RP 515-16. L.A. was nude for the treatments and Sweet would use these opportunities to touch L.A. RP 517-18. He would also use the tanning treatments to bribe L.A. RP 521.

Sweet's sexual abuse of L.A. also resumed at the new home in Carnation, and escalated to sexual intercourse. RP 520-25. L.A. described the first time Sweet had sexual intercourse with her in the media room in the Carnation home. RP 520. They were watching a movie and Sweet placed L.A.'s arm on his penis. RP 520. L.A. had been asking for spray tan treatments and Sweet agreed to provide the treatment if she had sex with him for ten minutes. RP 520-21. After Sweet had sex with L.A. he made her use

spermicide. RP 520. L.A. testified believed that there were multiple acts of intercourse in the media room. RP 525. She also testified he had sex with her in her bathroom and family room. RP 522-23.

The last instance occurred the night before L.A. disclosed the abuse to her friends. RP 523-24. L.A. wanted to go out with her friends and her mother did not want her to go. RP 523. Sweet told L.A. they would "make a deal." RP 523. He told her she could go with her friends if she had sex with him for ten minutes. RP 523. L.A. submitted. RP 523. L.A. was scared because the sex was becoming more frequent. RP 525. L.A. felt she should tell someone but was very fearful. RP 526.

The following day, February 8, 2009, L.A. went out with her friends. RP 187, 251. Sweet dropped off L.A. and her friends, including E.C. RP 250. While in the car, E.C. noticed Sweet making unusual remarks about L.A. RP 251. He told L.A. that she was pretty and that "all the boys are going to want you." RP 251, 253. Sweet asked if L.A. was wearing a new bra, or wearing a bra at all. RP 251, 257. Towards the end of the night L.A.'s friends noticed her demeanor change when she started to receive text messages. RP 191. L.A.'s phone battery died and she began to

use E.C.'s phone. RP 259, 528-29. L.A. was supposed to be home at 10:00 pm and the messages began at 9:30. RP 193. L.A. did not want to go home because she was afraid of Sweet. RP 528. L.A.'s friends, E.C. and D.R., saw the messages coming from Sweet. RP 194. One of the messages said that if Sweet had to pick up L.A. he expected thirty minutes of sex. RP 194, 261. L.A. sent Sweet a text message saying she was going to disclose the sexual abuse. RP 528. Sweet replied that if she told anyone her mother would lose everything, and if he went to jail it would hurt her mother. RP 198-99. Sweet threatened to kill himself if L.A. did not return home.³ RP 531-32. L.A. was emotional and worried about her family. RP 261.

L.A. stayed at E.C.'s house that night. RP 267. The following day, L.A. sent a text message to her mother telling her that Sweet was sexually abusing her. RP 268, 402, 533. L.A.'s mother took her to the hospital. RP 533, 268. L.A. was given a sexual assault examination which included taking vaginal swabs for DNA analysis. RP 584. Police were called to the hospital and initiated an investigation. RP 287.

³ A forensic examination of the phone recovered Sweet's text message threatening to kill himself. RP 642. However, either E.C. or L.A. deleted the messages demanding sex. RP 208, 530.

Detective Casey Johnson was assigned to investigate the case. RP 157. He took L.A.'s vaginal swabs from the sexual assault exam and submitted them to the Washington State Patrol Crime Laboratory. RP 161. He also took a DNA swab from Sweet to be compared to L.A.'s sexual assault examination. RP 161-62. Sara Weber from the crime lab analyzed the samples and determined there was sperm present on L.A.'s vaginal swabs, and that the DNA in the sperm belonged to Sweet. RP 234, 238.

Detective Casey searched Sweet's home and found the surveillance cameras, including hidden "pinhole cameras," and a computer that recorded the video footage. RP 166, 329, 332-34. Detective Casey reviewed footage from the media room and saw footage of Sweet having sex with L.A. RP 169-70, 330. There was additional video footage showing Sweet rubbing L.A. while she was on a couch. RP 655. The video of Sweet having sex with L.A. was admitted at trial. RP 169-70.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT SWEET WAS ABUSIVE TOWARD OTHER FAMILY MEMBERS TO EXPLAIN L.A.'S FEAR OF HIM.

Sweet contends that the trial court erred by admitting evidence that Sweet was abusive towards other members of the household, and contends the State misused the evidence to show a propensity for violence. Sweet is incorrect. The trial court permitted evidence that Sweet was abusive to other family members to show L.A.'s state of mind, and to explain why she allowed the abuse to continue, delayed reporting the abuse, and recanted her disclosure in 2006. The trial court did not abuse its discretion by admitting this evidence, nor did the prosecution misuse the evidence.

a. Relevant Facts.

The State offered evidence that Sweet was physically and psychologically abusive to L.A.'s mother and her siblings. The evidence explained L.A.'s response to the sexual abuse, and her delayed reports, recantations, and inconsistent statements.

L.A. testified about her observations of Sweet's temper and his physical abuse of her siblings. Sweet and her mother would fight every day and yell at each other. RP 488. This would occur in front of the children and L.A. said it scared her. RP 488-89. L.A. had seen Sweet hurt her mother by driving off in the car while her arm was in the car door. RP 489. She observed Sweet yell at and hit her brothers. RP 490-91. L.A. testified this made her afraid that Sweet would hurt her. RP 492. L.A. testified about Sweet screaming at J.S. because he was not cooperating with recording a birthday greeting on the computer. RP 493-95. She also said this incident made her fearful of Sweet. RP 494.

L.A. testified that it was her fear of Sweet that caused her to submit to his requests for sex and deterred her from reporting it. L.A. testified repeatedly that she was afraid of Sweet because of the physical and psychological abuse she witnessed in the home. RP 489, 492, 494-95, 507-08, 510-11, 526, 547. L.A. testified that she did not tell anyone about the abuse because she thought she would get in "trouble." RP 507. She explained, "I would get yelled at, or I would get hurt because that's just all that happened around my house." RP 507-08. When she did report the abuse while in the sixth grade she noted that she was "extremely scared" and,

"I felt like I was going to get into trouble." RP 509-10. When L.A. recanted she said she was "still scared." RP 510-11. When she finally disclosed the abuse in 2009 she was "like really scared." RP 526. L.A. testified, "I just knew -- but the way he got mad and the way he yelled and hurt us, I just -- I felt scared all the time." RP 547.

The trial court permitted L.A.'s mother and siblings to testify about Sweet's temper to corroborate L.A.'s testimony. However, the trial court placed two limitations on their testimony. First, the other family members were not permitted to testify about specific instances of misconduct by Sweet, and second, they were only permitted to testify regarding facts that would have been known to L.A. RP 154. The prosecutor and the court took great care not to elicit testimony about specific instances of conduct. RP 359-60. Furthermore, the court gave the jury a limiting instruction:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of an audio recording of an alleged altercation between the Defendant and [J.S.], and other alleged acts of anger and non-sexual abuse.

It may be considered by you only for the purpose of your considering the impacts of those acts on L.A.

You may not consider it for any other purpose.

Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP 606.

Penny Arneson testified that she and Sweet often argued and yelled at each other while the children were home. RP 374-75. She described Sweet as having an unpredictable temper. RP 410. He would swear and yell in front of the children, including L.A. RP 410. She described Sweet as "explosively angry" when he believed that L.A.'s boyfriend was touching her inappropriately. RP 389-90.

A.A., the oldest son, testified that Sweet had a volatile temper and could anger without provocation. RP 438. He testified that his stepfather would scream at them and escalate to physical abuse. RP 440. A.A. said that L.A. witnessed Sweet's temper. RP 441.

B.A. testified that Sweet had a temper that was "out of control." RP 452. He testified that Sweet was often angry and yelled at the kids. RP 452. He also noted Sweet used physical punishments on the boys but, not L.A. RP 454. He said the abuse occurred in front of L.A. RP 454.

J.S. testified that Sweet and Arneson would yell at each other in front of the children. RP 462. J.S. testified that Sweet would yell at him in front of L.A. RP 463-64.

Sweet asked the court to exclude this evidence. Sweet indicated he did not intend to impeach L.A. with the recantation but the judge asked:

Court: Well of course if he [the prosecutor] doesn't bring it out, you are going to bring out the recantation I assume?

Defense: I don't know your honor . . . depending on how it unfolds . . .

RP 69-70. Consistent with the trial court's ruling, the State discussed Sweet's temper during opening statement and how L.A. feared disclosing the sexual abuse. The prosecutor noted, "To understand the context of L.A.'s life, and more importantly the context of the defendant's actions, it is important for me to give you some background of this family and the people that you will meet . . ." RP 104. The prosecutor went on to explain the context:

"she remembers the violence and the yelling between not only the defendant and her mother, but her mother, as well -- yelling that would bring the police -- violence towards her mother that would spill over, spillover to her brothers and her self.

L.A. remembers, as do her brothers, a temper possessed by the defendant that behind the closed doors of the Arneson's and Sweet household would

be something that none of you would want to see. The temper would actually go from 0 to 60 with the slightest provocation -- provocation that would make no sense, and exploding in front of the children, and exploding in front of Penny Arneson."

RP 105. The prosecutor turned to the report that L.A. made in 2006 that her stepfather was raping her, and her recantation.

RP 106-07. When L.A. disclosed the abuse to her friends in 2009, the State noted, "but L.A., who continued to witness the defendant's violence towards her mother, continued to witness the defendant's violence towards her brother and sister, did not come forward right away." RP 109. Furthermore, the State focused extensively on the overwhelming evidence of Sweet's guilt, including his DNA found in L.A.'s vagina, and the video clearly depicting him raping L.A.

RP 113-14.

b. Evidence Of Abuse In L.A.'s Household Was Admissible To Show Her Fear Of Sweet.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove character and show action in conformity therewith. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ER 404(b). Such evidence is admissible, however, for other purposes, "such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). This list is not exclusive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Powell, 126 Wn.2d at 258-59. Such evidence is admissible if its probative value outweighs its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion. Powell, 126 Wn.2d at 258; State v. Smith, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). Discretion is abused if the trial court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

Washington courts have recognized that evidence of misconduct is admissible to prove the alleged victim's state of mind. See State v. Nelson, 131 Wn. App. 108, 116, 125 P.3d 1008 (2006)

(allowing evidence of past physical abuse to demonstrate the victim's fear of the defendant and explain the apparent inconsistency of the victim not reporting the full extent of the abuse earlier); State v. Cook, 131 Wn. App. 845, 851-52, 129 P.3d 834 (2006) (approving use of ER 404(b) evidence to show the victim's state of mind).

When an alleged victim acts inconsistently with a disclosure of abuse, such as by failing to timely report the abuse or by recanting or minimizing the accusations, evidence of prior abuse is relevant and potentially admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act. See Powell, 126 Wn.2d at 261, 893 P.2d 615 (“Evidence of previous disputes or quarrels between the accused and the [accuser] ... ‘tends to show the relationship of the parties and their feelings one toward the other, and often bears directly upon the state of mind.’”) (quoting State v. Davis, 6 Wn.2d 696, 705, 108 P.2d 641 (1940)).

Furthermore, evidence of prior abuse that may affect the victim's behavior may include verbal abuse. State v. Nelson, 131 Wn. App. at 115-16. It may also include abuse of others that cause fear for the current victim. Id.

In the present case, L.A. clearly testified that she was reluctant to report Sweet's sexual abuse because she was afraid of him. RP 507-08. She also recanted her disclosure in 2006 because she was afraid. RP 509-11. L.A.'s fear of Sweet was due to witnessing Sweet's temper and abuse of the other members of the household. RP 489, 492, 494-95. This evidence was highly relevant to L.A.'s decisions to submit to Sweet's sexual abuse, to delay reporting, and to recant her prior disclosure. Furthermore, the trial court placed appropriate limitations on the evidence and provided guidance to the jury by giving them a limiting instruction. The trial court did not abuse its discretion.

In arguing otherwise, Sweet relies primarily on State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). In Fisher, the defendant was charged with sexually abusing his stepdaughter. Id. at 733. The State sought to admit the defendant's prior physical abuse of his other children to explain the charged victim's delayed reporting. Id. at 743. The trial court ruled that the prior misconduct was not admissible until the defense raised the delayed reporting. Id. The prosecution blatantly ignored the pretrial rulings, admitted prior misconduct that was irrelevant to the delayed reporting because the victim was not aware of it, and urged the jury to use

the evidence as propensity and to seek justice for the other victims. Id. at 735-40.

The Supreme Court held the trial court did not abuse its discretion by making the prior misconduct contingent on the defense making an issue of the delayed report. Id. at 746. However, the Supreme Court did not hold that such a contingent ruling was required as a matter of law. In fact, the Supreme Court noted that evidence of prior misconduct was relevant to a victim's state of mind. Id. at 744-45. The Supreme Court cited to Nelson and Cook with approval. Id.

Unlike Fisher, in the present case there was more than simply a delay in reporting. There was a documented recantation, with inconsistent statements about the crimes charged, where L.A. told police in 2006 that she made up allegations against Sweet. RP 511, 131. When the judge asked the defense if they would raise the recantation if the State did not, Sweet was non-committal. RP 69-70. The trial court did not abuse its discretion by allowing the State to address the recantation and the reasons for it.

The trial court did not abuse its discretion by permitting the State to address L.A.'s prior recantation and prior inconsistent statements in its case in chief with the use of ER 404(b) evidence.

c. Any Error Was Harmless.

Even if the trial court erred admitting the evidence of Sweet's prior physical and psychological abuse of other household members, it was harmless. Erroneous admission of evidence under ER 404(b) is reviewed under the non-constitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Reversal is not required unless there is a reasonable probability that the outcome of the trial was materially affected by the error. Id.

The jury saw a video of Sweet having sex with his stepdaughter. RP 169-70, 330. His DNA was found inside her vagina. RP 234-38. Independent witnesses saw Sweet's text messages demanding sex from L.A. and his threats to kill himself if she told anyone. RP 194, 261, 531-32. As the trial judge noted, "[t]he evidence was just overwhelming with respect to the substantive offenses." RP 776. The evidence of Sweet's prior misconduct paled in comparison. The trial court did not allow witnesses to testify regarding any specific instances of misconduct other than L.A. She testified that Sweet yelled at her mother and siblings, and punched her siblings. RP 488-95. There was little danger that the video and DNA evidence could have been

overshadowed by Sweet's prior misconduct. In sum, there is no reasonable probability that the jury's verdict was materially affected by the evidence of Sweet's prior physical and psychological abuse.

The trial court properly found evidence of abuse in L.A.'s household was admissible to explain her fear of Sweet, her recantation, and delayed reporting of this sexual abuse. This Court should affirm.

2. SWEET HAS FAILED TO SHOW ANY PROSECUTORIAL MISCONDUCT THAT AFFECTED THE VERDICT.

Sweet argues that the prosecutor committed misconduct by failing to limit his use of Sweet's prior misconduct to show L.A.'s state of mind. Sweet's argument is not supported by the record. The State followed the trial court's pretrial rulings and relied upon evidence of prior abuse for the proper purpose of showing L.A.'s state of mind. Sweet has failed to demonstrate any prosecutorial misconduct.

a. The Prosecutor Did Not Commit Misconduct.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Unless a defendant objected to the allegedly improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76, 81 (1992). Prejudice occurs only if “there is a substantial likelihood the instances of misconduct affected the jury's verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

In the present case, the prosecutor's remarks did not constitute misconduct. The prosecutor addressed the prior violence in L.A.'s home, but clearly linked the evidence to L.A.'s recantation and failure to disclose the abuse:

Her home was something quite different. It was a place where violence was common, yelling and screaming was the norm. It was a place where her trust was violated, a place where her body was not her own. In her home 10 year old L.A. to this man was an object of sexual desire.

RP 715. The prosecutor turned immediately to the sexual abuse and the relevance of the other abuse in the home:

He did not just rape her once, or twice, it was repeatedly -- weekly -- monthly -- until after two years she finally had enough of him putting his fingers inside her -- his fingers inside of her. She recognized at her young age that that was not appropriate. This was wrong. It should not be happening. She needed to tell somebody, but who? She could not tell anyone at home, because the one thing that she learned is that home just was not safe.

RP 715 (emphasis added). The prosecutor then talked about L.A. reporting in 2006 and her recantation. RP 716. The prosecutor argued that, "[t]hat little girl lived in fear of that abuse every single day, from when she was 10 years old until she finally had the courage to come forward in February 2009." RP 717. The prosecutor explained at length about how Sweet's prior abuse was important when evaluating L.A.'s recantation:

you may be thinking to yourself, "Well why did she recant? It happened so many times. It was ongoing. Why was she saying it didn't happen?"

Well ladies and gentlemen, she is 12 and she is scared, and she repeatedly saw her brothers and her mother brutalized by this man, and she constantly lived in fear. She told him every -- she told you everyone in the house lived in fear, and you heard for yourself the audio recording.

Look what happened to little [J.A.] when all he did was not say happy birthday to his step sister? What kind of rage would a 12 year-old girl be facing from this man when she tells somebody that he is

touching her? She knew what kind of rage that she would be facing.

RP 722. The prosecutor added "She knew the rage of the defendant. That's why she recanted." RP 723. The State also linked L.A.'s fear with the delayed reporting after her recantation:

why didn't she tell the second time? Why did she get the courage, a little bit of courage in 2006, but then it started again in 2009, why not report it?

Well again, she was only 15, and she told you she was afraid, and her mother was still oblivious.

RP 727. The record shows that the prosecutor's arguments about Sweet's prior abuse was properly limited to evaluating L.A.'s recantation, her delayed reporting, and her credibility. Accordingly, the remarks were not misconduct.

Again, however, Sweet relies primarily on Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). The distinctions between the egregious misconduct in Fisher and the facts of the present case are numerous. In Fisher, the prosecutor admitted the evidence in violation of the court's motion in limine. Id. at 746-48. In the present case, the trial court properly found the evidence of prior abuse admissible. RP 154. In Fisher, there was no limiting instruction telling the jury how to use the evidence of prior abuse. Id. at 734. In the present case, the trial court provided a limiting

instruction to insure the evidence of prior abuse was not misused. RP 606. The prosecutor in Fisher proceeded to improperly use the evidence to argue the prior abuse of others made it more likely that Fisher sexually abused the victim. Id. at 737-39. The prosecutor in the present case made no such arguments, and limited the use of the prior misconduct evidence to assess L.A.'s recantation and delayed reporting of the abuse. RP 715-23. In Fisher, the prosecutor argued that the jury was obligated to seek justice of the victims for the prior abuse. Id. at 748-49. Again, the prosecutor in the present case made no such arguments. The Fisher case relied solely on the credibility of the victim, whereas in the present case there was a video of Sweet sexually abusing his stepdaughter and DNA evidence to corroborate L.A.'s testimony. RP 169-70, 234, 194, 261, 531-32.

Furthermore, in Fisher, the State admitted evidence that the defendant physically abused current stepchildren. Id. at 751. This evidence was not relevant to the allegation of sexual abuse of the victim, or to her state of mind. Id. at 751. The prosecution went on to rely upon this evidence as propensity to commit sexual abuse and to argue for justice for the current stepchildren. Id. at 737-38, 748. In the present case, the prosecutor and the judge took care to

limit the evidence of prior misconduct to that which L.A. was aware of and hence relevant to her state of mind. RP 359-60.

In sum, the prosecutor in this case admitted evidence of Sweet's prior abuse in accordance with the trial court's rulings, and used the evidence for legitimate purposes during closing argument. Sweet has failed to show any misconduct.

b. Sweet Has Failed To Demonstrate Prejudice Requiring Reversal.

But even if the prosecutor's argument was improper, Sweet cannot show prejudice. Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Pirtle, 127 Wn.2d at 672.

Even if the Court concludes that the prosecutor improperly attempted to rely upon the prior abuse, the trial court had clearly instructed the jury that the evidence was admissible only to explain the effect on L.A. RP 606. The jury is presumed to follow the court's instructions. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). Furthermore, as discussed above, the evidence against Sweet was overwhelming. There was video of Sweet having sex with his stepdaughter. His DNA was found inside her

vagina. Independent witnesses saw Sweet's text message to L.A. demanding sex.

The prosecutor properly followed the trial court's ruling and argued the evidence of Sweet's prior misconduct for legitimate purposes. Sweet has failed to demonstrate any misconduct that would warrant reversal.

3. THE TRIAL COURT PROPERLY DENIED SWEET'S MOTION FOR A MISTRIAL.

Sweet argues that he should have received a new trial because the State elicited testimony that he had been previously arrested for child abuse. Sweet is incorrect. Sweet made no motion in limine regarding the social worker's testimony and made no objection when the testimony was elicited. The trial court gave a strongly worded instruction to the jury to disregard the testimony. The trial court properly denied Sweet's motion for a mistrial.

a. Relevant Facts.

The State called Vicki Waddleton, a social worker at Overlake Hospital, as a witness. RP 303. She was working the day L.A. came to the hospital after disclosing the sexual abuse by

Sweet. RP 310. The prosecutor sent her copies of medical records and she noticed that they were incomplete. RP 298. Waddleton contacted the hospital and obtained a copy of her handwritten summary of L.A.'s disclosure to her and she provided her notes the day she testified. RP 298-99. The prosecutor provided to the defense the notes the afternoon Waddleton came to court. RP 298-99. The prosecutor offered the defense an opportunity to talk to her about the notes, which were described as a single page containing two handwritten paragraphs. RP 299-301. The defense moved to exclude her testimony in its entirety. RP 299. The defense did not request additional time to address the notes, nor did the defense make any motions to exclude any part of the notes. RP 299-302. The trial court denied the motion to suppress all of Waddleton's testimony and recessed briefly to allow the defense to speak to Waddleton. RP 302-03.

During Waddleton's testimony the prosecutor announced that he intended to read the notes into the record as a recorded recollection under ER 803(a)(5). The judge asked the defense if there was any objection and Sweet's attorneys answered, "No, your Honor." RP 318. Waddleton proceeded to read her notes indicating that L.A.'s stepfather, Ken Sweet, sexually assaulted her

and that she did not want to return home. RP 318-19. She disclosed that Sweet vaginally raped her and attempted to have her perform oral sex. RP 319. She had been raped four times in the last two weeks and Sweet threatened to kill himself if she told anyone. RP 319. Waddleton then read the following:

He tried to do this stuff around age 10, 11. He began by talking -- (gross to her) and he wouldn't stop when she asked him to.

She reports he has been in and out of jail a couple of times for child abuse. She -- and she rescinded her story feeling pressured, but she had not been lying."

RP 319. Sweet did not object. RP 319-20. When Waddleton's testimony was complete, Sweet did not object or request a mistrial.

RP 324. At the end of the trial day, the defense did not address Waddleton's testimony. RP 335.

The following morning, Sweet requested a mistrial. RP 343. The defense explained they were surprised by the statement and did not wish to highlight it with an objection. RP 345. The defense noted that Sweet had been charged with assault in the fourth degree in 2000, but that case was dismissed as a result of a deferred prosecution. RP 346-47. L.A.'s mother was the victim in the assault case. RP 347. The defense did not know if Sweet had been in jail as a result of that case. RP 346. According to the

prosecutor, L.A.'s older brother claimed Sweet had been arrested for assaulting him. RP 348.

The trial court noted that had the statement been brought to his attention he would have excluded it. RP 349. However, the court denied the motion for a mistrial and offered to give a limiting instruction to the jury. The trial court then gave a strongly worded limiting instruction to the jury:

Yesterday during social worker Vicki Waddleton's testimony she read to you what she says L.A. said to her. Part of what she read to you involved a claim that the defendant had previously been arrested. There will be no evidence to suggest that he was arrested, and you are to disregard that entirely. It should not prejudice him. As I say, there will be absolutely no evidence in this trial to support that, and it should be disregarded.

RP 357.

b. Sweet's Motion For A Mistrial Was Properly Denied.

Sweet argues that Waddleton's testimony warranted a mistrial. Sweet is incorrect. A reviewing court applies the abuse of discretion standard when reviewing a trial court's denial of a motion for a mistrial. State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). Testimony that violates a ruling in limine can be grounds

for a mistrial if it prejudiced the jury. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Reversal is required only if there is a substantial likelihood that the testimony in question affected the verdict. Lord, 117 Wn.2d at 887, 822 P.2d 177. To determine whether a trial irregularity warrants a new trial, a court considers three factors: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow." State v. Escalona, 49 Wn. App. at 254 (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)). The trial court has wide discretion to cure trial irregularities. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992) (citing State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). Ultimately, the Court must decide whether the remark, when viewed against the backdrop of all the evidence, so prejudiced the jury that there is a substantial likelihood the defendant did not receive a fair trial. Id. (citing Weber, 99 Wn.2d at 164-65). In reviewing a trial court's decision whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," Escalona, 49 Wn. App. at 256. The trial court is best suited

to judge how much prejudice a statement causes, and it should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Thompson, 90 Wn. App. 41, 45, 950 P.2d 977 (1998).

If the defendant fails to object or to request a curative instruction, he waives any claim of error unless the remark was so prejudicial it could not have been cured by a curative instruction. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577, 804 P.2d 577 (1991), cert. denied, 115 S. Ct. 2004 (1995)). See State v. Wright, 76 Wn. App. 811, 823, 888 P.2d 1214 (1995). Sweet did not object to the testimony and did not request a mistrial until the following day. Therefore, this Court must decide if the testimony was so prejudicial that it could not have been cured by the court's instruction to disregard.

Sweet argues that Waddleton's testimony violated the trial court's motions in limine and was a "trial irregularity." Sweet is incorrect. Sweet made no motions in limine regarding Waddleton's notes. RP 298-302. Sweet contends this may have been because the notes were a surprise to Sweet's attorneys. However, the notes

were on a single page and consisted of two paragraphs, and Sweet's attorneys had an opportunity to talk to Waddleton before she testified, yet made no motion in limine nor objected when the testimony was presented. RP 299-301, 319-20.

Sweet alternatively argues that the testimony violated the trial court's more general ruling precluding prior bad acts. However, the trial court properly allowed evidence of prior bad acts that L.A. knew about to explain her actions and state of mind. L.A. related the information to Waddleton; therefore, she was clearly aware of it. Waddleton's testimony did not violate the trial court's motions in limine.

When Sweet finally requested a mistrial the following day, the trial court properly weighed all the factors outlined in Escalona and Weber. RP 350. While the trial court felt the remark was serious, the trial court properly allowed evidence of past violence that L.A. was aware of and noted that the evidence was partially cumulative.⁴ RP 350. In other words, the jury was already aware

⁴ Sweet argues that Waddleton's testimony implied that he had been arrested for sexually abusing children. Waddleton's notes only referred to "child abuse." RP 319. This was in the context of a trial in which the jury heard testimony that Sweet physically abused the other children, and there was no suggestion that he sexually abused the other children. Furthermore, the jury heard that police had investigated L.A.'s 2006 disclosure, but took no further action when she recanted, and did not arrest Sweet.

that Sweet had been violent with the children. The trial court also provided a very strongly worded limiting instruction. In sum, the trial court carefully considered the applicable law and the facts of Sweet's case and denied the request for a mistrial. The trial court did not abuse its discretion.

Furthermore, Sweet cannot show substantial likelihood that the testimony of the witness affected the verdict. The trial court instructed the jury to disregard the evidence. The jury is presumed to follow the instructions. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). Furthermore, given the strength of the evidence which included DNA and a video, Sweet cannot show Waddleton's testimony affected the verdict.

Sweet relies heavily on State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), in arguing that reversal is required. In Escalona, the defendant was charged with assault in the second degree for threatening a person with a knife. Id. at 252. The trial court erred by refusing to grant a mistrial when a victim testified that the defendant had a "record" and had stabbed someone in the past. Id. at 253. The trial instructed the jury to disregard the testimony. Id. at 253. However, in Escalona, the weakness of the State's case clearly magnified the inappropriate testimony; the

Court noted there was only one witness and he was very inconsistent. Id. at 252-53. The other evidence seemed to support the defendant's version of events:

Furthermore, the reference to Escalona's record becomes particularly serious considering the paucity of credible evidence against Escalona. Vela's testimony, which was essentially the State's entire case, contained many inconsistencies. There were no other witnesses to the alleged crime except Escalona himself, whose testimony was not substantially impeached.

Id. at 254-55. Unlike Escalona where there was a "paucity" of credible evidence against the defendant, in the present case there was overwhelming evidence of Sweet's guilt. There was little danger the jury would be distracted from this damning evidence. In other words, this was not the "close case" that Escalona was. The trial court did not abuse its discretion by denying Sweet's motion for a mistrial.

4. THE STATE CONCEDES THE EVIDENCE WAS INSUFFICIENT TO SUPPORT SWEET'S CONVICTIONS FOR SEXUAL EXPLOITATION OF A MINOR.

Sweet contends that the evidence was not sufficient to find that he committed sexual exploitation of a minor. He argues the evidence was not sufficient to show that he "permitted" L.A. to be

photographed. Based on the Washington Supreme Court's holding in State v. Chester, 133 Wn.2d 15, 940 P.2d 1374 (1997), Sweet is correct.

Sweet was charged with two counts of sexual exploitation of a minor pursuant to RCW 9.68A.040(c):

(1) A person is guilty of sexual exploitation of a minor if the person:

(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

The Supreme Court has interpreted this language, and held that it prohibits a parent or guardian from permitting a child to be exploited *by another*. Id. at 23-24. The Supreme Court concluded:

While "permit" may suggest passive conduct, it appears that *the aim of subsection (c) of the sexual exploitation statute is to prohibit a parent from allowing a child to be exploited under subsection (a) or (b) of the statute*. The language of the statute does not support a contrary interpretation. If a parent, or stepparent, were actively involved in causing the exhibition or other sexually explicit conduct, then the

parent would be subject to the terms of subsection (a) or (b). *We interpret RCW 9.68A.040(1)(c) to prohibit the parent's knowing failure or refusal to protect his or her child from sexual exploitation by another.*

Chester, 133 Wn.2d at 23-24 (emphasis in original). The court held if the parent or guardian were actively involved in causing the exhibition or the explicit conduct they would be more appropriately charged under subsections (a) or (b) of the statute.

In this case, Sweet recorded himself sexually abusing L.A. using the home's surveillance system. He did not "permit" L.A. to be sexually abused by another. While Sweet could have been charged under RCW 9.68A.040(b), the Supreme Court's interpretation of the statute does not permit him to be charged under subsection (c). This court should remand for dismissal of counts nine and ten.⁵

⁵ Sweet's offender score for the remaining counts would be reduced from a 27 to 21 and would make no change to his sentencing range.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Sweet's convictions for each count of rape of a child, and remand for dismissal of two counts of sexual exploitation of a minor.

DATED this 30th day of November, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JEFFREY C. DERNBACH, WSBA #27208
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to John Henry Browne, the attorney for the appellant, at 108 S. Washington Street Ste 200, Seattle, WA 98104-3414, containing a copy of the Brief of Respondent, in STATE V. KENNETH SWEET, Cause No. 66574-0-1, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame
Name
Done in Seattle Washington

11/30/11
Date 11/30/11