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Division I
State of Washington NO. 72262-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANNY PARK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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A. ISSUES

1. To preserve a claim of prosecutorial misconduct for appellate review, a defendant must make a timely and specific objection. Park objected only as “improper argument” to the prosecutor’s statement in closing that the State did not need to prove intent. On appeal, Park makes a technical, legal argument that the prosecutor misstated the law because the ordinary definition of attempt requires intent or purposeful action. Has Park waived his claim of prosecutorial misconduct by failing to make a specific objection to the alleged misstatement of the law?

2. To prove luring, the State must prove, *inter alia*, that the defendant “ordered, lured, or attempted to lure.” The statute does not require proof of any mens rea. Legislative history and caselaw support the conclusion that the legislature intended luring to be a strict liability offense. When “attempt” is used in a statute it must be given its ordinary meaning; one meaning of “attempt” is an unsuccessful effort. Did the prosecutor correctly state the law in closing argument because “attempt” in the luring statute simply means that the defendant did not succeed in luring the child?

3. A prosecutor’s unobjected-to misstatement of the law in closing argument does not require reversal unless it was flagrant,

ill-intentioned, and could not have been cured by an instruction. In closing argument, the prosecutor summarized the law as stated in the statute, jury instructions, and caselaw when he stated that luring did not require proof of the defendant's intent. The jury also found that Park acted with sexual motivation, which necessarily included a finding that Park acted with purpose. Has Park failed to show that any misstatement of the law was flagrant and ill-intentioned and could not have been cured by an instruction?

4. A prosecutor may not clearly and unmistakably express his personal opinion of the evidence. In rebuttal, the prosecutor responded to the defense argument that "[t]his is not a luring case" by summarizing the evidence and stating, "It sounds like a luring case to me." Park did not object. The jury was instructed that the lawyers' remarks were not evidence. Has Park failed to show that the remark was so flagrant and ill-intentioned that any prejudice could not have been cured by an instruction?

5. The trial court has discretion to allow a child witness a comfort item when it appears reasonably necessary to facilitate the child's testimony. The ten-year-old victim cried during her testimony and was unable to continue. After a break, she testified while holding her mother's driver's license. Did the trial court act

within its discretion by allowing the child witness to hold the license when it did not unduly distract from her testimony and there was minimal, if any, prejudice to Park?

6. When sentencing a defendant for a sex offense, a trial court may impose a sexual assault protection order (SAPO) that expires two years following any time of confinement or community custody. The trial court sentenced Park to credit for time served, did not impose community custody, and imposed a SAPO to expire three years from the date of sentencing. Is remand required to fix the scrivener's error so that the SAPO expiration date is two years from the date of sentencing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Danny Park with luring with a sexual motivation enhancement. CP 1. The Honorable Judge Bruce E. Heller presided over the jury trial. 2RP 3.¹ The jury found Park guilty as charged and found that Park had committed the offense with sexual motivation. 4RP 102-03; CP 44-45. The court sentenced Park to credit for time served and imposed a sexual

¹ The verbatim report of proceedings consists of four volumes, which will be referred to in this brief as: 1RP (12/10/2013 & 3/4/2014); 2RP (6/3/2014 & 6/4/2014); 3RP (6/5/2014); 4RP (6/10/2014 & 7/3/2014).

assault protection order with an expiration date of July 3, 2017; three years from the date of sentencing. 4RP 62-67; CP 79-80. The court did not impose community custody. 4RP 117-18; CP 65.

2. SUBSTANTIVE FACTS.

On September 22, 2013, nine-year-old E.H. played outside at her apartment complex, Creston Point Apartments. 3RP 16-17; 4RP 69-70. She saw Danny Park, drunk, talking loudly to himself about love, and spelling the word out loud. 4RP 74, 81. E.H. went up the hill, but Park followed. 4RP 74-75. Park then spoke directly to E.H. and asked, "Do you want to go to my house because I have candy and cigarettes?" 4RP 76-77. He also asked, "Do you want to have sex with me?" E.H. said nothing, but was crying and scared. 3RP 43; 4RP 77.

Another resident of the complex, Kelli Thompson, saw part of this exchange, intervened, and told E.H. to go home. 4RP 77. E.H. ran to the security guard, Lucas Schmidt, and told him that a drunk male told her that he had cigarettes and beer at his apartment. 3RP 32-33; 4RP 78-79. Schmidt recognized that the male was likely Park as he had seen Park earlier, drunk and raving about the Seahawks win. 4RP 34. Schmidt had taken a short video of Park because he found it humorous. 3RP 28-29. At trial,

E.H. identified Park from a still photo taken from Schmidt's video. 3RP 27-29; 4RP 81.

The neighbor saw E.H. again and took her home. 4RP 85-86. E.H. did not tell her mother everything that Park had said to her because she was afraid she would get in trouble for saying words that she was not supposed to say. 4RP 80-81.

E.H.'s mother called police; police and security guard Schmidt responded to E.H.'s apartment. 3RP 104, 107. E.H. was hesitant to say all that Park had said to her. 3RP 35-36; 4RP 17-19. Schmidt spoke to E.H. individually because she appeared more comfortable with him. 3RP 24-25. E.H. told Schmidt that Park had asked her to have the "S-word" with him. 3RP 24-25. The deputies went to Park's apartment and arrested him. 4RP 22. Park was intoxicated. 3RP 118; 4RP 22-23.

3. E.H.'S TESTIMONY AND THE COURT'S RULING THAT SHE COULD HOLD HER MOTHER'S DRIVER'S LICENSE.

E.H. was ten years old when she testified at trial. 3RP 64. She easily answered the prosecutor's initial questions, but became very hesitant and non-responsive when asked about the incident with Park. 3RP 64-71. As the prosecutor asked more questions, this exchange occurred:

DPA: So, [E.H.], I want to go back to kind of why we're here today. Why do you think we're here today? What happened? Let me ask you this, [E.H.]. Do you remember what happened to you?

E.H.: Yeah.

DPA: Okay. Where did this take place; where did this thing happen?

E.H.: Creston Point.

DPA: Creston Point? And is that somewhere you lived?

E.H.: Yes, for four years.

DPA: Okay. For four years. What happened at Creston Point; what happened there?

E.H.: Somebody tried to –

DPA: That's okay, somebody tried to what?

E.H.: Led me in his house.

DPA: You say let me in his house?

E.H.: Led me.

DPA: Okay. Where did that happen at the Creston Point Apartments? Let me ask you this, [E.H.]. Were you inside or were you outside?

...

DPA: Yeah. So talk to me a little bit more about that. What happened? It's okay, [E.H.]. Do you remember what happened? What did that person say to you? What did that person say to you? You won't get in trouble, [E.H.].

E.H.: [Crying].

DPA: If I may take a brief recess.

3RP 69-71. Outside the jury's presence, the trial court discussed

E.H.'s inability to continue her testimony and what should occur.

3RP 71. The prosecutor asked to call a different witness and allow

E.H. more of a break. 3RP 71-72.

When the prosecutor returned to the courtroom, he requested a sidebar, which was later summarized for the record.

3RP 72, 104-06. The prosecutor explained that E.H. wished to continue testifying, but wanted to hold her mother's driver's license containing her mother's picture. 3RP 104-05; Exhibit 3.² Park's counsel objected. 3RP 105. The trial court considered the fact that the Supreme Court had recently approved the use of a facility dog to comfort a vulnerable witness, and said that it did not feel E.H. holding the card would unduly inflame the passions of the jury. 3RP 105. The trial court then decided that the prosecutor should ask E.H. about the card as the jury would likely figure out what it was anyway. 3RP 105. When E.H. retook the stand, this exchange occurred:

DPA: Okay. And, [E.H.], just [so] we know, you appear to have something in your hand; is that right?

E.H.: Yeah.

DPA: What is it?

E.H.: My mommy's picture.

DPA: Okay. Would you like to hold onto that? Is that a yes?

E.H.: Yes.

3RP 73. No other questions were asked of E.H. about what she held nor was it mentioned during closing arguments. E.H. looked at

² Exhibit 3 is a copy of E.H.'s mother's driver's license, which E.H. held during her testimony. 3RP 105-06. Because the court referred to what E.H. held as a "card," it is clear that E.H. actually held her mother's driver's license and not a paper photocopy of it. 3RP 104-06.

the driver's license when she needed to, but did not stare at it.

3RP 106.

4. CLOSING ARGUMENTS.

In the prosecutor's initial closing argument, he recounted that the State bore the burden to prove the charge beyond a reasonable doubt and he went through the elements of luring as stated in the jury instructions. 4RP 66-67. He then clarified that the State needed to prove only that the defendant had attempted to lure E.H. 4RP 67-68. Next, the prosecutor stated:

The other things that I would also need to prove to you – that I do not need to prove to you beyond a reasonable doubt is also whether Mr. Park did this act knowingly or with intent, which is a different type of crime. You notice here all that is required is that the individual again lure or attempt to lure essentially a minor under the age of 16 years old.

4RP 69. Defense counsel objected as "improper argument" and the trial court overruled the objection. 4RP 69. The prosecutor continued his argument with a recitation of the testimony that established the elements of luring. 4RP 69.

Park's counsel began her closing argument by stating, "This is not a luring case." 4RP 80. She argued that E.H.'s first statement to the security guard that Park had told E.H. he had beer and cigarettes in his house was more credible than her later

statements, and that Park had not offered E.H. candy. 4RP 88.

Park's counsel concluded by returning to her theme that Park had not lured E.H. or done anything for his own sexual gratification. 4RP 93.

In rebuttal, the prosecutor addressed these arguments by recounting E.H.'s testimony and concluding, "It sounds like a luring case to me." 4RP 94. Park's counsel did not object to the prosecutor's statement. 4RP 94-95.

C. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT REVERSIBLE ERROR IN CLOSING ARGUMENT.

Park contends that the prosecutor committed misconduct in closing argument by misstating the law and by expressing his personal opinion on guilt. Park is incorrect. The prosecutor correctly stated the law and did not clearly express his personal opinion. Nor was either remark so flagrant and ill-intentioned that it could not have been cured by an instruction.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). 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). Where the defendant objected to the prosecutor's remarks at trial, the trial court's ruling is reviewed for abuse of discretion. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

Failure to object waives any error, unless the misconduct was so flagrant and ill-intentioned that no instruction could have cured the prejudice. Emery, 174 Wn.2d at 760-61. A defendant must show that (1) a curative instruction could not have corrected the prejudicial effect of the misconduct, and (2) the resulting prejudice had a substantial likelihood of affecting the verdict. Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). On review, the prosecutor's remarks are viewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

a. The Prosecutor Did Not Misstate The Law In Closing Argument.

i. Park waived any error.

A defendant must make a timely and specific objection to any alleged misconduct to alert the trial court to the specific reason for the objection and provide it an opportunity to correct the error.

State v. Padilla, 69 Wn. App. 295, 301, 846 P.2d 564 (1993).

Absent a proper objection, request for a curative instruction, or motion for a mistrial, the issue is waived on appeal unless the alleged misconduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. Id. at 300.

Park did not make a specific objection to what he now claims was such a misstatement of the law in closing argument that it requires reversal. Park's counsel objected as "improper argument" to the prosecutor's statement in closing argument that the State did not need to prove intent. 4RP 69. On appeal, Park makes a technical legal argument that the ordinary definition of "attempt" required that the State prove that Park acted with intent. Br. of App. at 12-13.

Park's objection did not alert the trial court to the basis for the allegedly improper argument or give the trial court any

opportunity to correct the error. The objection was so general that it may as well not have been made. Therefore, the alleged misstatement should be reviewed under the flagrant and ill-intentioned standard.

ii. The prosecutor did not misstate the law.

Park alleges that the ordinary definition of “attempt” as used in the luring statute necessarily requires proof of intent or purposeful action, and, thus, the prosecutor misstated the law by stating that the State did not need to prove intent. Because Park’s interpretation of “attempt” would frustrate clear legislative intent, his claim fails.

For Park’s claim to succeed, this Court must interpret “attempt to lure” in RCW 9A.40.090 to require that the State prove intent. The primary goal of statutory construction is to determine and carry out the legislature’s intent. State v. A.G.S., 182 Wn.2d 273, 277, 340 P.3d 830 (2014). The analysis begins with the text of the statute, other provisions of the same act, and related statutes. Id. When the meaning is plain on its face, then effect is given to the plain meaning. Id. at 277-78. If not, then the reviewing court looks to other aids of statutory construction, such as legislative history and relevant caselaw. Id. A dictionary may be used to determine

the ordinary meaning of a term, unless a contrary meaning is clearly intended by the statute. American Legion Post 32 v. City of Walla Walla, 116 Wn.2d 1, 8, 802 P.2d 784 (1991).

A statute is not ambiguous merely because multiple meanings are conceivable. State v. Velasquez, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). If a statute is ambiguous, then the rule of lenity requires that the statute be interpreted in the defendant's favor *unless* contrary legislative intent is evident. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

The plain language of the statute shows that the legislature did not intend luring to require any intent or mens rea, even in criminalizing "attempt to lure." RCW 9A.40.090. Luring requires proof only of an invitation and an enticement, but not that the defendant acted with intent or any unlawful purpose. State v. Homan, 181 Wn.2d 102, 107, 330 P.3d 182 (2014). It is a strict liability offense. State v. Dana, 84 Wn. App. 166, 180 n.28, 926 P.2d 344 (1996) (citing Senate Bill Report, Senate Committee on Law & Justice, ESSB 5186 at 2).

Luring is also contained in the same chapter as the offenses of kidnapping and unlawful imprisonment, which both require a specific mens rea. RCW 9A.40.020 (defining kidnapping as

“intentionally abducts another person with intent...”); RCW 9A.40.040 (defining unlawful imprisonment as “knowingly restrains another person.”). Because related statutes must be harmonized, the fact that the legislature chose to expressly require a specific mens rea for related offenses shows that it did not intend for luring to have a mens rea. See Velasquez, 176 Wn.2d at 336.

When “attempt” is used in a statute to criminalize a completed crime then it must be given its ordinary meaning. State v. Felix Gallegos, 73 Wn. App. 644, 650, 871 P.2d 621 (1994). In Gallegos, this Court interpreted “attempting to elude” in RCW 46.61.024 as having the ordinary meaning of “to try” rather than meaning the intent to commit a specific crime, as in the criminal attempt statute, RCW 9A.28.020(1). 73 Wn. App. at 649-50. Thus, the State did not need to prove intent to elude to prove the crime of “attempting to elude a pursuing police vehicle.” Id. at 650.

As in Gallegos, this Court should interpret “attempt” in the luring statute according to its ordinary meaning and in line with the legislature’s clear intent that luring be a strict liability offense. In addition to the definition of “attempt” used in Gallegos—“to try”—attempt is also defined as “the act of attempting. . . especially: an unsuccessful effort.” Webster’s Third New International Dictionary

140 (1993). Reading “attempt” in the statute in line with this definition makes it clear that the “attempt” refers to the fact that the defendant *need not have succeeded in actually luring* the child to a non-public area.

Such an interpretation is also in accord with relevant caselaw. Both Homan and Dana involved the “attempt to lure” prong of the statute and neither required that the State prove the defendant’s intent. In Homan, sufficient evidence proved that the defendant was guilty of luring when he stated to a nine-year-old child, “Do you want some candy? I’ve got some at my house.” 181 Wn.2d 107. The child did not follow the defendant, but that was immaterial to the defendant’s guilt. Id. at 108.

Similarly, in Dana, this Court held that the statute did not require that the child actually find the defendant’s offer enticing. In Dana, the two girls found the defendant’s exposure of his genitals and invitation to get into his car upsetting. Id. at 179. Nonetheless, the State proved the crime of luring. Id.

Thus, “attempt” in the luring statute means that the defendant did not have to succeed in his effort to lure the child. A contrary interpretation requiring proof of a purposeful act would frustrate the legislature’s clear intent that luring be a strict liability

offense. Therefore, the prosecutor correctly stated the law in closing argument.

- iii. The prosecutor's statement was not flagrant and ill-intentioned nor did it affect the verdict.

The prosecutor, Park's counsel, and the trial court discussed in some detail the fact that "luring" did not require proof of intent or a mens rea. 4RP 5-10. The discussion occurred in determining whether Park was entitled to the defense of voluntary intoxication, which is available only when the offense requires a particular mental state. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10 (comment) (3d ed. 2008); State v. Francis Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992) (requiring that the crime charged have as an element a particular mental state for the defendant to receive a voluntary intoxication instruction). The trial court and both counsel agreed that luring did not require proof of a particular mental state, but that the sexual motivation enhancement did require proof of a mental state. 4RP 7-9. Thus, the trial court instructed the jury on voluntary intoxication only for consideration of the sexual motivation enhancement. CP 9.

The discussion shows that the prosecutor was well aware of the law and the required elements of the crime of luring. No one

raised the particular, technical argument that Park now raises on appeal. In fact, the Washington Supreme Court and the Court of Appeals in considering the luring statute have consistently noted that the crime does not require proof of intent or any mens rea. Homan, 181 Wn.2d at 107; Dana, 84 Wn. App. at 180 n.28.

In this context, the prosecutor's statement cannot be viewed as flagrant and ill-intentioned. No one has raised this issue in the over twenty years since the luring statute was enacted in 1993. Final Bill Report, ESSB 5186, Ch. 509, Laws of 1993. The prosecutor correctly stated the law as it existed at the time of the trial in accordance with the statute, pattern jury instructions, and current caselaw.

Moreover, any misstatement could have been cured by an instruction from the court. The jury was correctly instructed on the elements of the offense, the burden of proof, and that the lawyers' comments and remarks were not evidence. CP 49, 52, 55-56. Jurors are presumed to follow the court's instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Lastly, because the jury found the sexual motivation enhancement, the jury necessarily found that Park had acted intentionally or with purpose. CP 44-45. Thus, even if this Court

finds that the prosecutor's statement was error, it could not have had any effect on the verdict.

The sexual motivation enhancement required the jury to find that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." CP 57. This necessarily included a finding of intent or that Park acted with a purpose. Thus, any misstatement by the prosecutor could not have affected the verdict.

b. The Prosecutor's Remarks In Rebuttal Were Not Misconduct.

Park contends that the deputy prosecutor also committed misconduct in rebuttal closing argument by expressing his personal opinion on guilt. Because the remarks were a response to defense counsel's argument and were not improper in context, Park's claim fails.

A prosecutor may not express his or her personal opinion on the guilt or innocence of the accused. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). A prosecutor expresses a personal opinion if it is "clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." Id. at 54 (emphasis omitted) (quoting State v.

Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983)).

But a prosecutor may properly argue that the defendant is guilty based on the evidence. Id. at 53. Thus, in State v. Brett, it was proper for a prosecutor to argue, "I would suggest that one reason you might want to believe Pat Milosevich on that issue is that she at the time those events were occurring was watching her husband of 33 years being blown away by a .410 shotgun." 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The argument was an inference from the evidence as to why the jury should believe one witness over another, not an expression of personal belief. Id.

A prosecutor may also properly respond to defense counsel's argument. McKenzie, 157 Wn.2d at 54. Arguments made in response to a defense attorney's argument are generally not so prejudicial as to deny a defendant a fair trial. State v. Weber, 159 Wn.2d 252, 277-79, 149 P.3d 646 (2006).

In Park's case, the prosecutor's rebuttal was in direct response to Park's counsel's closing argument that "[t]his is not a luring case." 4RP 80. The prosecutor argued:

To simply say that this is not a luring case, you maybe ask the next question which is sort of what is that based upon. Why would we say this is a luring case?

Right. You sort of have to ask yourself the next question. Well, if I remember the evidence and the testimony, I'm sure there was discussion of beer and cigarettes from Lucas Schmidt who we also know directly from [E.H.] that there was mention of cigarettes and candy.

What else do we know? We also know that this man asked that little fourth-grader if she would have sex with him. And where would this take place? He asked her to go back to his place, to his house as described by [E.H.]. It sounds like a luring case to me.

4RP 94. While the prosecutor used the word "we" and ended with a reference to himself, the context made it clear that the prosecutor was arguing that it was a luring case *based on the evidence*. The prosecutor did not clearly and unmistakably express his personal opinion.

Park relies on State v. Ish in contending that the prosecutor's rebuttal argument improperly conveyed that the prosecutor's office would say this is a luring case. 170 Wn.2d 189, 198, 241 P.3d 389 (2010). Ish is not helpful. In Ish, the Washington Supreme Court held that it was error for the prosecutor to introduce, on direct examination, the fact that the witness had agreed to tell the truth when the witness was testifying pursuant to an agreement for a lesser sentence. Id. This was error because it implied that the prosecutor was referencing facts outside of the record and was

independently able to verify that the witness had complied with the agreement. Id. at 199.

By contrast, the prosecutor here recounted the evidence as admitted at trial and did not imply that he or his office knew facts outside of the record. The prosecutor simply responded to defense counsel's theme that "[t]his is not a luring case." 4RP 80. While it could have been worded more artfully, it did not amount to improper vouching or express the prosecutor's personal opinion.

In any event, Park's counsel did not object to these brief statements and the statements were not so flagrant and ill-intentioned that they could not have been cured by a jury instruction. Because the statements were made in direct response to defense counsel's argument, they are also less likely to have unfairly prejudiced Park. The jury was correctly instructed to base its decision on the evidence and that the lawyers' remarks were not evidence. 4RP 53, 55-57; CP 47, 49. In the context of the entire trial, these brief statements did not prejudice Park.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE CHILD WITNESS TO HOLD HER MOTHER'S DRIVER'S LICENSE WHILE TESTIFYING.

Park asserts that his due process right to a fair trial was violated when the trial court permitted ten-year-old E.H. to testify while holding her mother's driver's license. Because the trial court did not abuse its discretion in allowing the clearly distressed child to hold the small picture of her mother and Park fails to show any prejudice, his claim fails.

A trial court has broad discretion to manage trial proceedings, including "the mode and order of interrogating witnesses and presenting evidence." ER 611(a); State v. Dye, 178 Wn.2d 541, 547, 309 P.3d 1192 (2013). ER 611 provides the trial court this authority so as to "make the interrogation and presentation effective for ascertainment of the truth," and to "protect witnesses from harassment or undue embarrassment."³ ER 611(a). This discretion allows the trial court to provide a vulnerable witness an accommodation, such as a comfort item or support animal, upon a showing that the accommodation is necessary. Id. at 553.

³ The Washington Constitution also grants rights to crime victims "[t]o ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect." Const. art. I, § 35.

The appellate court reviews a trial court's decision to allow a witness accommodation for abuse of discretion. Id. at 548. Even when the appellate court does not agree with the trial court's decision, it will not reverse unless the decision was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Id. This deferential standard is necessary because:

Trial courts have a unique perspective on the actual witness that an appellate court reviewing a cold record lacks; because the trial court is in the best position to analyze the actual necessity of a special dispensation, we will not overrule the trial court's exercise of discretion unless the record fails to reveal the party's reasons for needing a support animal, or if the record indicates that the trial court failed to consider those reasons.

Id. at 553.

In Dye, the Washington Supreme Court held, as a matter of first impression, that the trial court did not abuse its discretion in allowing a developmentally-delayed adult witness to testify while accompanied by a facility dog, a golden retriever. 178 Wn.2d at 556-57. Dye reached its decision after examining decisions from other jurisdictions allowing child witnesses to hold a doll, toy, or comfort item, or to be accompanied by a parent or trusted individual. 178 Wn.2d at 550; see e.g. Stanger v. State, 545 N.E.2d 1105, 1114 (Ind.Ct.App. 1989) (mother's presence near

child witness during child's testimony not inherently prejudicial), overruled on other grounds by Smith v. State, 689 N.E.2d 1238 (Ind. 1997); see also State v. Dompier, 94 Or.App. 258, 261, 764 P.2d 979 (1988) (not an abuse of discretion to permit child to sit on foster mother's lap while testifying).

Dye also found persuasive State v. Hakimi, in which the Court of Appeals affirmed the trial court's decision to allow two child witnesses in a sexual abuse case hold dolls while testifying. 124 Wn. App. 15, 18, 98 P.3d 809 (2004). In Hakimi, the trial court heard argument from both parties prior to making its decision, did not allow the dolls to be the subject of any questioning, and considered prejudice by stating, "I don't think the doll unduly prejudices, to the extent it prejudices anyone at all." Id. at 20.

After examining these decisions, Dye held that the trial court did not abuse its discretion because it had a basis for allowing the facility dog due to the witness's disability and because it found that the facility dog would not be disruptive during trial. Id. at 554. The trial court held a hearing and made an implicit finding that the facility dog was necessary because of the witness's significant anxiety over his upcoming testimony and his fear of the defendant. Id. Finally, any prejudice to the defendant was minor and largely

mitigated by the limiting instruction that the jury not “make any assumptions or draw any conclusions based on the presence of this service dog.” Id. at 556-57. The defendant, who had a responsibility to create a record of any error, failed to show that the facility dog ever disrupted the proceedings, distracted the jury, or impermissibly bolstered the witness’s credibility. Id. at 554.

Similarly, here, the trial court acted well within its discretion by allowing E.H. to testify while holding her mother’s driver’s license. First, this inquiry is of a fundamentally different nature than if she were holding a teddy bear or doll or being accompanied by a golden retriever. Unlike items that may appear obviously sympathetic, the driver’s license in E.H.’s hands was not likely to appear in any way particularly sympathetic. It was simply a card.

Second, the trial court implicitly found that it was necessary for E.H. to hold the card while attempting to complete her testimony. After E.H. was unable to continue her testimony due to her emotion, the court stated:

Let’s talk about how we might want to deal with this issue. She’s going to come back in a few minutes and we’ll again try to see if she’s willing to talk about the incident. My suggestion is that if she still is unwilling to talk about it, then I don’t know whether defense wants to ask her any questions, you certainly have the right to; but I don’t think we can do more

than simply ask her one more time whether she's willing to tell the jury what happened.

4RP 71. From these comments, the trial court clearly knew that E.H. might not be able to continue testifying. 3RP 71.

After E.H. returned to the witness stand and the trial court ruled at sidebar that she could hold her mother's driver's license, the trial court summarized its reasoning in allowing the accommodation:

We discussed the fact that I believe it was the Supreme Court had indicated that a dog is not inappropriate if the dog serves to comfort a vulnerable witness, and the court indicated that the card was the equivalent of the dog and that it was helping the witness to calm down and to provide her with reassurances and justice. With a dog situation, the court didn't feel that the card crossed the line in the sense that it would unduly inflame the passions of the jury.

3RP 105. Thus, the court held a hearing, considered recent caselaw, and found that E.H. was in need of an accommodation to complete her testimony.

The trial court also considered and rejected the possibility of prejudice, likely due to the obvious differences between a live dog and a driver's license. This was not unreasonable and Dye does not require more. In fact, the trial court's consideration of prejudice was remarkably similar to that by the trial court in Hakimi, which this

Court held was not an abuse of discretion. 124 Wn. App. at 15 (“I don’t think the doll unduly prejudices, to the extent it prejudices anyone at all.”).

In addition, the trial court’s decision to have the prosecutor ask E.H. what she was holding was appropriate. The prosecutor asked only two questions about it. 3RP 73. Because E.H. was holding a card and the jury could have wondered what it was or thought perhaps she was reading from something, this was appropriate. E.H.’s answer did not unnecessarily inject sympathy into the trial nor did it amount to instructing the jury that it could consider sympathy.

To the contrary, the jury was instructed that it could not base its decision on sympathy or prejudice. CP 50. Jurors are presumed to follow their instructions. Warren, 165 Wn.2d at 28. The trial court’s decision to allow E.H. to hold the card and to tell the jury what she held was not an abuse of discretion. While the trial court could have provided a limiting instruction, because the jury was instructed not to base its decision on sympathy or prejudice, it was not required. CP 50. Defense did not request one. See State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011) (the trial court is not required to *sua sponte* give a limiting

instruction). Nor does Dye mandate that the court offer a limiting instruction.

Park further alleges that E.H.'s testimony about holding her mother's picture was inappropriate because it amounted to testimony about E.H.'s fear of testifying. Park relies on State v. Bourgeois, but reads that case too narrowly. 133 Wn.2d 389, 400-02, 945 P.2d 1120 (1997). Bourgeois held that it was error to ask three witnesses about their fear of testifying, but it was appropriate to ask one of the witnesses about his fear of testifying because his credibility was likely to be attacked. Id.

Here, the prosecutor's questions and E.H.'s answer that she was holding her mother's picture were not direct statements about her fear of testifying. While it could be inferred from the circumstances that E.H. held the card because she was afraid to testify without it, it was not clear that her fear had any connection to Park. E.H. did not even recognize Park at trial. 3RP 67. This ten-year-old child could have been afraid to speak in public or afraid to have to say words that would normally get her in trouble. 3RP 80.

Lastly, Park does not point to any specific prejudice in the record. He relies only on the speculative claim that the jury could

have been so sympathetic to E.H. holding her mother's driver's license while she testified that it disregarded his defense. But the jury was instructed that it could not consider sympathy in reaching its verdict. The relatively innocuous accommodation allowed E.H. to complete her testimony did not disrupt the trial, and enhanced the truth-seeking function of the trial. Therefore, the trial court did not abuse its discretion.

3. REMAND IS REQUIRED TO CORRECT THE SCRIVENER'S ERROR IN THE EXPIRATION OF THE SEXUAL ASSAULT PROTECTION ORDER.

Park asserts that remand is required to correct the expiration date of the sexual assault protection order because the trial court had authority to impose only a two-year order under RCW 7.90.150. The State agrees that remand is required to correct this scrivener's error.

A trial court may enter a sexual assault protection order pursuant to a criminal conviction for a "period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole." RCW 7.90.150. At sentencing on July 3, 2014, the trial court did not impose additional confinement, crediting Park for the time he had already served, and did not impose community

custody. CP 62-67. The court entered a sexual assault protection order with an expiration date of July 3, 2017; three years from the date of sentencing. CP 79-80. This was a scrivener's error. The trial court was limited to imposing a sexual assault protection order with an expiration date no later than July 3, 2016. Remand is required to correct the expiration date.

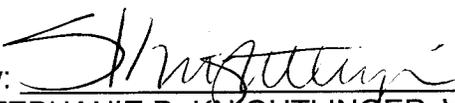
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Park's conviction and to remand to correct the scrivener's error in the expiration date of the sexual assault protection order.

DATED this 30th day of April, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert, the attorney for the appellant, at Sweigertj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Danny C Park, Cause No. 72262-0, 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.

Dated this 1st day of May, 2015.

UBrame

Name:

Done in Seattle, Washington