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Court of Appeals
Division I
State of Washington

NO. 72347-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GREGORIO OLIVAREZ-AGUILAR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SUSAN AMINI

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. It violates the state constitution for a trial judge to make a comment that conveys to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial. At the end of the 14-year-old alleged rape victim's testimony, in which the child attempted to protect the defendant and displayed discomfort at testifying and being questioned about her knowledge of the mechanics of sexual intercourse, the trial court remarked, "Thank you very much for [being] here. I know it was hard for you," as she was dismissing the child. Did the trial court's parting remark, when viewed in context, improperly convey to the jury the trial court's personal opinion of the evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Gregorio Olivarez-Aguilar,¹ by amended information with kidnapping in the second

¹ The defendant asserts that his last names are improperly hyphenated in the captions of documents filed in both the trial court and this Court. However, because he was convicted under the hyphenated last name, and it appears that all of his DOC and DOL records are under the hyphenated name, the State will continue to use the hyphenated form for consistency unless this Court directs otherwise.

degree, rape of a child in the second degree, and rape of a child in the third degree, with a special allegation that Olivarez-Aguilar committed the kidnapping with sexual motivation. CP 24-25. A jury found him guilty of kidnapping in the second degree with sexual motivation and rape of a child in the third degree. CP 39, 41-42. The trial court imposed a standard range indeterminate sentence of 17.5 months to life on the kidnapping charge and a standard range determinate sentence of 26 months on the rape charge, plus an additional 24 months on the sexual motivation enhancement. CP 68-72. Olivarez-Aguilar timely appealed. CP 82.

2. SUBSTANTIVE FACTS.

Adela M.G.² was in a dating relationship with the defendant, Gregorio Olivarez-Aguilar, from 2012 until February of 2014. 6RP 6-7. During that time, Olivarez-Aguilar lived with Adela, her daughter K.M.D.M., and Adela's two younger daughters in their apartment in Kent, Washington. 6RP 4, 17. In late 2013, when he was 27 years old and K.M.D.M. was 13, Olivarez-Aguilar began to cultivate a romantic relationship with K.M.D.M. 5RP 60; 7RP 4, 10-12. Olivarez-Aguilar asked her to be his girlfriend, and kissed

² Adela will be referred to by her first name to protect her daughter's privacy. No disrespect is intended.

her on the mouth when she agreed. 7RP 13, 23. Olivarez-Aguilar began buying K.M.D.M. gifts, such as chocolate and stuffed animals, said nice things to her, and kissed her on the mouth regularly. 7RP 14-15, 24, 29. K.M.D.M. kept the relationship a secret from her mother at Olivarez-Aguilar's request. 7RP 30.

One day in January of 2014, while Adela was at work, Olivarez-Aguilar kissed K.M.D.M., took her to bed, and had penile-vaginal intercourse with her. 7RP 25-26. Afterwards, Olivarez-Aguilar told K.M.D.M. that he loved her, and K.M.D.M. decided that she was in love with Olivarez-Aguilar as well. 7RP 27, 45. On January 27, 2014, K.M.D.M. turned 14 years old, and Olivarez-Aguilar was present for the family's birthday dinner. 6RP 8-9.

One day around February 20th or 24th, 2014, Adela arrived home after work to discover that Olivarez-Aguilar had picked K.M.D.M. up from school without her permission. 6RP 9-11. Adela observed Olivarez-Aguilar sitting with K.M.D.M. in his vehicle in the parking lot of their apartment building, and became suspicious. 6RP 10; 7RP 16. Adela promptly broke up with Olivarez-Aguilar and kicked him out of her apartment. 6RP 11. However, Olivarez-Aguilar continued to communicate with K.M.D.M. through Facebook, telling her that he wanted to leave for California and

wanted K.M.D.M. to go with him as his girlfriend. 7RP 31, 34. She agreed, and they made plans to do so, keeping it a secret from her mother. 7RP 32-33. Olivarez-Aguilar and K.M.D.M. also talked about getting married. 7RP 34.

On Friday, February 28th, K.M.D.M. took the bus to school as usual, but instead of going inside, she met Olivarez-Aguilar outside as they had planned. 7RP 35. He drove her home to pick up a suitcase that she had packed the previous evening, and then the two drove to a bus station in Seattle and boarded a bus to California. 7RP 34-36. Olivarez-Aguilar mentioned to K.M.D.M. that he was worried the police would be looking for them. 7RP 45. K.M.D.M. had left a note for her mother asking Adela not to search for her, but did not give any information about where she was going or with whom. 6RP 16; 7RP 46. K.M.D.M. also left her phone at home, and Olivarez-Aguilar changed his phone number. 6RP 13, 20; 7RP 44. When Adela arrived home that afternoon and discovered that K.M.D.M. was gone, she first verified that K.M.D.M. was not with her father or uncle, and then called the police to report her missing. 6RP 12.

When Olivarez-Aguilar and K.M.D.M. reached California the next day, Olivarez-Aguilar's cousin picked them up and brought

them to her home, where she lived with her boyfriend and three young sons. 7RP 36-38. Over the next week, K.M.D.M. and Olivarez-Aguilar shared a bedroom in the cousin's house, and had sex approximately four times. 7RP 37.

Meanwhile, police in Washington had obtained a warrant for Olivarez-Aguilar's arrest and were searching for the pair. 5RP 56. Officers learned that Olivarez-Aguilar had recently called a friend in the Kent area and claimed that he was in Atlanta. 6RP 52, 54. However, other information indicated that Olivarez-Aguilar was actually in a town northwest of Los Angeles, California. 6RP 58. That information was relayed to United States Marshal Service personnel in Los Angeles, where Inspector David Dominguez located the address of Olivarez-Aguilar's cousin and went to her residence with the support of local law enforcement. 6RP 68-70.

When Dominguez arrived at the home around 12:30 a.m. on the seventh day after K.M.D.M. went missing, he was let in by one of several young children who were sleeping on a sofa bed in the living room. 6RP 70-73. At the time, Olivarez-Aguilar and K.M.D.M. were lying together in bed in one of the bedrooms. 7RP 40. Dominguez announced himself as a police officer, and called out to determine whether anyone else was home. 6RP 73.

One of the bedroom doors immediately opened, and a shirtless Olivarez-Aguilar looked out, saw the police officers, and promptly closed the bedroom door. 6RP 73.

When officers called commands for Olivarez-Aguilar to come out of the bedroom, the cousin and her boyfriend came out of the other bedroom to see what was going on. 6RP 73. Dominguez explained the situation to them, and the cousin confirmed that "Gregorio" was staying in the other bedroom. 6RP 79. The cousin granted permission for the officers to break down the bedroom door to secure Olivarez-Aguilar. 6RP 80.

When officers then breached the door, Olivarez-Aguilar came crawling out, now wearing a shirt and boxers. 6RP 80. As officers were handcuffing him, K.M.D.M. came out of the bedroom and begged them not to hurt him. 6RP 81. She, too, was under-dressed in only shorts and a tank top on a cold night. 6RP 81-82. The bedroom out of which they emerged contained only one bed and the belongings of both K.M.D.M. and Olivarez-Aguilar. 6RP 83. Dominguez explained to K.M.D.M. why they were there, collected her belongings, and transferred her into the custody of children's services, where she was soon put on a plane back to her mother in Washington. 6RP 82; 7RP 42.

At trial, K.M.D.M. (who was still only 14 years old), Adela, Dominguez, and others testified to the facts above. During K.M.D.M.'s testimony, she answered questions in a way that suggested reluctance to blame Olivarez-Aguilar or get him in trouble, frequently initially attempting to take equal responsibility for their romantic relationship and flight to California. For example, when asked if their relationship changed from platonic to romantic because Olivarez-Aguilar began treating her differently, she responded that "both of us started to treat each other [differently]." 7RP 10. K.M.D.M. testified that the change started when "[o]ne day, we sat down to talk and we told each other everything," then explained that Olivarez-Aguilar had told her he "liked" her and she told him the same. 7RP 11.

K.M.D.M. also initially testified that she hadn't told her mother about her relationship with Olivarez-Aguilar "[b]ecause she could punish me," but when questioned about it again later, K.M.D.M. revealed that she kept it a secret from her mother "because [Olivarez-Aguilar] didn't want to say anything to her." 7RP 16, 30. When asked whose idea it was to go to California, K.M.D.M. initially stated "both." 7RP 31. When asked if one person in particular had suggested California, K.M.D.M. was evasive,

responding, "Well, I wanted to go to California." 7RP 31. When pressed, K.M.D.M. admitted that Olivarez-Aguilar had asked her if she wanted to go to California with him, but added, "[B]ut I had already told him that I like California." 7RP 32.

K.M.D.M. also initially denied that Olivarez-Aguilar had ever mentioned that police might be looking for him as a result of them going to California. 7RP 45. When asked the question again with slightly different wording, K.M.D.M. said, "Maybe," and when asked why she said "maybe," K.M.D.M. admitted that "I remember, it seems like he told me that." 7RP 45.

K.M.D.M.'s youth and discomfort at testifying were apparent at various other times during her testimony, such as when she repeatedly stated that she didn't know how to explain what she meant by comments such as "he treated me well" and "he talked to me nicely." 7RP 29-30. K.M.D.M. also had difficulty explaining what she meant when she said that she and Olivarez-Aguilar had "sex," initially just saying "I don't know how to explain it." 7RP 25. However, after responding affirmatively when asked if she knew what the words "penis" and "vagina" meant, K.M.D.M. was able to articulate that "[h]e put his penis in my vagina" when they had sex. 7RP 25-26.

When neither party had any more questions for K.M.D.M., the trial court excused her, saying, "Thank you very much for you to be here [sic]. I know it was hard for you. Okay. Thank you. You are free to leave." 7RP 63. At no point did Olivarez-Aguilar object or raise any concern about the court's remark. 7RP 63.

Olivarez-Aguilar's post-arrest statements to police officers were suppressed based on a pre-trial motion, and he did not testify at trial or call any witnesses on his behalf. 2RP 72; 7RP 68.

C. ARGUMENT

1. THE TRIAL COURT'S PARTING REMARK TO K.M.D.M. DID NOT CONSTITUTE A COMMENT ON THE EVIDENCE.

Olivarez-Aguilar contends that the trial court's parting remark to K.M.D.M. thanking her for coming to court and stating, "I know it was hard for you," constituted a judicial comment on the evidence entitling him to a new trial. This claim should be rejected. Given the context in which the comment was made, the jury would not have interpreted the trial court's statement as an expression of personal opinion regarding the credibility of K.M.D.M.'s testimony.

a. Olivarez-Aguilar May Not Raise This Claim For The First Time On Appeal.

Appellate courts generally will not consider an issue that is raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Because Olivarez-Aguilar did not object to the alleged judicial comment on the evidence at trial, in order to have the claim reviewed on appeal he must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. A claim of judicial comment on the evidence indisputably alleges an error of constitutional dimension. Wash. Const. art. IV, § 16 (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”). However, not every alleged constitutional error is a manifest constitutional error. State v. Lynn, 67 Wn. App. 339, 342-46, 835 P.2d 251 (1992) (“[I]t is important that ‘manifest’ be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.”).

A manifest error is an error that is “unmistakable, evident or indisputable” and that causes “actual prejudice” by having “practical and identifiable consequences in the trial of the case.”

State v. Kalebaugh, No. 89971-1, 2015 WL 4136540, at *3, ___ Wn.2d ___ (July 9, 2015); State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011). The mere possibility of prejudice is insufficient; the defendant must show that the alleged error actually affected his rights at trial. Kirkman, 159 Wn.2d at 926-27.

Here, Olivarez-Aguilar does not, and cannot, show that the court's parting remark to K.M.D.M. actually affected the trial. As discussed below, when viewed in the context of the trial as a whole, the court's statement did not actually communicate to the jury the judge's personal opinion of K.M.D.M.'s credibility, and it had no effect on the outcome because K.M.D.M.'s credibility was not materially disputed at trial. As such, Olivarez-Aguilar fails to demonstrate a manifest error that may be reviewed for the first time on appeal. See State v. King, 131 Wn. App. 789, 800, 130 P.3d 376 (2006) (declining to review claim of judicial comment on the evidence because not a manifest error).

Even if this Court chooses to reach the merits of Olivarez-Aguilar's claim, his convictions should be affirmed for the reasons stated below.

b. The Challenged Remark Did Not Convey To
The Jury The Court's Personal Opinion
Regarding The Evidence.

Article IV, section 16 of the Washington State Constitution prohibits a judge from making a comment that conveys to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). In evaluating whether a trial court's words or actions amount to a comment on the evidence, the appellate courts look at the facts and circumstances of the particular case. Jacobsen, 78 Wn.2d at 495.

Here, the trial court's remark that "I know it was hard for you" merely alluded to K.M.D.M.'s discomfort during her testimony, which was apparent in her frequent inability or reluctance to articulate the details of her relationship with Olivarez-Aguilar and her attempts to take equal responsibility for their relationship and flight to California upon herself. 7RP 16, 25-26, 29-32. K.M.D.M. was a 14-year-old girl who had just been required to sit on the witness stand in front of strangers and be questioned about topics such as her knowledge of the mechanics of sexual intercourse, in the criminal trial of a man the 14-year-old previously had wanted to marry. 7RP 3-63. In that context, the jury would not have

interpreted the trial court's inclusion of the statement "I know it was hard for you" in its remarks thanking and dismissing K.M.D.M. as an expression of the trial court's personal belief in her truthfulness. Instead, the jury would have interpreted the comment precisely as the trial court likely intended it: as a simple acknowledgement of K.M.D.M.'s observable discomfort.

The trial court's acknowledgement of K.M.D.M.'s discomfort was divorced from any suggestion that because K.M.D.M. was uncomfortable during her testimony, she was therefore telling the truth about having sex with Olivarez-Aguilar; as the jurors likely knew from their own life experience, any 14-year-old would be uncomfortable discussing the mechanics of sex in front of strangers in anatomically correct language, even if she were lying about having had sex with the defendant.

Furthermore, the court's parting remark in no way invited the jurors to base their verdict or their assessment of K.M.D.M.'s credibility on their emotions rather than rational thought, as Olivarez-Aguilar claims. Brief of Appellant at 8. The record does not indicate that K.M.D.M. displayed strong emotions during her testimony, such as by crying, and thus there was not a significant risk that the jurors were going to have difficulty assessing her

testimony rationally rather than emotionally. 7RP 3-63. Indeed, K.M.D.M. displayed a rather positive emotional attitude toward the defendant during her testimony, attempting to protect him by taking joint responsibility for their actions. 7RP 10-11, 16, 30-32. The jury would thus not have interpreted the trial court's parting acknowledgement of K.M.D.M.'s discomfort during her testimony as a suggestion that Olivarez-Aguilar was responsible for K.M.D.M.'s discomfort because he committed the crimes charged, or that the jurors should base their verdict on sympathy for K.M.D.M. rather than their rational assessment of the evidence.

Because the trial court's comment did not convey to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during trial, it did not constitute a judicial comment on the evidence.

c. Any Error Was Harmless.

Where a trial court comments on the evidence, the error is presumed to be prejudicial, and reversal is required "unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted." State v. Hartzell, 156 Wn. App. 918, 937, 237 P.3d 928 (2010). In this

case, even if this Court finds that the trial court's parting remark to K.M.D.M. constituted a judicial comment on the evidence, Olivarez-Aguilar's convictions should be affirmed because the record affirmatively shows that he was not prejudiced by the error.

The trial court instructed the jury at both the beginning and the end of the trial to disregard any remark by the court that appeared to indicate the court's personal opinion of the evidence, and jurors are presumed to follow the court's instructions. 5RP 6; CP 46; Kirkman, 159 Wn.2d at 937. Additionally, the fact that defense counsel apparently did not consider the remark worth objecting to suggests that it was perceived as inconsequential by those who heard it firsthand. State v. Hansen, 46 Wn. App. 292, 301, 730 P.2d 706 (1986).

Furthermore, Olivarez-Aguilar did not materially dispute the truthfulness of K.M.D.M.'s testimony. On cross-examination, Olivarez-Aguilar did not attempt to establish that K.M.D.M. had testified untruthfully in any way. 7RP 48-61. Rather than challenging in any way her testimony that they had sex, Olivarez-Aguilar's strategy on cross-examination focused on eliciting details from K.M.D.M. that would allow him to argue on an emotional level that he hadn't really done anything wrong by taking her to

California. Defense counsel elicited from K.M.D.M. that Olivarez-Aguilar believed she had left a note for her mother telling Adela that she was with Olivarez-Aguilar, that K.M.D.M. did not have a strong bond with her mother, that Adela had permitted K.M.D.M.'s older sister to leave home to live with an older man when the sister was only a little older than K.M.D.M., and that leaving home and beginning a sexual relationship with a man at the age of fourteen was normal and accepted in the Honduran community in which K.M.D.M. had spent most of her life. 7RP 48-61.

In closing argument, Olivarez-Aguilar focused primarily on arguing that K.M.D.M.'s desire to go to California with him meant that the definition of "restrain" in the kidnapping charge was not satisfied, and that K.M.D.M.'s testimony regarding the timing of their first sexual encounter was too uncertain to conclude that it occurred while she was 13 years old. 7RP 24-29. While defense counsel did argue in closing that the State had not proved beyond a reasonable doubt that Olivarez-Aguilar ever had sex with K.M.D.M., he based this argument primarily on the need for corroboration and the fact that the officers who arrested Olivarez-Aguilar observed

nothing more than the fact that he and K.M.D.M. were in the same bedroom, never explicitly arguing that K.M.D.M. had lied or was mistaken about having sex with Olivarez-Aguilar. 8RP 24-27. Thus, Olivarez-Aguilar's own strategy at trial suggested to the jury that K.M.D.M. had testified truthfully.

In light of the context in which the trial court's remark was made, the court's repeated instructions to the jury to disregard any apparent comment on the evidence, and Olivarez-Aguilar's own strategy at trial, the record affirmatively shows that the result of the trial would have been the same had the challenged remark not occurred, and thus any error was harmless. See State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999) (standard jury instruction to disregard any apparent comment on the evidence was effective in curing any prejudice from alleged judicial comment); Hansen, 46 Wn. App. at 300 (alleged comment was harmless because it touched only on an undisputed issue).

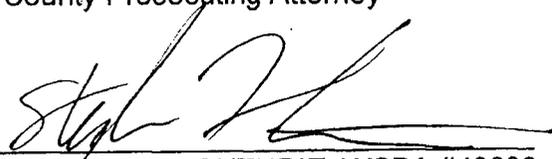
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Olivarez-Aguilar's convictions.

DATED this 17th day of August, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

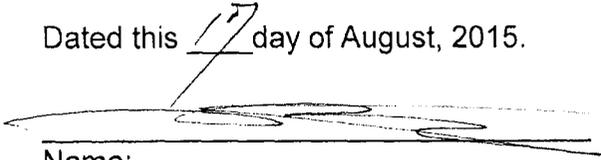
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 17 day of August, 2015.


Name:
Done in Seattle, Washington

KING COUNTY PROSECUTOR

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