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Court of Appeals
Division I
State of Washington

NO. 74056-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JORGE ZAYAS-LOPEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An out-of-court statement offered to prove the truth of the matter asserted is hearsay, and thus is inadmissible without an exception; conduct that is nonassertive or is offered not for the truth of an assertion but as relevant circumstantial evidence of another fact, such as a child's precocious knowledge of sexual matters, is not hearsay and is admissible if relevant. In Zayas-Lopez's trial for raping and molesting his 11-year-old stepdaughter, a police officer testified that the girl had made a masturbatory hand motion, and a 14-second silent video from a subsequent interview of the child showed her making a similar hand motion. These gestures were offered as circumstantial evidence of the child's precocious knowledge of sexual matters. Did the trial court correctly rule that this evidence was not hearsay and thus admissible? Was any error harmless?

2. A trial court abuses its discretion by not declaring a mistrial when an irregularity creates such prejudice to the defendant that nothing short of a new trial can ensure a fair trial. Testimony that is not a direct comment on the defendant's guilt or on the veracity of another witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion

testimony. In Zayas-Lopez's trial, a nurse testified that while interviewing the victim for medical diagnosis related to repeated rapes, the nurse told the girl she was "brave" for discussing her abuse, and she answered the girl's question about whether "this has happened to other kids." Did the trial court act within its discretion in refusing to grant a mistrial because the comments were not opinions on the victim's credibility or on Zayas-Lopez's guilt and there was no prejudice?

3. A trial court has discretion to determine whether multiple offenses encompass "same criminal conduct" for sentencing purposes, and the defendant has the burden of proving that the crimes were committed at the same time and place, and involved the same victim and intent. In Zayas-Lopez's case, the victim testified to multiple rapes occurring at several distinct times and places — more instances than there were charged counts — and the prosecutor specifically told the jury that one of those instances, in which the girl was raped both anally and orally in her mother's bedroom, amounted to a single count of child rape. Did the trial court act within its discretion in finding that none of Zayas-Lopez's crimes were "same criminal conduct?"

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Jorge Zayas-Lopez was charged by Second Amended Information with Child Molestation in the First Degree – Domestic Violence; three counts of Rape of a Child in the First Degree – Domestic Violence; and Communication with a Minor for Immoral Purposes. The counts all alleged that between April 1, 2012, and September 13, 2013, in King County, Washington, Zayas-Lopez victimized A.R.B., who was less than 12 years old at the time of the offenses. CP 9-11. The State later withdrew the domestic-violence allegations. 1RP 1686.[1] A jury convicted Zayas-Lopez as charged. CP 159-63. The court sentenced Zayas-Lopez to a standard-range indeterminate sentence of 250 months to life. CP 430. Zayas-Lopez timely appealed. CP 438-39.

2. FACTS OF THE CRIME

In 2012 and 2013, A.R.B. was an 11-year-old fifth-grader who lived with her single mother, her younger sisters and her

[1] The verbatim report of proceedings is divided into multiple volumes. Volumes One through Eleven are consecutively numbered and are referred to here as 1RP (May 7 and 11, 2015 — pp. 1-135; May 12 and 13, 2015 — pp. 136-386; May 14, 2015 — pp. 388-599; May 19, 2015 — pp. 600-613; May 21, 2015 — pp. 614-815; May 26, 2015 — pp. 816-869; May 27, 2015 — pp. 870-1051; May 28, 2015 — pp. 1052-1229; June 1, 2015 — pp. 1230-1424; June 2, 2015 — pp. 1425-1607; and June 3, 2015 — pp. 1608-1772). A separately numbered volume, referred to as 2RP, contains a transcription of audio-recorded proceedings on June 3, 2015, and October 2, 2015 (sentencing).

de facto stepfather, Jorge Zayas-Lopez, in an apartment in Kent. 1RP 1182-85, 1190-91. A.R.B. was a fun, outgoing, happy child who liked the Disney Channel and video games, playing at the playground, and swimming at the apartment-complex pool. 1RP 1183-84, 1196. She had trouble with reading-comprehension and math and needed special education at her elementary school. 1RP 1186-86.

A.R.B.'s mother, Armida Castro, met Zayas-Lopez In the summer of 2011 at a local nightclub and they soon started dating. 1RP 1202. He almost immediately started staying with Castro and the girls, and Castro quickly became pregnant. Id. The couple were engaged in May 2012. 1RP 1201.

At first, A.R.B. and her sisters liked their soon-to-be-stepfather. Though "George" made them do chores and homework and meted out punishment, he also made their mother happy, and he was nice and did fun things with them, such as playfully throwing the girls into the pool. 1RP 1242, 1209-11, 1387, 1455, 1464. Zayas-Lopez seemed to favor A.R.B. over the younger girls. 1RP 1394. But her opinion of him soon changed. 1RP 1464-65.

With the new baby on the way, the family moved to a larger, three-bedroom apartment in the same complex. 1RP 1197. While

they were unpacking, A.R.B. found herself alone with Zayas-Lopez. 1RP 1521. He sat down next to the little girl, kissed her on the lips, and told her he loved her. 1RP 1521, 1528. It made A.R.B. feel weird. 1RP 1522.

One day soon after, A.R.B.'s mother was at work and her sisters were outside when Zayas-Lopez called A.R.B. into the master bathroom. 1RP 1466. He rubbed her genitals. 1RP 1467. She was "freaking out," but did not know what to do. Id. He told her not to tell anyone, that it was their secret, and promised to buy her a new phone. Id. A.R.B. did not want this secret. Id. "I wanted to tell so bad, but I couldn't." 1RP 1470.

Zayas-Lopez's sexual abuse of his stepdaughter became so routine that A.R.B. later could not count how many times or how often he had raped her, and she later referred to Zayas-Lopez violating her as "the same as usual." 1RP 1480, 1502, 1531. Zayas-Lopez raped her in nearly every room in the apartment — her mother's bathroom, her mother's bedroom, the children's bedroom, the children's bathroom, and the living room. 1RP 1471-72, 1510. Specifically, A.R.B. recalled:

- One day when her mother was at the store, Zayas-Lopez brought her into her mother's room, locked the door, told her to remove her pants, painfully raped her in the anus and

then told her to turn and face him so he could rape her orally. 1RP 1474-77.

- During at least two or three afternoons after school, Zayas-Lopez called her into her mother's bedroom and vaginally raped her on the bed. 1RP 1479-82, 1485-93.

- Often in the middle of the night or in the predawn morning, Zayas-Lopez would call to A.R.B. and wake her from bed to rape her orally. 1RP 1495-1505. He would force his penis so far into her mouth that she would choke and feel like throwing up. 1RP 1501. He "would just squeeze" and "squirt" his penis and "white stuff" would go into the sink. 1RP 1478. "I just wanted to leave, like, when he was making me suck his thing, I just wanted to run out of the room," she later testified. 1RP 1504. After the rapes, she could not sleep because she was so "grossed out." Id.

- Once in her mother's bathroom, Zayas-Lopez showed his stepdaughter two videos on his cell phone of a man and woman engaging in fellatio and told her to emulate the videos on him. 1RP 1502-04.

- On another occasion, Zayas-Lopez was orally raping her in the bathroom, and she looked up to see him "smoke this pipe thing" and "gross"-smelling smoke came out of his mouth. 1RP 1508-09.

- One night, Zayas-Lopez was orally raping A.R.B. on the living room couch when her one-year-old sister — Zayas-Lopez's daughter — toddled over and tried to touch Zayas-Lopez's penis. 1RP 1510-11. He continued raping A.R.B. anyway. Id.

- The next morning, Zayas-Lopez told A.R.B. to tell her mother she was sick so she could stay home from school. 1RP

> 1512. Zayas-Lopez made her "do all that stuff" while she was home alone with him. 1RP 1513. A houseguest, Shukri Del, had overheard Zayas-Lopez telling A.R.B. to lie about being sick. 1RP 1513-14, 1086-92. After leaving the apartment, Del later told Castro, and Castro came and took A.R.B. to school. Id.

By the fall of 2013, Zayas-Lopez's marijuana and cocaine smoking had cost him his job and had destroyed his relationship with Castro. 1RP 1264-70. He had become paranoid, jealous and violent. Id. He and Castro were fighting every day. 1RP 1269, 1468. On October 20, 2013, Zayas-Lopez took Castro's car and left. 1RP 1270-71. He did not come back all weekend and would not answer his phone. 1RP 1271-72.

At last, Zayas-Lopez was not around to deny what he had been doing to her, A.R.B. thought. 1RP 1582. She approached her mother while she was cooking dinner and asked to talk to her in private. 1RP 1273. They went into Castro's bedroom and sat on the bed. 1RP 1469. "I couldn't hold it anymore," A.R.B. later testified. 1RP 1468. A.R.B. calmly told her mother everything, and they cried. 1RP 1274-75, 1468-69. Then Castro called the police. 1RP 1469-70, 1275.

After the police came and took statements and A.R.B. went to stay with a relative, Zayas-Lopez came home late at night and

accused Castro of having an affair with a policeman he had seen leaving the apartment. 1RP 1277, 1280. Zayas-Lopez hit her, pushed her against a wall and choked her, and broke her car key, then left. 1RP 1278-80.

The next day, October 21, 2013, Castro took A.R.B. to Harborview Medical Center, where the now-12-year-old girl told a social worker that her mother's boyfriend was "telling me to suck his thing" and had told her to keep it secret. 1RP 687. A pediatrician did not find any external injury to A.R.B.'s genitals, which was unsurprising given that the last reported abuse was more than 21 days earlier. 1RP 730-33.

On October 30, A.R.B. returned to Harborview for a sexual-assault exam by an advanced registered nurse practitioner, Joanne Mettler. 1RP 759, 775. A.R.B. told the nurse that "George" had "fingered my butt and my peepee and he put his thing in my butt and my peepee, and he was kissing me, and his tongue was in my mouth." 1RP 781-82. A.R.B. told the nurse this "was not done on one day" but "days," and it hurt. Id. Mettler found no injuries, which did not rule out abuse. 1RP 789-90, 808.

Detectives got a warrant for Zayas-Lopez's cell phone and found that Zayas-Lopez had viewed a large number of

pornographic websites with titles such as "small body teens," "horny stepfather amateur fucking," "real stepdaughter fuck cum shot," "stepfamily fuck threesome," and "cute tiny girl on home porn video." 1RP 940-46, 981-84; Ex. 11. He also had searched a pornography website with the terms "fuking [sic] my stepdaughter" and "fucking my step daughter in the bathroom." 1RP 985-89; Ex. 13, 15.

At trial, the family's former houseguest recounted overhearing Zayas-Lopez telling A.R.B. to stay home from school, and said she later told Castro. 1RP 1054-94. The State presented an apologetic letter Zayas-Lopez had sent to Castro, and translations of phone calls between Zayas-Lopez and Castro in which he said Castro was "trapped in the past" and asked her to "move on" and "forget about the bad." 1RP 1294-1304; Ex. 29, 34, 35. And A.R.B.'s younger sister recalled an afternoon when Zayas-Lopez summoned A.R.B. into the bathroom alone and closed the door for a while. 1RP 1381-84.

Zayas-Lopez's defense was that A.R.B. was "lying to get back with her real father," and "someone influenced her." 1RP 1749-51. Zayas-Lopez testified that he moved out of the apartment abruptly simply because Castro had refused to show him a text

message on her phone and he ended the relationship when he "saw underwears that didn't belong to me" when he had gone to the apartment to gather his belongings. 1RP 1623-26.

Zayas-Lopez contended that Castro was angry with him for his drug use and the girls were mad at him for making them do chores. 1RP 1639. He denied ever being alone with A.R.B., but his attorney never asked him in direct examination whether he had raped or molested A.R.B.[2] 1RP 1619-42. Under cross-examination, Zayas-Lopez acknowledged all the internet pornography, but he said it was coincidental that the subject matter involved stepfamilies and stepdaughters. 1RP 1657-72. He agreed, however, that the specific genre of pornography was interesting, sexually gratifying and arousing. 1RP 1666-67. "I like the females," he told the jury. 1RP 1667.

C. ARGUMENT

1. EVIDENCE OF THE VICTIM'S HAND MOTIONS WAS NOT HEARSAY.

First, Zayas-Lopez claims he deserves a new trial because evidence of his young victim's hand motions was inadmissible

[2] On redirect, Zayas-Lopez's attorney asked him, "Did you ever have [A.R.B.] perform blow jobs on you like in these videos?" but the Court sustained an objection that the question was outside the scope of cross examination. 1RP 1676.

hearsay. To the contrary, there was no error because the evidence was not hearsay. The testimony and silent video of the victim's masturbatory gestures, presented without specific context or accompanying questions, were not offered for the truth of the gestures themselves but as relevant circumstantial evidence of the victim's precocious sexual knowledge. Any error was harmless.

a. Additional Relevant Facts.

The State offered the testimony of Kent Police Officer Melvin Partido, who would testify that while speaking to A.R.B. at her home on October 20, 2013, she made a hand gesture indicating male masturbation. 1RP 886. The officer would describe it to the jury as "a motion which, as if you were — say if you have a hammer, turn it upside-down, and you grab the top of the hammer with your hand and you rub the hammer up and down." Id. Partido also would testify that A.R.B. also pointed to her vaginal area and buttocks. Id. The State also offered the testimony of Carolyn Webster, a child interview specialist, that on October 24, 2013, during an interview, A.R.B. made a similar hand gesture, which was

video-recorded and lasted approximately 14 seconds. 1RP 1152, 1166, 1170; Ex. 23.[3]

Pretrial, Zayas-Lopez objected to this evidence as inadmissible hearsay. 1RP 200-01, 1129-33; CP 137-38. The State responded that the gestures were offered "to show that she [A.R.B.] is familiar with these sorts of things." 1RP 202. "[H]er moving her hand up and down in this masturbatory gesture, we don't know if that means she did it to him ... or he did it to himself and — or that it happened at all — but that she's familiar with something she shouldn't be familiar with, which is a male masturbatory gesture," the prosecutor said. 1RP 202-03.

The trial court ruled that the gestures were not hearsay because they were offered "for the purpose of showing sexual knowledge beyond the normal understanding of a child of her age." 1RP 207. The court offered to give the jury a limiting instruction, but Zayas-Lopez declined. 1RP 207-08, 1132.

Officer Partido did not testify to anything that he and A.R.B. discussed, except that he had asked her to tell him "briefly what happened." 1RP 885-916. Partido did not mention any questions

[3] In pretrial motions, the State described the gestures in the Webster interview as including head motions suggestive of oral sex. 1RP 198. But the silent video that was shown to the jury does not appear to include any such motions, only hand gestures similar to those described by Officer Partido. Ex. 23.

or statements that preceded or accompanied the gesture. Id. Similarly, Webster testified only about the general procedure of child interviews but did not discuss any questions that she asked A.R.B. or anything that A.R.B. said. 1RP 1152-77. Webster affirmed that A.R.B. had "used a gesture," but did not describe it. 1RP 1168. She said only that the video accurately depicted it. 1RP 1168, 1170.

b. The Gestures As Presented Were Not Hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless an exception applies. ER 802. Whether a statement was hearsay is reviewed de novo. State v. Gonzalez-Gonzalez, __ P.3d __, 33027-3-III, 2016 WL 1755818 at *2 (May 3, 2016).

A "statement" is an oral or written assertion, or a person's nonverbal conduct if that person intends that conduct to be an assertion. ER 801(a). Thus, a mere utterance, or nonverbal conduct that is not assertive, is not hearsay and its admissibility is governed by principles of relevance, not by hearsay principles. In the Matter of the Dependency of Penelope B., 104 Wn.2d 643, 652-53, 709 P.2d 1185 (1985) (gestures and utterances during

child-abuse interview not hearsay when offered to show precocious knowledge of sexual matters). Accordingly, nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay. Id. at 652.

As our supreme court explained, "An involuntary act such as trembling would be admissible as nonassertive nonverbal conduct whereas the act of nodding one's head affirmatively or pointing to identify a suspect in a lineup would be hearsay and not admissible because it is assertive nonverbal conduct." Id. The burden is on the party claiming that an assertion is intended; doubtful cases are to be resolved against that party and in favor of admissibility. Id. at 654.

If nonverbal conduct is assertive, whether it is hearsay "depends upon the purpose for which the statement is offered." State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000). In determining whether the statement was offered to prove its truth instead of for the State's other asserted purpose, the issue is whether the other purpose was relevant. Gonzalez-Gonzalez, 2016 WL 1755818 at *3.

"An assertion that is circumstantial evidence proves a fact indirectly, by implication; credibility of the declarant is not important

because the relevance of the assertion does not depend on its truth." In re Penelope B., 104 Wn.2d at 653. Further:

> If tulips bloom, they are not making assertions that it is spring; but the testimony of a witness that tulips were observed to be blooming may be offered as circumstantial evidence of spring. If a dog limps, it is not thereby making an assertion and the testimony of a witness that the dog was observed to be limping may be offered as circumstantial evidence that the dog was injured. Similarly, the testimony of a witness that he or she observed a person limping may be offered as circumstantial evidence that the person was injured.

Id.

Thus, a declarant saying "X is no good" circumstantially indicates the declarant's state of mind toward X and, if relevant, it is admissible. Id. (quoting United States v. Brown, 490 F.2d 758, 762-63 (D.C. Cir. 1973)). But if the declarant said "I hate X," it would be offered for the truth of the matter alleged — that declarant hates X — and thus would be inadmissible absent an exception under the hearsay rules. Id. Just because something is an assertion does not automatically make it hearsay.[4]

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[4] Other states recognize that under the so-called Bridges doctrine, "out-of-court assertions are nonhearsay when offered to prove a victim's knowledge of facts the victim could not know unless the victim had certain experience." John E.B. Myers, Myers on Evidence of Interpersonal Violence: Child Maltreatment, Intimate Partner Violence, Rape, Stalking, and Elder Abuse § 7.09 (5th ed. 2011) (citing Bridges v. State, 247 Wis. 350, 19 N.W. 529 (1945) (molested child's description of van not hearsay when offered to show knowledge of van as proof he was inside)).

Accordingly, in In re Penelope B., specific acts by the girl during her exam that were not responses to specific questions were admissible as circumstantial evidence of "precocious sexual knowledge." 104 Wn.2d at 654-55. These included utterances showing knowledge of private names for genitalia and pushing an anatomically correct male doll into the therapist's face and saying "put this in your mouth" or "suck me" as she held its penis. Id. But other acts and statements presented as responses to specific questions were inadmissible hearsay because they were assertions offered for their truth. Id. at 657-58. For example, the therapist testified that the child used clay, drew pictures and spelled out words to answer direct questions. Id. at 658.

Turning to Zayas-Lopez's case, evidence of A.R.B.'s hand gesture was not hearsay because it was not offered for the truth of the gesture itself. The gesture was highly relevant evidence by implication of the preteen's precocious sexual knowledge.[5] As presented to the jury — devoid of any preceding questions or accompanying words — the hand motions themselves carried no message to the jury except the implication that A.R.B. was knowledgeable about adult sexual experiences.

[5] See State v. C.J., 148 Wn.2d 672, 687, 63 P.3d 765 (2003) (indirect evidence of sexual abuse may include a child victim's precocious sexual knowledge).

Zayas-Lopez correctly looks to In re Penelope B. for guidance, but he compares his case to the wrong examples, where Penelope B.'s actions were actual statements offered for the truth of the statements themselves, i.e., using drawings to answer a therapist's specific questions. As presented in Zayas-Lopez's case, devoid of specific context, A.R.B.'s hand motions were no different than the non-hearsay conduct in Penelope B. because they were not offered for the truth of the hand motions.

Zayas-Lopez's argument that the motions were "non-verbal accusations" relies on reading far too much into the gestures as presented to the jury. His claim that the gestures could not be "divorced from the context in which they were made" requires one to imagine the rest of the specific context, i.e., what questions were asked and what words A.R.B. spoke. But that is not part of the hearsay rules. The hand motions alone do not directly say "He did this," or "I did this," or "I know about male masturbation." If the broader context here — the simple fact that A.R.B.'s hand motions were made while talking to police and the forensic interviewer — turned them into hearsay, then *all* the non-verbal conduct in In re Penelope B. also would have been inadmissible hearsay simply by virtue of the broader context of a child-abuse examination.

104 Wn.2d at 655. What matters is whether they are assertions, and if so, for what purpose they were offered.[6]

Also, because Zayas-Lopez refused the trial court's offer of a limiting instruction, he cannot complain now that the jury might have used the evidence for purposes other than that for which the State offered it. He contends that no limiting instruction could possibly have prevented this, but trial courts give such instructions routinely, and this Court presumes that jurors follow them. State v. Yates, 161 Wn.2d 714, 763, 168 P.3d 359 (2007).

Zayas-Lopez's argument that the evidence should have been excluded as unfairly prejudicial under ER 403 is baseless in the face of all the other sexually graphic evidence in this case. In any event, he did not raise that argument at trial so he may not raise it now, where the trial court has had no chance to weigh the prejudice and probative value. See CP 137-38; State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (on appeal, a party may not raise objection not properly preserved at trial absent manifest constitutional error); RAP 2.5.

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[6] See 5B Wash. Prac., Evidence Law and Practice § 801.9 (5th ed. 2015) ("[T]he drafters of the [evidence rules] fully intended [to take] implied assertions out of the definition of hearsay . . . [A]ccording to the Washington Supreme Court's opinion in Penelope B. the hearsay rule is out of the picture, period. Implied assertions are not hearsay, and in the years since Penelope B., the Supreme Court has never expressly retreated from this position.").

The evidence of hand gestures made by Zayas-Lopez's young rape victim was not hearsay. It was admissible as relevant circumstantial evidence of the girl's precocious sexual knowledge to bolster the proof of her repeated sexual abuse. Zayas-Lopez's argument fails.

c. Any Error Was Harmless.

An erroneous evidentiary ruling does not result in reversal unless the defendant was prejudiced. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). For evidentiary errors not implicating a constitutional mandate, this Court will reverse only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Id. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id. Under this "overwhelming untainted evidence" test, this Court looks only at the untainted evidence and determines whether it is so overwhelming that it necessarily leads to a finding of guilt. State v. Watt, 160 Wn.2d 626, 635-36, 160 P.3d 640 (2007).

Here, even if the gestures were erroneously admitted, they were harmless in the face of all the other overwhelming evidence of

Zayas-Lopez's repeated rape and molestation of his 11-year-old stepdaughter. The jury was presented not only with harrowing and heartbreakingly detailed testimony from A.R.B. herself (which also demonstrated her precocious sexual knowledge), but substantial corroborative testimony. All this was topped off with the evidence that Zayas-Lopez not only had the pornographic videos on his phone like the ones A.R.B. described, but he actively sought out pornographic videos about the identical criminal conduct that the little girl reported.

Zayas-Lopez's assertions that this case "boiled down to credibility" — that it was a she-said-he-said case — fly in the face of the record. The jury heard that A.R.B. made consistent allegations to three different medical professionals. The jury heard from the family's houseguest who verified a unique episode related to the rapes. The jury heard from A.R.B.'s little sister, whose recollection was consistent with A.R.B.'s account. The jury heard from A.R.B.'s mother, who corroborated much of A.R.B.'s account, including Zayas-Lopez's drug smoking in the bathrooms. And the jury learned of Zayas-Lopez's pornographic fantasies about "fucking my stepdaughter in the bathroom." 1RP 985-89; Ex. 13, 15. This was not a case that relied solely on A.R.B.'s hand motions

for corroboration. Even if their admission was erroneous, the value as corroboration was insignificant alongside the other overwhelming evidence. Any error was harmless.

2. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING ZAYAS-LOPEZ'S MOTION FOR A MISTRIAL.

Zayas-Lopez next claims that the trial court should have declared a mistrial based on a nurse testifying that she told A.R.B. that she was brave and that she answered the girl's question by affirming that "this has happened to other kids." He contends that this was improper vouching for the victim's credibility and opining on the ultimate factual issues in this case. This claim fails because the trial court was well within its discretion to recognize the testimony for what it was — contextual, permissible, and entirely innocuous comments that had no effect on the trial.

a. Additional Relevant Facts.

Joanne Mettler, the Harborview nurse practitioner who examined A.R.B., began her testimony by discussing her typical procedure for such child interviews and exams, including how to speak to children in such situations, and how to put them at ease and generally get "warmed up with kids." 1RP 763-67. Mettler then specifically recounted, by reading her report verbatim to the jury as

a recorded recollection, how she spoke to A.R.B. "about what kind of contact happened to her body." 1RP 780-81. Mettler asked A.R.B. specific questions that assumed the truth of A.R.B.'s previous accounts, such as, "This may be a hard question to answer, and that is okay. But did you ever see any bleeding?" 1RP 782; Ex 3.

At the end of the interview, Mettler testified, she asked A.R.B. if she had any questions.

> And she said, no. And then she said that she really did not want to talk about it too much, because she starts crying and it is painful. I said, that is fine, I did not want her to cry, that she did a really good job talking to me. *I asked her if she had any other questions. And then she asked me if this has happened to other kids. I told her and talked with her a little bit about how I see kids every day and this has happened to other kids ...*

1RP 782; Ex. 3 (emphasis added).

Zayas-Lopez then objected on the grounds that A.R.B.'s question to Mettler about it happening to other kids, along with Mettler's response and some additional upcoming questions and answers, which had not yet been read to the jury, were all inadmissible hearsay. 1RP 784. The State agreed in part, but proposed presenting Mettler's report up to the phrase "sexual

secrets," which included the portion about being brave and it happening to other kids. 1RP 785; Ex. 3.

When asked if he objected to that proposal, Zayas-Lopez's counsel objected only to a portion in which A.R.B. said her stepfather had told her to keep a secret, again claiming hearsay. 1RP 786. The court overruled that specific objection, and the State drew a line through the last five lines of Mettler's report after "sexual secrets" so Mettler would know what part not to read to the jury. 1RP 786-87; Ex. 3. The prosecutor also placed a bracket on the report where Mettler was to resume reading. 1RP 787; Ex. 3.

Mettler then read the following from her report to the jury:

> I told her and talked with her a little bit about how I see kids every day and that this has happened to other kids and that it was very brave that she told about it. And she told me about how he told her to keep it a secret but now her and her mom have talked about how they cannot keep secrets and cannot keep any sexual secrets.

1RP 788. Zayas-Lopez made no objection and did not seek a limiting instruction. 1RP 788.

The following week, after a four-day recess over Memorial Day weekend, Zayas-Lopez moved for a mistrial. 1RP 825; CP 148-54. For the first time, Zayas-Lopez argued that Mettler's telling A.R.B. she was brave, and that "it has happened to other kids"

were "improper comment[s]" on A.R.B.'s credibility and on the "ultimate issue." CP 151. He also claimed that a couple of the State's remarks in opening statements warranted a mistrial. CP 148-54.

The trial court denied a mistrial, noting that Zayas-Lopez had not objected on those grounds at the time the testimony was given. 1RP 838. The judge ruled:

> So, I don't think that the statement when you tell -- when she told the child you're brave, this happened to other people is vouching for the child. There was no indication from this witness that she was making any valuation about whether this child was credible or not. And I didn't take it that way. It's just something you say so that a child will talk, not that she was vouching. So, I don't think that was vouching at all. So, I'm going to deny the motion for mistrial.

Id.

b. The Trial Court's Denial Of A Mistrial Was Proper Because There Was No Error And No Prejudice.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). In evaluating this claim, the reviewing court considers (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court instructed the jury to disregard the evidence. Id. Those factors are

considered with deference to the trial court because the trial court is in the best position to discern prejudice. State v. Garcia, 177 Wn. App. 769, 777-78, 313 P.3d 422 (2013). A trial court should grant a mistrial only if there is such prejudice that nothing short of a mistrial will ensure the defendant a fair trial. Emery, 174 Wn.2d at 765. An abuse of discretion will be found for denial of a mistrial only when no reasonable judge would have reached the same conclusion. Id.

A trial court's evidentiary rulings also are reviewed for abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

A witness may not offer testimony in the form of an opinion regarding the guilt or veracity of the defendant. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion); City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). In determining whether a statement constitutes improper opinion testimony, courts consider the type of witness involved, the specific nature of the testimony,

the nature of the charges, the type of defense, and the other evidence before the trier of fact. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

But "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." Heatley, 70 Wn. App. at 578. Thus, just because an opinion encompasses ultimate factual issues and supports the conclusion that the defendant is guilty does not mean it is an improper opinion on guilt. State v. Saunders, 120 Wn. App. 800, 812, 86 P.3d 232 (2004). An opinion must plainly go to the core factual issue of the crime charged to be an improper opinion on guilt. See State v. Quaale, 182 Wn.2d 191, 200, 340 P.3d 213 (2014) (trooper "form[ed] an opinion" from eye test that drunk-driving suspect was "impaired" by alcohol).

i. The nurse's testimony was neither erroneous nor a trial irregularity.

As the trial court correctly noted in refusing to declare a mistrial, there was nothing erroneous about Mettler's testimony because it was not an opinion of anything, let alone of A.R.B.'s credibility or Zayas-Lopez's guilt. Mettler's comments were simply

neutral assurances made in the course of interviewing a young patient who was reporting traumatic sexual abuse. This is especially clear when this brief portion of Mettler's testimony is viewed in the context of her entire testimony, which emphasized the importance of the child patient's trust and comfort with the examination, and included other (unobjected to) questions of A.R.B. that presumed the truth of her account. Mettler was not asked for any opinion, nor did she express any. She certainly did not say or imply, "I believe A.R.B. was telling the truth," or "I believe Zayas-Lopez is guilty of first-degree child rape." The trial court was well within its discretion to see the testimony for what it actually was.

Zayas-Lopez's reliance on two cases about child-sex-abuse victims is misplaced because that is the extent of their similarity to his case:

In State v. Carlson, a doctor who examined the child victim was specifically asked by the prosecution for a specific "conclusion or assessment of sexual abuse." 80 Wn. App. 116, 120, 906 P.2d 999 (1995). The doctor replied, "My assessment on the basis of the validity of the interview was that I trusted that [the child] had been sexually abused by her father." Id. The doctor further

testified that her "assessment" was based "almost entirely upon the interview" of the child. Id. at 121.

In State v. Alexander, the prosecutor directly asked a nine-year-old rape victim's counselor "whether [the child] gave any indication that she was lying about the abuse." 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). "By stating that he believed [the child] was not lying, [the counselor] effectively testified that Alexander was guilty as charged." Id.

Zayas-Lopez's case is nothing like Carlson and Alexander. Mettler was not asked for any opinion or conclusion, and no reasonable person would regard her testimony as such. There was no error or irregularity in her testimony.

ii. There were no grounds for a mistrial.

Even assuming that Mettler's innocuous comments were erroneous or irregular, the trial court was well within its discretion to find no basis to grant Zayas-Lopez a mistrial. Applying the factors advanced in Emery:

(1) The remarks were meaningless in the context of the entirety of the State's evidence, which was discussed in detail in

the harmless-error analysis above. As in his previous claim, Zayas-Lopez repeats his assertion that his case "boiled down to [A.R.B.'s] word against Zayas-Lopez's." Amended Brief of Appellant (ABOA) at 36. But as discussed above, that was hardly the case. Even if Mettler's comments could be construed as an overt opinion of credibility or guilt, any prejudice was swept away by the strength of the rest of the State's evidence. (2) If Mettler's testimony was opinion, it was cumulative given all the other corroboration, as previously discussed. And (3) no curative instruction was given because there was no error and Zayas-Lopez did not object to this particular testimony at the time it was repeated to the jury (and he was directly asked if he objected).[7]

Regardless, these factors are applicable only if there was an actual irregularity or error. Because there was none, Zayas-Lopez suffered no prejudice and the trial court did not abuse its discretion in denying a mistrial. His claim fails.

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[7] The absence of a motion for mistrial at the time of the alleged error strongly suggests that the argument or event in question did not appear critically prejudicial in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), as clarified on denial of reconsideration (June 22, 1990).

3. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN FINDING THE CHILD RAPE CONVICTIONS WERE NOT SAME CRIMINAL CONDUCT.

Lastly, Zayas-Lopez claims the trial court miscalculated his offender score by rejecting his contention that two of the child-rape convictions may have been based on "same criminal conduct." This argument fails because he is wrong on both the law and the facts. Because he cannot meet his burden of proving that the facts allowed for no other conclusion than same criminal conduct, the trial court did not abuse its discretion in counting all the rape convictions in his offender score. His sentence was proper.

a. Additional Relevant Facts.

In the State's closing argument, the prosecutor explained to the jury that "each of these crimes has to be decided by you separately," and told the jury that Count One, the child-molestation charge, was based on the first instance of abuse when Zayas-Lopez rubbed A.R.B.'s genitals. 1RP 1722, 1726. The prosecutor then emphasized that "the law requires you and it's in your instructions that you have to -- if you're going to convict him of any of the counts of rape, that you must agree unanimously as to separate and distinct acts, all twelve of you." 1RP 1728.

The prosecutor then immediately delineated several "separate and distinct" acts that could each be a count of child rape. Id. First:

> [T]he State would argue to you that a separate and distinct act of rape was what [A.R.B.] described on her mother's bed when she said that he put his penis into her butt hole where the poop comes out and that it hurt, that he told her to bend over on her knees on the bed, that she told him that it hurt, that he wouldn't stop, and that it continued to hurt and that it hurt later on and that she then performed oral sex on him when he told her to turn and to face him.

Id. "That is *a* separate and distinct act," the prosecutor stressed. Id.

The prosecutor then noted that "For [A.R.B.] these things happened to her repeatedly in different rooms on different occasions and, as I said, they became interwoven into the fabric of her life." 1RP 1729. But the jury could consider that single episode in the bedroom that "stood out in her mind because it hurt" as "count two." Id.

Next, the prosecutor suggested that "[c]ount three could be the vaginal intercourse that she described on her mother's bed," and count four could be based on the separate episode when she was orally raped while Zayas-Lopez smoked a pipe. 1RP 1729-30. "That is a separate and distinct act that she was able to describe

with such detail, how she saw the smoke going up, her vantage point," the prosecutor noted. 1RP 1730.

But the prosecutor also stressed that the evidence also supported "other acts that you could rely on." Id. For example, the prosecutor said, there was "the time in her mother's bathroom when he used his cell phone to show her videos of oral sex to ask her if she could do it that way." Id. "And your notes and your recollection of the testimony will likely reveal that there are more," the prosecutor said. Id.

At sentencing, Zayas-Lopez argued that "only two of the rapes should count in Mr. Zayas-Lopez's offender score," because "[t]he State cannot prove that the anal and oral sex in the mother's bedroom were separate and distinct acts." CP 197, 200. Thus, those were the same criminal conduct and Zayas-Lopez's offender score should be six, not nine, he argued.[8] CP 200. Zayas-Lopez alleged that the State had argued to the jury that "these were separate and distinct acts" and "the jury was misled as to what could be considered a separate act." CP 197.

The State replied that it agreed the anal and oral rape in the bedroom was a single episode, and "[t]his is precisely why the

[8] Each concurrent sex offense contributed three points to the score. RCW 9.94A.525(17).

State argued and discussed this specific incident as a basis for a single count of Rape of a Child in the First Degree." Supp. CP __ (State's Response Re: Offender Score at 3). The State argued that Zayas-Lopez was completely misconstruing the State's closing argument. Id. at 2-4. "[T]he State *never* argued or implied that the anal rape and oral rape discussed as the basis of Count II should be considered as the basis of two separate counts of Rape of a Child in the First Degree." Id. at 4. (emphasis in original).

The court ruled:

> I did read the briefs of both sides, and I read the transcript that was provided, and I do find that these are separate and distinct acts. The State actually was very clear in their argument that the one act that defense says is the same criminal conduct, the State argued probably was the same criminal conduct. And I read the testimony of the witness, and there's a description of many different acts in different rooms on different days. And the jury was instructed that they had to be unanimous in finding that an act occurred. So I am going to find that his score is a 9.

2RP 11.

b. Zayas-Lopez Failed To Meet His Burden Of Proving The Child Rape Convictions Were Same Criminal Conduct.

A finding of "same criminal conduct" at sentencing affects the standard range sentence by altering the offender score, which is calculated by adding a specified number of points for each prior

offense. RCW 9.94A.525. For purposes of this calculation, current offenses are treated as prior convictions. RCW 9.94A.589(1)(a). However, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." Id. Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id.

Our supreme court recently reaffirmed that "a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law." State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). "Under this standard, when the record supports *only one conclusion* on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." Id. at 537-38 (emphasis added). "But where the record adequately supports either conclusion, the matter lies in the court's discretion." Id.

The burden is firmly upon the defendant to prove "same criminal conduct." Id. at 538. This is because a "same criminal conduct" finding "favors the defendant by lowering the offender

score below the *presumed* score." Id. at 539 (emphasis in original). If the defendant fails to prove any element under the statute, the crimes are not the "same criminal conduct." Id. at 540. The statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act. Id. Graciano, for example, failed to meet his burden because "at best the record [was] unclear" about the time and place of the multiple acts, so it did not conclusively show that the crimes were necessarily committed at the same time and place. Id. at 540-41.

Here, the record is plain that Zayas-Lopez committed multiple separate and distinct acts of rape against his stepdaughter at clearly different times, and in clearly different places. Contrary to Zayas-Lopez's misreading of the record, the prosecutor made it abundantly clear in her closing arguments that the jury should consider the single episode of anal and oral rapes in the mother's bedroom as a single act for a single count. When the sentencing judge said, "I do find that these are separate and distinct acts," she was plainly referring to the three rape convictions before her for sentencing, not the episode in the bedroom, as Zayas-Lopez erroneously asserts.

Zayas-Lopez conspicuously ignores Graciano. Yet under our Supreme Court's clear mandate in that case, Zayas-Lopez's argument automatically fails because he asserts that "the jury *may have* convicted Zayas-Lopez of two separate counts based on the alleged anal intercourse and oral sex, which occurred during an uninterrupted sequence." ABOA at 37. Zayas-Lopez has the absolute burden of showing that "the record supports *only one conclusion* on whether crimes constitute the 'same criminal conduct.'" Graciano, 176 Wn.2d at 537-38. By conceding uncertainty, Zayas-Lopez concedes the issue.

Similarly, his reliance on State v. Tili is inapt because Tili was convicted of three counts of rape based *exclusively* upon three acts of penetration within two minutes of each other. 139 Wn.2d 107, 119, 124, 985 P.2d 365 (1999). The trial court "failed to articulate any other viable basis" for separate and distinct conduct. Id. at 124. In other words, the record supported only one conclusion on same criminal conduct. That is not the case here, where the testimony was replete with more separate and distinct instances of rape than charged counts, and even Zayas-Lopez admits that the jury "may" have found two convictions from the single episode — or not.

Nonetheless, Zayas-Lopez, while ignoring Graciano, argues that "principles of lenity require the court to interpret an ambiguous jury verdict in favor of the defendant." ABOA at 39. This argument is completely contrary to Graciano: "[W]here the record adequately supports either conclusion, the matter lies in the court's discretion." 176 Wn.2d at 538. "The scheme — and the burden — could not be more straightforward: each of a defendant's convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim."[9] Id. at 540 (emphasis in original).

The record here is unequivocal that Zayas-Lopez's three rape convictions stemmed from different rapes at different times, in different places. Zayas-Lopez failed to meet his burden of proving that there was no other possibility from the evidence but that the rape counts encompassed the same criminal conduct. The trial court did not abuse its discretion in counting all three rape convictions in his offender score.

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[9] Moreover, Zayas-Lopez bases his lenity argument on a double-jeopardy case, State v. DeRyke, 110 Wn. App. 815, 822, 41 P.3d 1225 (2002), aff'd, 149 Wn.2d 906, 73 P.3d 1000 (2003) (first degree kidnapping conviction merges with attempted first degree rape conviction). But "a double jeopardy violation claim is distinct from a 'same criminal conduct' claim and requires a separate analysis" because double jeopardy is about the allowable unit of prosecution in the charging and trial stages whereas a "same criminal conduct claim involves the sentencing phase." State v. French, 157 Wn.2d 593, 611-12, 141 P.3d 54 (2006).

4. THIS COURT SHOULD NOT FORECLOSE THE STATE'S OPTION TO SEEK APPELLATE COSTS.

This Court should not foreclose the State's option to seek appellate costs in this case, should it prevail, because the record is too limited to make such a determination at this stage. The State respectfully disagrees with this Court's approach to costs on appeal set forth in State v. Sinclair.[10] As of this writing, a decision on the State's petition for review of Sinclair was expected on May 31, 2016.

As in most cases, the appellant's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record does not contain information about the appellant's financial status and the State did not have the right to obtain information about the appellant's financial situation.

An order authorizing appointment of appellate counsel addresses only an appellant's present financial circumstances and ability to pay appellate costs up front. It does not address future ability to pay or ability to pay over time. It is the future ability to pay, instead of simply the current ability, that is most relevant in determining whether the imposition of financial obligations is

[10] State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016).

appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments).

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Zayas-Lopez's judgment and sentence.

DATED this 31ST day of May, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Dana Nelson, the attorney for the appellant, at Nelsond@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Jorge Javier Zayas-Lopez, Cause No. 74056-3, 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 31 day of May, 2016.

Name:
Done in Seattle, Washington