

NO. 42538-6-II

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

STATE OF WASHINGTON, Respondent

v.

CHARLES TEWEE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 10-1-01517-5

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENT OF ERROR.....1

 I. TEWEE FAILED TO OBJECT TO DETECTIVE BULL’S TESTIMONY ON THE GROUND THAT IT EXCEEDED THE SCOPE OF THE HUE AND CRY DOCTRINE, AND ANY ERROR WAS HARMLESS1

 II. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF A.B.’S CONSELOR1

 III. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY’S FINDING THAT TEWEE ABUSED A POSITION OF TRUST TO FACILITATE THE COMMISSION OF THE CRIME1

 IV. THE TRIAL COURT PROPERLY INCLUDED TEWEE’S OREGON CONVICTION FOR UNAUTHORIZED USE OF A MOTOR VEHICLE IN HIS OFFENDER SCORE1

B. STATEMENT OF THE CASE1

C. ARGUMENT.....4

 I. TEWEE FAILED TO OBJECT TO DETECTIVE BULL’S TESTIMONY ON THE GROUND THAT IT EXCEEDED THE SCOPE OF THE HUE AND CRY DOCTRINE, AND ANY ERROR WAS HARMLESS4

 II. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF A.B.’S COUNSELOR.9

 III. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY’S FINDING THAT TEWEE ABUSED A POSITION OF TRUST TO FACILITATE THE COMMISSION OF THE CRIME.....13

 IV. THE TRIAL COURT PROPERLY INCLUDED TEWEE’S OREGON CONVICTION FOR UNAUTHORIZED USE OF A MOTOR VEHICLE IN HIS OFFENDER SCORE.....15

D. CONCLUSION17

TABLE OF AUTHORITIES

Cases

<i>In re Personal Restraint of Grasso</i> , 151 Wn.2d 1, 20-21, 84 P.3d 859 (2004).....	11
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	9
<i>State v. Ackerman</i> , 90 Wn.App. 477, 482, 953 P.2d 816 (1998).....	10
<i>State v. Bedker</i> , 74 Wn.App. 87, 95, 871 P.2d 673 (1994).....	14
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)	8
<i>State v. Butler</i> , 53 Wn.App. 214, 220, 766 P.2d 505 (1989).....	10
<i>State v. Carol M.D.</i> , 89 Wn.App. 77, 86, 948 P.2d 837 (1997)	11, 12
<i>State v. Doggett</i> , 136 Wn.2d 1019, 967 P.2d 548 (1998).....	12
<i>State v. Duke</i> , 77 Wn.App. 532, 535, 892 P.2d 120 (1995)	16
<i>State v. Finch</i> , 137 Wn.2d 792, 810m 975 P.2d 967 (1999)	9
<i>State v. Fisher</i> , 108 Wn.2d 419, 427, 739 P.2d 683 (1987)	14
<i>State v. Fleming</i> , 27 Wn.App. 952, 958, 621 P.2d 779 (1980).....	7, 8
<i>State v. Grewe</i> , 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).....	14
<i>State v. Jackson</i> , 129 Wn.App. 95, 117 P.3d 1182 (2005).....	16
<i>State v. Kilgore</i> , 107 Wn.App. 160, 183, 26 P.3d 308 (2001).....	12
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	5, 6
<i>State v. McKenzie</i> , 157 Wn.2d 44, 53, n.2, 134 P.3d 221 (2005).....	7
<i>State v. Morley</i> , 134 Wn.2d 588, 605, 952 P.2d 167 (1998)	16
<i>State v. Murley</i> , 35 Wn.2d 233, 212 P.2d 801 (1950)	7
<i>State v. Nunez</i> , 160 Wn.App. 150, 157, 248 P.3d 103 (2011).....	5
<i>State v. P.B.T.</i> , 67 Wn.App. 292, 304, 834 P.2d 1051 (1992).....	15
<i>State v. Robinson</i> , 171 Wn.2d 292, 304, 253 P.3d 292 (2011).....	5, 6
<i>State v. Scott</i> , 110 Wn.2d 682, 685, 757 P.2d 492 (1988).....	5, 6
<i>State v. Tharp</i> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981).....	8
<i>State v. Thomas</i> , 52 Wn.2d 255, 257, 324 P.2d 821 (1958)	8
<i>State v. Williams</i> , 30 Wn.App. 558, 565-66, 636 P.2d 498 (1981), rev'd on other grounds, 98 Wn.2d 428, 656 P.2d 477 (1982).....	9
<i>State v. Woods</i> , 143 Wn.2d 561, 602, 23 P.3d 1046 (2001).....	10

Statutes

RCW 9.94A.535 (3) (n).....	13
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Rules

ER 801(c).....	9
ER 803	9
ER 803(a)(4).....	9, 10

A. RESPONSE TO ASSIGNMENT OF ERROR

- I. TEWEE FAILED TO OBJECT TO DETECTIVE BULL'S TESTIMONY ON THE GROUND THAT IT EXCEEDED THE SCOPE OF THE HUE AND CRY DOCTRINE, AND ANY ERROR WAS HARMLESS
- II. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF A.B.'S CONSELOR
- III. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY'S FINDING THAT TEWEE ABUSED A POSITION OF TRUST TO FACILITATE THE COMMISSION OF THE CRIME
- IV. THE TRIAL COURT PROPERLY INCLUDED TEWEE'S OREGON CONVICTION FOR UNAUTHORIZED USE OF A MOTOR VEHICLE IN HIS OFFENDER SCORE

B. STATEMENT OF THE CASE

When A.B. was eleven years old she was living with her grandmother, her grandfather, her brother, and her uncle, Charles Tewee. RP 194, 196. A.B. used to sleep with her grandmother while the defendant slept on the couch. RP 194. A.B. thought her uncle was thirty-eight or thirty-nine years old. RP 194. One night in February of 2010 A.B. had gone to bed with her grandmother but got up at some point to get a glass of water. RP 196. When she went out to get the water the defendant, who was lying on the couch, asked her for a hug. RP 197. It was common for A.B. to hug her uncle. RP 197. A.B. went over to him

and gave him a hug. RP 197. The defendant was lying on his back on the couch and pulled A.B. on top of him. RP 197-98. The defendant began touching her with his hand inside of her pants. RP 198. He rubbed her vagina, with his skin touching her skin. RP 199-200. At the time of trial fifteen months later, A.B. could not recall if the defendant's finger went inside her vagina or not. RP 199. Her brother was sleeping on the floor during this time. RP 200. The next morning the defendant found A.B. as she was retrieving her jacket and he told her he was sorry and asked her not to tell anybody. RP 200. He told her he could get in "big trouble for this." RP 200. About three weeks later A.B. told her step-sister Nicole about what happened and asked her not to tell anyone. RP 173-74, 202.

Nicole subsequently told A.B.'s stepmother Jennifer. RP 174, 180-81, 203. After discussing what happened with Jennifer, A.B. was seen by a counselor, to whom she also disclosed the sexual abuse. RP 203.

Amy Baggett is a licensed counselor who treated A.B. at Columbia River Mental Health. RP 289-91. Her role at Columbia River Mental Health was as a child intake specialist therapist, which involved her doing intake assessments to determine whether treatment was necessary and what type of treatment will be provided. RP 289-90. As part of this assessment, Ms. Baggett testified it is important to ask questions about a

child's environment, family history, the primary complaint, and medical questions. RP 289-90. Regarding abuse, Baggett confirmed that it is important to know for treatment purposes whether there is an allegation of abuse and if there is, whether the alleged abuser is living in the home with the child. RP 290. Indeed, Ms. Baggett is a mandatory reporter and testified "it's required for me to ask those questions and act upon them." RP 290.

Ms. Baggett took notes as part of her assessment of A.B in March of 2010. RP 290-91. A.B. presented with symptoms of depression. *Id.* A.B. told Ms. Baggett that her uncle had touched her sexually. RP 292-93. Ms. Baggett paraphrased what A.B. told her, which was that A.B.'s uncle had put his hands down her pants on an occasion when she hugged him good night and that he had penetrated her vagina with his finger. RP 293. The penetration caused A.B. pain. RP 293. Ms. Baggett confirmed that A.B. understood what penetration meant. RP 293. Following the assessment, Ms. Baggett told A.B.'s father about the sexual abuse and completed a mandatory report on the abuse. RP 294.

A.B.'s grandmother Linda Antone is also the defendant's mother. RP 334. A.B. and her brother M.B. lived with Antone during this time and she was the childrens' primary care giver. RP 335. After A.B. disclosed the sexual assault Linda Antone tried to persuade A.B. not to tell

anyone else about it, telling A.B. it would “ruin” the defendant’s “college education.” RP 214-15.

Tewee testified that he had a good relationship with A.B. and he would commonly tickle her and wrestle with her and her brother. RP 409-11. His relationship with the two kids was a “normal being a [sic] uncle, nephew, niece relationship. RP 412.

Tewee was charged with one count of rape of a child in the first degree and one count of child molestation in the first degree. CP 257. Tewee was acquitted of rape of a child but convicted of child molestation. CP 328-331. The jury also found that Tewee had abused a position of trust to facilitate the crime. CP 331. This timely appeal followed. CP 527.

C. ARGUMENT

I. TEWEE FAILED TO OBJECT TO DETECTIVE BULL’S TESTIMONY ON THE GROUND THAT IT EXCEEDED THE SCOPE OF THE HUE AND CRY DOCTRINE, AND ANY ERROR WAS HARMLESS

Prior to trial, defense counsel objected to any witness testifying about A.B.’s disclosure of the alleged rape because he argued the disclosure was untimely. RP 148-50. When the trial court ruled that the disclosure was timely and, therefore, admissible, defense counsel argued that the State should only be permitted to introduce the evidence in

rebuttal while acknowledging in the same breath that the case law bore no such requirement. RP 151-52. Last, the trial court agreed that the fact of disclosure was not substantive evidence and indicated it would give such an instruction if requested, although not on the timeline requested by defense counsel. RP 152-53.

During Detective Bull's testimony, the following exchange took place:

Prosecutor: And when did you talk to [A.B.]?

Bull: I talked to [A.B.] on March 30th, 2010, about 855 hours in the morning.

Prosecutor: Okay. And without going into the details of what she told you, what was the basic general thing that she was talking to you about?

Bull: About an inappropriate contact with her uncle.

Defense counsel did not object to this testimony. RP 274.

"RAP 2.5 (a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Nunez*, 160 Wn.App. 150, 157, 248 P.3d 103 (2011); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). See also *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors,

thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *Scott*, at 685. “[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources.” *Robinson*, supra, at 305.

As explained in *McFarland*, supra, RAP 2.5 (a) (3) is “not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.” *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be “‘manifest,’—i.e. it must be ‘truly of constitutional magnitude.’” *Id.*; *Scott*, supra, at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights. *McFarland* at 333. “It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record.” *Id.* at 334.

Here, Tewee does not even acknowledge that he bears the burden of persuading this Court to review this claimed error for the first time on appeal. Tewee’s pre-trial objection to any witness testifying about the fact of complaint on the basis that the disclosure was not timely made does not excuse his failure to object, during Detective Bull’s testimony, that her testimony exceeded the permissible scope of the hue and cry doctrine by

identifying the perpetrator. Had a timely objection been made, the trial court could have ruled on the objection and instructed the jury to disregard the testimony. Defense counsel's failure to object strongly suggests that he did not view the remark as prejudicial to Tewee's defense. Defense counsel's failure to object to the remark at the time it was made "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. McKenzie*, 157 Wn.2d 44, 53, n.2, 134 P.3d 221 (2005) quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752 (1991).

Even if this Court elects to review this claimed error for the first time on appeal, any error in Detective Bull's testimony was harmless. The "hue and cry" doctrine, also termed the "fact of complaint" doctrine, provides:

In rape cases, the "hue and cry" of the injured person, *i.e.*, the complaint that she has been raped, made within a reasonable time after the commission of the crime is admissible. The testimony is introduced for the sole purpose of rebutting an inference that the complaining witness was silent following the attack.

State v. Fleming, 27 Wn.App. 952, 958, 621 P.2d 779 (1980) (internal citation omitted); *State v. Murley*, 35 Wn.2d 233, 212 P.2d 801 (1950).

However, the particular details of the complaint, including the identity of

the perpetrator, are not covered by this doctrine. *Fleming* at 958, *State v. Thomas*, 52 Wn.2d 255, 257, 324 P.2d 821 (1958).

While it is clear that Detective Bull's testimony that the inappropriate contact A.B. complained of was perpetrated by her "uncle" exceeded the scope of the hue and cry doctrine, this testimony was harmless. An evidentiary error is grounds for reversal only if it results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An evidentiary error "is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); see *Bourgeois*, 133 Wn.2d at 403. As in *State v. Fleming*, supra, where such testimony was also deemed harmless, identity was not at issue in this case. "We need not reach the issue as to the alleged error in the admission of that portion of the victim's statement which (arguably) identifies the defendant. There was no prejudice to defendant because his identity was not contested." *Fleming* at 958. Likewise here, Tewee's defense was not that he was the not the perpetrator of the offense, but that the offense never occurred. The jury heard A.B.'s testimony identifying Tewee as the perpetrator of the sexual abuse. The only issue to be decided by the jury was whether the offense occurred, not by whom. Mr. Tewee

should not be awarded a new trial for this minor breach of the hue and cry doctrine.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF A.B.'S COUNSELOR.

The trial court's admission of out-of-court statements is an evidentiary decision that is covered by the Rules of Evidence, not constitutional law. *See State v. Williams*, 30 Wn.App. 558, 565-66, 636 P.2d 498 (1981), rev'd on other grounds, 98 Wn.2d 428, 656 P.2d 477 (1982). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810m 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

ER 801(c) provides: "[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 803 provides "[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute."

Under ER 803(a)(4) hearsay is admissible when the declarant made the statement for the purposes of medical diagnosis or treatment.

ER 803(a)(4) provides

[s]tatements [are] made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

- ER 803(a)(4).

A statement is “reasonably pertinent to diagnosis or treatment” when (1) the declarant’s motive in making the statement is to promote treatment and (2) the medical professional reasonably relies on the statement for the purposes of treatment. *State v. Butler*, 53 Wn.App. 214, 220, 766 P.2d 505 (1989). Statements to therapists can be admitted pursuant to ER 803 (a)(4). *State v. Ackerman*, 90 Wn.App. 477, 482, 953 P.2d 816 (1998).

Under ER 803(a)(4), the definition of medical “treatment” is not limited “to a medical lexicon involving only physical injuries.” *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). Rather, psychological treatment also falls within the definition of the medical treatment exception. *Woods*, 143 Wn.2d at 602. For example, in *Woods*, the Court found, when a witness observed her friend being beaten, the emergency room doctor needed to know “what happened” from the perspective of the

witness because she was likely to experience post traumatic distress and the doctor needed to assess her need for counseling. *Id.*

“Because a medical professional or therapist must be attentive to treating both the physical and the emotional injuries that result from child abuse, a child's statements as to the identity of a closely related abuser are also of the type relied upon in determining proper treatment.” *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 20-21, 84 P.3d 859 (2004).

Here, relying exclusively on Division III of the Court of Appeals’ opinion in *State v. Carol M.D.*, 89 Wn.App. 77, 86, 948 P.2d 837 (1997), Tewee argues that the proper foundation for Amy Baggett’s testimony was not laid where she did not specifically testify that A.B. understood that her statements to Baggett would further diagnosis and treatment. In *Carol M.D.* Division III held that “in the case of a child who has *not* sought medical treatment, but makes statements to a counselor procured for him or her by a state social agency, the State’s burden under ER 803 is more onerous. The record must *affirmatively demonstrate* the child made the statements understanding that they would further the diagnosis and possible treatment of the child’s condition.” *Carol M.D.* at 86. The very language of the above quotation suggests that Tewee misconstrues *Carol M.D.* as broader than it actually is. In this case, A.B. was taken to a counselor by her father, not a “state social agency.” *Carol M.D.* was one

of many cases arising from the so-called Wenatchee sex ring trials, a group of cases that revealed rampant governmental corruption in the law enforcement and social service communities of Wenatchee. It was significant, in *Carol M.D.*, that the alleged victim had arrived at the doctor's doorstep, so to speak, at the behest of the government (as opposed to a concerned parent). Further, there is no evidence in this case that A.B. was not in agreement with her father that she should see a counselor. In other words, she was not there reluctantly or as a result of governmental machination.

Division II of the Court of Appeals has departed from the holding in *Carol M.D.* on this point:

Kilgore relies upon *State v. Carol M.D.* to argue that the State was required to affirmatively establish that C.M. had a treatment motive for making her statements. *See State v. Carol M.D.*, 89 Wn.App. 77, 948 P.2d 837 (1997), *rev'd and remanded for reconsideration on other grounds sub nom. State v. Doggett*, 136 Wn.2d 1019, 967 P.2d 548 (1998). *Carol M.D.* is distinguishable because it involved a therapist and the child explicitly denied knowing what a therapist did. When the party is offering hearsay testimony through the medical diagnosis exception, when the declarant has stated he or she does not know what the medical personnel to whom the statement was made does, and when the opposing party makes a proper foundation objection after the declarant denies having such knowledge, the party offering the statement must affirmatively establish the declarant had a treatment motive. Otherwise, as long as the declarant is not a very young child, courts may infer the declarant had such a motive.

State v. Kilgore, 107 Wn.App. 160, 183, 26 P.3d 308 (2001). Baggett's testimony demonstrates that A.B. had a treatment motive when she

disclosed the sexual abuse she suffered from Tewee. A.B. knew she was speaking with a counselor. When she began her assessment with Baggett she asked to speak to Baggett outside her father's presence. RP 292. Once alone with Baggett, A.B. was apprehensive about discussing the matter but disclosed that her uncle had put his finger in her vagina and that it caused her pain. RP 293. Baggett testified "it seemed like it felt like she felt a need to talk to me about it." RP 293. The record amply supports the trial court's decision to admit this evidence.

Even if admission of this evidence was error, the error was harmless. The jury heard about the molestation from A.B. and heard about her timely disclosure of the molestation to her friend Nicole as well as her stepmother. The only way in which the disclosure to Baggett differed was that Baggett testified that A.B. reported a digital rape as opposed to molestation. Because the jury acquitted Tewee of rape of a child and convicted him of child molestation, Baggett's testimony about the digital rape had no impact on the jury's decision. If it was error to admit this testimony, such error was harmless.

III. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY'S FINDING THAT TEWEE ABUSED A POSITION OF TRUST TO FACILITATE THE COMMISSION OF THE CRIME.

The Sentencing Reform Act allows the jury to find an aggravating factor where "The defendant used his or her position of trust, confidence,

or fiduciary responsibility to facilitate the commission of the current offense.” See RCW 9.94A.535 (3) (n). The Supreme Court has held that “[t]he two factors to be considered in determining whether [a] defendant abused a sufficient position of trust to merit an exceptional sentence are the duration and the degree of the relationship.” *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). In *State v. Fisher*, 108 Wn.2d 419, 427, 739 P.2d 683 (1987), the Supreme Court stated:

A relationship extending over a longer period of time, or one within the same household, would indicate a more significant trust relationship, such that the offender’s abuse of that relationship would be a more substantial reason for imposing an exceptional sentence.

The Court of Appeals enumerated the following considerations:

Whether the defendant is in a position of trust depends on the length of the relationship with the victim, the trust relationship between the primary care giver and the perpetrator of a sexual offense against a child, the vulnerability of the victim to trust because of age, and the degree of the defendant’s culpability.

State v. Bedker, 74 Wn.App. 87, 95, 871 P.2d 673 (1994). In *Bedker*, the Court held that where the defendant raped his half-brother, with whom he lived in the same house, the trial court properly found that the defendant abused a position of trust to facilitate the crime:

Here, there was a family relationship between the victim and the predator. The crimes occurred at the house of M and Bedker’s father. Bedker is M’s half-brother, someone the victim should have been able to trust. The trial court did not err in finding an abuse of trust.

Bedker at 95-96.

Moreover, in *State v. P.B.T.*, 67 Wn.App. 292, 304, 834 P.2d 1051 (1992), cited heavily by Tewee, the Court sustained the finding that the defendant, a scout leader, had abused a position of trust to facilitate the crime of second degree molestation against a camper in his care. The Court said: “That there is no direct evidence that the position of trust was relied upon to perpetrate the crime is unimportant, as long as there is evidence which logically could lead to the conclusion that the crime was *facilitated* by the position of trust.” (Emphasis added.)

In this case, the evidence of abuse of trust is far more compelling than that in *Bedker* and *P.B.T.* Here, Tewee was the adult son of A.B.’s primary caregiver; he was A.B.’s uncle and lived in the same home. He had built a relationship of trust in which A.B. felt comfortable hugging him and having him tickle her and wrestle with her. These are classic grooming behaviors. His own description of the relationship inescapably points to the conclusion that he abused a position of trust to facilitate the molestation of A.B. This Court should affirm the jury’s finding.

IV. THE TRIAL COURT PROPERLY INCLUDED TEWEE’S OREGON CONVICTION FOR UNAUTHORIZED USE OF A MOTOR VEHICLE IN HIS OFFENDER SCORE.

Tewee claims that the trial court erred in including his 2002 Oregon conviction for unauthorized use of a motor vehicle (under case number 02FE-0232) in his offender score. Tewee’s claim fails.

Tewee claims, as he did below, that the trial court is prohibited from including a foreign conviction in his offender score unless the elements of the foreign crime match identically to the elements of a Washington felony. Tewee misstates the law. The first step in determining whether a foreign conviction is comparable to a Washington felony is to examine the elements of the crime. *State v. Morley*, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). If the elements do not strictly match up, or if the foreign statute is broader in its scope of proscription than the Washington statute,

[T]he sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute.

Morley at 606, citing *State v. Duke*, 77 Wn.App. 532, 535, 892 P.2d 120 (1995).

Here, the trial court conducted this necessary inquiry.

Acknowledging that the Oregon crime of unauthorized use of a motor vehicle is broader than Washington's crime of taking a motor vehicle without permission (see e.g. *State v. Jackson*, 129 Wn.App. 95, 117 P.3d 1182 (2005)) the court reviewed the indictment, the probable cause declaration, the petition to enter a guilty plea and the judgment and sentence (found at CP 466-473) and found that Tewee had been convicted of unlawfully operating a motor vehicle knowing that he did not have the

owner's permission to do so. RP 543-44. Tewee's statement of defendant on plea of guilty states "I unlawfully and intentionally retained possession of a vehicle, a Toyota 4-Runner, owned by Manuel Salazar, in excess of the period of specified time I was authorized to use the vehicle." CP 470. The trial court properly found that Tewee's Oregon conviction of unauthorized use of a motor vehicle is comparable to taking a motor vehicle without permission and properly included this conviction in his offender score.

D. CONCLUSION

Tewee's conviction and sentence should be affirmed.

DATED this 25th day of July, 2012.

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