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Division II
State of Washington

NO. 48993-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRANDON CHRISTOPHER BARNES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 14-1-04802-7

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANTS ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it found the victim competent after considering her testimony, the recording of her forensic interview and the testimony of her extended family at the combined competency and child hearsay hearing?
2. Did the trial court properly admit the victim's child hearsay statements after finding her competent where those statements bore sufficient indicia of reliability?
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6. Did the trial court abuse its discretion when it ordered crime related prohibitions related to the child sex abuse crime of conviction, and where the conditions were related to the sexual deviancy evaluation and treatment requirement?

B. STATEMENT OF THE CASE.

1. PROCEDURAL HISTORY.

On December 2, 2014, Appellant Brandon Christopher Barnes (the "defendant") was charged with two counts of first degree child rape. CP

1-2. The victim was the same four year old child in both counts. CP 3-4. The incidents took place during an eight month time period of time that ended less than a month before the charging date. CP 1-2. Trial did not start until a year and a half later on March 10 2016. 1 RP 2.¹

The defendant appeared in custody for arraignment on December 2, 2014. 12/02/2014 RP 3-11. The presiding court set bail at \$100 thousand bondable but also stated, "The Court will include language that indicates that bail may be readdressed based upon further investigation." 12/02/2014 RP 9. Two weeks after the arraignment and in a hearing before the pre-assigned trial court, the defendant brought a motion for a bail reduction. 12/19/2014 RP 3. After the motion colloquy which included a recommendation of a bail increase by the prosecution to \$150 thousand dollars, the court reduced bail to \$50 thousand dollars, an amount the defendant was able to post. 12/19/2014 RP 15, CP 210-12.

The case proceeded to trial on March 10, 2016, after a number of continuances. CP 9-12, 16, 18, 43, and 46. During pretrial hearings the trial court ruled on child competency and child hearsay motions. The trial court's ruling was delivered after a two-day hearing in which the

¹ The verbatim reports in this case consist of nine numbered volumes that include pretrial motions and trial proceedings. Pretrial matters and jury selection are separately numbered in nine volumes which bear the date of the proceeding. Citations in this brief will include the volume and page number for pretrial motions and the trial proceedings. All other citations will include the date of the proceeding and page number.

prosecution introduced testimony from six witnesses and admitted two exhibits. CP 188 and 189. 2 RP 71, et. seq., 3 RP 245 et. seq. The court ruled that the then six year old victim was competent and that statements she had made to family members and to a forensic child interviewer were admissible under the child hearsay statute. 3 RP 286, et. seq.

Jury selection followed the completion of pre-trial motions and opening statements were delivered on March 16, 2016. Thereafter the trial proceeded through three court days of testimony. 3 RP 314. The parties delivered closing arguments on March 22, 2016. 7 RP 742, et. seq. The defendant was convicted as charged on count one and acquitted on count two. 8 RP 812-14. Sentencing was held on May 20, 2016. CP 155-70.

2. STATEMENT OF FACTS.

In 2014, the four year old victim lived with her mother and grandmother in a south Tacoma home until September. 5 RP 326-30. The child's mother, Keshia Vaetoe, and her grandmother, Francesca Heard, were her primary caretakers. But she also had regular contact with a number of other relatives in the area, including her 32 year old cousin, Sonya Peters. 5 RP 333-34

In September 2014, Keshia Vaetoe began the process of relocating to Las Vegas. 5 RP 326. She left the victim in her mother's care and intended to send for her once she was settled. 5 RP 330-33. While Ms.

Vaetoe was in Las Vegas, the victim spent several nights in the defendant's home. 5 RP 512-13. The defendant's household included his girlfriend, Tahjiere Smith, a cousin of Keshia Vaetoe, and two children, Brandon Jr. and Gia. 5 RP 336-38, 501-03. The defendant had watched the victim before when her mother and grandmother were working. 5 RP 341-42.

With her mother in Las Vegas and while living with Francesca Heard, the four year old victim spontaneously disclosed sexual abuse at the hand of the defendant. This occurred in November 2014, and the first disclosure was to Sonya Peters. 5 RP 436, et. seq. Ms. Peters testified that the victim came to her room, climbed in bed with her, snuggled close and told Ms. Peters that she was sad. 5 RP 436-37. She went on to give a brief, four-year-old-appropriate description of what happened with the defendant:

She said, "Well, Brandon, you know, touched me down there," and I asked her to explain. And she explained, and I said, "Well, did big Brandon or little Brandon do it?" And she said, "Big Brandon."

Q. When you say just now that she said "he touched me down there" whose phrase is "down there?"

A. That's my phrase.

Q. What did she say?

A. She showed me with her hands what happened.

5 RP 437.

The disclosure to Ms. Peters included several other details. The victim said it happened in the defendant's bedroom [5 RP 437.], that her cousins were in the other room watching TV [*Id.*], that the defendant called her back to the room and started to take her underwear off and laid her on the ground [5 RP 438.], and that she tried to scream but the defendant put his hand over her mouth and laid on top of her and moved up and down [*Id.*].

Ms. Peters raised the alarm. She asked the victim if she had told anyone and instructed her that she needed to tell her grandmother, Ms. Heard, whom the victim referred to as "Momo". 5 RP 438. The victim then disclosed to Ms. Heard with some variance in the degree of detail and specifics. 5 RP 516-18. Ms. Heard called the defendant's wife Tahjiere Smith, and attempted to talk to the defendant. 5 RP 516, 518-19. She was unsuccessful in talking to the defendant and then called the police. *Id.* In addition to the disclosure, Ms. Heard reported that the defendant watched the victim during a couple of days just a week or so before the disclosure. 5 RP 512-15.

On November 20, 2014, Tacoma Police Officer Walter Miller responded to Ms. Heard's 911 call. 6 RP 637. He took a report by talking to Ms. Heard and Ms. Peters and referred the victim for a sexual assault exam and forensic interview per protocol. 5 RP 520-21, 6 RP 638-41.

Ms. Heard took the victim to the sexual assault appointment. 5 RP 521.

The examination and forensic interview took place on December 1, 2014.

6 RP 11. During the medical examination the victim made a brief disclosure describing sexual contact with her anal area:

Q. Did she tell you what part of her body someone had done something to?

A. Yes.

Q. What body part did she describe to you?

A. She said hip, but then she actually pointed to her anal area. Is it all right if I look at my report?

Q. Will it help refresh your memory as to her words?

A. Yes. I can't remember if she said pee pee or private. She said hip, but pointed to her anal area, then the part where the pee pee comes out. That's the word she used.

6 RP 615.

The forensic interview took place the same day as the sexual assault exam and was recorded onto a DVD. 7 RP 664. The forensic interviewer first discussed the ground rules established with the child during the interview [7 RP 671-73.], the interview method and the reasons for it [7 RP 674-79.], and the indicators of possible coaching [7 RP 680-85.]. She then described the victim's interview in detail and identified the DVD recording of the interview. 7 RP 685-92. The DVD was then

admitted as trial Exhibit 12 and published to the jury. 7 RP 692, CP Exhibit 12.

The recording of the forensic interview lasted approximately 41 minutes. 7 RP 692. During the recording starting at approximately time stamp 15:39 (in military time), the victim disclosed penetration by the defendant's "boomerang" (her word for the defendant's penis), that is the place where pee comes out of. Trial Exhibit 12. During the disclosure she exhibited difficulty in knowing what words would describe something that was beyond her capacity to comprehend. *Id.*

The parties delivered their closing arguments the same day that the DVD was published to the jury. During the state's arguments, the defendant objected seven times. 7 RP 744, 750, 757-58, 761, 797, and 803. Two of the objections included a reference to shifting the burden. 7 RP 750 and 757. The prosecutor did not argue that the jury could only acquit if it disbelieved a witness or witnesses, and thus the objections do not include a reference to false choice.

The defendant was found guilty on March 23, 2016. 8 RP 812. At sentencing he stipulated to his criminal history and offender score and the court therefore found that he had a standard range of 93 – 123 months to life. CP 153-54, 155-70. The defendant was sentenced to a mid-range minimum term of 100 months in prison. *Id.* The court also ordered the

defendant to complete a sexual deviancy evaluation and treatment and ordered a number of conditions supportive of that condition. *Id.* The defendant filed this timely appeal the same day as the sentencing. CP 174.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT THE VICTIM WAS COMPETENT, WHERE HER COMPETENCY WAS EVALUATED AFTER SHE TESTIFIED IN OPEN COURT AND WHERE THE RECORDING OF THE FORENSIC INTERVIEW AND THE TESTIMONY OF HER FAMILY SUPPORTED COMPETENCY.

The trial court ruled that the victim, a little girl who was nearly six years old and in kindergarten at the time of trial, was competent. 2 RP 286-88. That ruling was followed immediately by a ruling that statements she had made to several adults and to a trained, forensic interviewer were admissible under the child hearsay statute, RCW 9A.44.120(2)(a). 2 RP 288-92. These rulings were well within the trial court's discretion and should be affirmed.

As to competency, "[e]very person is competent to be a witness except as otherwise provided by statute or by court rule." ER 601. *See also* RCW 5.60.020. Competency is presumed for all witnesses including young children at every age. RCW 5.60.050, *State v. C.M.B.*, 130 Wn. App. 841, 845-46, 125 P.3d 211, 213 (2005). A party challenging competency of a child witness bears the burden of proving that the child

was not competent by a preponderance of the evidence. *State v. Brousseau*, 172 Wn.2d 331, 341, 259 P.3d 209 (2011), citing *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010).

Competency determinations are particularly entrusted to the discretion of the trial court. “We afford significant deference to the trial judge's competency determination, and we may disturb such a ruling only upon a finding of manifest abuse of discretion.” *State v. Brousseau*, 172 Wn.2d at 340, citing *State v. Leavitt*, 111 Wn.2d 66, 70, 758 P.2d 982 (1988), and *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). “An abuse of discretion occurs when the trial court's decision is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’ ” *State v. Cross*, 156 Wn. App. 568, 580, 234 P.3d 288 (2010), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The test for competency has been with us since the 1960's. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021, 1022 (1967). “[T]he test of competency of a young child as a witness consists of the following:

- (1) an understanding of the obligation to speak the truth on the witness stand;
- (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
- (3) a memory sufficient to retain an independent recollection of the occurrence;
- (4) the capacity to express in words his memory of the occurrence;

and (5) the capacity to understand simple questions about it.”

State v. C.M.B., 130 Wn. App. 841, 846, 125 P.3d 211, 213 (2005), quoting *State v. Allen*, 70 Wn.2d at 692. In addition, the entire record may be considered in determining whether a child’s trial testimony was properly admitted. *State v. Brousseau*, 172 Wn.2d at 340.

In this case, the trial court applied the *Allen* test in its entirety. See 3 RP 286, et. seq. At the time the court had before it testimony from six witnesses plus a DVD recording of a forensic interview of the child. 2 RP 66. CP Exhibit 12. The court observed firsthand the child’s responses to questions in court and was able to compare her responses both as to content and demeanor with the more relaxed setting of the forensic interview. 3 RP 287-88. There is good reason to defer to the trial court on competency since it is the trial court “who sees the witness, notices his manner, and considers his capacity and intelligence [,] ... matters that are not reflected in the written record for appellate review”, and who observed the witness being questioned under oath by experienced trial counsel. *State v. C.M.B.*, 130 Wn. App. 841, 846, 125 P.3d 211, 213 (2005), quoting *State v. Allen*, 70 Wn.2d at 692. In light of the record in this case, including the extensive pre-trial record supplemented by the trial record, there is little room for the argument that the trial court committed a manifest abuse of discretion.

The defendant's competency arguments focus on the first two *Allen* factors. The argument relies on disconnected excerpts from the victim's testimony to the exclusion of the rest of the evidence. When the victim's testimony as a whole is considered in conjunction with the supporting testimony of the other witnesses, as it was considered by the trial court, there was little reason to question her understanding of the need for truthful testimony, nor her ability to receive and imprint accurate impressions on her memory.

The victim's competency as to the first two *Allen* factors was supported by every witness who testified in the pre-trial hearing. For example her maternal grandmother, the first witness, testified that she had no issues with her granddaughter lying, either at home or at daycare or school, and that she would be punished if she lied to the adults in her life. 2RP 84-87. Furthermore, in regard to the sexual abuse disclosure, the grandmother stated that "I did say to – I did have a conversation with her about as long as she's telling the truth there is no issues." 2 RP 94, 112-13.

The grandmother repeated the admonition about telling the truth both when the victim was forensically interviewed and before she was brought to court to testify. 2 RP 100. The victim's response to her grandmother's explicit admonition was not tentative in the least: "She said

she was telling the truth.” 2 RP 94. From this testimony alone the trial court could discern that the victim’s general character was that of truthfulness and specifically that she knew the importance of telling the truth as to the matter at hand, that lying would lead to trouble, and that when challenged as to the sexual abuse disclosure she reaffirmed that it was the truth. *State v. C.M.B.*, 130 Wn. App. at 846.

The grandmother’s testimony was supported by the other adult witnesses. The victim’s adult cousin testified that immediately after the very first disclosure, and before the victim disclosed to the grandmother, the cousin also asked about whether the disclosure was the truth. 2 RP 150. The victim’s response affirmed not just the truthfulness of the disclosure but that she knew what was truthful and what was not: “Sone, I’m not telling you a story. I’m telling the truth.” *Id.* The victim’s capacity to know the difference was further supported by another grandmotherly figure, who when asked if she had talked to the victim about lying, said, “No, not really, because I knew that she knew the difference already.” 2 RP 176.

The trial court also heard testimony indicating that the victim’s capacity to tell the truth was not new. From the time she was three or four and in daycare, her mother taught her right from wrong and the need to tell the truth. 2 RP 196. Her mother testified that she taught her daughter,

“Don’t ever be afraid to tell the truth, and I told her the truth needs to help you. Just tell the truth. Even if it hurts somebody, you got to tell it.” *Id.* She never had any problems with her daughter: “She’s never really not a liar. She doesn’t just fabricate stories.” 2 RP 196-97. In regard to the sexual abuse disclosure and her trial testimony, the only instruction the victim was given by her mother was “I always tell her the truth.” 2 RP 209.

The victim’s capacity to understand the need for truthfulness and to distinguish reality from fantasy was also supported by testimony from an experienced, trained, professional forensic interviewer. In the case of young children such as the victim, the interviewer followed a protocol (approved for use in Washington and nationally) that included questions designed to allow the child to distinguish truthful and accurate information from false or inaccurate information. 2 RP 224-26. The questions were designed to enable the child to display her capacity to provide truthful and accurate information: “So with younger children, we make sure that they understand some of those rules that don’t guess if they don’t understand or if I get something wrong to correct me.” 2 RP 226-27. The interviewer also relied on questions calling for a narrative response and looked specifically for repetition that would indicate coaching. 2 RP 228-32.

In the victim's interview, the interviewer went over the ground rules and elicited her promise to give truthful information. 2 RP 235. The developmental assessment included that the victim was not hesitant about correcting and clarifying during the interview: "Nothing really outstanding except for the fact that she was very polite, and I mean, I recall just doing a really good job clarifying kind of things if she didn't understand something, as well as if I missed something or I got messed up on something, she'd correct me." 2 RP 236. The interviewer had no concerns about truthfulness, accuracy of her memory, fabrication or coaching concerning the sexual abuse and explained why:

A. There's instances in the interview that I asked her a question and, for instance, she's -- when we're talking about a boomerang, and she's explaining how it goes back into his body. If somebody -- she's explaining that from her perception, and so that makes it much more clear that it's actually her perception, because she's not being able to articulate what happens with the Boomerang. She's only able to articulate what she sees or understands about it.

Or even when she's talking about where her pee comes out of her potty and her hip, again she's saying what she thinks is happening behind her and how she feels about that part of her body and not able to give like a specific anatomical correct name for that.

So I think those are indicative of non-coaching. Those are very much developmentally appropriate ways for a child who may not have a lot of information about her genitalia and her body area there.

Q. Okay. What about her description of how it felt when his boomerang was almost in her, going in her potty and she described it as smooshy or gooey or something like that, is that significant or indicative of the lack of coaching?

A. I would say that smooshy seems to be a very, again, developmentally appropriate description for something. I don't usually hear more mature adult people using the word smooshy or goo. She also seems to be really authentic about how she says -- at one point, she says that "I don't know. It felt weird," like she can't articulate what it is or what it feels like.
3 RP 246-47.

It is significant that the cross-examination of the interviewer did not challenge the victim's competency. Instead the defendant focused on the interviewer's ability to detect coaching or false memories. 3 RP 249. The interviewer was able to dispel those concerns: "So again in that interview that we watched yesterday, she's able to correct me or even when I ask a question that I thought I knew the answer to, and I would continue to ask a kind of open-ended questions, she would keep going back to explain it in her own words and in her own way, if that makes sense." 3 RP 255. She further testified that, "Kids are not usually able to, when coached, describe anything other than the specific statements that they are coached to say." 3 RP 258. In this case the victim used words appropriate to her age and stage of development, narrative responses to open ended questions and discussed details such as money having been

counted which could only have been the result of actual memory accurately recounted. 3 RP 258-61.

Additional support for the trial court's competency ruling may be found in the timing of the disclosure, the forensic interview and the trial proceedings. The adult family witnesses and the forensic interviewer all indicated that she was competent when she first disclosed at age four. Since the trial proceedings were held just before her sixth birthday, the trial court was well aware that she had nearly two years of development and had started her formal education by the time she was appearing in court. This too supports the trial court's competency ruling.

The foregoing discussion addresses the supporting evidence regarding competency. But the trial court also experienced the victim herself firsthand. She appeared twice. 2 RP 71, et. seq. 2 RP 117 et. seq. The first appearance was when she was under such emotional distress as a result of appearing in a courtroom filled with unfamiliar adults and the defendant that she was unable to complete her testimony. 2 RP 71. As one would expect of a five year old child she wanted "my mommy" and needed a security blanket on the stand. 2 RP 71-72. Even then, however, she displayed testimonial competence by responding to necessary preliminary questions from the prosecutor before her testimony was recessed:

Q. (By Ms. Sanchez) All right. [the victim], I'm going to ask you a few questions. Okay? So just look at me and answer my questions. All right? Okay? Can you do that for me? Okay? All right. Can you tell me your first name?

A. [the victim].

Q. And do you know how to spell that?

A. T-a –

Q. Can you spell it for me? How about this? Is [the victim] your full name or is it your nickname?

A. First.
2 RP 72

When the victim resumed the stand her testimony consumed twenty pages of transcript. When viewed against the five factor competency test, her testimony contributed additional evidence supporting the trial court's competency determination. *See State v. C.M.B.*, 130 Wn. App. at 846. For example the victim gave and correctly spelled her full first and last name and gave her correct age and date of birth in response to preliminary prosecution questions. 2 RP 118-20. She thereby displayed her capacity to understand and respond to the lawyers' questions. She also displayed her knowledge of reality and imagination, of the need to tell the truth, and of the importance of keeping her promise to tell the truth by answering age-appropriate questions designed to display her competence. 2 RP 120-122. In particular she promised to

correct anything that was misunderstood by the prosecutor just as she had done in the forensic interview two years earlier:

Q. Is it important to keep your promises?

A. Yes.

Q. Can you also promise me then that if you don't understand what I'm asking you that you will tell me?

A. Yes.

Q. Can you also promise me that if I get something wrong that you'll correct me?

A. Yes.
2 RP 121.

After the preliminary questions, the victim went on to give testimony about persons, places and events that could be independently verified by the adults in her life. This testimony related directly to the other *Allen* factor focused on by the defendant, namely the capacity to imprint accurate memories. In this regard, the testimony included a number of details during the two years that the case was pending such as: (1) where she was living when she moved back to the Tacoma area, and where she lived just after the sexual abuse when she had moved to Las Vegas [2 RP 122-23.], (2) where she attended school, what grade she was in, who her teacher was, and whether she was in school or day care when she lived in Las Vegas just after the sexual abuse incident [2 RP 123-25.],

(3) what she likes to do for fun and what movies she likes [2 RP 125-26.], and (4) details of where she lived and who she spent time with during special occasions and presents she had received [2 RP 128-33.]. She also identified the defendant as the father of two of her cousins. 2 RP 132-33.

As might be expected, considering that her appearance in court concerned sexual abuse by the defendant, the defendant's name caused her trouble: She was asked, "Do you know their dad's name?" and she responded "Yes. Just I don't want to say it, because it will get me nervous again." 2 RP 133. Few adult witnesses could have responded to that question in a more competent and persuasive fashion. In light of her earlier breakdown and the recess necessary for her to compose herself, this response was a powerful indicator that she was well aware of the subject matter and gravity of the proceedings. She completed her testimony by identifying the people she was close to that she had disclosed to and that her disclosure was the truth. 2 RP 134.

The defendant did not challenge the victim's testimony as to competency *per se* in the trial court; he alleged coaching. 2 RP 136. It should be noted that the ability to be coached weighs in favor of competency not against it because coaching implies that the victim had the capacity to keep a false story straight and repeat it. This was the theory adopted by the defendant's trial counsel. The defendant questioned each

of the adult witnesses in order to verify the accuracy of the victim's testimony and to determine whether she had been coached. *See* 2 RP 100, et. seq.; 2 RP 155 et. seq.; 2 RP 182 et. seq.; 2 RP 210, et. seq.; and 3 RP 249, et. seq. When it came to the victim herself, the defendant did not develop any lines of questioning that called into question the accuracy of her testimony. 2 RP 136.

The five factors from *Allen* were more than supported by the pre-trial testimony. During the pre-trial hearing the victim's capacity to understand the need to tell the truth and her memory were the factors most challenged. But from all the testimony, she understood the need to tell the truth (1) when she disclosed to her family, (2) again when she was forensically interviewed, and (3) finally when she was questioned in court by the prosecution during the pre-trial hearing. Likewise her memory was proved to be accurate by her ability to recall persons, places and events stretching back over the two years that the case was pending. The remaining factors, namely her ability to respond to simple questions and thereby express in words things she remembered, was not questioned, nor could it be in light of the time she was on the stand and the variety of questions for which she had an answer. In short, it cannot be shown that the trial court abused its discretion on competency in light of all of the evidence.

2. THE TRIAL COURT PROPERLY ADMITTED CHILD HEARSAY STATEMENTS FROM THE VICTIM AFTER FINDING THAT SHE WAS COMPETENT AND THAT THE STATEMENTS BORE SUFFICIENT INDICIA OF RELIABILITY.

The child hearsay statute was first enacted in 1982 and is codified at RCW 9A.44.120. The statute allows for two avenues for admission of a child's out-of-court statements "describing any act of sexual contact performed with or on the child by another. . . ." *Id.* Advance notice and a pretrial hearing are mandatory. *Id.* The trial court must find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability" and further the child must either testify or be found unavailable. RCW 9A.44.120(1) and (2).

In this case the nearly six year old victim testified both at the pre-trial hearing and at the trial. 2 RP 71, et. seq. 2 RP 117 et. seq., and 5 RP 390, et. seq. The totality of her testimony consists of more than forty-five pages of transcript on two separate appearance dates. *Id.* The defendant argues that her testimony should not be considered testimony because she was supposedly incompetent. For the reasons discussed above, this is incorrect. The victim's forty-five pages of testimony was in fact testimony and the defendant's arguments to the contrary should be rejected.

The testimony requirement has been interpreted in light of the requirements of the confrontation clause. Those cases have held that when a witness has appeared in court, has been questioned about the incident at issue, and was available for cross examination as to the incident and any hearsay statements, the witness has testified. *State v. Clark*, 139 Wn.2d 152, 155, 985 P.2d 377, 381 (1999) (Child held to have testified even though she recanted her hearsay statements saying, “her previous statements that [the defendant] made her touch his penis were lies. . . .”), citing *United States v. Owens*, 484 U.S. 554, 560, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988), and *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). The gravamen of the *Clark* test is that the child “must have been asked about both the underlying events and about her prior statements” even if the child is unable to remember or otherwise refuses to answer the questions. *State v. Price*, 158 Wn.2d 630, 648, 146 P.3d 1183 (2006). See *State v. Clark*, 139 Wn.2d at 160 and *State v. Foster*, 135 Wn.2d 441, 464, 957 P.2d 712 (1998) (Testimony means that the witness gave “live testimony, under oath, subject to cross-examination, and under the watchful eyes of the jury” and that such testimony “maximizes the accuracy of the truth-seeking process in criminal trials.”), quoting *State v. Rohrich*, 132 Wn.2d 472, 477, 939 P.2d 697 (1997).

When analyzed under the *Clark* standard, there can be little doubt that the victim in this case testified. At the pretrial hearing the prosecution assured the trial court that the victim would testify as required by the child hearsay statute by briefly referencing the sexual abuse and her disclosures. After identifying the defendant by name, she was asked and responded:

Q. Thank you. That was very good. [the victim], did you know that you were coming to court today to talk about their dad, Brandon?

A. Yeah.

Q. Did you talk to other people before coming to court today about Brandon?

A. No.

Q. You never talked to anybody about it?

A. No, only sometimes I told my mom and, yeah.

Q. You told your mom?

A. Yeah.

Q. Did you tell your Momo?

A. Yes.

Q. Did you tell Sonie?

A. Yes.

* * * *

Q. When you talked to your Momo and your mom and Sonie about it, did you tell them the truth?

A. Yes.

2 RP 133-34.

Subsequently at trial she testified exactly as a five-year-old would be expected to testify about sexual abuse that occurred nearly two years previously. After answering a number of questions related to her family constellation, the places she'd lived during the relevant time period, and certain family events [5 RP 390-404], she was asked specifically about the sexual abuse incidents included in her disclosures:

Q. No. Okay. I didn't think so. [the victim], the last time that you were over at your cousin's house, Gia and Bobe's house, playing with them, did their dad Brandon do something to you that you didn't like?

A. Yeah.

Q. Can you tell us what he did? All right. I'm going to ask you this. Did it happen in their house?

A. Yes.

Q. Can you tell me what room it happened in?

A. It happened in Brandon's room.

* * * *

Q. Did Brandon say something to you?

A. When we got in the room?

Q. Yes.

A. No. Wait, yeah.

Q. What did he say?

A. He told me to lay down on the floor.

Q. Okay. Did you lay down on the floor?

A. Yeah.

Q. Okay. Were you laying on your stomach or on your back or on your side?

A. On my stomach.

Q. And did something happen after you laid down?

A. Yeah.

Q. What happened?

A. He got on top of me.

Q. Who got on top of you?

A. Brandon.

Q. Okay. Were you still laying on your stomach?

A. Yeah.

5 RP 407-14

The victim also answered questions about the people to whom she had disclosed. 5 RP 414-15. She accurately identified them in the order in which her disclosures had occurred: "I told Sonie and then Sonie told Momo, and then I told my mom and my dad." 5 RP 414. The only person to whom she had disclosed that she was asked about but didn't remember was a grandmother who had passed away and who therefore did not introduce child hearsay statements. 5 RP 415.

The defense attorney elected not to cross examine. He was nevertheless expressly afforded an opportunity to do so when the prosecutor directed the victim to remain on the witness stand because "[s]omeone else is going to ask you questions. Okay." 5 RP 415.

Considering the definition of testimony from *Clark* there has been no showing that the victim was unavailable. Thus, the child hearsay statements were not required to be supported by “corroborative evidence of the act” RCW 9A.44.120(2)(b). See *State v. Pham*, 75 Wn. App. 626, 632, 879 P.2d 321, 325 (1994) (Where a child victim “was competent” and therefore “available to testify as a witness, corroboration of the out-of-court statements is not a prerequisite to their admissibility.”), citing *State v. Bishop*, 63 Wn. App. 15, 20, 816 P.2d 738 (1991), *review denied*, 118 Wn.2d 1015, 827 P.2d 1011 (1992).

Even so “corroboration *of the alleged act* can be satisfied by indirect evidence produced from observation of the declarant's behavior and the context of the statement.” *State v. Young*, 160 Wn.2d 799, 812, 161 P.3d 967, 975 (2007) (emphasis supplied). Although corroboration was not necessary, in this case corroborating evidence was in fact admitted in this case both through the victim’s testimony and the context of her statements.

The context of the statements included the circumstances of the first disclosure to the victim’s adult cousin, Sonya Jones. Ms. Jones testified that her relationship with the victim was “very close, very, very close.” 5 RP 429. The disclosure occurred when the victim came unexpectedly to Ms. Jones room, climbed into her bed (a not unusual

occurrence), pulled Ms. Jones arm around her, and said simply “Sone, I’m sad.” 5RP 437. The cousin had until that moment been sick and in bed. She was not interacting with the victim in any respect and was certainly not conversing with her or anyone else about the defendant or his family. The initiation of the conversation was purely the four year old child’s doing. Furthermore, the disclosure was not by words but by physical demonstration: the five year old showed Ms. Jones how the defendant, an adult non-caregiver male, put his hand in her “vaginal region”. 5 RP 437.

Corroboration from “the declarant’s behavior and the context of the statement” may be provided by the spontaneous circumstances of the disclosure. In *Young*, corroboration was required in the context of excited utterances by an eleven year old who later recanted the statements and testified for the defense at trial. *State v. Young*, 160 Wn.2d at 817-18. The disclosures in *Young* consisted of tear-filled, emotional descriptions of a sexual encounter with the defendant earlier in the day. *Id.* In this case, the victim’s disclosure was equally spontaneous, if not more so. The victim here voiced to a trusted adult out of the blue that something was bothering her. The spontaneous genesis of the disclosure, coupled with the physical showing of what the defendant had done, provided more than sufficient corroboration if corroboration had been required.

In his child hearsay challenge, the defendant relies primarily on arguments about the victim's competency. In what appears to be an afterthought he quoted the nine reliability factors and offered a brief argument about several of them. Like the *Allen* competency test, the nine-factor reliability test for child hearsay has been with us for some time. *State v. Ryan*, 103 Wn.2d 165, 175–76, 691 P.2d 197(1984). The test requires a determination of, “(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness”, plus a determination of whether “(1) the statement contains no express assertion about past fact, (2) cross-examination could not show the declarant's lack of knowledge, (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.” *Id.*, quoting *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982), and citing *Dutton v. Evans*, 400 U.S. 74, 88–89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970).

The discussion above in response to the defendant's competency arguments supports reliability under *Ryan*. Furthermore it was evident

that from all the testimony that (1) the victim's character for truthfulness, (2) her lack of motive to lie, (3) the number of people who heard her statements, and (4) the timing and relationship of the victim and the supporting witnesses all supported the trial court's determination. Furthermore, the defendant had the opportunity to cross examine the child declarant to show lack of knowledge, faulty recollection or misrepresentation but did not. Thus both the trial court and this Court are left with no showing that the victim was mistaken, confused, or otherwise mixed up about what happened to her. The lack of any such evidence that would undermine the trial court's *Ryan* factors analysis should result in the ruling being affirmed. There is little or no support for the argument that the trial court abused its discretion with the child hearsay ruling.

3. THE PROSECUTION'S CLOSING ARGUMENT
DID NOT INCLUDE MISCONDUCT WHERE
THE PROSECUTOR'S CONDUCT WAS
NEITHER IMPROPER NOR PREJUDICIAL.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Thus the first task is to determine whether the prosecutor's conduct was improper. *Id.* at 759. If it was, the next task is to determine whether the misconduct resulted in prejudice. *Id.* at 760. Prejudice is established by a

showing of a substantial likelihood that the improper conduct affected the verdict. *Id.*

The defendant argues that the prosecutor's closing argument was erroneous for two reasons: first that it was a so-called false choice argument, and second that it constituted burden shifting. For the reasons stated below the prosecutor's closing argument was neither improper nor prejudicial under these or any other theories.

A form of argument that has been held to be improper is a so-called false choice argument. *State v. Barrow*, 60 Wn. App. 869, 875–76, 809 P.2d 209, 213 (1991) (Improper to argue that in order to acquit, the jury necessarily needed to disbelieve the investigating officers.), *State v. Wright*, 76 Wn. App. 811, 824, 888 P.2d 1214, 1222 (1995). This form of argument is improper because it neglects to take into account the prosecution's burden of proof: "all that [the jury] needed was to entertain a reasonable doubt that it was [the defendant] who made the sale to [the undercover officer]." *State v. Barrow*, 60 Wn. App. at 876.

The false choice argument is to be distinguished from arguments about credibility. *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). *Miles* was a drug case in which the defendant's testimony was contradicted by the testimony of the police officers. The court held that by failing to acknowledge that a jury could both disbelieve the defendant and

still acquit, the prosecutor erred. *Id.* at 890. Nevertheless the prosecutor's argument about credibility was not improper because when "the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable." *Id.*

A prosecutor is entitled just like the defense to argue credibility of witnesses. "Although it is improper for a prosecutor to vouch for a witness's credibility, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). *State v. Jackson*, 150 Wn. App. 877, 884–85, 209 P.3d 553 (2009) ("In context, the prosecutor reminded the jury that it is the sole judge of credibility. He then outlined which evidence (and reasonable inferences from the evidence) could support the jury's conclusion that the officers were credible and [the defendant's] witness was not."). Where a prosecutor argues from the evidence why a witness' or a victim's testimony should be believed, no misconduct occurs.

In this case the prosecutor did not make a false choice argument but did argue credibility. She argued against the defense theory which was (1) that the four year old victim had been coached [7 RP 766], and (2) that the adults in the child's life had improper motives, including revenge,

for doing the coaching [7 RP 774-75]. 7 RP 750-59. The prosecutor argued without objection that:

None of these people may be people that you would choose to hang out. Someone like Sonya Jones, maybe you didn't like her attitude on the stand. That very well may be. But in this case, what she had to say, what all of them had to say that's relevant to this case, there's nothing to show that they have any reason to fabricate it, to make up what [the victim] told them, none.
7 RP 756.

At no time did the prosecutor make a false choice argument by equating a credibility judgment with a requirement that the jury either acquit or convict. Instead, she pointed out that the coaching allegation was “unsupported by any evidence and it also doesn’t make sense.” 7 RP 757. This argument prompted one of two burden shifting objections during the prosecution’s closing argument but not a false choice objection. *See* 7RP 750 and 757.

Burden shifting is not the same as false choice. Instead it is based on the obvious prohibition that burden of proof may not be mischaracterized or diminished. *State v. Lindsay*, 180 Wn.2d 423, 434-7, 326 P.3d 125 (2014) (Prosecution may not “shift or misstate the State’s burden to prove the defendant’s guilt beyond a reasonable doubt.”). When discussing the burden of proof or the jury’s decision making, a prosecutor may not diminish the burden of proof by, for instance, attempting to

quantify the burden, compare it to everyday decision making, encourage the jury to “speak the truth”, or use other misleading rhetoric that has been found to trivialize the burden of proof. *Id.* See also ***State v. Johnson***, 158 Wn. App 677, 682, 243 P.3d 936 (2010); ***State v. Anderson***, 153 Wn. App 417, 431, 220 P.3d 1273 (2009), and ***State v. Walker***, 164 Wn. App 724, 732-33, 265 P.3d 191 (2011).

In this case the prosecutor made none of the prohibited burden shifting arguments. The defendant’s trial counsel objected twice voicing burden shifting but in context likely meant to object that the prosecution was arguing that the defense had a duty to present evidence. See ***State v. Jackson***, 150 Wn. App. 877, 887, 209 P.3d 553, 559 (2009). Had the prosecutor made such an argument it would have been improper, but she did not. The ***Jackson*** court distinguished between proper and improper argument concerning the defense burden of production:

Here, [the defendant] essentially argues that the State may not explain to the jury that there is no evidence to support or corroborate a particular matter. That is not the standard. The prosecutor mentioned that no evidence corroborated [a defense witness’] testimony, but he focused on the fact that the police officers’ testimony contradicted her story. This is not a comment on [the defendant’s] silence.

Id. at 887, citing ***State v. Ashby***, 77 Wn.2d 33, 37–38, 459 P.2d 403 (1969).

In this case the burden shifting objections were not actually about burden shifting but rather about the defendant's right not to present evidence. 7RP 750 and 757. Neither these objections, nor any of the other four defense objections, nor anything else that was said by the prosecutor without objection violate this principle. The prosecutor did not comment on the defendant's rights, she commented on the lack of evidence to support the defense theory of the case. The defendant made it abundantly clear that alleged coaching and improper motives was the basis of the defense theory of the case. *See* 7 RP 766, 774-75. There was nothing objectionable in the prosecution arguing to the contrary from the evidence presented.

When arguing credibility a prosecutor has free reign except where the argument suggests that the outcome of the case depends entirely on credibility. *State v. Lewis*, 156 Wn. App. at 240, *State v. Jackson*, 150 Wn. App. 884–85. As with arguments trivializing the burden of proof, it is improper for a prosecutor to argue that acquittal requires that the jury find the state's witnesses must have been lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.3d 1076 (1996). Such an argument neglects to account for the jury's right to weigh the probative value of the evidence independent of any judgment it may make as to credibility. *State v. Wright*, 76 Wn. App. 811, 825–26, 888 P.2d 1214

(1995). Such arguments are improper because a jury could find that the state had not met its burden of proof regardless of whether the State's witnesses or the defense witnesses or the defendant were deemed credible or not. *Id.* The jury's ultimate duty is to determine whether the state has met its beyond-a-reasonable-doubt burden of proof. *Id.*

A similar erroneous argument in a child sex case is to suggest that child sex abuse cases as a category could not be prosecuted if a child's testimony by itself was insufficient evidence. *State v. Thierry*, 190 Wn. App. 680, 692, 360 P.3d 940 (2015), *review denied*, 185 Wn.2d 1015 (2016). While a prosecutor may not argue that sex abuse prosecutions in general hang in the balance, a prosecutor may argue credibility and draw reasonable inferences about credibility concerning the testimony of witnesses including a child victim. *Id.* Furthermore, when the state's evidence contradicts a defendant's testimony, a prosecutor may even infer that the defendant is lying or unreliable. *State v. McKenzie*, 157 Wn.2d 44, 59, 134 P.3d 221 (2006), citing *State v. Copeland*, 130 Wn.2d 244, 291–92, 922 P.2d 1304 (1996)). “[T]here is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.” *State v. Wright*, 76 Wn. App. at 825.

The prosecutor here confined her argument to what is permissible. It is permissible for a prosecutor to argue that if a victim is determined to

have been credible, that the victim's testimony can be sufficient for conviction. *State v. Thorgerson*, 172 Wn.2d 438, 454, 258 P.3d 43, 52 (2011). *Thorgerson* was a child sex abuse case in which the prosecutor's argument about the sufficiency of the evidence was expressly approved: "In context, the prosecutor did not tell the jury there was a presumption that [the victim] was telling the truth, but rather argued that the jurors should believe her testimony and if they did, then they should find [the defendant] guilty." *Id.* See also *State v. Osman*, 192 Wn. App. 355, 367, 366 P.3d 956 (2016) ("[A] prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case.") citing *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

In this argument, the prosecution did not argue that the victim should be automatically believed. Instead she referred to the jury instructions as to what they said and did not say, pointed out that there is no specific requirement of corroboration of a victim's testimony and then discussed the evidence and lack of evidence concerning corroboration. 7 RP 759-63. None of this was improper. The defendant has pointed to no case that prohibits a prosecutor from arguing from the court's instructions and the evidence actually presented in a case. In fact those are precisely the elements of proper argument. *State v. Smiley*, 195 Wn. App. 185, 379 P.3d 149 (2016), *review denied*, 186 Wn.2d 1031, 385 P.3d 110 (2016).

A prosecutor's arguments are improper if they "shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt." *State v. Lindsay*, 180 Wn.2d at 434. "A proper argument stays within the bounds of the evidence and the instructions in the case at hand." *State v. Smiley*, 195 Wn. App. at 194-95. The argument in this case was a cautious example of exactly that. The argument focused sequentially on (1) the elements of the crime and the sexual intercourse definition jury instruction [7 RP 742-48.], (2) it then turned to the evidence actually presented and touched on consistency, inconsistency, spontaneity, and motive [7 RP 748-61.], and (3) it concluded with a discussion of the requirement of proof beyond a reasonable doubt [7 RP 761-63.]. Far from constituting a false choice or a shifting of the burden or a mischaracterization of the burden of proof, the argument did not stray even close to the line.

A final proposition is important to be discussed in a case such as this. There are distinct standards that apply where prosecutorial misconduct is either preserved or not preserved. Where the issue was preserved, the defendant's burden is to show merely that the argument was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Where the issue was not preserved, the burden is much higher:

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. . . . Under this heightened standard, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.”

State v. Emery, 174 Wn.2d 741, 760–61, 278 P.3d 653, 664 (2012), citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), and quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43, 52 (2011).

In this case, as discussed above, the defendant does not satisfy the preserved misconduct standard. He all the more does not satisfy the unpreserved misconduct standard. None of the defendant’s objections were sustained. The trial court instead made general references to the jury’s duty to utilize the instructions as given and consider the evidence as presented. While the defendant makes allegations of improper argument, there can hardly have been flagrant and ill-intentioned conduct where the defendant’s objections were so summarily overruled. It can be inferred that even trial counsel did not consider the argument so far out of bounds as to have been flagrant and ill-intentioned where no mistrial motion was made. This court should reject the prosecutorial misconduct argument and affirm the conviction on this assignment of error.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ENTERED THE STIPULATED DISCOVERY PROTECTIVE ORDER CONCERNING THE PARTIES' HANDLING AND DISEMINATION OF THE DVD RECORDING OF THE FOUR YEAR OLD VICTIM'S FORENSIC INTERVIEW.

The trial court in this case entered a stipulated discovery protective order concerning the DVD recording of the child victim's forensic interview. CP 213-14. It did not enter an order sealing the DVD recording after it was admitted either as a child hearsay hearing exhibit or trial exhibit. The protective order was not error. "Courts are empowered to limit the scope of discovery and the use of its fruits '[u]pon motion' and 'for good cause shown.' . . . Thus, because there is not yet a public right of access with respect to these materials, '[m]ere discovery may be sealed 'for good cause shown.' " *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 541, 114 P.3d 1182, 1187 (2005).

Had the trial court entered an order sealing the DVD after it had been admitted as a child hearsay exhibit or trial exhibit, a different standard would apply. "Trial proceedings and records attached to dispositive motions, on the other hand, are presumptively open absent an 'overriding interest.' " *Id.* at 541, quoting *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004), quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir.1988), citing *Cohen v. Everett*

City Council, 85 Wn.2d 385, 388–89, 535 P.2d 801 (1975). In cases involving trial and pretrial proceedings, trial courts are “to apply the five *Ishikawa* factors in determining which documents may continue to be sealed. *Id.* at 543-44.

The record in this case does not show that the trial court entered any order other than the stipulated discovery order. That order does not direct that the DVD be sealed if it is admitted during pre-trial or trial court proceedings. Instead it directs that the DVD “shall not be used for any purpose other than to prepare for the prosecution and/or defense of the named defendant in the above-entitled cause.” CP 213. While the order did include a provision directing that additional copies were to be returned to the prosecution following “final disposition”, the order did not restrict access to copies admitted into evidence as trial or hearing exhibits and the copy admitted into evidence was not returned to the prosecution. CP 214.

Protective orders for discovery in criminal cases are not forbidden. “The provision for protective orders in CrR 4.7(a) makes sense if one concludes the defense is entitled to copies of the evidence. It is the possession of evidence implicating privacy that often explains the use of a protective order.” *State v. Boyd*, 160 Wn.2d 424, 438, 158 P.3d 54, 61 (2007), citing *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 242–43, 654 P.2d 673 (1982) (barring newspaper from publishing information derived

from copies of tax returns and other discovered materials), and *Barfield v. City of Seattle*, 100 Wn.2d 878, 885, 676 P.2d 438 (1984) (protective order issued to prevent defense attorney's dissemination of officer records). The discovery rules, including the option for protective orders for sensitive materials, are intended to facilitate defense preparation for trial. Thus, even for material such as child pornography, “[The defendant] was entitled to have his defense team take a mirror image of his own computer's hard drives out of the County–City Building to be analyzed by his experts, subject to an appropriate protective order.” *State v. Grenning*, 169 Wn.2d 47, 56, 234 P.3d 169 (2010).

The protective order here was precisely the type of order approved to be used with sexually sensitive discovery in *Grenning* and *Boyd*. Contrary to the defendant’s implicit assertion, the trial court here did not prevent the defendant from having possession of the DVD as had the trial courts in *Grenning* and *Boyd*. The defendant here had a copy of the DVD throughout the pre-trial proceedings, during trial and continues to have a copy during the appeal. The discovery order included a number of provisions related to the issues addressed in *Grenning*. Dissemination of the DVD and its handling by both the prosecution and the defense team before trial was tightly controlled. CP 213-14. What was not addressed was whether it would or would not be sealed if admitted during court

proceedings. The order may prevent the parties from disseminating the DVD to uninvolved third parties, but it does not address whether third parties will have access on their own initiative.

With the foregoing discussion of the content of the order in mind, the state concedes that this Court's clerk treated the DVD as sealed when the state sought to view it as part of this appeal. That appears to have been as a result of a motion filed by the defendant in this Court on June 26, 2017. The relief sought in that motion was: "Pursuant to RAP 1.2 and RAP 18.8, appellant requests that this Court order that transmittal from Pierce County Superior Court of State's Exhibit 12 shall be done under seal, based on the attached trial order, pending this Court's own decision regarding the propriety of that seal." The order attached to the motion is the protective discovery order discussed above.

This Court's commissioner entered a ruling granting the defendant's motion on July 24, 2017. The ruling stated: "Barnes requests that trial exhibit #12 be transferred to the court under seal (along with a copy of the trial court's sealing order), pending any further decision from this court regarding the propriety of that seal." Subsequently, the state filed a motion for access to the exhibit which was also granted by a commissioner's ruling on September 11, 2017.

The record does not include any reference to public access having been denied. Nor does it include any reference to either of the parties to this appeal having been denied access. While it is true that the state filed a motion requesting access, that motion was filed after the defense requested that this Court maintain the DVD in a sealed condition. For the sake of argument, if this Court's clerk or the clerk of the superior court misinterpreted the scope of the discovery protective order, that misinterpretation should not be deemed a court order having the capacity to violate open court decisions. It would be a matter for training and instruction of the deputy clerks who handle trial exhibits. In any event, the defendant has not argued nor cited any authority for the proposition that this Court would violate open court principles by granting a defense motion to keep a trial exhibit in a sealed condition.

The trial court order in this case restricted dissemination of the DVD by the parties as a matter of discovery. This Court's commissioner entered an order at the request of the defense to maintain the exhibit in a sealed condition but also entered an order granting the prosecution access to the DVD for purposes of the appeal. It can be inferred that any other request for access would have been duly considered and granted had any other request been made. Under these circumstances, it can hardly be said

that an open court violation occurred as a result of the trial court's discovery order.

5. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SET BAIL AT THE DEFENDANT'S FIRST APPEARANCE, LEFT OPEN THE POSSIBILITY OF REVISITING BAIL AT A FUTURE HEARING, AND THEN REDUCED BAIL TO AN AMOUNT THAT THE DEFENDANT WAS ABLE TO POST.

Defendants do not have an absolute right to be released on personal recognizance pending trial. *State v. Goodwin*, 4 Wn. App. 949, 951, 484 P.2d 1155, 1156 (1971), citing *Reeves v. State*, 411 P.2d 212 (Alaska 1966), and *State ex rel. Wallen v. Judges Noe, Towne, Johnson*, 78 Wn.2d 485, 475 P.2d 787 (1970). "Imposition of pretrial bail is proper when determined to be necessary to insure court appearance of the accused." *State v. Reese*, 15 Wn. App. 619, 620, 550 P.2d 1179, 1180 (1976). Furthermore, "[h]aving found that bail was necessary, the amount was a matter within court discretion to be reversed on appeal only for manifest abuse." *Id.* Where a defendant had "a prior similar conviction" and "was evasive to the court" and was "charged with two felonies", no abuse of discretion was shown, and "the trial court committed no error in refusing to reduce pretrial bail." *Id.*

When it comes to proper application of the CrR 3.2's presumption, relevant factors and least restrictive conditions of release, there is "no

formula for translating these factors into dollars.” Ferguson, 12 *Wash. Prac., Criminal Practice & Procedure* § 414 (3d ed. 2016). It is likely that trial judges statewide have a range of perspectives as to appropriate bail and that in part what informs their decision making are local norms and local needs. An urban county like Pierce County appropriately may have a different perspective compared to a rural eastern Washington county. This is as it should be because bail is an inherently judicial concern best applied by the courts bearing the responsibility for conducting trials and other criminal proceedings. “In short, ‘the fixing of bail and the release from custody traditionally has been, and we think is, a function of the judicial branch of government, unless otherwise directed and mandated by unequivocal constitutional provisions to the contrary.’ ” *Westerman v. Cary*, 125 Wn.2d 277, 291, 892 P.2d 1067, 1075 (1994), quoting *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974).

The two judges who ruled on bail in this case did not abuse their discretion. They ruled on bail at different stages of the proceedings and with different information having been brought to their attention. Furthermore, it should be noted that the defendant was actually held in custody for only seventeen days before posting a bail bond and securing release pending trial. CP 188-89, 208-09, and 210-12. In light of the facts that (1) the defendant had a prior class B felony conviction [12/02/2014

RP 4-6, 12/19/2014 RP 5-6.], (2) a separate conviction for two gross misdemeanors that were reduced from felony charges [*Id.*], (3) was committing a class B felony when arrested by being in possession of a handgun in a vehicle at the time of his arrest [12/19/2014 RP 7-8, 11-15.], (4) had discussions with his fiancé in jail calls about securing the gun [*Id.*], and (5) was charged with two class A, violent sex offenses that carried possible sentences of up to life in prison [*See* CP 153-54, 155-70.], the discretion of the trial judges surely cannot have been abused where the defendant ultimately had his bail reduced by half. 12/19/2014 RP 15.

Any trial judge would know that where a defendant is charged and makes his first appearance the day after an arrest, neither party can be expected to bring to court all that may be relevant to a final bail ruling. That is exactly the circumstance at play in this case. Here the defendant was charged and made his first appearance the afternoon after his arrest. 12/02/2014 RP 3-4. The prosecution's bail recommendation did not include the full facts and in particular did not include reference to the defendant's possession and/or ownership of handguns. *See* 12/19/2014 RP 7-8, 11-15. Had the gun and the defendant's communications about it been available at arraignment it is likely that the prosecution's bail recommendation and the presiding court judge's ruling would have been quite a bit higher. As it was, the bail was appropriately set based on the

seriousness of the offense, the length of the potential prison sentence and the extremely strong incentive to flee the court's jurisdiction rather than face a potential life sentence. That judgement cannot be shown to have been a judgment that no trial judge would have made.

The foregoing discussion is all the more rational considering the presiding judge made bail a matter that could be revisited by either party. 12/02/2014 RP 9. In due course, before the pre-assigned trial department, bail was revisited. 12/19/2014 RP 3. The pre-assigned judge considered the entirety of the foregoing facts, weighed them against information about the defendant's living and work circumstances and elected to cut the defendant's bail in half. 12/19/2014 RP 15. The conduct of the two bail proceedings shows that the trial court as a whole adhered to and weighed the relevant appearance factors enumerated in CrR 3.2(c), and the danger to the community factors enumerated in CrR 3.2(e), before setting a bail amount that could be posted by the defendant. It might be possible to find a trial judge somewhere in the state who would find fault with the outcome of these proceedings but it surely cannot be said that all judges statewide would have ruled differently.

Since it has not been shown that no reasonable trial judge would have made the same judgment as to bail as was made here, no abuse of

discretion has been shown. Accordingly the trial court's decision on this assignment of error should be affirmed.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THAT THE CRIME RELATED PROHIBITIONS RELATED TO THE CHILD SEX ABUSE CRIME OF CONVICTION AND WHERE THE CONDITIONS WERE RELATED TO THE SEXUAL DEVIANCY EVALUATION AND TREATMENT REQUIREMENT.

The Sentencing Reform Act authorizes sentencing courts to impose “crime-related prohibitions and affirmative conditions” as part of any felony sentence. RCW 9.94A.505(9). This power is statutorily expanded and may include life time community custody supervision in the case of sex offenders. RCW 9.94A.507(5). Community custody supervision of sex offenders can include both crime related prohibitions and affirmative conditions and sexual deviancy treatment related conditions. RCW 9.95.420 – 435. *State v. Riles*, 135 Wn.2d 326, 351, 957 P. 2d 655 (1998) (“A sentencing court has authority under [former] RCW 9.94A.120(9)(c)(iii) to impose treatment or counseling for sex offenders.”). The abuse of discretion standard applies to the question of whether a crime related prohibition relates to the circumstances of the crime. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006), citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In this case all of the challenged conditions were related to the crime. The defendant was convicted of raping a four year old child. The trial court ordered the defendant to serve life time community custody supervision. CP 155-170, §4.8. It also ordered the defendant to undergo a sexual deviancy evaluation and follow up with any recommended treatment. CP 155-170, §4.4 and §5.10. It should be noted that error has not been assigned to either of those conditions, only to a select few of the supporting conditions. Opening Brief, p. 1.

Where deviancy treatment is ordered, the court may delegate to the community corrections officer or treatment provider further restrictions on the offender's conduct and behavior even where they may impact constitutional rights. *State v. Sansone*, 127 Wn. App. 630, 643, 111 P.3d 1251 (2005) ("A delegation would not necessarily be improper if [the defendant] were in treatment and the sentencing court had delegated to the therapist to decide what types of materials [the defendant] could have."). A similar delegation in the absence of sexual deviancy treatment could be deemed impermissibly vague, especially where protected materials are concerned. *State v. Bahl*, 164 Wn.2d 739, 761, 193 P.3d 678, 689 (2008) ("The condition cannot identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified.").

The conditions complained of here were directly related to the court ordered sexual deviancy evaluation and treatment. CP 155-70, § 5.10, CP 171-73. They were also similar to restrictions that have been found not to be unconstitutionally vague when applied to a sex offender. In *Bahl* the court declined to invalidate a community supervision condition that is quite similar to the conditions here, namely a restriction against frequenting of “establishments whose primary business pertains to sexually explicit or erotic material”. *State v. Bahl*, 164 Wn.2d at 758. This condition was permissible because, “When all of the challenged terms, with their dictionary definitions, are considered together, we believe the condition is sufficiently clear. It restricts [the defendant] from patronizing adult bookstores, adult dance clubs, and the like.” *Id.* at 759.

In this case condition number 11 reiterated and elaborated on the references in the defendant’s judgment that he would be required to undergo a sexual deviancy evaluation and follow up on any recommended treatment. CP 171-73. Thereafter the remaining conditions, including the four to which error is assigned, were directly related to the defendant’s anticipated release into the community as a sex offender potentially to undergo sexual deviancy treatment. *Id.* In *Sansone* it was observed that, “Sentencing courts have the power to delegate some aspects of community placement to the DOC. While it is the function of the judiciary to

determine guilt and impose sentences. 'the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature.' ” *State v. Sansone*, 127 Wn. App. at 641-42, quoting *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937).

All of the conditions in this case were related to the defendant’s conviction as a rapist of a child under the age of twelve. The defendant rhetorically asks how the conditions are related to this case when the defendant committed this crime inside a private home. The argument overlooks that the crime was committed against a four year old child and all of the conditions are related to keeping the defendant away from children and from inappropriate sexual stimulation. Presumably he would be kept from having contact with children until, to the satisfaction of his treatment provider and corrections officer, he learned the skills necessary to keep children safe.

Contrary to the defendant’s argument, it can hardly be said that any of the challenged conditions are not related to the fact that the defendant had sexual intercourse with a four year old girl. A number of the conditions specifically referenced monitoring by a treatment provider and community corrections officer so as to ameliorate the potential for those

conditions to infringe on first amendment rights. CP 172-73, Conditions 10, 12, 13, 20, 21, 22, 24, 26, and 28. Others reflected restrictions that would be related to deviancy treatment. Since the court could not know years in advance what the evaluation might recommend for treatment, it necessarily delegated some aspects of the defendant's supervision in the community to those professionals who would be monitoring the defendant's compliance.

The holding in *Sansone* is not only applicable to this case but also makes perfect sense. In sexual deviancy treatment the defendant would likely be taught skills that he could draw upon to resist the urge to have sexual contact with children.

Few sentencing judges would have the expertise to draw an exact line at a sentencing hearing. No sentencing court could have the prescient ability to anticipate all circumstances that might imperil children and thus threaten the defendant's liberty. "Further, the court's delegation of the specifics of community custody conditions to DOC was within DOC's authority set by *Sansone*. Therefore, the sentencing court did not impermissibly delegate sentencing authority to the DOC." *State v. McWilliams*, 177 Wn. App. 139, 154, 311 P.3d 584 (2013) (Blanket delegation consisting of, "Conditions per DOC; CCO" was not improper."). In view of the distinguishing fact in this case, that

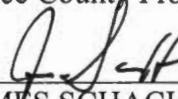
enforcement has been delegated to a supervising treatment provider, the conditions are not impermissibly vague. They should be upheld as enforceable once the defendant enters treatment at the end of his prison term.

D. CONCLUSION.

For the foregoing reasons this Court should affirm the defendant's conviction and sentence.

DATED: Friday, October 27, 2017

MARK LINDQUIST
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JAMES SCHACHT
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.27.17 Therenta
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

October 27, 2017 - 2:40 PM

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