

No. 50497-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD JACK HARDY,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-04940-4
The Honorable Gretchen Leanderson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by failing to address the venue issue raised by the defense at the close of the State's case.
2. The trial court abused its discretion by failing to instruct the jury that it must find by a preponderance of the evidence that the offenses were committed in Pierce County.
3. Richard Hardy was denied his constitutional right to venue and to have his case tried in the county where the offenses were alleged to have been committed.
4. Richard Hardy was denied his constitutional right to due process of law and jury unanimity where the evidence was insufficient to enable the jury to unanimously agree on a separate and distinct act to support each of the three convictions for rape of a child.
5. The trial court erred when it admitted testimony of uncharged acts of assault under ER 404(b).

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was Richard Hardy denied his constitutional right to venue and to have his case tried in the county where the offenses were alleged to have been committed, and did the trial court

abuse its discretion by failing to take action to protect Richard Hardy's constitutional right to venue, after the State insisted that it would ask the jury to convict Hardy of one count of rape of a child in the first degree based on an incident that occurred in King County? (Assignments of Error 1, 2 & 3)

2. Was Richard Hardy denied his constitutional right to venue and to have his case tried in the county where the offenses were alleged to have been committed, and did the trial court abuse its discretion by failing to take action to protect Richard Hardy's constitutional right to venue, where the trial court failed to instruct the jury that it must find by a preponderance of the evidence that the charged offenses were committed in Pierce County? (Assignment of Error 1, 2 & 3)
3. Was Richard Hardy denied his constitutional right to due process and jury unanimity, where the state and federal constitutions require that evidence be sufficient to enable a jury to unanimously agree beyond a reasonable doubt on a specific and distinct criminal act underlying each charged offense, and where the State's evidence of sexual

intercourse lacked differentiating factual details, making it impossible for the jury to reach a unanimous agreement regarding whether a specific separate and distinct criminal act occurred on a particular occasion? (Assignment of Error 4)

4. Did the trial court commit prejudicial error when it admitted testimony under ER 404(b) describing uncharged assaults against the alleged victim and her mother to explain the victim's delay in disclosing sexual abuse, where the victim did not delay disclosure, and where any delay in disclosure that might have existed was explained by other non-prejudicial testimony? (Assignment of Error 5)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Richard Jack Hardy with four counts of rape of a child in the first degree (RCW 9A.44.073). (CP 185-87) The State also alleged that the offenses were aggravated because Hardy used his position of trust to facilitate commission of the crimes (RCW 9.94A.535(3)(n)). (CP 185-87) The State alleged that Hardy committed these offenses between December 12, 2002 and December 11, 2008, while E.E., his girlfriend's daughter, was

aged six to 11 years. (CP 185-87)

Over defense objection, the State was allowed to elicit testimony regarding uncharged acts of assault that E.E. and her mother claimed were committed against them by Hardy. The trial court found that this evidence was relevant to show why E.E. delayed in reporting the alleged molestations. (RP 628-29) The court also allowed E.E.'s father to testify about statements E.E. made about Hardy's alleged abuse, under the excited utterance exception to the hearsay rule. (RP 686-88)

The jury found Hardy guilty as charged. (CP 177-84; RP 955-56) The trial court imposed an exceptional minimum term of 380 months and a maximum term of life in prison. (CP 205, 208; RP 975) Hardy now appeals. (CP 188)

B. SUBSTANTIVE FACTS

Melissa and James Eriksen were married in 1996. (RP 675-66) Their daughter, E.E., was born on December 12, 1996. (RP 581, 723) Melissa and James divorced when E.E. was about three and a half years old, and Melissa retained primary custody of E.E.¹ (RP 584, 677, 726) At first, Melissa and E.E. lived with Melissa's

¹ Several witnesses share the last name of Eriksen. To avoid confusion, they will be referred to by their first names.

mother in Gig Harbor. (RP 585, 726) They eventually moved to an apartment in University Place. (RP 586, 728)

Melissa met and started dating Richard Hardy in November of 2001. (RP 726) According to Melissa, E.E. was very rude to Hardy and spit in his face the first time they met. (RP 733) Hardy told Melissa he would break up with her if she did not address E.E.'s bad behavior. (RP 733-34) Nevertheless, Hardy moved in with Melissa and E.E. soon after. (RP 586, 728) E.E. was nearly five years old at the time. (RP 585, 586)

In late 2002 or early 2003, Hardy, Melissa and E.E. moved into a two bedroom apartment in Lakewood. (RP 589, 732, 736) E.E. was six years old at the time. (RP 589, 590) About eight months later, when E.E. was seven years old, they moved again to an apartment in Federal Way. (RP 590-91, 738, 739)

Melissa claimed that around that time, Hardy started getting physical with her when they argued, and that he verbally threatened and physically assaulted her several times. (RP 740-41) After about a year and a half in the Federal Way apartment, Melissa decided to leave Hardy. (RP 741) So in June of 2004, she and E.E. moved back to Melissa's mother's house in Gig Harbor. (RP 591, 741, 742) E.E. was about seven and a half years old at the

time. (RP 591)

But Melissa and Hardy reconciled, and in October of 2004 they moved into an apartment together in Gig Harbor. (RP 742-43) E.E. did not go with them, and instead moved in with her father and stepmother, James and Jessica Eriksen. (RP 592-93, 751, 679) E.E. stayed with her mother and Hardy on weekends. (RP 594, 746) E.E. turned twelve years old on December 12, 2008, and she started spending less and less of her time with Melissa and Hardy. (RP 595, 597)

According to E.E., Hardy began molesting her when she was six years old, and the molestation continued three or four times a month until she turned 12. (RP 598, 602, 603-04) The first incident occurred when they lived in the Lakewood apartment. (RP 589, 599) Typically, Hardy would come into her bedroom at night and would pace around to see if she was asleep. (RP 599-600) Then he would take her blankets off, rip a small hole in her underpants, and touch her genitals with his finger. (RP 600-01) Most of the time his finger would stay on the outside of her body, but on seven or eight different occasions his finger would penetrate her vagina. (RP 601, 602-03)

E.E. also described one incident that occurred when they

lived in the Federal Way apartment. (RP 605) While Melissa was at work, Hardy asked E.E. if she wanted to play a “taste test” game. (RP 606) E.E. put on a blindfold, then Hardy gave her bites of food and E.E. would try to guess what it was. (RP 606) According to E.E., Hardy gave her a few food items then put his penis in her mouth. (RP 606)

E.E. testified that she was scared of Hardy because he was physically violent with her mother. (RP 632) According to E.E., on several occasions Hardy hit Melissa or threatened to kill her, and once held a knife to her neck. (RP 632) She also testified that Hardy would punish E.E. by hitting her with a belt, striking her with the metal buckle and sometimes leaving welts. (RP 633)

When E.E. was seven years old, she told Melissa that Hardy was molesting her. (RP 634, 772) Melissa did not believe E.E., and told E.E. that she thought E.E. was “fucking lying.” (RP 635, 772) Melissa thought E.E. was making it up because she had never observed any tension or odd behavior between Hardy and E.E. (RP 772) Melissa testified that she asked E.E. about her allegation about six months later, and E.E. then told her nothing had happened. (RP 773-74, 794) E.E. testified that she did not tell anyone else at the time because she thought that if her own mother

did not believe her then no one else would either. (RP 671)

James recalled that E.E. would get upset whenever it was time for her to visit Melissa and Hardy. (RP 679-80) He testified that E.E. said it was because Hardy was mean to her, and that he always yelled and spanked her. (RP 680, 688) James also testified that he noticed small holes in E.E.'s underpants when he did the laundry, but he did not think anything of it at the time. (RP 689)

E.E. testified that she eventually told her brother about the molestation during a car ride to Great Wolf Lodge when she was about 14 years old. (RP 637) But her brother could not recall this conversation. (RP 845, 847-48)

E.E. also tried to talk to Melissa about the molestation several more times, but they would just argue. (RP 639-40, 641, 643) In 2015, E.E. told James and Jessica, and they encouraged her to go to the police. (RP 647, 649, 650, 691, 705) E.E. went to the police station and filed a report on September 9, 2015. (RP 536-37, 650-51)

IV. ARGUMENT & AUTHORITIES

- A. COUNT FOUR MUST BE DISMISSED BECAUSE NONE OF THE ACTS OR ELEMENTS OF THIS OFFENSE OCCURRED IN PIERCE COUNTY.

The State charged Hardy with four counts of first degree rape of a child, all alleged to have occurred between December 12, 2002 and December 11, 2008. (CP 3-5, 185-87) The probable cause declaration filed in conjunction with the Information alleged that Hardy would digitally penetrate E.E. with his finger two or three times a week during that time frame. (CP 1) The declaration also described the single “taste test” oral sex incident. (CP 1) The declaration concludes by saying during that time period, E.E. lived with her mother and Hardy “in Gig Harbor, University Place, Lakewood, and Federal Way. The oral sex incident happened in Federal Way.” (CP 1) Neither the Information nor the declaration indicate a specific act associated with each of the four charged counts. (CP 1-2, 3-5, 185-87)

Before trial, during a discussion about admitting evidence of other uncharged crimes or bad acts, defense counsel mentioned that the Federal Way “taste test” incident was likely admissible under ER 404(b), but could not be one of the acts relied upon for conviction because Federal Way is in King County, so Pierce

County was not the proper venue. (RP 473-74) Defense counsel suggested that a jury instruction limiting the jury's consideration of that act might be necessary. (RP 473-74) The prosecutor, however, argued that there was no venue problem and, even if there was, any motion to change venue was untimely and therefore waived. (RP 487-88)

After the State rested its case-in-chief, defense counsel again brought the venue issue to the court's attention, and reiterated the need for a jury instruction. (RP 683-84, 867) Defense counsel clarified that he had not and was not arguing for a change of venue or dismissal of any of the charges on the basis of improper venue, because the State had presented evidence of at least four different incidents of rape that all occurred in Pierce County. (RP 683-84, 867) Counsel was simply pointing out that the jury could not rely on the Federal Way "taste test" incident as the basis for one of the convictions. (RP 683-84, 867)

The State again argued that any challenge to venue was untimely and waived, and that the State did not have to prove that any of the acts occurred in Pierce County. (RP 864-65) The court and parties tabled the issue, but did not revisit it. (RP 867)

During closing arguments, the prosecutor told the jury that

“count four is based on the taste test game. So when you all consider that, you all must unanimously agree on the taste test game for count four.” (RP 887) The jury instructions also instructed the jury that it must unanimously agree that this act occurred in order to convict Hardy of count four. (RP 172) Neither the court, the prosecutor nor the instructions told the jury that the offenses must have occurred in Pierce County.

The Washington Constitution provides that the accused in a criminal case shall have the right not only to a speedy, public trial before an impartial jury, but that the jury be “of the county in which the offense is charged to have been committed.” Wash. Const. art. 1, § 22; *see also State v. Dent*, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). The right to proper venue is not an element of the crime but is instead a constitutional right. *Dent*, 123 Wn.2d at 479.

Additionally, CrR 5.1(a) provides that an action shall be commenced either “(1) In the county where the offense was committed,” or “(2) In any county wherein an element of the offense was committed or occurred.” CrR 5.1(a). If there is reasonable doubt about where the offense occurred, the defendant “shall have the right to change venue to any other county in which the offense may have been committed.” CrR 5.1(c); *see also State v. Rockl*,

130 Wn. App. 293, 298, 122 P.3d 759 (2005).

A defendant may raise the issue of venue for the first time during trial when the evidence introduced at trial raises a question of venue. See *Dent*, 123 Wn.2d at 480. In *Dent*, the Court held that, when a defendant demonstrates that there is not sufficient proof of venue at the close of the prosecution's case, the court should allow the prosecution to "reopen" their case to present such evidence, unless the defendant makes a showing of actual prejudice. 123 Wn.2d at 480. If, after such reopening (or if the prosecution chooses not to reopen), there remains a genuine issue of fact about venue, the issue should be submitted to the jury, because it "becomes a matter for resolution by the trier of fact." 123 Wn.2d at 480.

In this case, even though E.E. testified that Hardy penetrated her with his finger at least eight times during the years that she lived in various Pierce County apartments (RP 603), the prosecution elected to rely on the King County "taste test" incident as the act underlying count four. (RP 887) The State refused to acknowledge that venue is a constitutional right, and instead argued that the defense had waived the issue by failing to move before trial to dismiss count four. (RP 487-88, 864-65)

This Court's opinion in *State v. Stearman*, 187 Wn. App. 257, 348 P.3d 394 (2015), is instructive. There, the State charged Stearman in Pierce County with first degree trafficking in stolen property as an accomplice, possession of a stolen firearm as an accomplice, and conspiracy to traffic in stolen property. 187 Wn. App. at 261. Before trial, Stearman moved for a change of venue to King County, arguing that none of the elements of the crimes occurred in Pierce County. 187 Wn. App. at 261. The State gave an offer of proof, indicating that certain actions by Stearman's co-conspirators and accomplices occurred in Pierce County. 187 Wn. App. at 261-62. The trial court denied Stearman's motion, finding that there was no reasonable doubt that at least part of each charged offense occurred in Pierce County. 187 Wn. App. at 262.

After the State rested, Stearman renewed his motion to change venue, arguing that the State had not produced any evidence at trial to show that any acts or elements of the crimes occurred in Pierce County. 187 Wn. App. at 263-64. The prosecutor argued that the venue motion was not timely, and the trial court declined to rule on the motion because the issue had already been ruled upon before trial. 187 Wn. App. at 264.

This Court, relying on *Dent*, first noted that the trial court

erred by refusing to rule on the renewed motion to change venue because “the trial court must allow the defendant to raise a venue issue at the close of the State’s case when evidence at trial raises a question of venue.” *Stearman*, 187 Wn. App. at 269 (citing *Dent*, 123 Wn.2d at 480). And the trial court’s failure to rule on the motion was an abuse of discretion because the failure to exercise discretion or to make a necessary decision is an abuse of discretion. 187 Wn. App. at 264-65 (citing *State v. Flieger*, 91 Wn. App. 236, 242, 955 P.2d 872 (1998)).

This Court also rejected the State’s argument that *Stearman* waived his right to challenge the error by failing to offer a jury instruction on venue:

Dent requires the trial court to submit the venue issue to the jury for resolution by a preponderance standard if it agrees that the defendant has raised a genuine issue of fact about venue at the close of evidence. It does not specify that the defendant must provide a jury instruction simultaneously, or else waives his challenge.

Stearman, 187 Wn. App. at 272 (citation omitted).

Finally, the *Stearman* Court rejected the State’s argument that any error was harmless. The Court noted that “[v]enue in the proper county is a constitutional right,” and that “[t]he remedy for constitutional error is a new trial unless the error was harmless

beyond a reasonable doubt.” 187 Wn. App. at 271 (citing *Dent*, 123 Wn.2d at 479, *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013)). A procedural error regarding venue is harmless constitutional error when any reasonable jury would have found that the offense occurred in the county where it was tried. 187 Wn. App. at 271 (citing *State v. McCorkell*, 63 Wn. App. 798, 801, 822 P.2d 795 (1992)). As the *Stearman* Court explained:

where the facts at trial clearly establish that venue was proper, a venue error may be harmless, because the defendant in fact was tried before a jury of the proper county. In such cases, any jury would have found that venue was proper if the question were put to them because sufficient facts existed at trial to support venue. But where no reasonable jury could have found that venue was proper by a preponderance of the evidence because no facts at trial established venue, this error cannot be harmless. That is, if we held that constitutional error about venue were harmless even where no facts supported venue in the county where trial occurred, the constitutional right to venue would lose all force.

187 Wn. App. at 272 (emphasis in original).

The *Stearman* Court concluded that, because no evidence supported venue in Pierce County, no reasonable jury could have found that *Stearman* committed his offenses in Pierce County by a preponderance standard. 187 Wn. App. at 273. Accordingly, the error was not harmless. 187 Wn. App. at 273. The *Stearman*

Court reversed and dismissed the charges without prejudice. 187 Wn. App. at 274.

Stearman is factually and procedurally distinguishable from this case, but the reasoning and analysis is still very much applicable. There was an obvious venue problem if the State chose, as it did, to rely on the King County “taste test” incident as the factual basis for count four. Defense counsel brought this issue to the attention of the trial court at the close of evidence, and stated that the jury should be instructed that it must find that the acts relied upon for conviction occurred in Pierce County. (RP 473-74, 863-64) The trial court did nothing, and instead followed the State’s lead and instructed the jury to rely on the King County “taste test” incident for count four. (RP 887; CP 172) And no evidence supported venue in Pierce County for the “taste test” incident.

As in *Stearman*, no jury could have found that Hardy committed the “taste test” game in Pierce County, and the trial court abused its discretion by failing to act when necessary to protect Hardy’s constitutional right to venue. Hardy’s constitutional right to venue was clearly violated, and the error was not harmless. Hardy’s conviction on count four must be reversed and dismissed.

B. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN CONVICTIONS FOR COUNTS ONE, TWO AND THREE, AS NO JURY COULD UNANIMOUSLY AGREE BEYOND A REASONABLE DOUBT THAT HARDY COMMITTED THREE SEPARATE AND DISTINCT ACTS OF RAPE.

In counts one through three, the State charged Hardy with rape of a child in the first degree under RCW 9A.44.073. (CP 3-5, 185-87) To convict Hardy of these offenses, the jury was required to find that Hardy had “sexual intercourse” with E.E. on three separate and distinct occasions during the charging period.² (CP 62-64, 171) But the State failed to present any evidence from which a jury could have found three separate and distinct acts of sexual intercourse.³

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). And in Washington, a defendant may be convicted only when a unanimous jury concludes

² The criminal code defines sexual intercourse to include “its ordinary meaning” or “any penetration of the vagina or anus however slight, by an object, when committed on one person by another” or “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another[.]” RCW 9A.44.010(1).

³ As detailed in the preceeding section, the State elected to rely on the separate and distinct Federal Way “taste test” incident to establish the fourth charged count of rape of a child.

that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); Wash. Const. art. 1, § 22. Thus, when the evidence shows that the defendant committed multiple acts, the jury must agree which act it is relying upon for a guilty verdict. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

In sexual abuse cases where the State alleges multiple acts within the same charging period, the State need not elect particular acts associated with each count so long as the evidence “clearly delineate[s] specific and distinct incidents of sexual abuse” during the charging periods. *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (quoting *State v. Newman*, 63 Wn. App. 841, 851, 822 P. 2d 308 (1992)). The jury must be able to isolate distinct incidents, distinguish among them, and agree as to which incident occurred. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); *Petrich*, 101 Wn.2d at 572-73. This ensures a unanimous verdict for one criminal act. *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007).

The *Hayes* court developed a three-prong test to determine whether generic testimony was specific enough to sustain a conviction: the alleged victim must (1) describe the act or acts with

sufficient specificity to allow the jury to determine what offense, if any, has been committed; (2) describe the number of acts committed with sufficient certainty to support each count the prosecution alleged; and (3) be able to describe the general time period in which the acts occurred. 81 Wn. App. at 438.

For example, in *State v. Edwards*, the trial court vacated one of two counts of child molestation due to insufficient evidence of separate and distinct acts. 171 Wn. App. 379, 386, 400, 294 P.3d 708 (2012). The victim, A.G., had testified that she thought Edwards first touched her inappropriately when she was five or six years old. She testified that Edwards sat her in a chair, on his lap, in the living room, and then he removed her pajama bottoms and underwear. He then touched her vagina with his fingers. A.G. testified that he touched her “front privates” 10 to 15 times during the charging period. She stated that Edwards always touched her in the same way—he would come pick her up while she was sleeping, take her to the chair, remove her clothes, and touch her with his hand. 171 Wn. App. at 384, 403.

On appeal, this Court affirmed the trial court’s conclusion that there was not “sufficient specificity in testimony to differentiate between any of the acts of molestation that occurred,” stating:

A.G. testified that the first time she remembered Edwards touching her was when she was about five years old, but she could have been six. There was no evidence defining the time period in which any other act occurred. A.G. testified to the specifics of the “first time” but “generally stated that Edwards” touched her “front private” 10 to 15 times....

The evidence does not clearly delineate between specific and distinct incidents of sexual abuse during the charging period. Because the State failed to present sufficient evidence for the jury to convict Edwards of two separate and distinct counts of first degree child molestation, the trial court did not err in vacating count II.

Edwards, 171 Wn. App. at 403.

In this case, E.E. described how Hardy would come to her room at night, pace around to see if she was asleep, remove her blankets and rip a small hole in her underpants, then touch her genitals with his finger. (RP 59-603) She testified that most of the time Hardy’s hand would stay outside of her body, but there were “occasions where he did put his finger inside.” (RP 601) She testified that he penetrated her vagina about seven or eight different times during the six year charging period. (RP 603)

This testimony does not describe the number of acts of sexual intercourse committed or the time period during which they occurred with “sufficient certainty,” as required by *Hayes*. And, like in *Edwards*, the testimony did not “delineate between specific and

distinct incidents.” E.E. did not provide any distinguishing facts, such as different actions, locations, or timeframes. There was simply no evidence that a juror could use to identify and differentiate three distinct acts of sexual intercourse.

Because E.E. failed to describe any specific and distinct acts of sexual intercourse, the Court must vacate counts one, two and three.

C. THE TRIAL COURT ERRED WHEN IT ADMITTED TESTIMONY UNDER ER 404(B) TO EXPLAIN WHY E.E. DELAYED DISCLOSING THE MOLESTATION, BECAUSE E.E. DID NOT DELAY AND THE EVIDENCE WAS NOT NECESSARY FOR THE JURY TO ASSESS HER CREDIBILITY.

A defendant must only be tried for those offenses actually charged. Therefore, evidence of other crimes or bad acts must be excluded unless they are shown to be relevant to a material issue and to be more probative than prejudicial. *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952); ER 404(b) (“[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person [but may] be admissible for other purposes”).

Prior acts of domestic violence between the defendant and the victim may be admissible to assist the jury in assessing credibility of a victim who delays reporting. See *State v. Baker*, 162

Wn. App. 468, 474-75, 259 P.3d 270 (2011). Evidence of prior abuse that bears on a victim's credibility may also include abuse of a third party, and may be admissible if the abuse caused the current victim to be fearful of the defendant. *State v. Nelson*, 131 Wn. App. 108, 114-16, 125 P.3d 1008 (2006). In this case, the trial court allowed the State to introduce evidence that Hardy physically abused Melissa and E.E. to help explain why E.E. delayed reporting the molestation. (RP 628-29)

A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Tharp*, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court abused its discretion in this case for a number of reasons.

First, E.E. did not actually delay reporting the abuse. E.E. told her mother about the molestation just months after the first alleged incident. (RP 598, 634-65, 771) E.E. also repeated the allegations to her mother several times over the years, and told her brother when she was about 14 years old. (RP 637, 639-40, 641,

774, 775)

Second, even if E.E.'s behavior does qualify as a delayed disclosure, the defense did not make an issue of it and did not use the delay to challenge E.E.'s credibility. In a similar case, *State v. Fisher*, the defendant was charged with molesting his stepdaughter. 165 Wn.2d 727, 733, 202 P.3d 937 (2009). The State sought to admit under ER 404(b) evidence of the defendant's prior physical abuse of his other children to explain the victim's delayed reporting. *Fisher*, 165 Wn.2d at 734. The trial court ruled that the prior misconduct was inadmissible unless the defense raised the delayed reporting. *Fisher*, 165 Wn.2d at 734.

On appeal, the court held that the trial court did not abuse its discretion by making the prior misconduct's admissibility contingent on the defense first making an issue of the victim's delayed reporting. *Fisher*, 165 Wn.2d at 746. The Supreme Court explained, "Only if defense counsel made an issue of [the victim's] delayed reporting did the physical abuse become relevant to the determination of whether sexual abuse occurred." *Fisher*, 165 Wn.2d at 746. In this case, on the other hand, the trial court admitted the evidence even though defense counsel never raised the issue of delayed disclosure. The issue of why E.E. did not

immediately disclose to her mother, or to other adults or law enforcement was, therefore, not a relevant issue.

Finally, the evidence was not necessary because E.E. gave several other plausible explanations for why she waited until 2015, when she was 18 years old, to report the allegations to the rest of her family and the police. (RP 641, 642, 650) E.E.'s initial disclosure to her mother, when she was seven years old, was met with anger and disbelief. (RP 635-36) E.E. testified that she felt that no one would believe her if her own mother did not. (RP 671) This is a perfectly understandable reaction from a seven year old girl, and one a jury would have no trouble accepting.

Furthermore, E.E. testified that she was motivated to come forward in 2015 out of a concern that Hardy's then six year old biological daughter might be at risk. (RP 647) Again, a jury could easily understand why this might make a young woman who had kept a secret all these years finally decide to come forward.

Evidence of prior abuse is admissible under ER 404(b) only if relevant and necessary to assess the victim's credibility as a witness and to prove that the charged crime actually occurred. *State v. Grant*, 83 Wn. App. 98, 105-06, 920 P.2d 609 (1996); see also ER 402 (evidence which is not relevant is not admissible). The

trial court's decision to admit the evidence was an abuse of discretion because the evidence was not necessary to properly assess E.E.'s credibility, and was therefore not relevant.

And the error in admitting the testimony was not harmless. E.E.'s and Melissa's testimony painted Hardy as a cruel and violent person, who regularly assaulted and abused the females he lived with. Any jury would have trouble erasing this image from their minds, even with a limiting instruction.

V. CONCLUSION

Hardy has a constitutional right to venue in the proper county where the offense was committed. The trial court failed to take action to protect this right, and the error is not harmless because the "taste test" incident occurred in King County. Hardy's conviction on count four must therefore be reversed and dismissed without prejudice. Furthermore, because the evidence does not clearly delineate between specific and distinct incidents of sexual abuse during the charging period, the State failed to present sufficient evidence for the jury to convict Hardy of three separate and distinct counts of first degree rape of a child. Hardy's conviction on counts one, two and three must also be reversed and dismissed with prejudice. Alternatively, the trial court's error in

admitting testimony of uncharged and unproved assaults was prejudicial error, requiring reversal and a new trial.

DATED: September 25, 2017



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CERTIFICATE OF MAILING

I certify that on 09/25/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Richard J. Hardy, DOC# 896811, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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