

FILED
Court of Appeals
Division II
State of Washington
8/1/2018 11:37 AM
NO. 50826-5-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JOSE MORENO HERNANDEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 15-1-04478-9

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
1.	Was the prosecutor's use of two Spanish terms in his examination of a witness error?.....	1
2.	Was the prosecutor's use of two Spanish terms in his examination of a witness manifest constitutional error?.....	1
3.	Did the trial court properly overrule appellant's hearsay objection to the victim's relation of a threat made to her by her mother?	1
4.	Did appellant preserve any objections to that threat testimony other than a hearsay objection?.....	1
5.	Did the trial court properly overrule appellant's hearsay objection to the victim's relation of an inducement made to her by her aunt?.....	1
6.	Did appellant preserve any objection to that inducement other than a hearsay objection?.....	1
7.	Did a straightforward question to the witness about using "different words" in prior statements amount to a personal opinion of witness veracity?	2
8.	Was the prosecutor's argument that the victim testified "very honestly" fair argument based upon the evidence presented?	2
9.	Is a no contact with minors condition of sentence unconstitutionally vague?	2
10.	Is a no contact with minors condition of sentence unconstitutionally overbroad when applied to a defendant who was convicted of the attempted rape of a fourteen year old girl?	2

B.	STATEMENT OF THE CASE.....	2
1.	PROCEDURE.....	2
2.	FACTS.....	3
C.	ARGUMENT.....	13
1.	THE PROSECUTOR’S USE OF SPANISH TERMS IN HIS QUESTIONING OF MS. MORENO WAS NOT ERROR.	13
2.	IF THE PROSECUTOR’S USE OF SPANISH WORDS IN HIS EXAMINATION OF MS. MORENO WAS ERROR, IT WAS NOT MANIFEST CONSTITUTIONAL ERROR.	19
3.	THE PROSECUTOR’S EVIDENTIARY ARGUMENT MADE IN FRONT OF THE JURY WAS NOT MANIFEST CONSTITUTIONAL ERROR.	21
4.	THE STATE’S INTRODUCTION OF RECANTATION PRESSURE APPLIED TO R. Y. BY HER MOTHER AND AUNT WAS NOT HEARSAY.	23
5.	DEFENDANT’S OTHER OBJECTIONS TO RECANTATION PRESSURE EVIDENCE WERE NOT PRESERVED FOR APPEAL.....	26
6.	A QUESTION POSED TO THE VICTIM-WITNESS WAS NOT AN IMPERMISSIBLE COMMENT.....	27
7.	THE PROSECUTOR’S USE OF THE WORDS “VERY HONESTLY” IN CLOSING ARGUMENT TO DESCRIBE R. Y.’S TESTIMONY WAS FAIR ARGUMENT.....	29
8.	THIS CASE DOES NOT PRESENT CUMULATIVE ERROR.	30

9. THE SENTENCING CONDITION OF NO CONTACT
WITH MINORS IS NOT UNCONSTITUTIONALLY
OVERBROAD..... 31

D. CONCLUSION..... 33

Table of Authorities

State Cases

<i>In re Cross</i> , 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014)	30
<i>In re Lui</i> , 188 Wn.2d 525, 564-65, 397 P.3d 90 (2017).....	30
<i>In re Penelope B.</i> , 104 Wn.2d 643, 652, 709 P.2d 1185 (1985).....	24
<i>In re Phelps</i> , 190 Wn.2d 155, 172, 410 P.3d 1142, 1150 (2018).....	22
<i>Ladenburg v. Campbell</i> , 56 Wn. App. 701, 784 P.2d 1306 (1990)	25
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989)	25
<i>State v. Aguilar</i> , 176 Wn.App. 264, 277, 308 P.3d 778 (2013)	32
<i>State v. Ancira</i> , 107 Wn.App. 650, 27 P.3d 1246 (2001).....	32
<i>State v. Barklind</i> , 87 Wn.2d 814, 821, 557 P.2d 314, 319 (1976)	32
<i>State v. Boast</i> , 87 Wn.2d 447, 553 P.2d 1322 (1976).....	20
<i>State v. Clark</i> , 187 Wn.2d 641, 389 P.3d 462, 466 (2017)	30
<i>State v. Collins</i> , 76 Wn. App. 496, 886 P.2d 243, 245 (1995)	25, 26
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182, 1189 (1985).....	20
<i>State v. Jessup</i> , 31 Wn.App. 304, 641 P.2d 1185 (1982).....	25
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125, 133 (2007)	20, 26
<i>State v. Loftin</i> , 76 Wn.2d 350, 351, 458 P.2d 29, 30 (1969).....	28
<i>State v. Riles</i> , 135 Wn.2d 326, 347, 957 P.2d 655, 666 (1998).....	31, 32

<i>State v. Roberts</i> , 80 Wn. App. 342, 908 P.2d 892, 898 (1996)	25
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059, 1063 (2010)	32
<i>State v. Wicke</i> , 91 Wn.2d 638, 591 P.2d 452 (1979).....	26
<i>Wendle v. Farrow</i> , 102 Wn.2d 380, 686 P.2d 480 (1984)	25

Federal and Other Jurisdictions

<i>United States v. King</i> , 608 F.3d 1122, 1128 (9th Cir. 2010).....	33
<i>United States v. Soltero</i> , 510 F.3d 858, 866 (9th Cir. 2007).....	33
<i>United States v. Zenni</i> , 492 F.Supp. 464, 469 (E.D.Ky.1980).....	25

Rules and Regulations

ER 103(a).....	19, 26, 27
ER 603	29
ER 611	28
ER 801	25
ER 801(a)(1)	24
ER 801(c).....	25
ER 801(d)(1).....	22
RAP 2.5(a)	19, 20, 26, 27

Other Authorities

K. Tegland, 5B Washington Practice § 336 at 34–35 (1994)	25
--	----

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the prosecutor's use of two Spanish terms in his examination of a witness error?
2. Was the prosecutor's use of two Spanish terms in his examination of a witness manifest constitutional error?
3. Did the trial court properly overrule appellant's hearsay objection to the victim's relation of a threat made to her by her mother?
4. Did appellant preserve any objections to that threat testimony other than a hearsay objection?
5. Did the trial court properly overrule appellant's hearsay objection to the victim's relation of an inducement made to her by her aunt?
6. Did appellant preserve any objection to that inducement other than a hearsay objection?

7. Did a straightforward question to the witness about using “different words” in prior statements amount to a personal opinion of witness veracity?
8. Was the prosecutor’s argument that the victim testified “very honestly” fair argument based upon the evidence presented?
9. Is a no contact with minors condition of sentence unconstitutionally vague?
10. Is a no contact with minors condition of sentence unconstitutionally overbroad when applied to a defendant who was convicted of the attempted rape of a fourteen year old girl?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Jose Moreno Hernandez, hereinafter defendant, was charged with attempted rape in the second degree and child molestation in the third degree. CP 3-4. Defendant was found guilty of both charges following a jury trial. CP 123, 124. The child molestation conviction was merged into the attempted rape conviction. CP 170. Defendant’s judgment and

sentence included a “no contact with minors” provision. CP 155-169.

Defendant timely appeals.

2. FACTS

R.Y. was born on October 19, 2000, in El Salvador. 7 VRP 1232; 5 VRP 709. Her mother left her when she was five years old. 4 VRP 709. She lived with her grandmother. 4 VRP 710. R.Y. came to the United States when she was thirteen years old, pregnant, and a victim of domestic violence. 4 VRP 710-17. R.Y. came to the United States at her mother’s suggestion. 4 VRP 718. She arrived in August, 2014. 4 VRP 719. Her mother hired a coyote to bring her to the United States. 4 VRP 728-29, 730-31; 7 VRP 924.

Defendant was R.Y.’s mother’s partner. 4 VRP 714-15. R.Y.’s daughter was born in November, 2014. 4 VRP 733. R.Y. and her daughter lived in an apartment in Tacoma along with defendant and R.Y.’s mother. 4 VRP 732-33.

R.Y. and defendant never got along. 4 VRP 737. Defendant would come into R.Y.’s bedroom without knocking. 4 VRP 738-39. Defendant would enter the bedroom and stare at her. 4 VRP 739. Defendant would attempt to touch R.Y. hands and legs when they sat on the sofa. 4 VRP 741-42.

R.Y. had a fight with defendant because she refused to bathe a child that her mother was being paid to take care of. 4 VRP 748-49. Following that argument, defendant "got angry, because he wants me to obey him in everything he wants. And then when he came into my room all mad, wanted to hit me." 4 VRP 749.

The next day defendant told R.Y. that he was going to go out. *Id.*

R.Y. described what happened:

And so I grabbed my daughter and I went to lie down. But it wasn't like he had said. He never left. And then all of a sudden, he came in my room and grabbed me by the arm and threw me to the floor. And he got on top of me.

And I was trying to defend myself the best I could. I was trying to defend myself with my feet, with my hands. And I was telling him not to hurt me, and he wouldn't say anything.

And then I -- once again, I said that I was going to call the police, to leave me alone.

And then he stood up, grabbed the car keys, and took off and left the door even open.

That's when I called the police. And then I called my aunt.

4 VRP 749-50. Defendant tried to kiss R.Y. 4 VRP 752-53. Defendant was trying to use his legs to hold R.Y.'s legs open. 4 VRP 753.

Defendant lowered his pants, including his underwear. 4 VRP 753-54.

R.Y. testified that defendant's penis touched her leg. 4 VRP 755.

Defendant grabbed his penis with his hand and was trying to find R.Y.'s "private part."¹ 4 VRP 756-57.

R.Y.'s uncle took her from the apartment to a building. 5 VRP 829. That evening, before her uncle arrived, R.Y. called her mother and told her what defendant had done to her. 5 VRP 831. She had waited at the apartment from 8:00 p.m. to 11:00 p.m., before leaving but her mother never arrived. 5 VRP 829.

In the car, defendant telephoned R.Y.'s uncle and R.Y. listened on the car's speaker:

He told him that he had gotten himself in a big problem by helping me. And he -- and he told him that he was going to get some money from him. How? I don't know. And there were my aunt and my cousin as well, and they can verify that.

5 VRP 834-35.

From the building, R.Y. was taken to foster care. 5 VRP 836. She next saw her mother the following day. 5 VRP 836. Her mother arrived with friends of hers from the church where she attends. 5 VRP 838. R.Y. testified to what her mother told her:

A. My mom is the only one, and she would ask me to tell the truth. Because to this point, my mom doesn't believe that that happened.

¹ R.Y. was never married and never in a domestic partnership with defendant. 5 VRP 886. Defendant is older than thirty. *Id.*

Q. So when your mom said, "Tell the truth," what did that mean to you?

A. Because she thinks that is a lie. She doesn't think that this happened. And what she wants to hear from me is to say that it was a lie, that that did not happen.

5 VRP 838-39. R.Y. related a threat made by her mother:

Well, the only thing she said is for me to tell the truth or they were going to take my child away.

5 VRP 840.

R.Y.'s Aunt Patricia, who told her how to call 911, had no contact with R.Y. after October 1, 2015. 5 VRP 843. Aunt Patricia text messaged to R.Y. a message to the effect that that she "should lie in order to go back with my mother." 5 VRP 873. This report was made after she made her report and after her mom contacted her at the meeting. 5 VRP 874.

R.Y. was able to maintain custody of her daughter. 5 VRP 889.

Oscar Arevalo, R.Y.'s cousin, testified that he knew R.Y. in El Salvador and that he had lived in the Tacoma for about eight years. 6 VRP 1078-79. Oscar testified that he went to the home of R.Y., defendant, and Ms. Moreno in Tacoma on the day that the police officers were there. 6 VRP 1080. Oscar interpreted R.Y. Spanish for or the police officers 6 VRP 1084. He translated R.Y.'s report that defendant had tried to force himself on her. 6 VRP 1086. Oscar testified that R.Y. had no other family and relatives in town beside himself and his parents.

6 VRP 1089. He testified that R.Y. looked like she had been crying when he arrived, but she was no longer crying. 7 VRP 1108.

Ruben Arevalo is Oscar Arevalo's father, Ms. Moreno's brother, and R.Y.'s uncle. 7 VRP 1112-13. Mr. Arevalo testified that he went to R.Y.'s home "when the trouble happened". 7 VRP 1115. Mr. Arevalo testified that after receiving a telephone call from his sister, Patricia Guzman, he went over to the apartment. 7 VRP 1116. Mr. Arevalo testified that Ms. Guzman told him "told him to go over [to R.Y.'s home] and that was it." *Id.* Mr. Arevalo testified that when he and his son, Oscar, arrived at the apartment R.Y. "was crying, and she was in trouble, but I didn't know what kind of trouble." 7 VRP 1117. The police were already there. *Id.* Mr. Arevalo and Oscar took R.Y. to the police station. 7 VRP 1120. Mr. Arevalo said that he called Ms. Moreno to have her come and pick up R.Y. 7 VRP 1120. This call was made after he was heading home. 7 VRP 1121. Mr. Arevalo said that he told Ms. Moreno to go pick up R.Y. up at the police station because they were going to let R.Y. go in a little bit. *Id.* Mr. Arevalo said that Ms. Moreno never came to pick up R.Y. *Id.* Mr. Arevalo said that, other than at court, he had not seen R.Y. after October 1, 2015. 7 VRP 1127.

Yanilda Dafe is a foster parent. 7 VRP 1129. At the time of trial, R.Y. had been placed in her home. 7 VRP 1132. R.Y. met Ms. Dafe on

October 2, 1015. *Id.* R.Y. and her child were in Ms. Dafe's care from October 2, 2015 to June 1, 2016, and from January, 2017 until the time of trial. 7 VRP 1137, 1139. R.Y.'s demeanor on October 2, 2015 was "very scared." 7 VRP 1133. Ms. Dafe testified to what R.Y. said: "She sat on the stairs and held her baby when she first saw me come to the door. And then later I asked her why she had done that, and she said she thought she was -- that I was coming there to remove her daughter from her." 7 VRP 1133-34. Ms. Dafe testified that at a "family team meeting" Ms. Moreno had "minimal interaction" with her daughter. 7 VRP 1135-36.

Ms. Dafe testified that at a family team meeting, Ms. Moreno made threats to her and was saying threatening things to Ms. Dafe. 7 VRP 1141. Ms. Dafe said Ms. Moreno was upset at the meeting. 7 VRP 1144. Ms. Dafe said that R.Y. had never retracted her statement. *Id.* Ms. Dafe said that Ms. Moreno took R.Y.'s cell phone away from her at either the first or the second family team meeting. 7 VRP 1156.² Ms. Dafe testified that R.Y. had contact with family, "at first," but "this time around" (since January, 2017, presumably), she had no contact with family. 7 VRP 1158-59.

² Ms. Moreno corroborated that she took the cell phone away. 8 VRP 1301-02. Ms. Moreno, however testified that Ms. Dafe told Ms. Moreno that it would not be convenient for R.Y. to have a cell phone.

Kevin Bartenetti, a Tacoma police officer, responded to R.Y.'s home on October 1, 2015 at 8:22 p.m., along with Officer Phan. 7 VRP 1165-68. Officer Bartenetti described R.Y.'s demeanor:

When we first arrived, she was visibly upset. I don't recall if she was crying, but kind of had the appearance that she might have been recently. She wasn't withdrawn to the point of not providing a statement, but she wasn't running around yelling or screaming or anything of that sort. So mostly subdued but willing to talk.

7 VRP 1170. It appeared that R.Y. had been crying. 7 VRP 1173.

Officer Bartenetti acknowledged the language barrier. 7 VRP 1170.

Officer Bartenetti testified that the police notified R.Y.'s mother that CPS placement was being conducted. 7 VRP 1183, 1185.

Officer Phan testified that Officer Bartenetti took R.Y.'s statement. 7 VRP 1222. Officer Phan testified that R.Y.'s emotional state appeared normal to him. *Id.*

Nelbis Moreno testified through an interpreter. 7 VRP 1104-06, 1126, 1243. Ms. Moreno was born in El Salvador and came to the United States in 2005, when she was 28 years old. 7 VRP 1229. She met defendant after she came to the United States. *Id.* Ms. Moreno, as of the trial date, had been married to defendant for seven years. 7 VRP 1227.

R.Y. is Ms. Moreno's eldest daughter. 7 VRP 1228. Ms. Moreno had two other children, both born before she left El Salvador to go the United States. 7 VRP 1229. R.Y. joined Ms. Moreno in the United States

in 2014 when R.Y. was thirteen years old and pregnant. 7 VRP 1231-32, 1236. Ms. Moreno's other two children remained in El Salvador, in the care of Ms. Moreno's mother. 7 VRP 1230. Ms. Moreno testified that it was her belief that it would be dangerous for R.Y. to return to El Salvador. 8 VRP 1291.

On October 1, 2015, R.Y.'s child was eleven months old. 7 VRP 1247. Ms. Moreno testified that on that day R.Y. was angry because the day before defendant told her to clean up a little bit after R.Y.'s baby, and that R.Y. told him that he was not her father so he didn't have to tell her anything." 7 VRP 1247-48. Ms. Moreno testified that R.Y. said "Don't ask anything from me. If you keep bothering me, I'll call the police." 7 VRP 1248.

On October 1, 2015, Ms. Moreno, who was working her two jobs that day, learned via a telephone call from her sister³ in Louisiana, that the police had been called and that something was wrong with R.Y. 7 VRP 1249-50. The record reflects that at this point, Ms. Moreno testified that her sister said that R.Y. said that "My husband has been molesting her." The trial court recessed for the day, and the next day, the interpreter informed the jury of the following:

³ Ms. Moreno's sister is Patricia Guzman. 7 VRP 1250.

THE INTERPRETER: Okay. I misinterpreted the word for "bothering" or "unknowing" as "molesting," which has a sexual connotation.

THE COURT: Okay.

THE INTERPRETER: So the connect word would be "bothering" or "annoying."

8 VRP 1268.

The prosecutor examined Ms. Moreno regarding her sister's telephone call about her daughter and Ms. Moreno's response following that call. The facts relating to that exchange are addressed in the argument below. The prosecutor also examined Ms. Moreno about her response when she returned home, and no one was there. 8 VRP 1281. Ms. Moreno responded that she sent her daughter a text message, she didn't know where to go looking for them, and she had to go to bed because she had to go to work the next day. 8 VRP 1282. Ms. Moreno said that when she woke up the next morning, she did not call the police, even though she had learned that her daughter had called the police because of something she said that defendant had done to her. 8 VRP 1283-84. Ms. Moreno called the police at 9:30 the next day. 8 VRP 1283-84. Ms. Moreno testified that the first time that she saw her daughter after October 1, 2015 was after October 4, 2015. 8 VRP 1292.

Ms. Moreno testified that defendant, her husband, "did not come home because in case [sic] the police were looking for him." 8 VRP 1354.

Ms. Moreno testified that he did return “[b]ecause his attorney told me that there was no reason for him not to be at the apartment because there wasn’t any report that the police might be looking for him.” 8 VRP 1354.

Albert Malave, a Tacoma Police Officer, testified that Patricia Guzman, R.Y.’s aunt in Louisiana, was initially cooperative when he talked to her, but then didn’t want to get involved and said that she wouldn’t provide any more information. 8 VRP 1372.

Katrina Andrade was a Child Protective Services investigator. 8 VRP 1380. Ms. Andrade came into contact with R.Y. on October 2. 8 VRP 1384. Ms. Andrade testified that R.Y. was uncomfortable at the family team meeting (FTDM) (8 VRP 1386); and that she became increasingly anxious, and after talking to her mother she became upset and crying. 8 VRP 1395. The purpose of the FTDM was to determine placement of the children. 8 VRP 1397. Ms. Andrade testified that things became contentious as Ms. Andrade and other women were all talking to R.Y. simultaneously.⁴ 8 VRP 1395. R.Y.’s demeanor was “closed down.” 8 VRP 1396 R.Y. was “kind of looking down and away. Red in the face. Tears.” *Id.* When they had the family team meeting, R.Y. “looked withdrawn and kind of maintained that.” 8 VRP 1397.

⁴ Ms. Moreno had testified that she brought three friends for her own support and because the friends wanted to see R.Y. and the baby girl. 8 VRP 1296.

Defendant called R.Y.'s grandmother, Maria Arevalo-Rivera. 9 VRP 1436-37. Ms. Arevalo-Rivera testified that R.Y. lived with her after her mother left her. 9 VRP 1437. Ms. Arevalo-Rivera testified that R.Y. left her home at age 13 to live with a man. *Id.* Ms. Arevalo-Rivera testified that five months later R.Y. came back to live with her. 9 VRP 1439. At that time she was pregnant. *Id.* At that time, R.Y. asked to go to the United States. 9 VRP 1441. Ms. Arevalo-Rivera testified that she paid someone to take R.Y. into the United States. 9 VRP 1442. Ms. Arevalo-Rivera testified that she wanted her daughter to call her and would ask her "when is the next time you're going to call me?" Ms. Arevalo-Rivera also testified that she did not speak to her daughter after October 1, 2015. 9 VRP 1445.

C. ARGUMENT.

1. THE PROSECUTOR'S USE OF SPANISH TERMS IN HIS QUESTIONING OF MS. MORENO WAS NOT ERROR.

R.Y.'s credibility was aggressively challenged by defense counsel. In his opening statement, defendant argued that R.Y. "has a lot of reasons . . . to be angry at her mother. And she is." 3 VRP 609. Defendant argued that R.Y. "is tremendously angry and resentful about [her mother leaving her], and I think will [sic] evidence will show you that that is a

tremendous motive in this case.” 3 VRP 611-12. In closing, defense counsel challenged R.Y.’s credibility even more aggressively. Defense counsel argued that R.Y. was “a scary young woman” and that she hated defendant even before she got to the United States. 9 VRP 1534. Defense counsel next pointed out R.Y.’s asylum application claim which included an accusation of rape by her boyfriend (9 VRP 1533), and made the point that R.Y. continued to have telephone contact with that boyfriend. 9 VRP 1534-35. Defense counsel challenged R.Y.’s motivations: “So what really happened in El Salvador? What was the real reason that she came here? Was it really because of what we were led to believe? Or was it something else?” 9 VRP 1534-35. Defense counsel broadly implied the possibility that R.Y. lied in this case to further her immigration asylum application. 9 VRP 1543-44. Defense counsel argued that R.Y. was sophisticated.⁵ He argued that R.Y. was “acting out,” would not listen to her mother or to defendant, and demonstrated “[n]othing but a bad attitude about having to do to anything for anybody except herself.” 9 VRP 1538-39.⁶ He argued that R.Y. was ungrateful to her mother after all her mother did for her. 9 VRP 1539.

⁵ “She knows how to get in touch with the police when she wants to get in touch with the police, and she knows how to avoid the police when she wants to avoid the police. Is this some sort of unsophisticated individual we’re dealing with? It’s not. It simply is not.” 9 VRP 1538.

⁶ Similar argument was made at 9 VRP 1548.

The prosecutor, in response, argued that R.Y.'s credibility was supported by R.Y.'s consistency despite recantation pressure and social isolation. 9 VRP 1512-13. In that vein, the prosecutor sought to demonstrate that Ms. Moreno, despite her daughter's claim of attempted rape, did not immediately respond to help her daughter. 7 VRP 1253.

At the point in time when Ms. Moreno's first day of testimony concluded, Ms. Moreno had unambiguously testified, through an interpreter, that on October 1, 2015, R.Y. had reported molestation to her aunt, who had then reported it to Ms. Moreno. 7 VRP 1251. That unambiguity ended when the word "molesting," translated from Ms. Moreno's testimony, turned out to be a translation error. 7 VRP 1259-61. Either "bothering" or "annoying" should have been used in its place. 8 VRP 1268.

The prosecutor had plainly acted in reliance upon that mistranslation in his cross examination the day before, when he asked Ms. Moreno the following questions:

Q. So you got a call at 7:00 p.m. that indicated your daughter said that the defendant had molested her; you didn't ask your manager for a ride home at that moment?

...

Q. You didn't ask a manager for a ride home at that moment?

A. Yes. I asked for the ride, but there was no other employee working or another manager to take care of the store.

and

Q. So you're telling me that you told your manager, "My daughter just told me she's being molested," and he said, "I won't give you a ride home"?

A. Well, to tell you the truth, I couldn't express myself like that because I don't speak English.

7 VRP 1253. In this exchange, the State was trying to demonstrate that Ms. Moreno did not believe R.Y. *Id.* There is no suggestion in the record that "molest" was mistranslated from English into Spanish. 8 VRP 1268.⁷

After the mistranslation was explained to the jury, the prosecutor sought to clarify whether something as serious as an attempted rape had been conveyed to Ms. Moreno by her sister. 8 VRP 1270-1273. Given that R.Y. testified that she had told her aunt "what had happened," and that what had happened was an attempted rape, Ms. Moreno's testimony suggested that Ms. Moreno was minimizing R.Y.'s report of attempted rape. 4 VRP 749-59.

Appellant asserts that the "prosecutor continued to assert the mistranslation of 'molestar' to incorrectly assert a sexual connotation.

⁷ The only mistranslation occurred from Spanish into English. *Id.*

Appellant's Brief at 15. That assertion is not borne out by the record. 8 VRP 1270. The prosecutor in this exchange is trying to get Ms. Moreno to definitively state that she did not learn of any sexual abuse during her conversation with her sister. *Id.* That was clarified when Ms. Moreno testified "Yes. Just annoying, bothering, pestering, that's it." (8 VRP 1270) and "I was not conscious of this because she had not said anything to me, as I will repeat again." 8 VRP 1271.

The prosecutor then inquired about the questions that he had posed to Ms. Moreno the day before regarding molestation. 8 VRP 1271. Those earlier questions about molestation were not mistranslated. 7 VRP 1268. What the prosecutor was getting at with the "abuso deshonesto" questions is apparent from the record. 8 VRP 1270-71. The prosecutor's inquiry can be paraphrased as: "But I asked you about molestation (not "bothering" or "annoying"), didn't I?" *See* 8 VRP 1271-1274. Ms. Moreno never answered that question. *Id.* Ms. Moreno testified "Well, I don't remember that you had -- if you asked me that question." and then in response to a follow up question testified that "of course" she remembered what she testified to the previous day. 8 VRP 1273-74. The record is also quite clear that it was Ms. Moreno's testimony that only "bothering," "annoying," or "pestering" had been related to her by her sister. 8 VRP 1270.

The prosecutor subsequently asked Ms. Moreno a pair of questions that included reference to the Spanish verb “molestar.” 8 VRP 1286-87. That inquiry sought to inquire whether Ms. Moreno thought that “molestar” could be used to describe an act of attempted rape. *Id.* Ms. Moreno clarified that it could not: “No. It’s different.” 8 VRP 1287. This exchange eliminated any ambiguity which could have resulted from the use of the term “molestar.”

The prosecutor then asked Ms. Moreno whether “abuso deshonesto” described such an act of attempted rape. 8 VRP 1287. The prosecutor never received an answer to that question. 8 VRP 1287-88. The question was not unclear. Whatever its actual meaning in Spanish, in the context that the prosecutor used the term, it referred to something akin to attempted rape—and Ms. Moreno was clear that she was not told of anything like that. *Id.*

The prosecutor’s examination of Ms. Moreno consisted of questions posed to the witness. It was neither testimony nor “usurpation.”

2. IF THE PROSECUTOR'S USE OF SPANISH WORDS IN HIS EXAMINATION OF MS. MORENO WAS ERROR, IT WAS NOT MANIFEST CONSTITUTIONAL ERROR.

- a. No evidentiary errors pertaining to "molestar" or "abuso deshonesto" are preserved for review.

Defense counsel's first objection presented no evidentiary objection. Defense counsel merely stated "if we need to take testimony from the interpreter, I'm going to need an opportunity to interview that interpreter." 8 VRP 1271-72. The record contains no suggestion that defense counsel lacked any opportunity to interview the interpreter.

The next objection was non-specific: "Your Honor, that's not what she said. She said ... and I object." 8 VRP 1273. The next objection was "argumentative." 8 VRP 1277. That objection is not argued as a basis for error on appeal.

The next objection was: "Objection to the use of Spanish in an English-speaking courtroom because I don't understand what he's saying, and I would need a translation for the jury. If he's going to start speaking in Spanish –" 8 VRP 1287. The "defense counsel did not understand what the prosecutor was saying" objection is not presented on appeal.

Defendant's failure to preserve evidentiary error precludes review. ER 103(a); RAP 2.5(a). "An objection which does not specify the

particular ground upon which it is based is insufficient to preserve the question for appellate review.” *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182, 1189 (1985); *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976).

b. Defendant has failed to demonstrate a manifest constitutional error.

Defendant’s failure to present a reasonably specific objection at trial precludes appellate review unless defendant demonstrates manifest constitutional error. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125, 134 (2007).

Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences.

(internal citation omitted) *Id.* Manifest constitutional error requires a showing of actual prejudice. *Id.*; RAP 2.5(a).

The examination of Ms. Moreno which pertained to how Ms. Moreno responded to the third party report of her daughter’s report was focused only upon Ms. Moreno’s lack of support for her daughter. That lack of support was uncontested in this trial. It was shown by the fact that CPS took R.Y. out of the home because she could not be placed in her

mother's household or a relative's household. 8 VRP 1384. It was shown that Ms. Moreno was aware of the allegations (at least by the time of the family team meeting) and was not acting to protect R.Y. 8 VRP 1398.

R.Y. testified that her mother's position was unambiguous:

Because she thinks that is a lie. She doesn't think that this happened. And what she wants to hear from me is to say that it was a lie, that that did not happen.

5 VRP 839. Ms. Moreno's lack of support for her daughter was an uncontested fact in this trial. She simply did not believe her. *Id.*

Defendant has failed to demonstrate the actual prejudice necessary to establish manifest constitutional error.

3. THE PROSECUTOR'S EVIDENTIARY ARGUMENT MADE IN FRONT OF THE JURY WAS NOT MANIFEST CONSTITUTIONAL ERROR.

The prosecutor made the following objection:

Just to make my record, Your Honor, it's a consistent statement regarding -- and goes directly to her credibility. She has been consistent to every person she's spoken to, and this merely explains and exemplifies that.

7 VRP 1125. The comment about material not before the jury (the consistency of the victim's other statements) should not have been included in that objection. No objection, or motion to strike, or request for curative instruction was made following that comment. 7 VRP 1145-48.

Moreover, the jury was instructed to disregard the argument of counsel

because it is not evidence. CP 102. Juries are presumed to follow the court's instructions. *In re Phelps*, 190 Wn.2d 155, 172, 410 P.3d 1142, 1150 (2018).

To reverse based on unobjected-to prosecutorial misconduct, the reviewing court needs to find inflammatory behavior or "severe" misconduct sufficient to demonstrate "flagrant and ill-intentioned" misconduct. *Id.* The misconduct in this case is the inappropriate reference to the victim's consistency—a consistency that was unchallenged at trial.⁸ Defendant cannot establish the actual prejudice necessary to prove manifest constitutional error.

Defendant is wrong when he asserts that the prosecutor was presenting facts not in evidence. Appellant's Brief at 26-27. The prosecutor was arguing admitted evidence because prosecutor had already presented testimony expressing the consistency of R.Y.'s report of sexual assault. 5 VRP 883-86. While that argument should have waited until closing argument, such inopportune argument does not amount to manifest constitutional error.

⁸ The absence of a challenge to the victim's consistency is the reason why the trial court properly sustained defense counsel's objection to the prosecutor's attempt to introduce prior consistent statements. 7 VRP 1125; ER 801(d)(1).

4. THE STATE'S INTRODUCTION OF
RECONTATION PRESSURE APPLIED TO R.Y.
BY HER MOTHER AND AUNT WAS NOT
HEARSAY.

The prosecuting attorney asked R.Y. the following question concerning R.Y.'s mother: "What, if any, bad consequences did she say would result if you didn't take back your report?" 5 VRP 840. R.Y.'s answered: "Well, the only thing she said is for me to tell the truth or they were going to take my child away." *Id.* The only objection interposed to this question was "[h]earsay." *Id.* The prosecutor then inquired further on the subject:

Q. And, to clarify, when she said, "Tell the truth or the State will take away your child," what do you think she wanted you to say that she was calling the truth?

A. Well, she told me several times to tell the truth. And she would also tell me that I was a minor and that she was going to keep my child. And she would -- told me quite a few times. She would tell me to behave myself, to mind her or she would take my child away.

5 VRP 841. The only objection to that question was also "hearsay." *Id.*

R.Y. also testified that her Aunt Patricia (her mother's sister) sent her a text message which she "understood was that she was seeming to ask me to lie; that way I could go back to my mother." 5 VRP 883. The message asked her to say "as if that what I alleged happened had not

happened.” *Id.* The only objections to this line of questioning was “hearsay” and “confrontation.”⁹ 5 VRP 846, 848.

There are two assertions which can reasonably be drawn from R.Y.’s mother’s statements to R.Y. ER 801(a)(1). One assertion is that R.Y.’s child would be taken away if R.Y. did not tell the truth. This is derived from the plain language of the statement. The other possible assertion is that R.Y.’s child would be taken away if she did not recant. This is derived from the context of the statement, as related by R.Y. 5 VRP 840-41. There are not any other candidate assertions, because “[t]he test is whether it was intended as an assertion or not.” *In re Penelope B.*, 104 Wn.2d 643, 652, 709 P.2d 1185 (1985).

If Ms. Morales threats were a “stick,” Aunt Patricia’s offer was a “carrot.” 5 VRP 883. The assertive component of Aunt Patricia’s statement to R.Y. was that a recantation would bring mother and daughter back together. *Id.* The truth of that assertion was of no moment. The prosecution sought to introduce the offer as another form of pressure applied to R.Y. *Id.*

The record demonstrates that the prosecution was uninterested in the truth of any assertive component of R.Y.’s mother’s or Aunt’s

⁹ The confrontation issue is not raised on appeal, presumably because the text messages were plainly nontestimonial in nature.

statements to her daughter.¹⁰ The mother's statements were threats—and that was how the prosecutor presented them.¹¹ 5 VRP 840-41. A threat is not hearsay if it is not introduced for the truth of the matter asserted in the threat. *State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d 892, 898 (1996); ER 801(c); K. Tegland, 5B *Washington Practice* § 336 at 34–35 (1994); *State v. Jessup*, 31 Wn.App. 304, 314–15, 641 P.2d 1185 (1982).¹²

“[V]erbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, [is] excluded from the definition of hearsay.” *State v. Collins*, 76 Wn. App. 496, 499, 886 P.2d 243, 245 (1995) (quoting ER 801 Advisory Committee's Notes to Subdivision (a), at 136 and *United States v. Zenni*, 492 F.Supp. 464, 469 (E.D.Ky.1980)).

The same rationale that applies to Ms. Morales threat applies to Aunt Patricia's inducement.¹³

¹⁰ Neither the practicality nor the legality of this mother's threat to take away her daughter's child or to have her daughter's child taken away was ever addressed in the trial court.

¹¹ Appellant argues that the “truth of the matter asserted” was that “R.Y.'s claim of attempted rape occurred.” Appellant's Brief at 34. That argument is unsupported by the record.

¹² A hypothetical involving a much younger child sexual assault victim illustrates this point. Imagine the mother of such a child saying “If you don't recant, the monster hiding underneath your bed will come out and eat your face.” This threat contains an assertion, but such a threat would never be admitted for the truth of the matter asserted—it would only be admitted for its threat value.

¹³ “This court can affirm on any basis established by the pleadings and supported by the evidence, even if the trial court did not consider it.” *Ladenburg v. Campbell*, 56 Wn. App. 701, 703, 784 P.2d 1306 (1990) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989) and *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)).

These non-hearsay statements were argued by the prosecutor to demonstrate the recantation pressure applied to R.Y.—for their effect on R.Y. 9 VRP 1511-13. They were not hearsay. *State v. Collins, supra*.

5. DEFENDANT'S OTHER OBJECTIONS TO
RECANTATION PRESSURE EVIDENCE WERE
NOT PRESERVED FOR APPEAL.

Defendant presents a relevance objection to Ms. Morales' threat statements and Aunt Patricia's inducement statements for the first time on appeal. 5 VRP 840; Appellant's Brief at 32. That relevance objection was waived because it was not made at trial. ER 103(a). "In order to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it." *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979). Defendant's untimely attempt to present relevance objections for the first time on appeal should be denied. RAP 2.5(a).

"Cases involving alleged child sex abuse make the child's credibility an inevitable, central issue. Where the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony. (citation and braces omitted) *State v. Kirkman*, 159 Wn.2d 918, 933, 155 P.3d 125, 133 (2007). This case is no exception.

As noted above, defense counsel aggressively challenged R.Y.'s credibility. The prosecutor in this case presented and argued evidence that

presented an alternative explanation for R.Y.'s anger, "bad attitude," and resentment. That alternative explanation was that pressure and isolation imposed upon a young child by her own family, while she in a foreign country with her child, as a consequence of her reporting a sexual assault.

Perhaps defense had a relevance-based argument that the prosecution should have been precluded from meeting defendant's credibility attack, perhaps not. But no such challenge was made before the trial court and any such challenge cannot be raised for the first time on appeal. RAP 2.5(a); ER 103(a).

6. A QUESTION POSED TO THE VICTIM-WITNESS WAS NOT AN IMPERMISSIBLE COMMENT.

The prosecutor asked R.Y. the following question:

When you told the police officers what happened, did you tell them -- you probably did not tell them exactly the same words that you used here today; is that right?

4 VRP 774. This gave defense counsel an opportunity to present an argumentive objection in front of the jury:

It's a leading question. He's putting words in the witness's mouth in anticipation of inconsistent testimony, and he's trying to mitigate the damages of that. He just needs to ask a question, Your Honor.

Id. After the objection was overruled, the prosecutor restated the question and the witness responsively answered it:

Q. And so you probably did not use exactly the same words we're using today when you spoke to the police when they arrived, correct?

A. No. Because I was not -- they did not ask me the questions I am being asked today. Each of the persons that I've seen, they ask different questions.

5 VRP 775.

The prosecutor's question was leading, but the trial court had "wide discretion" to allow it. *State v. Loftin*, 76 Wn.2d 350, 351, 458 P.2d 29, 30 (1969); ER 611. Defendant does not now claim error on the leading nature of the question. Instead defendant argues that the question constitutes an impermissible comment on the witness' veracity. Appellant's Brief at 28. In other words, defendant is now arguing that the prosecutor commented on the witness' veracity by suggesting that the witness has described the same event differently at different times. That interpretation does not make sense. Defendant's trial lawyer got it—and pointed it out to the jury. 5 VRP 775. The prosecutor was trying to draw the sting of the cross-examination to come by having the witness admit to some inconsistency.

This question presented no error.

7. THE PROSECUTOR'S USE OF THE WORDS
"VERY HONESTLY" IN CLOSING ARGUMENT
TO DESCRIBE R.Y.'S TESTIMONY WAS FAIR
ARGUMENT.

In closing, the prosecutor addressed R.Y.'s testimony:

She explained to you very honestly about how that occurred, that she didn't expect it, and her focus at that moment was defending herself.

9 VRP 1508. This statement is fair argument. R.Y. swore to tell the truth.

4 VRP 706. The jury actually witnessed that act of swearing to tell the truth. *Id.* ER 603 states:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

ER 603. As discussed, *supra*, R.Y.'s credibility was a central focus in this trial. The prosecutor was entitled to address it. No objection was interposed to this argument. *Id.* Defendant asserts that this statement constituted improper vouching, yet fails to present anything more than a conclusory statement that this argument represents the expression of the prosecutor's opinion. Appellant's Brief at 25-28. Appellant's claim of vouching in closing argument should be denied.

8. THIS CASE DOES NOT PRESENT
CUMULATIVE ERROR.

“The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial.” *In re Lui*, 188 Wn.2d 525, 564-65, 397 P.3d 90 (2017). “For relief based on the cumulative error doctrine, the defendant must show that while multiple trial errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.” (internal quotation omitted) *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462, 466 (2017). “In other words, petitioner bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial.” *In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014).

Defendant’s molestar-abuso deshonesto arose in the context of the prosecutor’s attempt to demonstrate what the mother knew about her daughter’s reported assault and when she knew it. More specifically, it was an attempt to show that she did not believe her daughter and did not support her. Those two conclusions were noncontroversial in this trial. It was undisputed in this trial that R.Y.’s mother did not believe her daughter and did not support her. Whether that point was developed with “molestar,” “abuso deshonesto,” or some other word, the ultimate outcome of this peripheral inquiry was always going to be the same.

As discussed above, the prosecutor's evidentiary argument made in front of the jury was wrong but it presented very little potential for prejudice. This is not a case of cumulative error.

9. THE SENTENCING CONDITION OF NO CONTACT WITH MINORS IS NOT UNCONSTITUTIONALLY OVERBROAD.

In multiple places in the judgment and sentence, defendant was ordered to have no contact with minors. CP 160; CP 162; CP 163; CP 168. Defendant was convicted of attempted rape in the second degree committed on October 1, 2015 upon R.Y., born on October 19, 2000. CP 157; 7 VRP 1232, 1247-49. In other words, defendant was convicted of attempting to rape a child.¹⁴

The defendant Riles in *State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655, 666 (1998) raped a child. *Id.*, 135 Wn.2d at 347. *State v. Riles* held that an "order prohibiting [the defendant] from contact with 'any minor age children'" was not unconstitutionally overbroad. *Id.*, 135 Wn.2d at 348.

Petitioner Riles' argument on overbreadth is without merit. He was convicted of anally raping a six-year-old boy. Prohibiting him from having contact with minor-age children for the period of his community placement upon his

¹⁴ The jury also necessarily found that the victim in this case when it found the defendant guilty of child molestation in the first degree. CP 124. This offense merged into the attempted rape conviction. CP 170

release from prison is a reasonable restriction imposed upon him for protection of the public—especially children.

Id., 135 Wn.2d at 347 (1998). The defendant Riles in *State v. Riles*, also rejected a void for vagueness challenge to a no contact with minors provision. *Id.*, 135 Wn.2d at 348-49.

State v. Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059, 1063 (2010) held that the presumption of constitutionality does not apply when scrutinizing sentencing conditions. This unsettled the reasoning underpinning *Riles*, but not its holding with respect to the defendant Riles. The Supreme Court held that “freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order.” *State v. Riles*, 135 Wn.2d at 347. “Prevention of harm to children is a compelling state interest.” *State v. Aguilar*, 176 Wn.App. 264, 277, 308 P.3d 778 (2013) (quoting *State v. Ancira*, 107 Wn.App. 650, 653–54, 27 P.3d 1246 (2001)).

There is nothing vague about an order requiring a person to have no willful contact with minor children.¹⁵ The Ninth Circuit has held that people of common intelligence need not necessarily guess at the meaning of “knowing contact” and known minors is a clearly defined and

¹⁵ Defendant can only be sanctioned for a willful violation of probation *State v. Barklind*, 87 Wn.2d 814, 821, 557 P.2d 314, 319 (1976).

unambiguous group. See *United States v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007); *United States v. King*, 608 F.3d 1122, 1128 (9th Cir. 2010). Washington’s willful standard is at least as stringent as the “knowing” standard addressed in *Soltero* and *King*.

Nor is the condition imposed in this case overbroad—defendant attempted to rape a minor child and his community custody condition ordered him to stay away from minor children.

Defendant’s constitutional challenges to the no contact with minors sentencing provisions should be denied.

D. CONCLUSION.

R.Y.’s credibility was challenged in this case. The prosecutor responded. The prosecutor presented evidence that R.Y. consistently maintained her story despite pressure and social isolation. It was uncontroverted that R.Y.’s mother did not believe R.Y. and did not support her. The use of two Spanish terms in the effort to demonstrate that uncontroverted fact presented neither error nor prejudice.

Defendant’s hearsay objections to a threat that was introduced to prove a threat and an inducement introduced to prove an inducement are not well taken. No other evidentiary objections were preserved.

The prosecutor’s speaking objection in response to the trial court’s adverse evidentiary ruling was wrong, but it was argument, not testimony,

and was subjected to no timely objection. It was an argument made at the wrong time, but it does not amount to manifest constitutional error.

The prosecutor properly argued the victim's credibility in closing argument. The attempted rape of a minor adequately justifies a no contact with minor sentencing condition. This case presents no cumulative error.

The judgment and sentence in this case should be affirmed.

DATED: August 1, 2018.

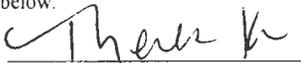
MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

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.

8/1/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

August 01, 2018 - 11:37 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50826-5
Appellate Court Case Title: State of Washington, Respondent v. Jose Moreno-Hernandez, Appellant
Superior Court Case Number: 15-1-04778-9

The following documents have been uploaded:

- 508265_Briefs_20180801113543D2146603_1648.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Moreno-Hernandez Response Brief.pdf

A copy of the uploaded files will be sent to:

- katebenward@washapp.org
- nancy@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: Mark Von Wahlde - Email: mvonwah@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20180801113543D2146603