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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANDRE VARGAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Shelly Speir

No. 16-1-02635-6

Brief of Respondent

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

1. Did the prosecuting attorney erroneously ask the alleged rape victim's mother whether she believed the alleged victim?
2. Was that question and its answer subjected to a timely objection?
3. Was that question and its answer manifest constitutional error?
4. If that unobjected-to question was manifest constitutional error, could that error have been remedied by a curative instruction?
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12. Was the no "use" of alcohol a properly imposed sentencing condition?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On July 26, 2017 appellant, Andre Vargas (hereinafter defendant), was found guilty of four counts of rape of a child in the third degree following a jury trial, each count with a special verdict finding that

defendant and his victim were members of the same family or household. CP 45-51.

On September 15, 2017 defendant was sentenced to 60 months of confinement followed by community custody. CP 80, 81. Defendant timely appeals.

2. FACTS

M.V. was born on January 11, 1998. 3 VRP 60. She is the daughter of Kimberly Vargas (hereinafter Ms. Vargas) and Andre Vargas (hereinafter appellant or defendant). 3 VRP 63; 3 VRP 203-04. At the time of trial, defendant was in his fifties. *Id.* M.V. graduated from high school in 2016. 3 VRP 61. M.V. testified that her father sexually abused her for a period of about three months during her “eighth grade year going into her ninth grade.” 3 VRP 64. This was in the year 2012. *Id.* M.V. testified that the abuse occurred in Graham, Washington. 3 VRP 64-65. This was during the period of summer at the end of M.V.’s eight grade year going into her ninth grade year. 3 VRP 100. M.V. testified that her father taught her how to use tampons, taught her how to shave near her private areas, and that he had conversations with her in the bathroom while she was taking a shower in a shower with a clear window. 3 VRP 68-69. This occurred even as she was in the eighth grade. 3 VRP 70.

M.V. testified that defendant showed her a pornographic DVD and showed her pornography on his cell phone. 3 VRP 160, 173-74.

M.V. testified to sexual abuse and rape. 3 VRP 79-111. Four separate and distinct incidents were included in M.V.'s testimony: (1) the first time defendant penetrated M.V.'s vagina with his fingers and with his penis with no ejaculation;¹ (2) a penile – vaginal rape where defendant ejaculated inside M.V.;² (3) defendant's digital penetration of M.V.'s vagina during a power outage;³ and (4) an incident where M.V. placed her mouth on defendant's penis.⁴

M.V. testified regarding text messages between herself and defendant that she had saved. 3 VRP 118-140. Among the messages exchanged at trial is the following exchange:

And you didn't screw up my life you've done the world for me but I'm afraid to ever have a bf because of what you've done. There's not a day that goes by that I don't think about that.

Me to An I thought I was your bf. ☺ ☺### ☺##

¹ 3 VRP 86-90. Defendant exploited M.V.'s concern about pain associated with the use of a tampon to effect this rape. *Id.*

² 3 VRP 90-92.

³ 3 VRP 92-93.

⁴ 3 VRP 103-08. M.V. testified that this was the last incident of sexual contact between herself and defendant. 3 VRP 108.

Exhibit 1.⁵ This exchange occurred sometime between M.V.'s sophomore and junior year. 3 VRP 119-20. Also in the messages is another statement from defendant: "I'm sorry for screwing your life up to." Exhibit 1.⁶

M.V. did not disclose the sexual abuse she endured until her sophomore year in high school. 3 VRP 140. On December 17, 2015 she disclosed to a friend, M.M. 3 VRP 147. Later that day, she told her mother. 3 VRP 148-49.

M.V. testified that she wanted to tell the police. 3 VRP 151. However, M.V. and her mother "decided we would wait and figure out what to do; weigh out our options. She [M.V.'s mother] wanted to; she just didn't know how to go about it or when." 3 VRP 150. M.V. was aware of many of her mother's motivations and they affected her:

She was extremely supportive. She was just scared. She felt so bad that I had gone through all of it and held it in and didn't tell anyone. She just felt so bad. But at that same time, that's when we found out my grandma had cancer and me and my brother might not be graduating and just felt like she had a full plate. She was really stressed out.

Id. See also 3 VRP 150-55.

⁵ "BF means boyfriend." 3 VRP 131.

⁶ This message was sometime between the summer of M.V.'s sophomore and junior year and December, 2015. 3 VRP 122.

In "April, May" 2016, M.V. disclosed her sexual abuse to her school counselor.⁷ 3 VRP 155. In May or June of 2016, M.V. disclosed to a law enforcement officer.

Kimberly Vargas was defendant's wife and M.V.'s mother. She testified to an incident in 2012:

A. Just one incident when the power was out at home. So I normally would pull in the garage, obviously you hear the garage open, come upstairs. But the power was out, so I just parked outside, went in through the front door with my key. And when I walked into the master bedroom, I saw [M.V.] and Andre laying really close together and just thought it was weird.

Q. Describe how -- where were they lying?

A. Laying in our bed and like Mariah was in front of him and Andre was behind her like spooning her like really close.

Q. Were they on or under the covers?

A. Under the covers.

Q. And what time of day was it?

A. I mean, I had gone to work, but I'm not exactly sure if I had got home -- it was during the day, so I definitely had gone to work for a while and maybe my power was out at work. I don't recall. But I had come home early. And so it was summertime, so she was out of school.

3 VRP 209. M.V. testified that this incident took place downstairs in the living room, under blankets, but also during a power outage. 3 VRP 187-89.

⁷ The disclosure was made as her graduation approached. *Id.*

Ms. Vargas also testified that M.V. disclosed to her in the middle of December, 2015. 3 VRP 219. Ms. Vargas testified that she wanted delay in disclosure, her reasons why she wanted that delay, and her daughter's agreement with that delay. 3 VRP 223-228. After testifying about the delay she urged on her daughter, she testified that she was still able to sleep in the same room, and in the same bed, with defendant. 3 VRP 228. Ms. Vargas testified that she believed her daughter. 3 VRP 228. Ms. Vargas also testified that she did not look into getting her daughter into therapy or setting her up with a counselor. 3 VRP 228-29. Ms. Vargas "just wanted to keep this secret." 3 VRP 229.

On cross-examination, defense counsel examined Ms. Vargas about her reasons for delaying M.V.'s disclosure. 3 VRP 242-44. Defense counsel examined Ms. Vargas' "relief" after M.V. talked to the counselor. 3 VRP 243-44.

Keri Arnold testified as an expert witness as to the common phenomenon of delayed disclosure of sexual abuse. 4 VRP 291-92.

Ryan McIntosh testified about M.V.'s identification of her father without providing any details about what M.V. told him. 4 VRP 293-315.

Mercedes Montgomery, M.V.'s friend, testified about M.V.'s identification of her father without providing any details about what M.V. told her. 4 VRP 336-38. Ms. Montgomery also provided testimony

pertaining to her helping M.V. store text messages sent between M.V. and M.V.'s father. 4 VRP 341-42.

Detective Jessica Whitehead testified about M.V.'s identification of her father without providing any details about what M.V. told her (although it is clear from the context of preceding testimony that Detective Whitehead's contact with M.V. pertained to an allegation of sexual assault). 4 VRP 370-71.

C. ARGUMENT.

1. MS. VARGAS' OPINION TESTIMONY WAS IMPROPER, BUT IT WAS NOT VOUCHING AND IT DID NOT PREJUDICE DEFENDANT'S RIGHTS AT TRIAL.

In mid-December, before Christmas, 2015, M.V. disclosed sexual abuse to her mother.⁸ Although M.V. wanted to go to the police the night she told Ms. Vargas, Ms. Vargas testified that she wanted to delay that reporting, for family reasons. 3 VRP 224. M.V. did not actually disclose the abuse she endured to law enforcement until May/June of 2016. 3 VRP 156-57.

Delay in reporting promotes the inference that the reporting was delayed because the report was not true. To counter that inference, the

⁸ M.V.'s mother testified "It was mid December. I want to say like the 18th or 19th. I know it was mid December, before Christmas." 3 VRP 227. M.V. testified that she made the disclosure to her mom on December 17, 2015. 3 VRP 148-150.

State admitted evidence for the purpose of explaining M.V.'s delay in reporting her abuse. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009).

Ms. Vargas testified to the reasons she urged delay in reporting upon her daughter. Ms. Vargas was concerned about her son's graduation from high school. 3 VRP 224-26. She was also concerned about the consequences of her mother's cancer treatment. 3 VRP 226-27. Ms. Vargas was also in the midst of an extramarital affair. 3 VRP 210-13. Ms. Vargas' own turmoil appears to have played a role in M.V.'s delayed reporting.⁹ Ms. Vargas thought it did.¹⁰ At any event, Ms. Vargas tried to influence M.V. to delay disclosure. It was in this context that the prosecutor asked the following questions:

Q. And in no way do I intend to sound confrontational, but could you explain to the jury, please, how it is your daughter made a disclosure to you about the defendant and you were able to still sleep in the same room, the same bed with him?

A. I just was scared. I just thought that was so much information. I honestly didn't know what he would do if he knew that I knew. And I just tried to keep things as normal as possible.

⁹ M.V. testified "That was when I told my mom, I decided you know, I wanted the police to know, but I just wanted to involve her in it if she could help, if there was anything she could do to make it easier, if she knew what options to do. But then I took it upon myself at school to get a counselor involved and tell the police myself." 3 VRP 156.

¹⁰ "I think we needed to keep it between ourselves before we figured out what we were going to do with the information." 3 VRP 228. "Q. And did Mariah seem to agree with that game plan, if you will, to wait? A. Yes. Yes." 3 VRP 225.

Q. Did you believe your daughter?

A. Yes.

3 VRP 228. This testimony about belief was provided without detail.¹¹

Although M.V. testified that she told her mother “everything,”¹² no further information about what M.V. told her mother was elicited.¹³ While the jury was told that Ms. Vargas believed her daughter, the jury was not told details of what Ms. Vargas believed. Furthermore, the prosecutor asked “Did you believe your daughter” to illustrate Ms. Vargas’ state of mind at the time she urged delay—not to buttress M.V.’s trial testimony. The record presents no instance where the prosecutor argued, or implied, that M.V. should be believed because her mother believed her. Furthermore, any such argument would have been incongruous with the prosecutor’s presentation of Ms. Vargas’ serious failures as a parent.¹⁴

¹¹ “Q. And I’m not asking for you to relay hearsay to the jury, but did she tell you who the person was that she reported did something –” 3 VRP 219. “Q. “As Mariah spoke with you -- and without telling us what was said -- she told you something about the defendant?” 3 VRP 220. M.V. did not provide a lot of detail to Ms. Vargas, at any event. 3 VRP 221.

¹² 3 VRP 149.

¹³ 3 VRP 149-154 (M.V.’s testimony); 3 VRP 220-21 (Ms. Vargas’ testimony).

¹⁴ For Ms. Vargas, keeping the family together while conducting an extramarital affair prevailed over protecting her daughter. The keeping the family together type reasons are expressed at 3 VRP 224-27. Ms. Vargas’ extramarital affair is expressed at 3 VRP 210-13. Ms. Vargas also testified that one day in 2012 when she returned home, unscheduled, from work she discovered defendant laying in on her and her husband’s bed under the covers “spooning” M.V. 3 VRP 209. Nothing happened after that. *Id.* Also, even after her daughter told her that she had been raped, Ms. Vargas did not look into getting her daughter into therapy or setting her up with a counselor. 3 VRP 228-29.

The prosecutor in closing argument referred negatively to Ms.

Vargas' behavior:

And the testimony, as the State recalls it, is that mom recalls coming home, there's a power outage, she usually would go in through the garage, she couldn't, she parks on the street, comes in the house, goes upstairs to change, sees the defendant and Mariah under the blanket in the bedroom, and that struck her as odd. Most people would have a much greater severe reaction. With all due respect to Kimberly Vargas, many people upon seeing that would make more of an effort to ascertain what's going on under the covers. But she came in and she told you, her reaction is what are you guys up to. That's weird. And then she just goes into the closet.

5 VRP 451-52. And again:

And you'll recall questions that were posed to her from her mother. If Mariah has to stay in the home with her perpetrator the defendant, questions posed to her by her mother were, "Did you enjoy it?" Did you enjoy the sex with your father? Difficult stuff that I raise not to belittle or be disrespectful, but critical details the State submits to you remove any motivation that should exist in your mind as to whether these people have ill motives towards the defendant or are making this up. Why would a mother admit out of all the things you could ask your daughter who made this disclosure to you, of all the things to admit that you asked your daughter? It doesn't paint the mom in the most sympathetic enduring light. And the State submits she's real. She's human. But there is no reasonable motivation that she displayed for you as to her taking the role in making up or taking part in allegations mistruths against the defendant.

5 VRP 459. The prosecutor asked the improper credibility question to humanize a mother who behaved very badly, nothing more.

Respondent concedes that Ms. Vargas's state of mind at the time of her daughter's disclosure was irrelevant, but that irrelevant testimony was admitted without objection and cannot serve as a basis for error. 3 VRP 228; *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986); *State v. Boast*, 87 Wn.2d 447, 451–52, 553 P.2d 1322 (1976).

Appellant asserts that “Did you believe your daughter?” amounts to manifest constitutional error. An explicit or almost explicit opinion on the defendant's guilt or a victim's credibility can constitute manifest constitutional error.

Admission of witness opinion testimony on an ultimate fact, without objection, is not *automatically* reviewable as a ‘manifest’ constitutional error. But, an explicit or almost explicit opinion on the defendant's guilt or a victim's credibility can constitute manifest error.

(internal quotation, citation, and braces omitted) *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642, 646–47 (2009). The manifest error exception is narrow. *Id.* “‘Manifest error’ requires a nearly explicit statement by the witness that the witness believed the accusing victim.” *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125, 135 (2007). Manifest error requires “vouching.” *State v. Aguirre*, 168 Wn.2d 350, 359–61, 229 P.3d 669, 673–74 (2010). Also, to establish manifest error, the defendant must show

the alleged error actually prejudiced his rights at trial. *Kirkman*, 159 Wn.2d at 926–27.

This case involves an explicit opinion on the victim’s credibility, but that error does not amount to manifest constitutional error because, in the context of this trial, Ms. Vargas was never asked to vouch for M.V.’s credibility. Ms. Vargas’ opinion was only used to establish (albeit irrelevantly) Ms. Vargas’s state of mind at the time M.V. first disclosed to her.

Alternatively, Ms. Vargas’ opinion testimony did not manifestly prejudice defendant’s rights at trial. Ms. Vargas’ credibility opinion was considerably diluted (by the prosecutor) because (a) Ms. Vargas’ parental judgment (and implicitly the value of any opinion testimony) was seriously undermined; (b) Ms. Vargas’ opinion was generalized and unrelated to any specific detail of M.V.’s testimony; and (c) Ms. Vargas’ opinion was only used to explain Ms. Vargas’ state of mind at the time she urged her daughter to delay reporting—not to address M.V.’s credibility at the time of trial.¹⁵

State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209, 211 (1996) is distinguishable because in that case the prosecutor asked multiple

¹⁵ The non-emphasis on vouching distinguishes this case from *State v. Jones*, 117 Wn.App. 89, 68 P.3d 1153 (2003).

questions of a mother about the credibility of her son's actual trial testimony. *Id.*, 83 Wn.App. at 506-07. The credibility testimony in this case was unlinked to any particular fact and was not related to M.V.'s trial testimony. Both *Jerrels* and this case present error, but *Jerrels*, unlike this case, presented clear prejudicial error.

State v. Johnson, 152 Wn. App. 924, 932, 219 P.3d 958, 961 (2009) and *State v. Carlson*, 80 Wn.App. 116, 906 P.2d 999 (1985) are distinguishable. In *Johnson*, the State presented testimony about an extremely dramatic scene which convinced the mother to expressly state that her daughter was telling the truth about her rape, and then prompted the mother to attempt suicide. *Johnson*, 152 Wn.App. at 932-33. In *Carlson*, a doctor diagnosed sexual abuse solely through the statements of the alleged victim. *Carlson*, 80 Wn.App. at 125. In those cases, the prejudice was palpable. This case also presents error, but error that is nothing near so prejudicial. In this case, the prosecution introduced evidence that a mother who had just heard her daughter report rape, and believed her, urged her daughter not to report the rape and continue normal life with the rapist. In this case, the State never sought to exploit the mother's testimony for any credibility bolstering type purpose, unlike *Johnson*, where the prosecutor exacerbated the error by presenting multiple witnesses who testified about the mother's suicide attempt, and also by arguing that such evidence showed

that the victim's allegations were well founded." *Id.* at 930. Unlike the expert witness in *Carlson*, the State's witness in this case was a compromised mother who demonstrated remarkably bad judgment.

The bottom line is that defendant's trial counsel did not object to Ms. Vargas' opinion testimony because it was not that harmful. Defendant's appellate counsel has not demonstrated 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. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). This Court should not find prejudice warranting reversal in the facts of this case.

2. THE TRIAL COURT PROPERLY ALLOWED STATEMENTS OF IDENTIFICATION PURSUANT TO ER 801(d)(1)(iii).

- a. Appellant has only preserved a narrow question for review: Do the identifications of the perpetrator made by the victim fall within ER 801(d)(1)(iii)?

The State made a motion in limine seeking to admit testimony from several witnesses pursuant to ER 801(d)(1)(iii). CP 96-97; 2 VRP 25-27. Defense counsel interposed no objection at the time of the motion. 2 VRP 25-26. Defense counsel requested an offer of proof relating to one

witness, and the prosecution provided it.¹⁶ *Id.* The trial court's order stated that the admission of M.V.'s statements identifying the defendant as the perpetrator were admissible for identification purposes only. CP 13. The trial court's order also stated that the witnesses were precluded from testifying as to M.V.'s substantive disclosures. *Id.* The order recited that the motion was granted over objection. CP 13. At trial, no objection of any kind was interposed during the identification testimony of M.V.,¹⁷ M.V.'s friend,¹⁸ M.V.'s high school education advisor,¹⁹ and Detective Whitehead.²⁰ Only one insubstantial objection was made in the course of Ms. Vargas' identification testimony.²¹

This case is only about the applicability of ER 801(d)(1)(iii) to the facts of this case. Defendant cannot now claim that trial court allowed inadmissible hearsay or improper ER 801(d)(1)(iii) evidence because those issues were not preserved for review below. The trial court

¹⁶ This request appears to be the precursor to an objection which was never made. *Id.*

¹⁷ 3 VRP 141-44 (M.V.'s disclosures to her friend related by M.V.); 3 VRP 149-152 (M.V.'s disclosures to her mother related by M.V.);

¹⁸ 4 VRP 336-37.

¹⁹ 4 VRP 304-08.

²⁰ 4 VRP 370-71.

²¹ The witness answered, unresponsively: "And she said she actually felt better." 3 VRP 221. No motion to strike this testimony was made, and the prosecutor resumed questioning the witness. 3 VRP 222. This statement is not challenged on appeal. If the court does not instruct the jury to disregard testimony, then that testimony is part of the record. *State v. Swan*, 114 Wash. 2d 613, 658, 790 P.2d 610, 633 (1990). The remainder of the other identification testimony was entered without objection. 3 VRP 219-221.

specifically told the parties that it intended to admit only the identification itself and told the lawyers

I am going to grant the motion to admit the statements for identification purposes only. And if you've warned your witnesses in advance that they can't be giving details, that's very helpful. We're just going to have to be very careful in the courtroom that they follow that instruction as well.

2 VRP 26-27. Defendant waived any other objection by failing to present a timely objection at trial. *State v. Smith*, 155 Wn.2d 496, 501-02, 120 P.3d 559 (2005). “Hearsay evidence admitted without objection may be considered by the trier of fact or the appellate court for its probative value.” *In re Marshall*, 46 Wn. App. 339, 343, 731 P.2d 5 (1986); *Harter v. King County*, 11 Wn.2d 583, 598, 119 P.2d 919 (1941); *State v. Whisler*, 61 Wn. App. 126, 139, 810 P.2d 540 (1991).

Additionally, no reasonably specific objection ever pointed the trial court in the direction of ER 403. This is important because appellant is now asking this court to engraft several unnecessary ER 403 considerations into its ER 801(d)(1)(iii) analysis.²² No ER 403 objection was preserved to any of the identification testimony presented in this case.

²² Appellant's Brief at 29 presents a floodgates argument that all out of court identifications will come in if this Court does not grant the relief defendant seeks. Appellant's Brief at 31 challenges the applicability of ER 801(d)(1)(iii) under the particular facts of this case. Appellant's Brief at 36 challenges the “mere repetition” of the identifications in this case. Each of these concerns is addressed by ER 403.

Defendant argues that other avenues of admissibility, such as fact of complaint, do not apply to this case. Respondent agrees. Respondent relies solely upon admissibility pursuant to ER 801(d)(1)(iii) along with failure to preserve any other objection at trial.

- b. The identifications of the perpetrator made by the victim fall within the plain language of ER 801(d)(1)(iii).

ER 801(d)(1)(iii) excludes from hearsay a statement that is “one of identification of a person made after perceiving the person” if the declarant testifies at the trial and is subject to cross examination concerning the statement. *Id.* In this case, M.V. identified defendant as her rapist after she perceived that the defendant was the person raping her.

- c. ER 801(d)(1)(iii) contains no unwritten contemporaneity requirement.

Defendant argues that ER 801(d)(1)(iii) requires a contemporaneous, not after-the-fact identification. Appellant’s Brief at 29. No such requirement can be found in the text of ER 801(d)(1)(iii) and defendant provides no cases which articulate such an unwritten rule. This Court should decline to impose a contemporaneity requirement upon ER 801(d)(1)(iii).

In *United States v. Anglin*, 169 F.3d 154, 159 (2d Cir. 1999), two bank tellers witnessed a bank robbery on April 16, 1996. *Id.* 169 F.3d at 157. Ten months later each of those two tellers identified the bank robber

from a photomontage. *Id.* One teller was able to identify the bank robber at trial, the other was not. *Id.* The pretrial photomontage identifications of each witness were admitted into evidence. *Id.* 169 F.3d at 159. The court held “[a] prior identification is admissible under Fed.R.Evid. 801(d)(1)(C), regardless of whether the witness confirms the identification in-court. *Id.* The Second Circuit had earlier held that “[a] prior identification will be excluded only if the procedure that produced the identification is ‘so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law.’” *United States v. Salameh*, 152 F.3d 88, 125 (2d Cir. 1998), *cert. denied sub nom. Abouhalima v. United States*, 525 U.S. 1112, 119 S.Ct. 885 (1999) (quoting *United States v. Simmons*, 923 F.2d 934, 950 (2d Cir.1991)).

In *United States v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) the victim was assaulted on April 12, 1982 and identified his attacker to law enforcement by both name and photomontage on May 5, 1982. *Id.* 484 U.S. at 556. At trial, the victim remembered identifying his assailant, but the victim could not remember seeing his assailant. *Id.* The Supreme Court held that this identification fell within the federal equivalent to ER 801(d)(1)(iii). *Id.* 484 U.S. at 564. The reasons expressed by the United States Supreme Court are persuasive:

The reasons for that choice are apparent from the Advisory Committee's Notes on Rule 801 and its legislative history. The premise for Rule 801(d)(1)(C) was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications. Advisory Committee's Notes on Rule 801, 28 U.S.C. App., p. 717. Thus, despite the traditional view that such statements were hearsay, the Advisory Committee believed that their use was to be fostered rather than discouraged. Similarly, the House Report on the Rule noted that since, "[a]s time goes by, a witness' memory will fade and his identification will become less reliable," minimizing the barriers to admission of more contemporaneous identification is fairer to defendants and prevents "cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." H.R.Rep. No. 94-355, p. 3 (1975). See also S.Rep. No. 94-199, p. 2 (1975), U.S.Code Cong. & Admin.News, 1975, pp. 1092, 1094. To judge from the House and Senate Reports, Rule 801(d)(1)(C) was in part directed to the very problem here at issue: a memory loss that makes it impossible for the witness to provide an in-court identification or testify about details of the events underlying an earlier identification.

United States v. Owens, 484 U.S. at 562-63.

As *Owens* and *Lopez* demonstrate, the ER 801(d)(1)(iii) hearsay exclusion exists because pretrial identifications are "generally preferable to courtroom identifications." Contemporaneity is not an ER 801(d)(1)(iii) requirement.

Consider a hypothetical rape, followed by a disclosure timeline similar to this case, followed by a criminal prosecution. Add to that mix, a fifteen year trial delay (caused by bail jumping, a long unsuccessful appeal, and a successful personal restraint petition, for example) during

which delay the victim loses the ability to identify her rapist at trial.

Under ER 801(d)(1)(iii), the victim's pretrial identification of the rapist is fully admissible because that identification—as three-year delayed as it was—is still far more reliable than any in-court identification she might attempt after all that time.

- d. ER 801(d)(1)(iii) allows identifications made by a certain person, known to the witness.

In *State v. Grover*, 55 Wn. App. 252, 254-55, 777 P.2d 22, 24 (1989), a witness identified two robbers shortly after the robbery but at trial denied both memory of the robbers and memory of the identification. The initial identification was properly admitted under ER 801(d)(1)(iii).

In *United States v. Owens*, a witness identified his assailant by name and photomontage, but was unable to identify the witness at trial because he was unable to recall seeing his assailant. The United States Supreme Court held that the initial identification was properly admitted under the federal equivalent to ER 801(d)(1)(iii).

In *United States v. Lopez*, 271 F.3d 472, 485 (3d Cir. 2001), *cert. denied sub nom Navarro v. United States*, 535 U.S. 962, 122 S.Ct. 1376 (2002) a government witness told police on the day of the crime that he had seen three of the defendants in the area of the crime at the time the crime was committed. At trial, the government witness denied making

that statement. The prosecution was allowed to admit that statement. *Id.*

The Third Circuit held

Statements of prior identifications are admitted as substantive evidence because of “the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions.” Fed.R.Evid. 801, advisory committee notes.

United States v. Lopez, 271 F.3d at 485.

Identifications are not static things. A human being’s ability to provide a perfectly sound identification of a known (or unknown) person at one time can degrade into nothing over a sufficient time.²³ Similarly, a witness’ willingness to provide an honest identification at trial can be corrupted by terror or self-interest.²⁴ ER 801(d)(1)(iii) allows the finder of fact to consider such identifications made while they were still possible. There is no principled reason—and certainly no textual reason—to exclude identifications of known persons from the scope of ER 801(d)(1)(iii).

In ***State v. Robinson***, 718 N.W.2d 400, 408 (Minn. 2006) the Minnesota Supreme Court took a contrary position.

The rationale behind the rule “stems from the belief that if the original identification procedures were conducted fairly,

²³ This appears to be the case presented by ***United States v. Owens***, *supra*.

²⁴ See ***Commonwealth v. Cong Duc Le***, 444 Mass. 431, 441, 828 N.E.2d 501 (2005) (discussing pressure as a concern underlying ER 801(d)(1)(C), the Massachusetts version of ER 801(d)(1)(iii)).

the prior identification would tend to be more probative than an identification at trial.” Minn. R. Evid. 801(d)(1) comm. cmt.-1989. This rationale applies to cases involving the prior identification of an unknown offender, where the in-court identification is so highly suggestive that it would be misleading if the jury were allowed to believe that this was the witness's only identification of the offender. Rule 801(d)(1)(C) was adopted to remedy this unique problem. But in the case of a known offender, we see no reason to prefer a witness's out-of-court accusation over his or her in-court accusation. We hold that Rule 801(d)(1)(C) does not extend to the out-of-court accusation against an offender whose identity was well-known to the victim.

Id. This approach—limiting 801(d)(1)(C) to extrajudicial identifications made from photographic arrays, showups, or lineups—was convincingly rejected in *Commonwealth v. Adams*, 458 Mass. 766, 771, 941 N.E.2d 1127, 1131 (2011), which held that differences between a witness’ pretrial identification statement and his trial testimony should be resolved by the jury. That position has its origins in the common law of evidence and has been followed by the majority of cases addressing the issue (including *State v. Grover*, *supra* and other cases cited in *Adams*). *Id.*, 458 Mass. At 771-72.

- e. ER 801(d)(1)(iii) does not require police-arranged identifications.

Appellant suggests that ER 801(d)(1)(iii) contains a requirement “. . . like seeing the defendant at the crime scene and then identifying him to the police . . .” Appellant’s Brief at 28. Such a requirement is not required by the plain language of ER 801(d)(1)(iii) and defendant points to

no authority suggesting that a police-administered identification has any more intrinsic value than an identification witnessed by someone other than a law enforcement officer.²⁵ That argument should be rejected

- f. Defendant's attempt to recast ER 403 issues as ER 801(d)(1)(iii) issues should be rejected.

Defendant argues that in this case a “courtroom identification would be entirely satisfactory”²⁶ and that the “mere repetition” of the identifications resulted in error.²⁷ Those arguments are claims of unfair prejudice and the needless presentation of cumulative evidence—in other words, ER 403 objections. Such objections need not be engrafted onto ER 801(d)(1)(iii). As discussed above, ER 403 objections were not preserved for review. If there was an unfair prejudice or a cumulative evidence problem in the trial of this case, the trial court was never asked to fix it.

- g. Defendant's “improper accusation” claims were not preserved for appeal.

Defendant argues that the ER 801(d)(1)(iii) identification testimony in this case crossed over the line from identification into “classic inadmissible hearsay.” Appellant’s Brief at 31-32. As discussed above, such issues were not preserved for review. While the trial court’s

²⁵ Such an interpretation would also limit ER 801(d)(1)(iii) largely to criminal cases, where police officers usually play a role. The rule should also be available to civil cases.

²⁶ Appellant’s Brief at 31.

²⁷ Appellant’s Brief at 36-38.

order preserved the ER 801(d)(1)(iii) objection, that order was very narrow (CP 13) and the trial court warned the parties: "We're just going to have to be very careful in the courtroom that they follow that instruction as well." 2 VRP 26-27. Defendant did not timely present a hearsay objection sufficient to preserve the claim he now raises.

3. DEFENDANT DID NOT PRESERVE ERROR REGARDING THE TEXT MESSAGES OF EXHIBIT 1.

Defendant claims error in the admission of certain text messages exchanged between defendant and his daughter. Appellant's Brief at 38-41. Defense counsel did not interpose a reasonably specific objection pretrial during the motion in limine. The following quotation includes the complete sentence spoken by defense counsel and the following exchange:

. . . And I don't believe -- and I know the Court hasn't seen the text -- but I think it would be hard for anyone to say that it's an admission by a party opponent. There's nothing in here saying, yes, I did these things. There's actually no overt here's what you did to me, in terms of explicit language. I don't know if maybe the Court wants to look at the text messages.

MS. DE MAINE: Your Honor, under 801(d), it's admission statements by a party opponent. The text messages -- seeing that your judicial assistant stepped out, I will hand these to you and ask that they be marked as Exhibit 1. May I approach, Your Honor?

THE COURT: Yes, go ahead.

MS. MELBY: And I don't disagree with what the State is saying in terms of every statement from a defendant comes in. But I think when you were kind of piggybacking it on

being authenticated by the alleged victim, that's where I think the bigger problem with these text messages is.

2 VRP 40-41.

The trial court never made a definite, final ruling on the State's text message pretrial motion, and it recognized that defense may have some objections:

Here's what I'm going to do: *I'm leaning towards admissibility*, but I think it all really hinges on a very strong foundation being laid as far as where the messages came from and the fact that they're substantially the same as when they were on the victim's phone originally. I don't know what capability Mercedes may have had to change things, but I just want to make sure that the messages that we show the jury are, in fact, the messages that were exchanged. And so if the State can satisfy that *and we can get through any potential motions by the defense, I would be inclined to admit this* because I think that when the victim testifies, she could probably say the details or give the details about how they were sent, when they were sent, what the content was, what she meant, what her understanding was. And I think that goes to the test that the State laid out under ER 901(b)(10).

(emphasis added) 2 VRP 45. The text messages were not addressed in the Court's Order Re: Motions In Limine, unlike the other—final—rulings, which were included. CP 12-14.

This Court should consider Exhibit 1. Exhibit 1 contains some passages which are unambiguously ER 801(d)(2) statements of a party

opponent and relevant context,²⁸ and some arguable passages. Defense counsel never distinguished objectionable material from unobjectionable material. Most importantly, defense interposed no trial objection to the admissibility of Exhibit 1. 3 VRP 124.²⁹ Defendant has failed to preserve evidentiary error for appeal.

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.

(internal quotation marks, braces, and citations omitted) *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615, 623 (1995).

4. THIS CASE DOES NOT PRESENT CUMULATIVE ERROR.

This case presents only one error—the improper “Did you believe your daughter?” question posed to Ms. Vargas. No cumulative error is presented.

²⁸ “I’m sorry for screwing your life up to.” Also, after M.V. texts “And you didn’t screw up my life you’ve done the world for me but I’m afraid to ever have a bf because what you’ve done.”, defendant texted in response: “Me to An I thought I was your bf. ☺ ☺### ☺##”.

²⁹ Defendant interposed a foundation objection at 3 VRP 123, but after the prosecuting attorney asked a series of foundational questions, defense counsel stated that it had no objection to the admission of Exhibit 1. 3 VRP 124.

5. DEFENDANT USED A COMPUTER—HIS CELL PHONE—TO FACILITATE HIS CRIME

The sentencing court acted within its discretion when it ordered defendant to comply with the following conditions:

No internet access or use, including email, without the prior approval of the supervising CCO.

No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to monitor compliance with this condition.

CP 92. These affirmative conditions are crime related prohibitions because defendant used his cellular telephone “pull up” an image of a girl sucking a horse’s penis and show it to M.V during the time frame he was raping M.V. 3 VRP 96-97 (M.V. dates the display of cell phone pornography); 3 VRP 64 (M.V. dates the sexual abuse her father inflicted); RCW 9.94A.703(3)(f)(5)(e).

A modern cell phone is a computer. *United States v. Wurie*, 728 F.3d 1, 8 (1st Cir. 2013), *affirmed sub nom. Riley v. California*, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). As the United States Supreme Court has noted “[e]ven the most basic phones that sell for less than \$20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on.” *Riley*, 134 S. Ct. at

2489. The trial court should be affirmed. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262, 1263 (2008).

Defendant argues that there is “no insinuation that this involved the internet or a computer.” Appellant’s Brief at 45. But the cell phone is a computer, the horse pornography had to come from somewhere, and the Internet is the most probable source.

6. THE STATE CONCEDES SENTENCING ERROR REGARDING THE “STAY OUT OF AREAS WHERE CHILDREN’S ACTIVITIES REGULARLY OCCUR OR ARE OCCURRING.”

The State concedes that this condition should not have been imposed because the record contains no indication that a rape of M.V. occurred at a location or locations where children’s activities regularly occur or are occurring, or that any such locations were used to facilitate any of defendant’s rapes of M.V.

7. THE STATE CONCEDES SENTENCING ERROR REGARDING THE “USE” LANGUAGE OF SPECIAL CONDITION 11 OF APPENDIX H.

Appellant correctly cites *State v. Norris*, 1 Wn.App.2d 87, 404 P.3d 83, 90 (2017) for the proposition that the court did not have authority to order appellant to refrain from the “use” of alcohol. This court should impose the same directory remedy upon the trial court that the Court imposed in *Norris*: “Because former RCW 9.94A.703(3)(e) authorizes the

imposition of a condition only on “consuming alcohol,” on remand, the court shall strike the words “use or” from condition 12.³⁰

8. THE STATE CONCEDES SENTENCING ERROR WITH RESPECT TO PARAGRAPH 22 OF THE SPECIAL CONDITIONS TO APPENDIX H.

After reviewing 5 VRP, the alleged victim’s testimony, the State cannot develop an argument that alcohol or drugs contributed to appellant’s crimes. See *State v. Munoz-Rivera* 190 Wn. App. 870, 893-94, 361 P.3d 182 (2015). The State asks this court to impose the directory remedy of directing the trial court to strike paragraph 22 of the special conditions of Appendix H requiring alcohol evaluation and treatment.

D. CONCLUSION.

The prosecutor should not have asked Ms. Vargas whether she believed her daughter when her daughter made her disclosure. However that question was not objected to at trial, was presented in the least offensive way, and was never used to vouch for M.V.’s credibility at trial. Under the facts of this case, manifest constitutional error does not exist.

Defendant’s ER 803(d)(1)(iii) objection is very limited in scope because it depends (due to the absence of any objection at trial) solely upon the trial court’s *in limine* order, which was very narrow. This court

³⁰ In *Norris*, the condition was numbered “12” in the order imposing sentencing conditions. *Norris*, 1 Wn.App.2d at 199-200. In this case, the condition is numbered 11.

should not accept defendant's invitation to broaden ER 803(d)(1) to make up for that deficiency.

No claim of evidentiary error was preserved for Exhibit 1, the text messages exchanged by defendant and M.V.

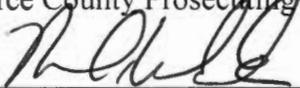
The computer and internet related crime related prohibitions were properly imposed, but the alcohol and childrens' activity area prohibitions were not properly imposed.

This case should be remanded to strike the words "use or" from paragraph 11 of Appendix H and to strike paragraph 18 of Appendix H. CP 92.

In all other respects, the judgment of the trial court should be affirmed.

DATED: July 18, 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 ~~US~~ 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.

7.18.18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 19, 2018 - 9:34 AM

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