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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID ROQUE-GASPAR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Timothy Ashcraft

No. 16-1-03825-7

Brief of Respondent

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

1. Did the trial court properly exercise its discretion when it reserved ruling on the State's fifth motion in limine to restrict testimony about A.G.'s interactions with boys but later permitted the defense to elicit such testimony? (Appellant's assignments of error 1 and 2).
2. Did the trial court properly deny defendant's motion to suppress his police interview where, under the totality of the circumstances, his statements were voluntary? (Appellant's assignment of error 3).

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 27, 2016, the State charged David Roque-Gaspar ("defendant") with four counts of first degree child rape. CP 3-4. Pre-trial motions began on January 25, 2018. RP 3.¹ State's fifth motion in limine included to "[e]xclude any evidence or argument suggesting that A.G. was

¹ The Verbatim Report of Proceedings (RP) are contained in 13 volumes and have consecutive pagination. They are referred to by page number.

promiscuous or that she received text messages from several boys” pursuant to Washington’s Rape Shield Law, RCW 9A.44.020(2). CP 5-17. The court heard oral argument from both sides regarding the motion. RP 109-113. At the oral hearing, the court held,

[s]o I’m just going to reserve on this issue. But before we get into that with any witness, Mr. Greene, you’re going to need to bring it up outside the presence of the jury.

RP 111. In a written order filed February 5, 2018, the court reserved ruling on State’s motion in limine number five. CP 20-22.

Following pre-trial motions arguments, a CrR 3.5 hearing was held regarding the admissibility of defendant’s initial police interview video. RP 26; Exh. 14.² The lead detective and defendant both testified, and the trial court heard argument from both sides. RP 26, 52, 86-97. The court ultimately found that defendant’s statements during the interview were made “knowing, voluntary, and intelligent.” RP 97. The court made specific oral findings that defendant was given *Miranda*³ warnings prior to questioning; the questions asked during the interview did not come “anywhere near” the types of deceptive questions that could potentially overcome a suspect’s otherwise voluntary confession; the hour and 40 minute interview was not unduly long, especially given the breaks

² A redacted transcript of the redacted interview was provided to the court for purposes of appellate review. Exh. 30. It was not admitted into evidence. RP 943-45.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

throughout; and defendant was of sound condition, maturity, education, physical condition, and mental health such that he could knowingly, voluntarily, and intelligently waive his constitutional rights. RP 97-101.⁴ Accordingly, the court held, “considering the totality of the circumstances,” that defendant’s statements were constitutionally admissible. RP 101. The interview video was played for the jury at the close of the State’s case in chief. RP 964-68; Exh. 14.

During the trial testimony of the victim, A.G., the trial court revisited the State’s motion in limine number five regarding A.G.’s “past sexual conduct” potentially prohibited under the rape shield law. RP 662-63, 667. At that point in the trial, it became apparent that A.G. disclosed the sexual abuse approximately two years after it ended while she was living in Tacoma with her father, Francisco Gaspar. RP 678-79. A.G. previously lived in Tacoma until her parents divorced in 2012, at which point A.G. moved to Arizona with her mother. RP 577-78. A.G. later moved back to Tacoma to spend time with Francisco⁵ approximately two years later. RP 653.

⁴ It does not appear that written findings of fact or conclusions of law were entered with the court.

⁵ Some witnesses will be referred to by the first names in order to avoid confusion where multiple parties share the same last name. No disrespect is intended.

Defense counsel attempted to elicit evidence that while A.G. was living with Francisco in Tacoma the second time, she was caught talking to and playing basketball with boys. RP 667-69. This, counsel argued, caused Francisco to become upset and cancel her quinceanera. *Id.* Defendant's theory of the case, which was presented during opening statements, trial testimony, and closing argument, was that Francisco was "possessive or something that made [A.G.] unhappy[,]" and that the restrictive environment she was in with Francisco, combined with him cancelling her quinceanera, caused A.G. to concoct a story about defendant raping her so she could return to her mother's less restrictive home in Arizona. RP 446-47, 667-68, 671, 1006-008, 1359-362. Defense counsel argued, therefore, that evidence about A.G.'s interactions with boys and Francisco's reaction was relevant and admissible to show A.G.'s motivation to fabricate a rape story about defendant. RP 667-70. On February 5, 2018, the trial court permitted defendant to inquire about A.G. talking to and playing basketball with a boy. RP 670. The court held that because the question was limited to non-sexual interactions, the rape shield statute did not apply; hence, the court did not need to decide what was meant by *past* sexual conduct under the statute. *Id.*

However, on February 8, 2018, the issue arose again during direct examination of defendant's second witness, Francisco. RP 976, 990-1005.

The State objected when it appeared that Francisco's testimony changed from him merely observing A.G. talking to and playing basketball with a boy, to him concluding that A.G. was flirting with a boy. RP 990-91.

During a hearing outside the presence of the jury, defense counsel revealed that Francisco actually saw A.G. hugging, kissing, and making out with multiple boys. RP 993, 999. The State argued that testimony about A.G. kissing a boy could trigger the suggestion that A.G. is "promiscuous in an attempt to inflame the passions and prejudices of the jury," and should be excluded. RP 994. The court ultimately permitted defendant to elicit testimony from Francisco that he saw A.G. "kissing a boy" for the limited purpose of establishing that there was a conflict between A.G. and Francisco, which allowed the defense to present its theory of the case. RP 1005. The court excluded any testimony that A.G. was seen "making out" with boys. *Id.*

On February 14, 2018, the jury found defendant guilty of all four counts of first degree child rape. CP 126-29. On March 16, 2018, the court sentenced defendant to 276 months confinement, followed by 36 months of community custody. CP 76-90. This timely appeal followed. CP 107-121.

2. FACTS

From 2010-2012, A.G. lived in Tacoma, Washington, with her family, including her cousin, the defendant. RP 1190. During those two years, defendant forcibly raped A.G., sometimes up to two times per week. RP 617, 629, 635. A.G. was nine years old when it started, and defendant was 15. RP 628-29, 1190; Exh. 8. The first time it happened, A.G. was sitting in her room alone when defendant walked in and asked if she wanted to have sex. RP 617-18. A.G. said no, and defendant left the room. *Id.* Shortly thereafter, defendant returned to A.G.'s bedroom wearing shorts. RP 618. Defendant grabbed A.G., pulled down her pants and underwear, and penetrated her vagina with his penis. RP 618-19. Defendant stopped only when he "heard somebody." RP 624.

A.G. recalled another specific instance of rape. RP 630. This time, A.G. was in her mother's bedroom watching her baby sister when defendant entered. RP 630-32. Defendant took the baby, set the baby aside, and then grabbed A.G. RP 633. Defendant pulled down A.G.'s pants and underwear and put his penis in her vagina. RP 635-36. When A.G. struggled, defendant held her down; when she tried to yell, he clamped his hand over her mouth. RP 635. Defendant finally stopped when he "heard somebody." RP 637.

A.G. testified about a third instance where defendant raped her on the couch. RP 642. It happened on the day A.G. was baptized. *Id.* A.G. came home late and sat on the couch to watch TV. RP 642-43. Everyone else had gone to bed. RP 644. Defendant went to A.G., pulled down her pants, inserted his penis into her vagina, and “continued until he was finished.” *Id.* A.G. testified that defendant raped her more than four times between the ages of nine to 11. RP 649, 651-52. A.G.’s mother, Chantelle Gaspar, recalled one time observing defendant run out of A.G.’s bedroom across the hall into his bedroom as she was coming up the stairs. RP 791-92. The stairs were not carpeted at the time, and they made a loud noise when anyone walked on them. RP 791-92.

A.G.’s parents separated in March 2012. RP 797. A.G. and her mother moved to Arizona. RP 797-98. Two years later, A.G. moved back to Tacoma to spend time with her father, Francisco Gaspar. RP 653, 796. She stayed in the same room she lived in before with Francisco. RP 657. Defendant stayed in the downstairs bedroom. *Id.*

While A.G. was living in Tacoma for the second time, Francisco told her that she was to “focus on school, prepare for the future,” and not chase boys. RP 989. A.G. was 13 years old at the time. RP 571. A.G. testified that on one occasion when she was playing basketball with a male friend, her father became upset. RP 675. He asked A.G. why she was

playing basketball with the boy instead of playing at her aunt's house and proceeded to lecture her about hanging out with boys. *Id.* Francisco testified that he later saw A.G. "kissing a boy[,]" so he cancelled her quinceanera. RP 1006.

Shortly thereafter, A.G. disclosed the sexual abuse she had experienced to her Aunt Rosa Torres. RP 678-79. Francisco did not find out about the rape allegations from A.G. RP 1007-09. Rather, Francisco only found out about A.G.'s allegations when Torres told him, approximately two weeks after Francisco cancelled A.G.'s quinceanera. *Id.* Francisco subsequently confronted A.G. about the allegations. RP 1042-43. After A.G. explained what defendant had done to her, Francisco told her to call her mother in Arizona. RP 1044. A.G. flew back to Arizona the next day. RP 1045. Francisco continued to live in Tacoma with defendant, and he did not speak to A.G. for months after. RP 1048. Francisco testified that he "did not believe" A.G. when she disclosed the abuse to him. RP 1078.

Upon A.G.'s return to Arizona, A.G. went to a doctor's appointment and disclosed the sexual abuse to her nurse. RP 693. The nurse called Arizona police, and A.G. was contacted for a forensic interview. RP 694, 716. On June 8, 2016, A.G. went to the interview in Arizona and talked "about what happened." RP 459-60, 695. A.G. later

participated in a Skype interview with the prosecutor and defense counsel. RP 716. She maintained her allegations the whole time. *Id.*

Detective Patricia Song of the Tacoma Police Department was assigned to A.G.'s case on May 23, 2016. RP 451, 455. Detective Song reviewed the video recording of the June 8, 2016, forensic interview and contacted defendant to set up an appointment. RP 460-61, 465. On July 5, 2016, defendant arrived at the Tacoma Police Department and participated in a recorded interview with Detective Song and Detective Philip Hoschouer. 465, 467, 541.

The detectives read defendant his *Miranda* warnings before beginning any substantive questioning. Exh. 14; exh. 30 (pp. 2-3). Defendant understood and waived his rights. Exh.14; exh. 30 (p. 3). When first confronted with A.G.'s allegations, defendant denied them completely, claiming he was "really religious" and a virgin. Exh. 14; exh. 30 (pp. 10-11). The detectives went into further detail and told defendant that A.G. said that from the time she was nine until she was 11, she remembered defendant raping her. Exh. 14; exh. 30 (pp. 11-12). Detective Song suggested that if A.G. consented to having sex, then "that's not rape, right?" Exh. 14; exh. 30 (p. 13). Defendant's response was redacted. *Id.* Detective Song then pressed defendant, "So do you remember?" *Id.* Defendant responded, "No, I don't... remember anything at all[.]" *Id.*

Detective Song explained to defendant that A.G. had made some “pretty serious” allegations and that defendant’s complete denial left Detective Song with “one extreme and then another.” Exh. 14; exh. 30 (pp. 14-15). Detective Song told defendant that she thought “the truth is somewhere kinda in the middle... [A.G.] wouldn’t just come out of left field and say that this happened[.]” Exh. 14; exh. 30 (p. 15). At that point, defendant strayed from his initial denial and admitted that he would sometimes “hug [A.G.,]” “hold her[.]” or sometimes “[j]ust lay down next to her[.]” on her bed. Exh. 14; exh. 30 (p. 16). Defendant later admitted to kissing A.G., “rubbing her [private] area” underneath her underwear, and pulling his pants down and getting on top of her. Exh. 14; exh. 30 (pp. 20, 22, 25-26, 33, 38). Defendant described one incident where he and A.G.

were just playing around and kinda just -- my hand just went towards and she kinda like stopped and she looked at me and -- but didn’t say anything, and then we just went our own ways and you know, we were fine the next day.

Exh. 14; exh. 30 (p. 19). At no point during the interview did defendant admit to having sexual intercourse with A.G. Exh. 14; exh. 30 (pp. 20, 22, 25-26, 33, 38).

Towards the end of the interview, Detective Song revealed her opinions about the allegations with statements like, “I think you guys had consensual sex[.]” “[t]ell us about the intercourse that she is

remembering[,]” and “if you had consensual sex with [A.G.], I need to know about it. Otherwise, what lies ahead of you is a world of hurt.” Exh. 14; exh. 30 (pp. 36, 37, 42). Despite Detective Song’s statements, defendant maintained throughout the entire interview that he did not have sexual intercourse with A.G. Exh. 14; exh. 30 (pp. 37, 42, 45).

Defendant testified on his own behalf at trial. Defendant testified that he drove himself to the police interview, he had his car keys and cell phone in his pockets during the interview, he knew he was free to stop the interview at any time, and after the interview ended he drove himself home. RP 1205-07, 1211-12. The entire interview lasted about one hour and 40 minutes. RP 1212.

Defendant admitted that he first fabricated a story during the interview to avoid talking about having intercourse with A.G. RP 1214. He admitted that he initially told detectives that he could not have had intercourse with A.G. because he was a virgin and active Christian. *Id.* Defendant then stated that he did not “remember” having intercourse with A.G. RP 1215-16. Eventually, defendant admitted that during the interview he stated that he kissed A.G., removed her pants and underwear, and touched her legs with his penis. RP 1249-50. However, defendant claimed that he was lying when he said those things to the detectives. RP 1250. He testified that he had witnessed his uncle get arrested before and

that that experience “heightened [his] perspective about authority[.]” RP 1183-84.

Despite his “heightened perspective” about authority, however, defendant maintained throughout the entire interview that he did not recall ever having intercourse with A.G. even when the detectives insisted he had. RP 1263-64. Defendant testified that he never fell prey to any perceived pressure exerted by the detectives during the interview. RP 1283-84.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT RESERVED RULING ON THE STATE'S FIFTH MOTION IN LIMINE TO RESTRICT TESTIMONY ABOUT A.G.'S INTERACTIONS WITH BOYS BUT LATER ALLOWED DEFENSE COUNSEL TO ELICIT SUCH TESTIMONY.

The Fifth Amendment to the United States Constitution and Article 1, section 3 of the Washington State Constitution guarantee the accused the right to defend against the State’s accusations. *See State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015). This includes the right to confront the prosecution’s witnesses through cross examination and the right to present witnesses on his own behalf. *Id.* at 295-96.

“These rights are not absolute, of course.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “Defendants have a right to present

only relevant evidence[.]” *Id.* If relevant, the burden then shifts to the State to show that “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720 (citing *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). But the State’s interest in “excluding prejudicial evidence must also ‘be balanced against the defendant’s need for the information sought,’ and relevant information can be withheld only ‘if the State’s interest outweighs the defendant’s need.’” *Id.* “[T]he integrity of the truthfinding process and a defendant’s right to a fair trial’ are important considerations.” *Jones*, 168 Wn.2d at 720 (citing *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)).

RCW 9A.44.020, Washington’s Rape Shield Law, provides that

Evidence of the victim’s past sexual behavior including but not limited to the victim’s marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim’s consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

However, where the exclusion of evidence of past general promiscuity would deprive the defendant of his ability to testify to his version of the incident, evidence of high probative value cannot be restricted regardless

of how compelling the State's interest is in doing so. *Jones*, 168 Wn.2d at 721 (citing *Hudlow*, 99 Wn.2d at 16-18).

The State's fifth motion in limine concerned evidence of A.G.'s "past sexual behavior" potentially barred by the rape shield law. CP 5-17. Pre-trial, the State moved to exclude "any evidence or argument suggesting that A.G. was promiscuous or that she received text messages from several boys." CP 5-17. The State and defense counsel argued about the motion insofar as it conflicted with defendant's ability to present a complete defense. Defendant's theory of the case was that while A.G. was living in Tacoma the second time, her father, Francisco, was very restrictive, especially concerning boys, and that when Francisco punished A.G. for kissing a boy, A.G. made up a story about defendant raping her so she could return to her mother's less restrictive home in Arizona. RP 667-68, 671. As explained below, the trial court permitted defendant to elicit testimony in support of this theory.

- a. The trial court properly exercised its discretion when it reserved ruling on the State's motion until the issue came up during trial.

It should first be noted that in defendant's opening brief, he claims that the trial court granted the State's fifth motion in limine on February 5, 2018, and then reversed itself on February 8, 2018, "during the second defense witness's testimony after AG had already testified," and

“weakened the defense’s opportunity to defend against the charges.” Brief of Appellant at 16. To clarify, on January 25, 2018, the court reserved ruling on the State’s fifth motion in limine. RP 111; CP 20-22. This ruling appeared to take into consideration the court’s uncertainty as to where exactly the testimony was going to go and what exactly defendant would attempt to elicit. The court held, “I don’t know if and when this will come up, but if it does, it needs to be done outside the presence of the jury before it comes out anywhere else.” RP 113.

On February 5, 2018, during the testimony of A.G., the court held that the question of, “[y]ou were talking to boys” was not an issue addressed by the rape shield statute and allowed defendant to ask that question on cross examination of A.G. RP 670. The court cautioned defense counsel, however, that “[i]f there’s something beyond that, Mr. Greene, you’re going to need to get permission of the Court[.]” *Id.* On February 8, 2018, Francisco unexpectedly testified that he saw A.G. “flirting with a boy.” RP 990. The court sustained the State’s objection as a violation of the pre-trial order and excused the jury. RP 670, 990-91; CP 20-22 (no. 5). The State argued that the statement about “flirting with a boy” went beyond merely “talking to boys,” previously allowed by the order in limine. RP 670, 991; CP 20-22 (no. 5). Defense counsel apologized for Francisco’s statement, explaining that he “can’t always

control what verb a client would say.” RP 992. Before making a final ruling on the scope of Francisco’s testimony, the court asked defense counsel to step outside, talk to Francisco, and find out what he planned to say on the stand. RP 993. When defense counsel returned, he told the court that Francisco said he observed A.G. “hugging,” “kissing,” and “making out” with more than one boy. RP 993, 999. After considering the purpose and implications of this testimony, the court ultimately allowed Francisco to testify that he saw A.G. “kissing a boy[,]” but not “making out” with anyone. RP 1005.

Evidentiary rulings are reviewed for abuse of discretion and may be reversed only if the trial court’s exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *State v. Lormor*, 172 Wn.2d 85, 94, 257 P.3d 624 (2011); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Here, the trial court reasonably exercised its discretion when it reserved ruling on the State’s pre-trial motion to restrict testimony regarding the victim’s previous interactions with boys. RP 111; CP 20-22.

The court made a calculated decision to avoid a blanket ruling on the State’s fifth motion in limine before it was fully apprised of what evidence defendant would attempt to elicit. As shown during Francisco’s testimony, even defense counsel was unsure as to what exactly Francisco

would testify about. *See* RP 990-92. Therefore, it cannot be said that the trial court’s decision to reserve ruling on the State’s fifth motion in limine was manifestly unreasonable or based on untenable grounds. ***Powell***, 126 Wn.2d at 258. And regardless of whether the evidence was excludable under the rape shield statute, ERs 401 and 403 also provided proper grounds for excluding the evidence. Thus, the trial court properly exercised its discretion.

- b. Reserving ruling did not prejudice defendant because he was able to present and argue his theory to the jury anyway.

Defendant next contends that the court’s decision to reserve ruling on the State’s fifth motion in limine on February 5, 2018, and then altering its ruling on February 8, 2018, weakened his opportunity to defend against the charges. Brief of Appellant at 16. However, the record shows that defendant was able to present his theory of the case during opening statements, witness testimony, and closing argument.

Defendant first presented his theory of the case during opening statements. He told the jury that while A.G. was living in Tacoma for the second time, her family was “very conservative, and they had some concerns about her behavior[.]” RP 446. He told the jury that A.G. was happy when she first returned to Tacoma, “but she then became unhappy,

and it was at that time that she came up with this story about being raped by Mr. Roque[.]” RP 446-47.

Defendant explored this theory throughout trial. Francisco testified on behalf of defendant that when A.G. returned to Tacoma to live with him for the second time, Francisco told her that she was to “focus on school, prepare for the future,” and not chase boys. RP 989. When Francisco saw A.G. “kissing a boy[.]” he cancelled her quinceanera, causing A.G. to become upset and “passive aggressive[.]” RP 1006. Francisco testified that he heard about the sexual abuse allegations only two weeks after cancelling A.G.’s quinceanera, even though A.G. had been living with Francisco for about a year prior. RP 1007-008. Francisco testified that he “did not believe” A.G. when she disclosed the abuse to him. RP 1078.

Finally, defendant argued during closing argument that when A.G. returned to Tacoma the second time, she was “an adolescent girl[.]” and Francisco was “putting some very strict rules on her.” RP 1359. When Francisco told A.G. that her quinceanera was cancelled “because of her behavior,” A.G. became upset and wanted to return to Arizona. RP 1361. Defendant then argued that Francisco insisted on having A.G. stay with him, prompting her to fabricate the rape allegations. *Id.* Defendant argued

that A.G.'s motive to lie was to return to her mother's less restrictive home in Arizona. RP 1362.

The difference between this case and *Jones*, 168 Wn.2d 713, is that in *Jones*, the court prohibited *any* testimony or cross examination about the claim that the rape victim was engaged in "a nine-hour alcohol- and cocaine-fueled sex party" to establish his defense of consent. *Jones*, 168 Wn.2d at 717. Here, the trial court allowed defendant to elicit testimony that formed his theory of the case, namely that A.G. was seen "kissing a boy," that this prompted Francisco to cancel her quinceanera, which then motivated A.G. to make up rape allegations about defendant so she could leave Francisco's strict home and return to Arizona. RP 446-47, 989, 1007-008, 1359, 1361-62.

The record shows that defendant was given a meaningful opportunity to present a complete defense, and he took advantage of it. Defendant claims his "right to put on a defense was substantially weakened by the court's delayed ruling and then reversal of the State's fifth motion in limine[,] brief of Appellant at 14, but he fails to state or show why he could not have recalled any of the witness that testified prior to the altered ruling.⁶ Recalling of witnesses prior to the close of a party's

⁶ Defendant does not raise an ineffective assistance of counsel claim.

case is a matter for the discretion of the trial court. *State v. McGinley*, 18 Wn. App. 862, 866, 573 P.2d 30 (1977). If defendant felt that he was unable to fully examine the witnesses based on the court's previous ruling, he could have made a motion to recall those witnesses. Moreover, by the time defendant rested, he had fully presented his theory of the case to the jury, and he argued that theory during closing. RP 1359-362. The trial court's preliminary decision to reserve ruling on the State's fifth motion in limine in no way prejudiced defendant's ability to present a complete defense.

c. The alleged error was harmless beyond a reasonable doubt.

Even if it was error for the trial court to reserve ruling on the State's fifth motion in limine, and later limit the scope of testimony from the witnesses, any error was harmless beyond reasonable doubt. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014) (citing *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). Constitutional errors are presumed prejudicial, and it is the State's burden to prove the error was harmless. *Id.* As detailed above, defendant presented considerable evidence in support of his case theory. *See* RP 675,

989, 1006-009. Hearing the evidence sooner rather than later would likely not have changed the outcome of the trial because after hearing all of the evidence, the jury nevertheless rejected defendant's theory.

Defendant's case theory was substantially diminished given that A.G. disclosed the rapes to her nurse in Arizona after she was free from Francisco's restrictive parenting environment. RP 693-95. And she did not stop there. A.G. also participated in a forensic interview while she was in Arizona, and she cooperated with the Pierce County Prosecuting Attorney's Office thereafter. RP 459-60, 694-95, 716. Also, as argued below, defendant admitted that sexual contact between him and A.G. occurred. Exh. 14; exh. 30. This evidence cut directly against defendant's theory of the case, leading a reasonable jury to conclude, beyond a reasonable doubt, that A.G. told the truth when she said defendant raped her. Thus, even if the alleged error had not occurred, the jury would have reached the same result. Any error was harmless beyond a reasonable doubt.

2. THE TRIAL COURT PROPERLY DENIED
DEFENDANT'S MOTION TO SUPPRESS HIS
POLICE INTERVIEW BECAUSE HIS
STATEMENTS WERE VOLUNTARY.

The Fifth Amendment to the United States Constitution and Article 1, section 9 of the Washington State Constitution prohibit admission of involuntary confessions at trial. *See State v. Unga*, 165 Wn.2d 95, 100,

196 P.3d 645 (2008). Whether statements obtained during custodial interrogations are admissible is based upon the totality of the circumstances surrounding the interrogation to determine “whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.” *Unga*, 165 Wn.2d at 100 (citing *Fare v. Michael*, 442 U.S. 707, 724-25, 99 S. Ct. 2560, 61 L. Ed.2d 197 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed.2d 854 (1973); *Miranda v. Arizona*, 384 U.S. 436, 475-77, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966)).

In addition to the inquiry of whether a confession was in fact voluntary, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’.” *Unga*, 165 Wn.2d at 101 (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed.2d 473 (1986)). “Thus, both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant’s ability to resist the pressure are important.” *Unga*, 165 Wn.2d at 101.

Potentially relevant circumstances in the totality-of-the-circumstances analysis include

the “crucial element of police coercion;” the length of interrogation; its location; its continuity; the defendant’s maturity, education, physical condition, and mental health;

and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation.

Unga, 165 Wn.2d at 101 (citing *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed.2d 407 (1993)). While an officer’s “psychological ploys such as playing on the suspect’s sympathies, saying that honesty is the best policy, or telling the suspect that he could help himself by cooperating may play a part in a suspect’s decision to confess,” so long as that decision is a product of the suspect’s own balancing of competing considerations, the confession is voluntary. *Unga*, 165 Wn.2d at 102 (citing *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir. 1986); *United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir. 1993)). The question, therefore, “is not whether [the interrogating officer’s] statements were the cause of [the defendant’s confession] ... but whether those statements were so manipulative or coercive that they deprived [the defendant] of his ability to make an unconstrained, autonomous decision to confess.” *Miller*, 196 F.2d at 605; *Unga*, 165 Wn.2d at 102. Where there is substantial evidence that a confession was voluntary, the decision by the

trial court to admit the confession will not be altered on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).⁷

- a. Defendant's statements were still voluntary even though defendant was held back one year in high school.

When evaluating the totality of the circumstances to determine the voluntariness of a confession, a court should take into consideration “the defendant’s maturity, education, physical condition, and mental health[.]” *Unga*, 165 Wn.2d at 101. In *U.S. v. Preston*, 751 F.3d 1008 (Ninth Cr. 2017), the Court of Appeals held that the defendant’s limited mental capacity produced an involuntary confession. *Preston*, 751 F.3d at 1028. There, the defendant was 18 years old and had an IQ of 65. *Id.* at 1020. The defendant’s intellectual disability became apparent to the officers early in their interrogation, and the officers inquired directly if the defendant was disabled. *Id.* At first, the defendant did not understand what the word “disabled” meant, but after the officers explained it to him, the defendant agreed he was disabled. *Id.* at 1020-21. The Ninth Circuit held that given that the defendant “had to ask for an explanation of a common

⁷ Although it appears the trial court did not enter written findings of fact or conclusions of law following the CrR 3.5 hearing, it made detailed oral findings of fact and conclusions of law. RP 97-101. Defendant does not challenge the court’s failure to enter written findings and conclusions. Where a trial court fails to enter written findings of fact and conclusions of law in support of its ruling to admit a defendant’s inculpatory statements to police officers, the court’s detailed oral findings and conclusions are sufficient to allow review. See *State v. Elkins*, 188 Wn. App. 386, 396, 353 P.3d 648 (2015); *State v. Riley*, 69 Wn. App. 349, 848 P.2d 1288 (2018).

word itself suggests the extent of his cognitive impairment.” *Id.* at 1021. For that reason, among many others, the court held that the defendant’s statements were involuntary. *Id.* at 1027-28.

Unlike *Preston*, the facts here do not call into doubt defendant’s cognitive function or ability to give a voluntary statement to police. Here, although defendant admitted he was held back during his Sophomore year of high school, he testified that this was not due to a learning disability but, rather, his failure to complete his homework. RP 52-53, 60. In fact, despite his failure to complete his homework, defendant testified that he still did well on tests. RP 60. Defendant clarified that he “did class work and the tests fine... didn’t do my homework very much.” RP 52-53. Defendant further agreed that he is a “pretty smart person.” RP 60. Defendant graduated high school in 2014, he worked on a farm and in a warehouse, and he drove himself to the interview alone. RP 52-53, 59, 63-64.

Given the lack of any indication that defendant suffered from any cognitive or educational deficiency, the trial court properly found that “defendant’s condition, his maturity, education, physical condition, and mental health... was sufficient by which he could knowingly, voluntarily, and intelligently waive his constitutional rights.” RP 101. Thus, the trial court did not err when it denied defendant’s suppression motion.

- b. The fact that defendant has been “afraid of authority” and previously witnessed his uncle get arrested did not render his confession involuntary.

In addition to defendant’s maturity, education, physical condition, and mental health, the court should also consider the length of the interrogation, its location, and its continuity when evaluating the voluntariness of the defendant’s statements. *Unga*, 165 Wn.2d at 101. While defendant testified that he had “always been afraid of authority[,]” he did not testify that he feared law enforcement. RP 54-55. Defendant testified that he previously witnessed police search his house and arrest his uncle, but he excluded law enforcement officers when he testified that he had “always been afraid of authority, whether it was ... teachers, or other parents or principals ... I just never ... wanted to mess around ... with authority or anything[.]” RP 54-55. And despite his fear of authority, defendant agreed that he violated his teachers’ orders when he failed to complete his homework. RP 62-63.

Additionally, the atmosphere during the interview did not indicate a threat of authority either. After the CrR 3.5 hearing and watching the interview video, the court held,

there were several times that the defendant took sometimes over a minute, sometimes longer, before saying anything in response to the investigator's comments. And I find this significant because this was not a case where the detectives were overbearing. They were not in the defendant's face. They were not loud. I did not find them aggressive. They were relatively gentle, I would say, in their questioning of the defendant. And he had ample time to consider their statements and respond as he felt appropriate.

RP 100-101. These findings, supported by the video, do not indicate that defendant's ability to make a voluntary statement was overcome by his fear of authority. Exh. 14. Rather, these findings support the trial court's conclusion that defendant's statements were voluntarily made. RP 101.

- c. The statement by Detective Song that defendant would be in a "world of hurt" if he did not tell the truth necessarily failed to overcome defendant's will to confess.

“[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’.” *Unga*, 165 Wn.2d at 101 (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed.2d 473 (1986)). “Thus, both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant's ability to resist the pressure are important.” *Unga*, 165 Wn.2d at 101.

There was no indication that defendant's will to confess was overcome by Detective Song's statement that defendant would be in a “world of hurt” if he refused to admit to having intercourse with A.G. Exh. 14; Exh. 30 (p. 36-37, 42). Defendant successfully maintained throughout

the entire interview that he never had sexual intercourse with A.G., despite Detective Song's repeated assertions that he had. Detective Song pressured defendant with statements like, "I think you guys had consensual sex[,]" "[t]ell us about the intercourse that she is remembering[,]" and "if you had consensual sex with [A.G.], I need to know about it. Otherwise, what lies ahead of you is a world of hurt." Exh. 14; exh. 30 (36, 37, 42). While defendant may have made some incriminating statements, the detectives were nonetheless unable to overcome defendant's total denial of ever having sexual intercourse with A.G. Exh. 14; exh. 30 (p. 20, 22, 25-26, 33, 38). During the CrR 3.5 hearing, defendant agreed that when he refused to admit to having intercourse with A.G., he contradicted what the detectives said he did. RP 84-85.

Accordingly, the interview showed that defendant's will to confess was not overborne by police pressure because defendant refused to admit to having sexual intercourse with A.G., despite Detective Song's assertions that he had. In light of the totality of the circumstances, defendant's ability to resist police pressure showed that his statements were voluntarily made. *Unga*, 165 Wn.2d at 101. The trial court properly denied defendant's suppression motion.

- d. Use of techniques from the Reid manual did not render defendant's statements involuntary.

Even assuming that Reid interrogations involve implicit threats or promises, all other circumstances of the interrogation must still be assessed to determine if the confession was voluntary. *See Broadaway*, 133 Wn.2d at 132 (citing *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991)). Here, the detectives' statements that there was "one extreme and then another" was potentially derived from the Reid manual. Exh. 14; exh. 30 (pp. 14-15). However, use of Reid techniques alone does not necessarily render a confession involuntary. *See Broadaway*, 133 Wn.2d at 132. The court must still examine the totality of the circumstances surrounding the entire interview to determine the voluntariness of a defendant's statements. *Id.*

Here, the totality of the circumstances provided substantial evidence that defendant's confession was voluntary. *See Unga*, 165 Wn.2d at 100; *Broadaway*, 133 Wn.2d at 131. The detectives' statements to defendant and alleged use of techniques from the Reid manual were not so manipulative or coercive that defendant was deprived of his ability to make an unconstrained, autonomous decision to confess. *See Miller*, 196 F.2d at 605; *Unga*, 165 Wn.2d at 102. This was shown by defendant's

repeated refusal to admit to having sexual intercourse with A.G. despite Detective Song's insistence that he had. Exh. 14; exh. 30 (pp. 20, 22, 25-26, 33, 36-38, 42). The court found that the detectives were not overbearing, they were not in defendant's face, and they were not loud or aggressive. Exh. 14; RP 100-101. In fact, they were relatively gentle in their questioning of defendant. *Id.*

Although defendant was held back one year in high school and had previously witnessed an incident with law enforcement, there was no indication that he lacked the capacity to understand his rights or the consequences of waiving his rights. Defendant was given *Miranda* warnings, and he voluntarily waived his rights. RP 30-31, 33. The entire interview lasted for about one hour and forty minutes, and the court found that this was not "unduly long, especially given [the] breaks." Exh. 14; RP 49-50, 67, 101. Defendant sometimes took a minute or longer to respond to the detectives' comments, and he was offered water during the interview. Exh.14; RP 66, 100-101. Defendant knew that he could stop the interview at any time. RP 64. He had his phone and car keys with him during the entire interview. RP 64, 1266.

Under the totality of the circumstances, defendant's statements were voluntary and admissible. *Unga*, 165 Wn.2d at 100. The trial court properly denied defendant's motion to suppress the interview.

e. Harmless error

Even if it was error to admit defendant's police interview, any error was harmless beyond a reasonable doubt. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014) (citing *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). Constitutional errors are presumed prejudicial, and it is the State's burden to prove the error was harmless. *Id.*

A.G. gave three specific examples of times when defendant raped her: one while she was in her bedroom, one while she was in her mother's bedroom with her baby sister, and one while she was watching TV on the couch after her baptism. RP 617-19, 624, 630-37, 642-44. A.G. testified that defendant would hold her down to prevent her from escaping and cover her mouth to stop her from screaming. RP 635. He would stop when he heard someone coming. RP 624, 637. That testimony was corroborated by Chantelle Gaspar's testimony that the stairs were uncarpeted and made a loud noise when walking on them. RP 791-92. Chantelle's testimony that she once saw defendant run out of A.G.'s room further supported

A.G.'s accounts. *Id.* A.G. testified that there were many more instances of rape that she could not remember in detail. RP 617, 629, 635, 649, 651-52.

A.G.'s conduct after her initial disclosure also indicated that A.G. did not lie about the sexual abuse. After A.G. was freed from Francisco's restrictive parenting environment, she disclosed the rapes to her nurse in Arizona. RP 693-95. A.G. participated in a forensic interview in Arizona, and she cooperated with the Pierce County Prosecuting Attorney's Office. RP 459-60, 694-95, 716. The jury would have found defendant guilty of first degree child rape beyond a reasonable doubt based on this evidence alone. In fact, the jury had to believe evidence separate from the interview video to convict defendant because defendant did not confess to sexual intercourse in the interview. CP 56-60; Exh. 14; exh. 30.

Thus, even if the trial court granted defendant's suppression motion, and defendant's police interview video was never played for the jury, the outcome of the trial would not have changed.

D. CONCLUSION.

Defendant was given a meaningful opportunity to present a complete defense. He took advantage of that opportunity; however, the jury ultimately rejected his theory of the case. Defendant's statements in the police interview video were voluntarily made, and the trial court properly denied defendant's motion to suppress the video. For the reasons

above, the State respectfully requests this Court affirm defendant's convictions and sentence below.

DATED: March 18, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


MICHELLE HYER

Deputy Prosecuting Attorney
WSB # 32724



Madeline Anderson
Rule 9 Intern

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.

3/18/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 18, 2019 - 4:18 PM

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