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No. 52400-7-II

**IN THE STATE OF WASHINGTON
COURT OF APPEALS DIVISION II**

STATE OF WASHINGTON, Respondent,

v.

STACEY BRIANNA ALLEN, Appellant.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
#17-1-01729-1

**BRIEF OF RESPONDENT
STATE OF WASHINGTON**

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INTRODUCTION

“Trial courts generally have wide discretion in deciding whether or not to grant a new trial because the trial judge who has seen and heard the witnesses is in a better position to evaluate and adjudge than can appellate courts from a cold, printed record.” State v. Lopez, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018). Defendant Stacey Allen asserts that a snippet of testimony – “she got a girlfriend” – inflamed the jury and deprived her of a fair trial. (2RP 190).

Pierce County Superior Court Judge Kitty Ann VanDoorninck found otherwise and denied Defendant’s motion for a mistrial.

I told [the Jury] to disregard it. If you want me to give some other special instruction, I’m more than happy to do that.

I think given how long ago it was, I mean, just the time frame of what we’re talking about and that it’s not --- I guess I don’t feel like it’s prejudicial enough.

(2RP 198-99). Defendant Allen’s sexual orientation was irrelevant to the charges against her, and the trial court appropriately granted a motion in limine to exclude mentioning it. But the inadvertent allusion to a girlfriend did not affect the Jury’s deliberation or verdict.

Because the Jury convicted Defendant Allen based on substantial evidence after a fair trial, the State of Washington

respectfully requests the Court to affirm Defendant's conviction and dismiss her appeal.

I. RESTATEMENT OF ISSUES PRESENTED

Defendant Allen's appeal presents two issues:

A. A trial court's denial of a motion for mistrial will be overturned only when there is a substantial likelihood that the error prompting the request for a mistrial affected the jury's verdict." State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). The Jury evaluated the evidence at trial and convicted Defendant on only two of four charges. Can Defendant prove it was substantially likely that the Jury convicted her because of her sexual orientation?

B. "A sentencing court may consider a defendant's youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines under the SRA." State v. Houston-Sconiers, 188 Wn.2d 1, 24, 391 P.3d 409 (2017). The trial court evaluated Defendant's youth as a mitigating factor and exercised its discretion by imposing a sentence at the low end of the standard range. Did the court abuse its discretion?

II. STATEMENT OF FACTS

In her Opening Brief, Defendant does not assign error to any jury instructions, the Jury's verdict, or the evidence supporting her

conviction. Instead, she argues that one moment of testimony so inflamed the Jury that it overwhelmed the other evidence at trial. The trial transcript shows the opposite

A. T.W. Testified to Four Incidents of Sexual Abuse.

The State tried Defendant Allen on four counts of sexually abusing her young niece, T.W. (Amended Information; CP 93-94). The abuse began when T.W. was five and Allen was 15, ending three years later. (2RP 190) (3RP 454) (Allen ten years older than T.W.) At trial, T.W. testified to four separate events over those three years.

The first took place at her great grandmother's house. (2RP 161) T.W. was five when her aunt, Defendant Allen, pulled her behind a couch.

A. I was at my other grandma's house, my great grandma's house –

Q. Okay.

A. -- and the next thing I remember is her taking me behind a sofa.

Q. ...Tell me what happened behind the sofa?

A. There was a green vibrator underneath the sofa that she grabbed while all the family was in the kitchen.

Q. Where – what did she do when she grabbed the vibrator?

A. She started to pull down her pants and pull down mine.

Q. You were five years old at the time?

A. Yes.

(2RP 161). Defendant made T.W. use the vibrator on them both.

(2RP 163). It ended when the girls were called for dinner. (2RP 165).

The second incident occurred when T.W. was five or six at Grandma June's house. (2RP 170). Defendant Allen lived there, and T.W. would visit nearly every weekend. (3RP 480). One day around noon, Grandma June left to go to the store, leaving Defendant and T.W. alone. T.W. was downstairs where Allen played a pornographic movie.

Q. ...What happened then after she put the pornography on?

A. She started to take off her clothes.

Q. Then what happened?

A. Then she started to take off mine.

Q. What did you do when she started to take off your clothes?

A. I was just sitting there helpless.

Q. Did you say "helpless"?

A. (Nodding head).

(2RP 171). T.W. described Defendant digitally penetrating her and commanding her to do the things they were watching on the screen.

(2RP 173-75). This incident ended shortly before Grandma June returned from the store. (2RP 175).

The third event also took place at Grandma June's house. T.W. was seven. (2RP 185). The girls were alone, and Defendant grabbed T.W.

She dragged me upstairs, pulled me upstairs and she took me into the spare bedroom, which was my bedroom. She got a toothbrush from the bathroom that was already in there, a vibrating toothbrush.

(2RP 181). Once in the bedroom, Defendant had T.W. masturbate her with the vibrating toothbrush. (2RP 183). This ended when the girls heard Grandma June drive up to the house. (2RP 184).

The last incident occurred in Allen's bedroom at Grandma June's. The girls were watching the movie "Blade" when Defendant took her clothes off and removed T.W.'s. She got the vibrating toothbrush.

Q. Then what?

A. Then she started to finger me and put the toothbrush toward the top of my vaginal (phonetic) area.

Q. Is that the part of your verginal (phonetic) area that you kind of had trouble pronouncing earlier this morning?

A. Yes.

(2RP 187). Defendant stopped before Grandma June come home.

T.W. did not recall any abuse other than these four events. (2RP 187).

B. Defendant Denied That Any Abuse Occurred.

Defendant Allen testified at trial, denying that any abuse took place. (3RP 473) (“absolutely not”). She did concede on cross examination that T.W. and she were in the same house most weekends for nearly nine years.

Q. And so that was about a nine-year span, correct?

A. Yes, sir.

Q. Every single – almost every single weekend, she would be over at your house?

A. I would say somewhat every single weekend.

Q. Okay. At least three weekends a month. Is that fair?

A. That’s fair to say.

(3RP 480).

She also admitted that during those nine years, it was possible she was alone with T.W. for short periods.

Q. At the age of 14, you could have watched a kid Tamia's age for 30 minutes, right?

A. Correct. My mother believed that kids didn't watch kids.

* * * *

Q. When you were 15, that was also a possibility, you could have also watched her, right?

A. Yes.

Q. Or 16, correct?

A. Yes.

Q. Or 17?

A. Yes.

Q. Or 18?

A. Yes.

(3RP 481).

C. The Jury Convicted Defendant on Two Counts of Child Molestation.

After a three-day trial, the Jury returned its verdict, finding Defendant not guilty on counts I and II, Rape of a Child in the First Degree, and guilty on counts III and IV, Child Molestation in the First Degree. (Verdict Forms I-IV; CP 212-219). The Jury also found for

counts III and IV that Defendant used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime. (Special Verdict Forms III-A & IV-A; CP 217, 219).

D. After Considering Defendant Allen's Youth, The Trial Judge Sentenced Her to The Low End of The Standard Range.

On August 23, 2018, Pierce County Superior Court Judge Kitty Ann VanDoorninck sentenced Defendant Allen to 67 months incarceration on each count to run concurrently. (Judgment and Sentence ¶ 4.5; CP 253). This was the lowest allowable sentence in the standard range for Defendant's offenses and history. Judge VanDoorninck entered this sentence, in part, to reflect Defendant Allen's youth when she committed the crimes.

The jury convicted you of two counts of Child Molestation. There's just no doubt about that. I appreciate that you have the love and support of at least half your family, it seems like. And that's good and I did acknowledge and read all the letters of support. You have a lifetime ahead of you of being a mother to your children, and [T.W.] has a lifetime of dealing with what happened to her. I have to acknowledge that. And I appreciate that you were young at the time. I'm not going to give an exceptional sentence downward. I don't think that's appropriate. You were young but also the jury found an aggravating factor there, and I need to consider that as well, because that's what the Legislature talks about in terms of the jury findings to these things.

(5RP 578).

Defendant now appeals, arguing that the trial court erred by denying her motion for mistrial and by failing to adequately consider her youth at sentencing.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's denial of a mistrial for an abuse of discretion.

We review a trial court's decision whether or not to grant a new trial for abuse of discretion. A trial court's wide discretion in deciding whether or not to grant a new trial stems from the oft repeated observation that the trial judge who has seen and heard the witnesses is in a better position to evaluate and adjudicate than can we from a cold, printed record.

State v. Hawkins, 181 Wn.2d 170, 179, 332 P.3d 408 (2014).

The Court reviews the trial court's sentence for an abuse of discretion.

Sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not... Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017)

(citations omitted).

IV. THE COURT APPROPRIATELY DENIED DEFENDANT’S MOTION FOR MISTRIAL.

Declaring a mistrial has serious consequences for defendants, testifying witnesses, and the State. For good reason, Washington law gives trial courts substantial discretion to decide whether an error has damaged a trial irrevocably.

In determining whether a trial court abused its discretion in denying a motion for mistrial, this court will find abuse only when no reasonable judge would have reached the same conclusion. The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial. In determining the effect of an irregular occurrence during trial, we examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.

State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (footnotes

and quotations omitted).

Here, the trial court appropriately denied Defendant Allen’s motion for mistrial for three reasons. First, in context, T.W.’s short statement that Defendant “got a girlfriend” was not a serious error. At trial, all parties agreed that Defendant’s sexual orientation was

irrelevant and should be excluded. T.W., a 14-year-old middle schooler, testifying under stressful conditions, slipped up and mentioned Defendant's girlfriend when explaining why the abuse stopped.

Q. Did anything change? Did you stop going over to Grandma June's house or anything?

A. No.

Q. They just stopped?

A. Because she got a girlfriend.

MR. HESTER: Objection, Your Honor. I would like to be heard outside the presence of the jury.

THE COURT: I'm just going to ask you to move on. We will take that up later.

MR. CUMMINGS: I will, Your Honor.

MR. HESTER: Your Honor, I would ask the jury to be instructed to disregard.

THE COURT: Disregard the last answer.

MR. CUMMINGS: I will join in that.

THE COURT: Yes.

Q. (By Mr. Cummings) At some point, it stopped. Did you, between the ages of five and eight, tell your mom about what happened to you?

A. No.

(2RP 190).

T.W.'s statement was not so prejudicial that it required an immediate mistrial. Irrelevant evidence is not per se prejudicial. In her Opening Brief, Defendant describes the history of homophobia in the United States and its appearance in older caselaw. (Opening Brief at 14-20). The State does not dispute the accuracy of this history, but strongly disputes that homophobia affected Defendant's trial. Public perception of sexual orientation has evolved significantly – as the trial judge recognized. "I think your speculation that the jury would think, 'Oh, well, then she's more likely to do this,' is certainly not scientifically true." (2RP 199).

In context, one fleeting comment about her getting a girlfriend did not deprive Defendant of a fair trial.

Second, the evidence and the error were not cumulative. No other witness mentioned Defendant's orientation and both counsel scrupulously complied with the trial court's order throughout trial. During a three-day trial, only T.W. made a short reference to Defendant having a girlfriend. No one called attention to the issue.

Third, the trial court immediately instructed the Jury to disregard the comment and was willing to offer further instruction if Defendant wanted. Wisely, counsel decided to let it be. This Court

assumes that the Jury followed the trial court's instruction to disregard T.W.'s comment. State v. Brunson, 128 Wn.2d 98, 109, 905 P.2d 346 (1995) ("the court assumes juries follow all the instructions given"). The Jury's verdict shows that it carefully examined the evidence for each charge and decided separately for each whether the State had met its burden.

Judge VanDoorninck appropriately denied Defendant's motion for mistrial at the time, and the remainder of the trial, along with the Jury's verdict, show that this was a reasonable ruling. Defendant fails to satisfy the high standard for reversing this discretionary decision.

V. THE SENTENCING JUDGE DID NOT ABUSE HER DISCRETION BY STAYING WITHIN THE STANDARD RANGE.

Defendant Allen also challenges her standard-range sentence, asserting that "the court had a duty to actually meaningfully consider Ms. Allen's youth at the time of the offenses as a possible mitigating circumstance." (Opening Brief at 31). Defendant faults the trial court and defense counsel for not holding a Miller hearing to examine Defendant's youth as a mitigating factor. (Opening Brief at 30); Miller v. Alabama, 567 U.S. 460, 132 S.Ct.

2455, 183 L.Ed.2d 407 (2012). There are at least two flaws in this argument.

First, Defendant's sentence, 67 months, was not a defacto life sentence mandating a Miller hearing. In her Opening Brief, Defendant repeatedly cites to the Washington Supreme Court's opinion in State v. Ramos, 187 Wn.2d 420, 387 P.3d 650, 655 (2017), as amended (Feb. 22, 2017), reconsideration denied (Feb. 23, 2017), cert. denied, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017). There, the Supreme Court required a Miller hearing under specific circumstances.

Where a convicted juvenile offender faces a possible life-without-parole sentence, the sentencing court must conduct an individualized hearing and take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. This individualized Miller hearing gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Ramos, 187 Wn.2d at 428–29 (citations omitted).

The Supreme Court does not require the same formal, searching scrutiny for all sentences. Instead, sentencing courts must exercise the discretion they have always had: to take youthfulness into account as a mitigating factor. "Trial courts must consider mitigating qualities of youth at sentencing and must have discretion

to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.” State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017); Matter of Light-Roth, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) (“RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court’s discretion”).

Second, the trial court appropriately exercised that discretion here. Judge VanDoorninck carefully considered Defendant’s youth as a mitigating factor and entered a low-end standard-range sentence as a result. (5RP 578). Defendant wants more, arguing that “the court failed to undergo a proper Miller analysis.” (Opening Brief at 34). But other than being more explicit about the factors it examined, the sentencing court considered all the relevant factors that guide its discretion. Defendant wants the court to give greater weight to the mitigating factors. That is an unreasonable request. “Age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence.” State v. O’Dell, 183 Wn.2d 680, 695, 358 P.3d 359 (2015).

The trial court acted well within its discretion sentencing Defendant to the low end of the standard range. Although she would

have liked a shorter sentence, Defendant received full, meaningful consideration of her youth as a mitigating factor.

CONCLUSION

Trial courts exercise discretion over criminal trials, and the sentences that follow, because they see and hear everything at trial. Appellate courts guard that discretion by recognizing the limits of reviewing a cold record, deferring to trial courts where appropriate. Here, the trial judge ruled reasonably and sentenced Defendant fairly. The State of Washington respectfully requests this Court to affirm Defendant's Judgment and Sentence and dismiss her appeal.

DATED this 12 day of June, 2019.

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By 

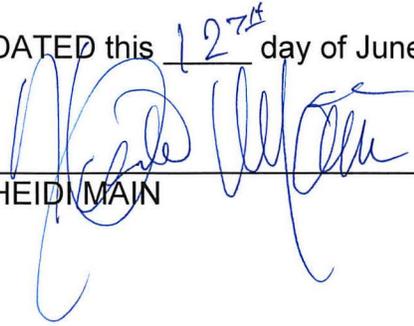
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **State of Washington's Response Brief** to:

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DATED this 12th day of June, 2019.



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