

FILED
Court of Appeals
Division II
State of Washington
1/29/2020 8:00 AM
No. 53343-0-II

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

STATE OF WASHINGTON, RESPONDENT

V.

TOMAS M. GASPAR, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Monty D. Cobb, Judge

No. 18-1-00263-0

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Nurse Wahl's testimony about A.B.'s behaviors and statements did not constitute an opinion on guilt, and defense counsel was not ineffective for failing to object to this testimony.
 - a) Nurse Wahl's testimony did not amount to an opinion on guilt.
 - b) Defense counsel was not ineffective for failing to object to Nurse Wahl's testimony about the behaviors typically exhibited by child victims of sex crimes and that A.B. exhibited such behaviors.
2. The prosecutor did not commit prejudicial misconduct in closing argument.
 - i) The prosecutor's comment asking the jury to focus on the elements at issue in the case and not to speculate about irrelevant evidence or other facts not presented to the jury was not improper and did not have any prejudicial effect on the trial.
 - ii) During closing argument the prosecutor mentioned "the hearsay rule" to the jury when arguing that the victims' reports to Nurse Wahl were probably reliable because the reports were made for the purpose of medical treatment or diagnosis. However, the prosecutor's use of the term "hearsay rule" was a fleeting reference that probably had no effect on the jury.
 - iii) Because he has not shown prejudice, Gaspar's claims of prosecutorial misconduct must fail.
3. Gaspar has not shown sufficient error in this case to apply to the cumulative error doctrine.

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4. Plethysmograph testing at the direction of the CCO or per DOC policy is unconstitutional and is unauthorized by law.
5. Internet related condition must be stricken because it is not crime related. And, the condition unconstitutionally infringes on First Amendment rights and is unconstitutionally overbroad.
6. The condition imposing interest on all of Gaspar's LFOs must be stricken from the judgment and sentence.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Gaspar's statement of facts, except where additional or contrary facts are offered below in relation to the State's individual arguments in response to Gaspar's assignments of error. RAP 10.3(b).

C. ARGUMENT

1. Nurse Wahl's testimony about A.B.'s behaviors and statements did not constitute an opinion on guilt, and defense counsel was not ineffective for failing to object to this testimony.
 - a) Nurse Wahl's testimony did not amount to an opinion on guilt.

At trial, Nurse Wahl first testified about her background, training and experience as a pediatric sexual assault nurse practitioner. RP 184-86. She then gave a general summary of the practices and role of her employer, Providence St. Peter Hospital Sexual Assault Clinic and Child

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Maltreatment Center, when treating children who are referred to the clinic. RP 185, 186-193. Mixed in with the generalized description were explanations about the special needs of child victims of sex crimes, such as the frequency of delayed disclosure and the impacts caused by delayed disclosure. RP 188-89. Nurse Wahl explained that her purpose is healthcare treatment. RP 193

Nurse Wahl then began testimony that was more specific to her examinations of the three child victims in the instant case, beginning with A.B. RP 193. A.B. was twelve years old when Nurse Wahl examined her. RP 194. Nurse Wahl described A.B.'s demeanor, as follows:

[W]hat struck me was that she had a very, what I call a blunt or a flat affect. She was not demonstrative in her facial expressions. Her eye contact was minimal to moderate at best. She was clearly guarded and what appeared to me to be shut down. And as she spoke she spoke without elaboration. She wore a hoodie, she was just very, very – unfortunately, appeared to be in internal distress.

RP 194.

Nurse Wahl testified that A.B....

was able to confirm in a head-to-toe manner what she had disclosed had happened to her for half of her life. At that time she was twelve, so starting at six, in the first grade, being sexually abused by her father. And she described in terms of *it* usually happened and sometimes *it* would happen, and these are terms that come out when a child has had so many sexual experiences with the perpetrator that they've blurred, and so there's patterns of

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experiences versus isolated incidences where they can tease out, pinpoint that one.

RP 194 (emphasis added). Nurse Wahl then catalogued a list of sex acts that A.B. “was able to describe and confirm” that the perpetrator had committed against her. RP 195. A.B. described the perpetrator of these sex acts to be her father, Gaspar. RP 208.

Nurse Wahl described the conversation she had with A.B. and explained that:

It’s from my discussion with her, using anatomically correct diagrams of male and female bodies, and going in a head-to-toe fashion, that this is – using the female as her as an example and the male anatomy as her father and going head-to-toe, each position, each penetration, each contact as yes or a no.

RP 196. Nurse Wahl further explained:

The sexual abuse disclosure made to Ms. Villa prompted me to utilize a head-to-toe body assessment of both what has happened to her and what if anything was she expected to do to her father’s body to garnish an understanding of the scope, the spectrum and the concerns that I may need to address ultimately, as far as her health – physical and mental health outcomes.

RP 199. Nurse Wahl explained that this was a procedure that is “based on [her] standard of care that [she] provide[s] every child when they come to the clinic every time, in a head-to-toe process.” RP 200.

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Gaspar contends that Nurse Wahl “offered her opinion that A.B. had been abused and that Gaspar was the perpetrator.” Brief of Appellant at 16. But Nurse Wahl was not expressing an opinion; instead, she was discussing what A.B. had told her. A.B. specifically identified her father, Gaspar, as the perpetrator. RP 208. Statements to medical providers that identify the perpetrator of a crime are generally inadmissible hearsay, but courts have made an exception for child patients. *State v. Ashcraft*, 71 Wn. App. 444, 456, 859 P.2d 60 (1993). And in child sexual abuse cases, statements identifying the perpetrator are admissible. *State v. Hopkins*, 134 Wn. App. 780, 142 P.3d 1104 (2006); *State v. Ackerman*, 90 Wn. App. 477, 482, 953 P.2d 816 (1998).

Nurse Wahl also testified generally, and on a few occasions about A.B. specifically, about the typical reactions and behaviors to sexual abuse. RP 201-04. Testimony about the typical behaviors and reactions to sexual abuse may be admissible. *State v. Stevens*, 58 Wn. App. 478, 496, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990). In cases of crimes against children, the accusing child’s credibility is apt to be a central issue. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). “Once a witness’s credibility is in issue, evidence tending to corroborate the testimony may,

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in the trial court's discretion, be obtained from an expert witness." *Id.* at 575.

Citing RP 202-04, Gaspar contends that Nurse Wahl testified that "A.B. suffered from physiological manifestations of sexual abuse by *Gaspar* and not another family member who had apparently also abused A.B., but who was not investigated." Brief of Appellant at 16. But Gaspar's citation to the record does not support his contention.

Nurse Wahl's reference to Gaspar was brief; she only briefly discussed the difficulty a child might have when disclosing against the child's own father. RP 202. And at least in this context, Nurse Wahl never discussed or even mentioned that A.B. was also sexually abused by another family member. RP 202-04. On cross examination – after Nurse Wahl gave the testimony discussed above – she agreed with defense counsel that A.B. also "talked about being molested by another individual other than Mr. Gaspar[.]" RP 208-09. But no detail was asked for or offered about this allegation, and Nurse Wahl never implied or opined, one way or the other, as to whether a specific perpetrator was or was not the cause of A.B.'s behaviors.

Gaspar asserts that "Wahl explicitly testified that that A.B. suffered from toxic stress *based on her father's abuse.* RP 202." Brief of

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Appellant at 17 (emphasis in original). But what Nurse Wahl actually described was the difficulty that the child experienced by keeping the abuse a secret for six years, as follows:

And children love their parents, they're like right and left arms. You can't sever that relationship; they're the first people that a child knows and loves. And to then put that burden of her father will go to jail if she tells shifts the onus of responsibility onto the child's back and off of the perpetrator's back.

And now we're talking about toxic stress, bearing that burden for six years until she disclosed....

RP 202. Nurse Wahl described the effects of this type of stress. RP 202-204. She concluded that self-harm, cutting behavior by a child is a typical response to molestation or rape. RP 205. However, she also agreed that there are reasons other than sexual assault that might cause a child to engage in cutting behavior (such as that exhibited by A.B.). RP 215.

Although he did not object on this basis in the trial court, on appeal Gaspar now contends that Nurse Wahl's testimony was improper opinion testimony. However, "an observation that a victim exhibits behavior typical of a group does not relate directly to an inference of guilt of the defendant." *State v. Florczak*, 76 Wn. App. 55, 73, 882 P.2d 199 (1994) (quoting *State v. Jones*, 71 Wn. App. 798, 815 n.6, 863 P.2d 85 (1993)). Still more, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is

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based on inferences from the evidence is not improper opinion testimony.”

City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

And opinion testimony that only indirectly relates to a witness’s credibility does not constitute manifest error that can be raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 922, 155 P.3d 125 (2007).

- b) Defense counsel was not ineffective for failing to object to Nurse Wahl’s testimony about the behaviors typically exhibited by child victims of sex crimes and that A.B. exhibited such behaviors.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel’s performance was deficient and, if so, whether counsel’s errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33. The reasonableness inquiry presumes effective

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representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Here, Gaspar has not shown that error occurred based on Nurse Wahl’s testimony about the behaviors exhibited by child victims of sex crimes. Nor has he shown that absent Nurse Wahl’s testimony the result of the trial would have been different. Because Gaspar has failed to make either of the two showings, both of which are required, his claim of ineffective assistance of counsel must fail.

2. The prosecutor did not commit prejudicial misconduct in closing argument.

As the defendant alleging prosecutorial misconduct, Gaspar bears the burden of establishing that the prosecutor’s conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Gaspar has failed to meet his burden, and his claim should therefore fail.

- i) The prosecutor’s comment asking the jury to focus

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on the elements at issue in the case and not to speculate about irrelevant evidence or other facts not presented to the jury was not improper and did not have any prejudicial effect on the trial.

To support his claim of prosecutorial misconduct, Gaspar asserts that “the prosecutor shifted the burden to the defense by suggesting that if the jury had doubts about the State having proven its case, the doubts should be resolved in favor of the State, because the rules of evidence did not allow all the evidence to come in.” Brief of Appellant at 28.

However, Gaspar’s paraphrased summary of his interpretation of the prosecutor’s argument omits essential context that gives the prosecutor’s comment its meaning. What the prosecutor said was:

The State doesn’t have to, you know, to prove that someone had red hair, or that, you know, a host of things. It might come up in your head during deliberations and you say, well, why didn’t the State prove this? Why didn’t the State prove this? Well, there’s lots of reasons. Part of it has to do with what evidence is allowed into the case. Some evidence is excluded because of hearsay, which is completely understandable. I mean, when the Court excludes evidence it’s all for a good reason. The Court wants the jury to make its decision based upon the facts and the law of the case. The Court doesn’t want the jury or the system, and the Court doesn’t want the jury to make decisions based outside those elements. So, all the State has to prove is the elements, nothing more.

RP 249-250. Gaspar did not object to this argument.

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If the defendant does not object to alleged misconduct by the prosecutor, then the defendant is deemed to have waived error related to the alleged misconduct, unless the misconduct was “so flagrant that no instruction could cure it.” *State v. Case*, 49 Wn.2d 66, 72, 298 P.2d 500 (1956). Additionally, “[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.” *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Here, all that the prosecutor intended was to urge the jury to follow the court’s instructions and to base the jury’s inquiry, and therefore its verdicts, on the issues and evidence properly before it rather than to be distracted by extraneous matters. If there were any erroneous interpretation that might have been misunderstood from the prosecutor’s remark, an objection and instruction from the court could have easily cured it. However, defense counsel – who was in a position to hear the tone and inflection of the prosecutor’s voice – most likely understood the prosecutor’s meaning. Thus, defense counsel did not object.

Gaspar has not shown that the prosecutor’s comment, given its full context, was improper. And he has not shown that the comment had any prejudicial effect or that that any potential effect could not have been

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overcome with an objection and a curative instruction from the court.

Therefore Gaspar's claim of prosecutorial misconduct should fail.

- ii) During closing argument the prosecutor mentioned "the hearsay rule" to the jury when arguing that the victims' reports to Nurse Wahl were probably reliable because the reports were made for the purpose of medical treatment or diagnosis. However, the prosecutor's use of the term "hearsay rule" was a fleeting reference that probably had no effect on the jury.

During closing argument, the prosecutor attempted to touch on the subject of the child victims' reluctance to elaborate before the jury about the sexual acts that the children were subjected to. RP 250. In this context, the prosecutor commented as follows:

So, you saw their reluctance in this case to talk about it. Well, then you heard from Lisa Wahl. Now, when they talked to Lisa Wahl they were sitting there with, you know, basically one-on-one or they had - I think she had a nurse in there with her as well. But they're sitting and they're comfortable and they're talking, and they're much more likely to disclose at that point. And Lisa Wahl took this information for the purpose of a medical diagnosis. So, what the kids told her, it was very important that it be true and accurate because that's the - for instance, on the hearsay rule, one of the exceptions is that the physician-patient conversation. Since it's - since the statements are made for the purpose of medical diagnosis and treatment people tend to be much more honest when they talk about what happened to them, because it's important that the doctor realize what's going on, to accurately help them. So, people tend to be much more accurate when they talk to a doctor. And that was what this was about. It wasn't the police gathering evidence; it wasn't anything else; it was just a person, a nice lady, talking to them about what had happened to them. And they disclosed fully.

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RP 250-51.

“Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness.” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The prosecutor’s argument as set forth above did not vouch for the witnesses’ credibility. It was probably ill-advised for the prosecutor to utter a reference to the evidence rules when making his argument to the jury, but it is apparent that he did so only because his reasons for arguing the weight of this evidence were similar to those that are often attributed to the evidence rule. *State v. Thorgerson*, 172 Wn.2d 438, 445, 258 P.3d 43 (2011) (“[W]e do not condone the prosecutor’s reference to the hearsay rules and how they affect production of evidence at trial”). In any event, it is apparent that the prosecutor’s fleeting reference to the hearsay rule or the physician-patient privilege had no effect on the jury’s verdicts.

“In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses.” *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Here, the prosecutor’s mention of the

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hearsay rules was not ill-intentioned, and but for the prosecutor's fleeting reference to the hearsay rule, the prosecutor's argument was proper. It is very unlikely that the prosecutor's fleeting reference to the hearsay rule had any effect on the jury's verdicts, and if Gaspar would have objected, a curative instruction would have cured the error.

- iii) Because he has not shown prejudice, Gaspar's claims of prosecutorial misconduct must fail.

Because Gaspar has not shown that the prosecutor's comments were improper or that they caused prejudice, he also cannot show that his attorney was ineffective for failing to object. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

- 3. Gaspar has not shown sufficient error in this case to apply to the cumulative error doctrine.

Gaspar claims that cumulative error entitles him to a new trial. But where there are no errors or where the errors had little or no effect on the outcome of the case, the cumulative error doctrine does not apply. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

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4. Plethysmograph testing at the direction of the CCO or per DOC policy is unconstitutional and is unauthorized by law.

At sentencing, the trial court imposed the following condition:

The defendant shall undergo, at his/her expense, periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by his/her Sexual Offender Treatment Provider (SOTP), CCO, or DOC Policy.

CP 59. The trial court also ordered Gaspar to participate in sexual deviancy treatment, as follows: “The defendant shall enter into within 30 days of release and successfully complete a program offering sexual deviancy treatment through a state certified therapist and sign all related releases of information.” CP 59.

The trial court may order plethysmograph testing as a part of crime-related treatment by a qualified provider. *State v. Johnson*, 184 Wn. App. 777, 780, 340 P.3d 230 (2014); *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). However, using plethysmograph testing as a monitoring tool at the discretion of the CCO (community custody officer) or DOC policy is improper. *Id.* At 780-81.

Accordingly, the State agrees with Gaspar that this community custody condition should be modified to state that the CCO’s authority to

require plethysmograph testing is limited to testing for purposes of sexual deviancy treatment.

5. Internet related condition must be stricken because it is not crime related.

At sentencing, the trial court imposed the following condition:

The defendant shall not use or access the internet (including through cellular devices, electronic tablets, video game consoles, TV's, ETC) or any other computer modem without the presence of a responsible adult is is aware of the conviction, and the activity has been approved by the CCO and the Sexual Offender Treatment Provider in advance[.]

CP 59. However, review of the record does not reveal any evidence that use of or access to the internet in any way contributed to Gaspar's crimes.

Conditions imposing prohibitions must be crime-related. RCW 9.94A.703(3)(f); RCW 9.94A.030(10). "[A] sentencing court may not prohibit a defendant from using the Internet if his or her crime lacks a nexus to Internet use." *State v. Johnson*, 180 Wn. App. 318, 330, 327 P.3d 704 (2014); *State v. O'Cain*, 144 Wn. App. 772, 774-75, 184 P.3d 1262 (2008). Because there is no evidence that Gaspar used the internet to commit his crimes, there is no nexus between Gaspar's crimes and the prohibition of social media use.

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Therefore, the State agrees that this condition should be stricken from Gaspar's judgment and sentence.

6. The condition imposing interest on all of Gaspar's LFOs must be stricken from the judgment and sentence.

The trial court entered judgment and sentence on April 22, 2019.

CP 45. In the judgment and sentence, the trial court ordered Gaspar to pay a \$500 victim assessment pursuant to RCW 7.98.035 and to pay a \$100 DNA collection fee pursuant to RCW 43.43.7541, for a total of \$600. CP 51. The judgment and sentence also contained boilerplate language that cited to RCW 10.82.090 and required the payment of interest on unpaid financial obligations. CP 52. However, prior to Gaspar's sentencing, RCW 10.82.090 was amended to eliminate the assessment of interest on non-restitution financial obligations.

Accordingly, the State agrees that the interest requirement should be stricken from Gaspar's judgment and sentence.

D. CONCLUSION

Gaspar has not shown that Nurse Wahl's testimony was improper in this case and has not shown that his attorney was ineffective or that the

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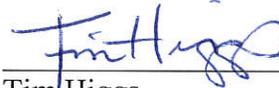
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prosecutor committed misconduct in closing argument. Therefore his convictions should be sustained.

Gaspar has shown that several of his community custody conditions are improper; therefore, this case should be remanded for the trial court to strike the improper community custody conditions.

DATED: January 28, 2020.

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January 28, 2020 - 5:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53343-0
Appellate Court Case Title: State of Washington, Respondent v. Tomas M. Gaspar, Appellant
Superior Court Case Number: 18-1-00263-0

The following documents have been uploaded:

- 533430_Briefs_20200128170656D2738271_7874.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 53343-0-II --- State v. Gaspar --- Brief of Respondent.pdf

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