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Court of Appeals
Division II
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NO. 54036-3-II

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

STATE OF WASHINGTON, Respondent

v.

LEROY FLOYD SALSBERY, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01430-1

RESPONSE TO PERSONAL RESTRAINT PETITION

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IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the Respondent in this matter. The defendant is restrained by the judgment and sentence entered by the Clark County Superior Court on March 25, 2016, under cause number 13-1-01430-1.

ISSUES FOR REVIEW

Does the petition establish that Salsbery's trial attorney made the decision, against Salsbery's will, that Salsbery would not testify?

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Leroy Salsbery was charged by fourth amended information with two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree for sexually abusing G.M. on or about or between June 6, 2012 and July 30, 2013. CP 157-59. Each count also alleged the abuse of trust aggravating circumstance. CP 157-59; RCW 9.94A.535(3)(n). The case proceeded to a jury trial on February 23, 2016 before the Honorable Daniel Stahnke and concluded on March 2, 2016 with the jury's verdicts finding Salsbery guilty as charged to include the aggravating circumstance. RP 667-1756; CP 286-293. The trial court

sentenced Salsbery to an indeterminate sentence pursuant to RCW 9.94A.507 with a minimum term of 279 months of total confinement and a maximum term of life. CP 350.

Salsbery timely appealed and argued that “the trial court abused its discretion by allowing the State to replay a video recording . . . during closing argument, . . . violated his right present a defense and to confrontation,” and that “insufficient evidence support[ed] his convictions.” Appendix A – *State v. Salsbery*, 4 Wn.App.2d 1023, 2018 WL 3046599 (2018). This Court affirmed Salsbery’s convictions and sentence in an unpublished opinion. App. A. On November 27, 2018, after the Washington Supreme Court denied review, the mandate issued.

Appendix B – Mandate.

Salsbery filed the instant personal restraint petition (PRP) one year later. Salsbery now argues that he did not “make a knowing, intelligent[,] and voluntary decision not to testify” because his trial attorney “coerced” him into not testifying. PRP at 2-3.

B. STATEMENT OF FACTS

For the purposes of this response, the State adopts this Court’s recitation of the facts of the crime in its unpublished opinion as follows:

In July 2013, GM, then nine years old, accused Salsbery, a 65 year old friend of her parents, of molesting and raping

her. GM often stayed the night at the home Salsbery and his girlfriend, Sharon Babcock, shared.

On July 23, 2013, after visiting Salsbery and Babcock, GM went to stay with her grandmother, Arlene Howard, and her aunt, Darcy McFarland. GM asked Howard to call Salsbery and tell him to stop touching her on and in her vagina. GM then described the touching and added that Salsbery made her touch his penis.

Howard then spoke with GM's father and told him what GM said. GM's father picked up GM and took her to Elizabeth Sledge's home. Sledge is GM's godmother and a former child therapist. GM told Sledge that Salsbery touched her vagina about ten times and that it hurt her because Salsbery stuck his "whole finger in." 7 Report of Proceedings (RP) at 785. She showed Sledge her index finger up to the first knuckle to describe how Salsbery touched her. GM also told Sledge that Salsbery made her shower with him, and would "put soap on his hand, and put his hand in [her vagina] and rub hard." 7 RP at 787. Sledge contemporaneously typed everything GM said on her computer.

The next day, Sledge and GM's father took GM to the Washougal Police Department. Detective Thad Eakins interviewed GM and videotaped it. GM told Eakins she came to the police station "[b]ecause of what Roy did to [her]." 12 RP at 1446. She said Salsbery babysat her and added that, the last time he babysat, he "grabbed [her] hand and put it inside his pants" and made her grab his penis. 12 RP at 1449. GM also told Eakins that Salsbery put his finger in her vagina three times, and he made her shower with him. Eakins asked GM how she knew Salsbery put his finger in her, and GM responded "[b]ecause I could see it." 12 RP at 1482.

The State charged Salsbery with two counts of rape of a child in the first degree or, in the alternative, child molestation in the first degree, and two counts of child molestation in the first degree.

A month later, Kathy Butler, a physician's assistant at a child abuse assessment center, examined GM and asked her about Salsbery's conduct. GM iterated that Salsbery took showers with her and made her touch his penis. GM also said Salsbery touched her vagina with his finger up to his first knuckle, which Butler understood to mean Salsbery inserted his finger into GM. Butler's examination did not reveal physical evidence of abuse, but she did not expect to find such evidence given GM's description of the acts.

In October 2013, Amy Morris, a licensed mental health counselor provided counseling for GM. GM disclosed Salsbery's sexual abuse to Morris. GM said Salsbery touched her vagina while she sat in a recliner in his living room. GM also told Morris about Salsbery touching her vagina and putting his fingers inside of her vagina a tiny bit when Babcock was not home.

App. A.

1. Salsbery's Decision to Not Testify

The possibility of Salsbery testifying came up three times during his trial. RP 1594, 1683-84, 1748-49. The first time was during the defense case:

[JUDGE]: Mr. Salsbery, we've come to that time now where you need to make - -

[(Defense counsel)]: Your Honor, I have other witnesses.

THE JUDGE: Okay. Think about it, then. Before we rest the case *you have the right to testify*. You also have the right not to testify. So you mull it around with your attorney and decide whether or not *you wish to take the stand*.

If you do not take the stand, I'll instruct the jury that they cannot prejudice you based on that failure to take the stand.

RP 1594 (emphasis added). Next, after additional defense witnesses were called, the trial court asked defense counsel whether he had additional witnesses and he replied that there were no more non-party witnesses but that he “need[ed] to talk to Mr. Salsbery.” RP 1683. The trial court responded: “Okay. So it’s Dr. Johnson, and then you guys will talk. And then we’ll need to work on any rebuttals that you plan on calling.” RP 1684.

Finally, just prior to defense resting, the trial court discussed the decision not to testify with Salsbery:

THE JUDGE: Mr. Salsbery, once we bring the jury out, you understand your attorney is going to move to rest. That means that you will not take the stand and testify.

MR. SALSBERY: Yes

THE JUDGE: Is that your desire?

MR. SALSBERY: Yes.

THE JUDGE: Okay. . . .

RP 1748.

Now Salsbery, relying on his attached declaration and that of his domestic partner, Sharon Babcock, argues that he wanted to testify but did not do so because of his defense counsel’s coercion. PRP 2-3. But

Salsbery's declaration paints a different picture, one of internal conflict. Salsbery admits that his defense counsel "tried to prepare me to the best of his ability" and even "brought in another attorney to do a mock trial." Declaration of Salsbery at 1-2. Salsbery also lays out the concerns that his defense counsel had with him potentially testifying to include that he "was too folksy . . . unable to recall exact dates . . . ha[d] a slight speech impediment, which becomes exaggerated when . . . stressed[,] " and that he "would elaborate too much on the stand." Dec. of Salsbery at 1-2. As a result, defense counsel "advised" Salsbery that he "should not testify." Dec. of Salsbery at 2. While Salsbery claims that his defense counsel "did not tell me that it was my decision if I wanted to testify or not," he agrees that it was "natural for me to rely on his advice to guide me, which I did." Dec. of Salsbery at 2.

Salsbery also acknowledges that he told the trial court that he "did not want to testify," but claims that he did so because he "was afraid that my attorney would quit on me." Dec. of Salsbery at 2. This claim is offered without support. Finally, Salsbery claims that "[h]ad I known that the decision on whether to testify was solely my decision to make, I would have testified, over the objection of my attorney." Dec. of Salsbery at 3.

Ms. Babcock's declaration is similar. She agrees that defense counsel "*advised* Mr. Salsbery that he *shouldn't* testify at trial" and that

“Mr. Salsbery listened to [his] advice.” Declaration of Babcock at 1-2 (emphasis added). She also agrees that defense counsel arranged a “mock trial” in order to determine how well Salsbery would do on the stand. Dec. of Babcock at 1. Moreover, Ms. Babcock describes Salsbery as “struggl[ing] with the decision on whether to testify during the jury selection process” and admits that she is not “aware whether [defense counsel] advised Mr. Salsbery that the decision to testify was Mr. Salsbery’s to make. . . .” Dec. of Babcock at 2.

RAP 16.9 STATEMENT

RAP 16.9(a) says the Respondent “should also identify in the response all material disputed questions of fact.” The State hereby declares that if any fact averred by the defendant would in any way dispute, refute, rebut, negate, undermine, or undercut any fact in the record or verdict of the jury, it is a disputed question of fact. Unless the State *specifically disavows* a fact adduced at trial, the State should be viewed as adhering to the settled record in total and to the extent anything said or averred by the defendant would stand in contrast with any fact from the record, the State disagrees with and disputes that fact. This includes any “opinion,” be it by expert or lay person, which purports to dispute, refute, rebut, negate, undermine, or undercut any fact adduced at trial or any

verdict rendered by the jury. If the fact in question is germane to this Court's consideration of the personal restraint petition such that the petition cannot be decided without settling the matter, this Court is then required by RAP 16.11 to remand this matter to the Superior Court for a reference hearing, wherein a proper trier of fact can settle the dispute. An appellate court is not a trier of fact and cannot settle factual disagreements. See e.g. *State v. Rafay*, 168 Wn.App. 734, 285 P.3d 83 (2012), *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996). A party is not required to specifically request a reference hearing to trigger the appellate Court's duty to hold one in the event this Court determines there is a disputed fact that must be settled.

ARGUMENT WHY PETITION SHOULD BE DISMISSED

A personal restraint petition is not a substitute for a direct appeal. *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual and substantial prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011); *In re Cook*, 114 Wn.2d 802, 792 P.2d 506 (1990). Moreover, because a personal restraint petition is not a second bite at a direct appeal, "new issues must meet a heightened showing before a court will grant relief." *In*

re Yates, 177 Wn.2d 1, 296 P.3d 872, 880 (2013); *Coats*, 173 Wn.2d at 132 (holding that relief “by way of a collateral challenge to a conviction is extraordinary, and the petitioner must meet a high standard before this court will disturb an otherwise settled judgment”) (citation omitted). Moreover, the petitioner “must make these heightened showings by a preponderance of the evidence.” *Yates*, 177 Wn.2d at 17.

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual and substantial prejudice or a complete miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983). A petitioner’s bare assertions and self-serving statements are insufficient to justify a reference hearing, let alone to establish actual and substantial prejudice or a complete miscarriage of justice. *Yates*, 177 Wn.2d at 18; *See also In re Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992); *In re Reise*, 146 Wn.App 772, 192 P.3d 949 (2008); RAP 16.7(a)(2)(i). Moreover, for “matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the

facts that entitle him to relief; if the evidence is based on knowledge in the possession of others, the petitioner may either present their affidavits or present evidence to corroborate what the petitioner believes they will reveal if subpoenaed. *Yates*, 177 Wn.2d at 18 (internal quotations omitted). This corroboration “must be more than mere speculation or conjecture.” *Id.* (citation omitted).

I. Salsbery cannot establish that his decision not to testify was not knowing, intelligent, and voluntary.

A criminal defendant has a constitutional right to testify and the decision of whether to exercise that right is the defendant’s. *State v. Robinson*, 138 Wn.2d 753, 758-59, 982 P.2d 590 (1999). If a defendant waives his right to testify said waiver must be “made knowingly, voluntarily, and intelligently, but the trial court need not obtain an on the record waiver. . . .” *Id.*

A defendant, however, may successfully challenge the waiver if he or she can establish by a preponderance of the evidence that his or her attorney “actually prevented him [or her] from testifying.” *Id.* at 759-765.¹

But as *Robinson* held:

in order to prove that an attorney actually prevented the defendant from testifying, the defendant must prove that

¹ And in order to be entitled to an “evidentiary hearing” to determine whether a defendant was actually prevented from testifying the defendant “must present substantial factual evidence” that his or her right to testify was violated. *Id.* at 760-61.

the attorney *refused to allow him to testify in the face of the defendant's unequivocal demands that he be allowed to do so*. In the absence of such demands by the defendant, however, we will presume that the defendant elected not to take the stand upon the advice of counsel.

Id. at 764 (emphasis added). In turn, an attorney's refusal² to allow a defendant to testify can be established when (1) the attorney coerces the defendant from testifying by telling a defendant that he or she is "legally forbidden to testify" or "misinform[s] the defendant of the consequences of taking the stand or make[s] other misrepresentations to induce the defendant to remain silent;" or (2) "flagrantly disregards the defendant's desire to testify." *Id.* at 762-64 (internal quotations omitted).

Here, Salsbery cannot meet his burden to show that his attorney prevented him from testifying. For one, Salsbery told the trial court that it was his desire not to testify. RP 1748-49. And the trial court had previously told Salsbery that *he* "ha[d] the right to testify" and "the right not to testify" and instructed him to "mull it around with your attorney and *decide* whether or not *you wish to take the stand*." RP 1594 (emphasis added). Thus, the trial record establishes that Salsbery was instructed that the decision whether to testify was his and that he was the one who decided not to testify.

² *Robinson* appears to distinguish between the actual "prevention" of a defendant from testifying and the "refusal" to allow him or her to testify, the latter of which must be proven in order to establish "the actual prevention" and the violation of the right to testify. *See Id.*; *State v. Borsheim*, 140 Wn.App. 357, 375-76, 165 P.3d 417 (2007).

Salsbery and Babcock's declarations do not change the story. While they establish that Salsbery's trial counsel strongly advised against him testifying, there is no assertion that defense counsel told Salsbery that he was "legally forbidden" from testifying, misinformed him "of the consequences of taking the stand," made "other misrepresentations to induce" Salsbery to "remain silent," or "flagrantly disregard[ed] [Salsbery's] desire to testify." *Robinson*, 138 Wn.2d at 762-64; *see also* Dec. of Salsbery; Dec of Babcock. Instead, the declarations establish that Salsbery followed his attorney's advice not to testify. In short, Salsbery fails to "prove that [his] attorney refused to allow him to testify in the face of [his] unequivocal demands that he be allowed to do so." *Id.* at 765. In fact, Salsbery never claims that he made unequivocal demands to testify. Thus, Salsbery's claim that his right to testify was violated fails and his PRP must be dismissed.

The State further argues that Salsbery has failed to carry his burden to show a constitutional error that caused actual and substantial prejudice or a nonconstitutional error that caused a complete miscarriage of justice. Here the evidence of Salsbery's guilt, which this Court has already found sufficient, was overwhelming and included the testimony of the victim, testimony by six other witnesses relaying the victim's statements about the sexual abuse, the victim's behavioral changes, and a chronology of events

that placed the victim with Salsbery contemporaneous to the abuse.
Accordingly, Salsbery cannot show the requisite prejudice to prevail.

CONCLUSION

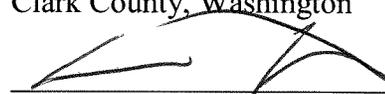
Based on the above arguments the defendant's personal restraint
petition should be dismissed.

DATED this 26 day of February, 2020.

Respectfully submitted:

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APPENDICES

APPENDIX	BATES
A - Unpublished Opinion, <i>State v. Salsbery</i> , No. 48843-4-II	001-019
B – Mandate, <i>State v. Salsbery</i> , No. 48843-4-II	020-021

APPENDIX A

June 19, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 48843-4-II

Respondent,

v.

LEROY F. SALSBERY,

UNPUBLISHED OPINION

Appellant.

MELNICK, J. — Leroy “Roy” Salsbery appeals from convictions for two counts of rape of a child in the first degree and two counts of child molestation in the first degree. Salsbery argues the trial court abused its discretion by allowing the State to replay a video recording, which had been admitted into evidence, during closing argument. He also claims the court violated his rights to present a defense and to confrontation. Salsbery further contends insufficient evidence supports his convictions and that cumulative errors denied him a fair trial.¹ We affirm.

FACTS

In July 2013, GM, then nine years old, accused Salsbery, a 65 year old friend of her parents, of molesting and raping her. GM often stayed the night at the home Salsbery and his girlfriend, Sharon Babcock, shared.

On July 23, 2013, after visiting Salsbery and Babcock, GM went to stay with her grandmother, Arlene Howard, and her aunt, Darcy McFarland. GM asked Howard to call Salsbery

¹ Salsbery asks us to deny appellate costs. Pursuant to RAP 14.2, we defer to the commissioner if the State files a cost bill and Salsbery objects.

and tell him to stop touching her on and in her vagina. GM then described the touching and added that Salsbery made her touch his penis.

Howard then spoke with GM's father and told him what GM said. GM's father picked up GM and took her to Elizabeth Sledge's home. Sledge is GM's godmother and a former child therapist. GM told Sledge that Salsbery touched her vagina about ten times and that it hurt her because Salsbery stuck his "whole finger in." 7 Report of Proceedings (RP) at 785. She showed Sledge her index finger up to the first knuckle to describe how Salsbery touched her. GM also told Sledge that Salsbery made her shower with him, and would "put soap on his hand, and put his hand in [her vagina] and rub hard." 7 RP at 787. Sledge contemporaneously typed everything GM said on her computer.

The next day, Sledge and GM's father took GM to the Washougal Police Department. Detective Thad Eakins interviewed GM and videotaped it. GM told Eakins she came to the police station "[b]ecause of what Roy did to [her]." 12 RP at 1446. She said Salsbery babysat her and added that, the last time he babysat, he "grabbed [her] hand and put it inside his pants" and made her grab his penis. 12 RP at 1449. GM also told Eakins that Salsbery put his finger in her vagina three times, and he made her shower with him. Eakins asked GM how she knew Salsbery put his finger in her, and GM responded "[b]ecause I could see it." 12 RP at 1482.

The State charged Salsbery with two counts of rape of a child in the first degree or, in the alternative, child molestation in the first degree, and two counts of child molestation in the first degree.

A month later, Kathy Butler, a physician's assistant at a child abuse assessment center, examined GM and asked her about Salsbery's conduct. GM iterated that Salsbery took showers with her and made her touch his penis. GM also said Salsbery touched her vagina with his finger

up to his first knuckle, which Butler understood to mean Salsbery inserted his finger into GM. Butler's examination did not reveal physical evidence of abuse, but she did not expect to find such evidence given GM's description of the acts.

In October 2013, Amy Morris, a licensed mental health counselor provided counseling for GM. GM disclosed Salsbery's sexual abuse to Morris. GM said Salsbery touched her vagina while she sat in a recliner in his living room. GM also told Morris about Salsbery touching her vagina and putting his fingers inside of her vagina a tiny bit when Babcock was not home.

I. GM'S HEARSAY STATEMENTS AND TESTIMONY

The court held a pretrial hearing, pursuant to RCW 9A.44.120, on the admissibility of the aforementioned out-of-court statements GM made to Howard, McFarland, Sledge, Eakins, and Butler. The court entered written findings of fact and conclusions of law and ruled that the State could admit the hearsay statements if GM testified at trial. The court found GM was credible and told many of the State's witnesses substantially the same account spontaneously in response to non-leading questions. Salsbery does not challenge any of those findings or conclusions.

The matter proceeded to jury trial. The jury heard Howard, McFarland, Sledge, Butler, and Morris testify that GM said Salsbery touched her vagina, inserted his finger in her vagina, and made her touch his penis. The court admitted the video of Eakins interview with GM during the State's case-in-chief. The jury heard and saw the entire video, except one irrelevant portion. It showed GM making substantially the same hearsay statements to Eakins as GM made to Howard, McFarland, Sledge, Butler, and Morris.

GM testified. She told the jury she was in court "[b]ecause Roy did something bad to [her]." 7 RP at 713. GM provided details of Salsbery kissing her, touching her on her private spot where she went "pee," and pulling her inside the shower and making her wash him. 7 RP at 714.

GM described going into Salsbery's bedroom with him and him pulling down her pants and underwear and rubbing the outside of her vagina. In one incident, Salsbery put GM's hand inside his shorts and made her rub his penis. GM then testified Salsbery "told me to never tell [about the touching] or he would kill me." 7 RP at 726.

GM testified she talked about the touching with Howard, McFarland, Sledge, and Eakins. GM told Howard "a lot of stuff about it." 7 RP at 728. GM said she "told [Sledge] . . . everything and then we went to the computer and I told her everything again[, and] then she typed it up." 7 RP at 729. GM said she told Eakins everything.

On cross-examination, GM said she told Howard, McFarland, Sledge, and Eakins everything she testified to on direct examination. She also told Howard, McFarland, and Sledge about Salsbery saying "I'm going to kill you if you tell." 7 RP at 743. GM said Salsbery touched her vagina five or ten times, kissed her one time, and showered with her one time. GM told the jury about taking a nap with Salsbery and that he touched her vagina.

GM never referred to Salsbery by his last name at trial. She called him "Roy." GM told the jury that Babcock was not home when Salsbery sexually abused her, and that she had not "gone back to . . . Babcock and Roy's house" since she told Howard about the abuse. 7 RP at 730.

Babcock later testified she lived with Salsbery during the relevant period, and that Salsbery and GM were alone at their shared home on June 24, 2013, and on three days between July 12 and July 20. Babcock also referred to Salsbery as "Roy" when testifying, and she identified him in the courtroom at trial.

II. EXCLUSION OF SPECIFIC INSTANCES OF GM'S BEHAVIOR

Salsbery attacked GM's credibility. He argued that GM suffered from reactive attachment disorder (RAD) from not having her needs met by her mother, rather than from post-traumatic stress disorder (PTSD) because of sexual abuse by Salsbery.

As pertinent to this appeal, Salsbery sought to elicit testimony about GM's prior bad behavior from Morris and from Dr. Christopher Kirk Johnson. Salsbery made an offer of proof that GM exhibited behavior more consistent with RAD than with PTSD. This behavior included GM's "physical aggression . . . towards her brother, her mother, and animals[,]" and a statement that GM allegedly made to "Babcock, to the effect that she wanted to stab her parents and watch the blood run out." 13 RP at 1604-05.

Morris, testified that GM's mother sought counseling for GM because she had shown "[a]ggression towards [her] b[r]other and mother." 10 RP at 1139. Morris also testified that she noted GM was "aggressive" on an intake form. 10 RP at 1161. The State objected when Salsbery asked Morris if GM's mother expressed a concern about GM's "aggression toward animals and her brother;" the trial court sustained the objection. 10 RP at 1163.

Outside the jury's presence, the court clarified that Salsbery could not ask Morris questions about specific instances of GM's aggression toward animals, her mother, or her brother. The court did say that Salsbery could ask Morris questions about PTSD and whether aggression is part of the diagnosis.

Morris told the jury about her counseling sessions with GM, and opined that GM showed symptoms of PTSD. Morris acknowledged that aggression could also be involved with RAD, and that she saw elements of RAD in GM.

Salsbery wanted Johnson, a clinical psychologist with expertise in evaluating and treating sex offenders, to discuss GM's behaviors because they were relevant to his testimony about RAD. He also argued Johnson's testimony on these subjects would rebut the State's evidence that GM may have suffered from PTSD.

The trial court disallowed this evidence. It ruled the proffered testimony was irrelevant, not indicative of truthfulness or untruthfulness, and overly prejudicial. The court ruled Johnson could testify about RAD generally.

Johnson, who had not evaluated or treated GM, testified that he did not agree with Morris's opinion that GM suffered from PTSD. Instead, Johnson believed GM's behaviors were more consistent with RAD than with PTSD. He also stated that GM demonstrated "aggression towards [her] brother and mother." 13 RP at 1648. However, the court sustained the State's objection to this testimony and struck it from the record. Johnson then testified that GM's aggressive behavior and lack of empathy were symptomatic of RAD.

III. CLOSING ARGUMENT

Prior to closing argument, Salsbery moved to preclude the State from replaying the video interview of GM during the State's closing argument. Salsbery argued that use of the video in closing would be unduly repetitious, unfair, and prejudicial because it would overemphasize GM's statement. The court denied Salsbery's motion, stating that the video had been admitted into evidence and nothing prohibited either side from using the tape in closing. The State played the video interview of GM during closing argument.

IV. GUILTY VERDICT

The jury convicted Salsbery of two counts of rape of a child in the first degree and two counts of child molestation in the first degree.

ANALYSIS

I. RIGHT TO FAIR TRIAL

Salsbery argues the trial court violated his right to a fair trial and an impartial jury by allowing the State to play Eakin's video interview of GM during closing argument.

We review a trial court's evidentiary ruling for an abuse of discretion. *State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013); *State v. Blair*, ___ Wn. App. ___, 415 P.3d 1232, 1235 (2018). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

A trial court has broad discretion to control courtroom proceedings, including closing argument. ER 611; *Dye*, 178 Wn.2d at 547-48. During closing argument, parties may utilize evidence admitted at trial and discuss reasonable inferences that arise from the evidence. 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4501, at 284 (3rd ed. 2004).

The trial court properly exercised its discretion in allowing the State to replay the admitted evidence for the jury. This situation is different from a situation where a trial court allows audio or video recordings to be played for jurors when they are already in deliberations.

Cases cited by Salsbery all involve procedural protections used to avoid a jury placing undue emphasis on testimonial audio or video evidence that was replayed for jurors during deliberations.

In *State v. Koontz*, 145 Wn.2d 650, 653, 41 P.3d 475 (2002), the defendant challenged the trial court's decision to permit a jury to review video of witnesses' trial testimony during jury deliberations. The jury asked the court to review the video of trial testimony to break a deadlock. *Koontz*, 145 Wn.2d at 651. The presiding juror told the judge the video would help the jurors

consider “facial expressions.” *Koontz*, 145 Wn.2d at 652. The judge played the video in open court, after instructing the jury not to place undue emphasis on the testimony. *Koontz*, 145 Wn.2d at 652.

Koontz reviewed the court’s actions for abuse of discretion, but did discuss the defendant’s right to a fair and impartial jury. 145 Wn.2d at 653, 658. However, in remanding the case for a new trial, the Supreme Court concluded insufficient procedural protections existed because the video showed more than the testifying witnesses. *Koontz*, 145 Wn.2d at 660-61. It included multiple perspectives, shot by different cameras, showing the prosecutor, defense counsel, defendant, and the trial court judge as the witnesses testified. *Koontz*, 145 Wn.2d at 652-53.

Koontz relied on *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997). 145 Wn.2d at 655-56. In *Binder*, the court concluded that a trial court judge abused his discretion by letting the jurors replay a video of child victims’ testimony in the jury room, rather than in open court. 769 F.2d at 598. The parties had consented to substituting the children’s prerecorded video testimony for live testimony at trial. *Binder*, 769 F.2d at 598. The jurors asked to replay the video during deliberations, and the defendant was not present when the jurors replayed the video in the jury room. *Binder*, 769 F.2d at 598. The trial court allowed the jury to “skip preliminary portions” of the video when it replayed the video. *Binder*, 769 F.2d at 598.

Binder concluded that replaying the video “in the jury room during deliberations placed prejudicial emphasis on the complaining witnesses’ testimony.” 769 F.2d at 600. The court noted that “the only evidence of molestation was presented through the children’s videotaped testimony,” and the replay “was equivalent to allowing a live witness to testify a second time in the jury room.” *Binder*, 769 F.2d at 600, 601 n.1. Notably, the only authority cited in *Binder* on the video replay

issued was *United States v. Nolan*, 700 F.2d 479 (9th Cir. 1983), a case finding no abuse of discretion in refusing to reread testimony and stating that trial courts are “given great latitude” in the area. 769 F.2d at 600-03.

In *State v. Frazier*, 99 Wn.2d 180, 187, 661 P.2d 126 (1983), the defendant consented to the State playing his tape recorded statement to the police in open court, and to the State giving jurors copies of a transcript of the tape while it played. However, the defendant objected when the State offered the tape as an exhibit. The defendant argued that, if admitted, the jury could replay the tape during deliberations. *Frazier*, 99 Wn.2d at 187-88. The court held that “admission of a tape recording as an exhibit” does not “overly emphasize the importance of that evidence” and is not “an impermissible comment on the evidence by the judge.” *Frazier*, 99 Wn.2d at 190.

Frazier stated that, because a jury can review admitted tapes “in open court with the trial judge’s permission,” there is “no reason to automatically prevent the jury from taking such exhibits into the jury room.” 99 Wn.2d at 190. However, the court cautioned that the trial court should “continue to be aware of the potential for overemphasizing the importance of such evidence and should prevent such exhibits from going to the jury [during deliberations] if unduly prejudicial.” *Frazier*, 99 Wn.2d at 190.

Salsbery also attempts to distinguish this case from *State v. Morgensen*, 148 Wn. App. 81, 83, 197 P.3d 715 (2008), where the court found no abuse of discretion when a trial court judge granted the jurors’ request to replay a thirty-five minute audio recording of the entire trial testimony in open court. There, we stated that the right to a fair and impartial jury “requires that the trial court balance the need to provide the jury with relevant portions of testimony to answer a specific inquiry against the danger of allowing a witness to testify a second time.” *Morgensen*, 148 Wn. App. at 88. Salsbery argues that, unlike in *Morgensen*, the trial court abused its discretion

because it did not take “proper precautions prior to playing audio testimony to the jury,” and that it overly emphasized only part of the evidence. Br. of Appellant at 22.

We conclude that replaying recordings during jury deliberations is different from replaying them during closing argument. When responding to a jury request to review evidence during deliberations, a trial court’s discretion is constrained by CrR 6.15(f)(1), which provides that courts may grant a jury’s request to “replay evidence, but *should* do so in a way that . . . is not unfairly prejudicial and . . . minimizes the possibility that jurors will give *undue weight* to such evidence.” (Emphasis added). We do note that even in the context of jury deliberations, no abuse of discretion arises from a trial court’s decision to permit the replay of testimonial evidence one time outside the jury room. *Morgensen*, 148 Wn. App. at 89.

Here, the trial court allowed the State to replay the video, an admitted trial exhibit, one time during closing argument. The trial court did not abuse its discretion in so ruling.

II. RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE

Salsbery argues the trial court violated his constitutional rights to confront adverse witnesses and to present a defense. First, he argues the trial court violated his confrontation rights by admitting GM’s hearsay statements because she did not testify about them. Second, he argues the trial court violated his confrontation rights and right to present a defense when it excluded evidence of GM’s behaviors toward her parents, sibling, and animals. We disagree with Salsbery.

A. Legal Principles

Criminal defendants have a constitutional right to present a defense. U.S. CONST, amends. V, VI, XIV; WASH. CONST. art. 1, § 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). A criminal defendant’s right to present a defense is satisfied if the defendant had “a fair opportunity

to defend against the State's accusations.'" *Jones*, 168 Wn.2d at 720 (quoting *Chambers*, 410 U.S. at 294. It includes a "right to introduce relevant evidence" and to confront adverse witnesses through "meaningful cross-examination." *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002).

Alleged violations of the right to present a defense, including confrontation rights, are generally reviewed de novo. *State v. Tyler*, 138 Wn. App. 120, 126, 155 P.3d 1002 (2007). We review de novo whether admission of hearsay statements violates a criminal defendant's confrontation right. *State v. Kinzle*, 181 Wn. App. 774, 780, 326 P.3d 870 (2014). Similarly, an absolute bar on cross-examination by a criminal defendant is reviewed de novo. *Jones*, 168 Wn.2d at 719.

However, where a defendant premises an alleged constitutional violation on a trial court's evidentiary ruling, we review for abuse of discretion. *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316 (2017). We review a limitation on the scope of cross-examination by a criminal defendant for abuse of discretion. *State v. Arredondo*, 188 Wn.2d 244, 266, 394 P.3d 348 (2017). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Lord*, 161 Wn.2d at 283-84.

B. Admission of Child Hearsay Statements

Salsbery argues the court violated his right of confrontation by admitting GM's hearsay statements to Howard, McFarland, Sledge, and Eakins. He claims that because the State failed to elicit testimony from GM at trial about what she told those witnesses regarding the abuse, he could not confront GM with inconsistencies between the hearsay statements and her trial testimony.

The legislature created RCW 9A.44.120 as an exception to the hearsay rule, and drafted it to avoid right to confrontation problems. *State v. Rohrich*, 132 Wn.2d 472, 476, 939 P.2d 697

(1997). RCW 9A.44.120 provides that the statement of a child under the age of ten describing acts of, or attempts at, “sexual conduct performed with or on the child” are admissible in criminal proceedings, if the trial court concludes, after a hearing, “that the time, content, and circumstances of the statement provide sufficient indicia of reliability[,]” and the child “[t]estifies at the proceedings.” Whether a child victim “testifies” as required by RCW 9A.44.120 depends on whether the child’s testimony at trial was sufficient to satisfy the defendant’s right of confrontation. *State v. Price*, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006).

A defendant’s confrontation rights are not violated by admission of a child victim’s hearsay statements if the child testifies and “is subject to ‘full and effective cross-examination.’” *Kinzle*, 181 Wn. App. at 780 (quoting *Price*, 158 Wn.2d at 640). “Full and effective cross-examination is possible only if the State asks the [child] during direct examination about the incident and his or her prior statements about the incident.” *Kinzle*, 181 Wn. App. at 780.

The State must elicit such testimony from the child before the hearsay statements are admitted. This procedure avoids putting a criminal defendant “in a ‘constitutionally impermissible Catch-22’ of calling the child for direct or waiving his confrontation rights.” *Kinzle*, 181 Wn. App. at 781 (quoting *State v. Rohrich*, 132 Wn.2d at 478).

In *Rohrich*, 132 Wn.2d at 478, the court reversed the defendant’s conviction because the State did not sufficiently elicit testimony from the child victim to provide the defendant an opportunity to fully and effectively cross-examine her about the alleged abuse. The State did not ask the child victim of rape and molestation any questions about the abuse or the hearsay statements when she testified at trial. *Rohrich*, 132 Wn.2d at 474. Instead, the State only asked her questions on topics such as her birthday and her cat’s name. *Rohrich*, 132 Wn.2d at 474.

In *Kinzle*, 181 Wn. App. at 783-84, a defendant's right to confrontation was violated because the State did not ask one of two child victims about hearsay statements she made accusing the defendant of molesting her. There, two sisters under the age of ten testified, but the State only asked the older sister to identify the defendant and describe the alleged abuse. *Kinzle*, 181 Wn. App. at 778-79. When the younger sister testified, the State did not ask any direct questions about the defendant or the alleged abuse. *Kinzle*, 181 Wn. App. at 779. The younger sister volunteered that her older "sister told them," but the State did not ask her to explain what that meant. *Kinzle*, 181 Wn. App. at 779. The court noted that it was "impossible to infer that [the younger victim] did not recall" the abuse or making the hearsay statement "because she was not asked." *Kinzle*, 181 Wn. App. at 783. The court only reversed the defendant's conviction for molesting the younger sister because of a violation of the defendant's right to confrontation. *Kinzle*, 181 Wn. App. at 784.

However, there is no confrontation violation if the state directly asks the child victim about making the hearsay statements and the acts alleged in those statements. *Kinzle*, 181 Wn. App. at 782. Even if the child is unable to remember the charged events or the prior statements, the defendant can cross-examine the child "about the truth of [the] statements or her lack of memory of the details." *Kinzle*, 181 Wn. App. at 782-83 (quoting *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 18, 84 P.3d 859 (2004)). "[J]urors then have the opportunity to evaluate whether they believe the child forgot or whether she was evading for some other reason," and the defendant's right of confrontation is satisfied. *Kinzle*, 181 Wn. App. at 784.

In *Price*, 158 Wn.2d at 633, 650, the court concluded no confrontation violation occurred, despite the testifying child victim's lack of memory. The child victim of molestation testified at trial, identified the defendant by his first name only, and then testified that she forgot what the

defendant did to her and forgot what she told others about the alleged abuse. *Price*, 158 Wn.2d at 635-36. The court concluded that, because the State asked the victim about the events and the hearsay statements, the defendant had a sufficient opportunity to cross-examine the victim. *Price*, 158 Wn.2d at 650.

Similarly, in *Grasso*, 151 Wn.2d at 9, 17-18, the court concluded that a child victim's response of "I can't remember" to questions about alleged sex abuse and hearsay statements was "a constitutionally acceptable response." There, the defendant could cross-examine the victim about her lack of memory. *Grasso*, 151 Wn.2d at 17-18.

Salsbery concedes he had a sufficient opportunity to cross-examine GM on the charged acts, but claims he was unable to fully cross-examine GM about the content of the hearsay statements.

Here, unlike in *Rohrich*, GM testified in the State's case-in-chief that she told Howard "a lot of stuff about [the touching]," and that she told Sledge and Eakins "[e]verything that happened." 7 RP at 728, 730. She testified on cross-examination that she told Howard, McFarland, Sledge, and Eakins "everything" she testified to earlier. 7 RP at 741.

The State asked GM about her statements to Howard, McFarland, Sledge, and Eakins. The State asked GM if she talked "about touching" with Howard, McFarland, Sledge, and Eakins respectively, and GM responded in the affirmative each time. GM also testified she told Howard that Howard needed to call Roy. She then told Howard and McFarland details about the touching. GM said she could not remember why she wanted Howard to call Roy. GM further testified that she "told [Sledge] . . . everything and then we went to the computer and I told her everything again[, and] then she typed it up." 7 RP at 729. GM also said she told Eakins about the abuse and that she told him "[e]verything that happened." 7 RP at 73.

GM's statements are more detailed than those of the child victims in *Price* and *Grasso*.

We conclude that the trial court did not violate Salsbery's right to confrontation. The State elicited testimony from GM on direct examination about the hearsay statements in a manner sufficient to provide Salsbery with an opportunity to fully and effectively cross-examine GM.

C. Limitation on Evidence of GMs Prior Bad Acts

Salsbery also argues the trial court prevented him from presenting his defense that GM suffered from RAD and not from PTSD. He bases this claim on the court's decision to exclude evidence of GM's alleged "physical aggression toward her mother and brother, her aggression toward animals, her lack of empathy, and her statements that she wanted to 'stab her parents and watch the blood run out.'" Br. of Appellant at 27. We disagree with Salsbery.

We review the trial court's limitations on the scope of direct and cross-examination on GM's prior bad acts for abuse of discretion. *Arredondo*, 188 Wn.2d at 267.

A criminal defendant's right to present a defense includes "the right to a fair opportunity to defend against the State's accusations." *Jones*, 168 Wn.2d at 720 (quoting *Chambers*, 410 U.S. at 294). However, the right to present a defense, including the right to confront adverse witnesses, is not absolute. *Jones*, 168 Wn.2d at 720. The right does not extend to presenting irrelevant or otherwise inadmissible evidence. *Darden*, 145 Wn.2d at 620-21; *Lozano*, 189 Wn. App. at 126. Instead, the right "is subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *State v. Lizarraga*, 191 Wn. App. 530, 553, 364 P.3d 810 (2015) (quoting *Chambers*, 410 U.S. at 294).

The scope of direct and "cross-examination is within the discretion of the trial court." *Arredondo*, 188 Wn.2d at 266 (quoting *State v. Russell*, 125 Wn.2d 24, 92, 882 P.2d 747 (1994)). A trial court may limit the scope of direct or cross-examination by a criminal defendant if the

excluded testimony is irrelevant, or relevant but “so prejudicial” it “disrupt[s] the fairness of the fact-finding process,” or is relevant and not unduly prejudicial, but the “State’s interest in withholding that information” outweighs the defendant’s need for the information. *Arredondo*, 188 Wn.2d at 266.

We conclude the trial court did not abuse its discretion in limiting the testimony of Morris or Johnson about GM’s behaviors based on established rules of evidence. The trial court ruled that specific acts of GM’s aggression and lack of empathy were inadmissible prior bad acts that were both irrelevant and unduly prejudicial. The court permitted general questioning of Morris and Johnson on GM’s aggression toward others, lack of empathy, and on the consistency of those behaviors with RAD and PTSD respectively. There was nothing manifestly unreasonable about this exercise of discretion, given the issues in the case, the established rules of evidence, and the holding in *Arredondo*.

We also note that the trial court allowed Salsbery to present evidence and an opinion that GM more likely than not suffered from RAD and not PTSD. Salsbery’s right to present a defense was not violated.

III. SUFFICIENT EVIDENCE OF IDENTITY AND PENETRATION

Salsbery argues insufficient evidence supports his two convictions for rape and his two convictions for molestation. We disagree.

When a defendant challenges the sufficiency of the evidence supporting his conviction, we examine the record to decide whether any rational fact finder could have found that the State proved each element of the offense beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Additionally, we deem the State’s evidence admitted, and draw all reasonable inferences from that evidence in the State’s favor. *State v. Caton*, 174 Wn.2d 239, 241,

273 P.3d 980 (2012). Direct and circumstantial evidence carry the same weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). “Credibility determinations are for the trier of fact” and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Appellate courts do not reweigh the evidence. *State v. Ramos*, 187 Wn.2d 420, 453, 387 P.3d 650 (2017).

A. Sufficient Evidence Exists of Salsbery’s Identity as the Abuser

Salsbery argues insufficient evidence supports all his convictions for rape and molestation because GM did not identify him as her abuser while testifying at trial. We disagree.

The identity of the abuser is an essential element of both rape of a child in the first degree and molestation of a child in the first degree. RCW 9A.44.073(1); RCW 9A.44.083(1).

Drawing all reasonable inferences in the State’s favor, we conclude that GM did identify Salsbery as her abuser while testifying at trial.

When the State asked GM why she was in court, she responded that she was there “[b]ecause Roy did something bad to [her].” 7 RP at 713. While GM testified, she referred to her abuser as “Roy.” GM also testified that Babcock was not at home when Salsbery sexually abused her. GM said she had not returned to Babcock and Salsbery’s house since she told Howard about the abuse. Babcock subsequently testified to living with Salsbery during the relevant period. She added that Salsbery and GM were alone at their shared home on June 24, 2013 and on three days between July 12 and July 20, 2013. Babcock also referred to Salsbery as “Roy,” and she identified him in the courtroom at trial. Moreover, multiple witnesses testified that GM told them Salsbery sexually abused her.

From this evidence, a reasonable factfinder could conclude that sufficient circumstantial evidence existed to prove Salsbery’s identity as GM’s abuser.

B. Sufficient Evidence of Penetration Exists

Salsbery argues insufficient evidence supports his rape conviction because of an alleged lack of evidence that Salsbery penetrated GM's vagina with his finger. We disagree.

"A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old . . . and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073(1). Sexual intercourse includes even "slight" penetration of the victim's vagina. RCW 9A.44.010(1)(b); *State v. Snyder*, 199 Wash. 298, 301, 91 P.2d 570 (1939).

Viewed in the light most favorable to the State, sufficient evidence of penetration exists. Multiple witnesses testified that GM told them Salsbery penetrated GM's vagina with his finger.

IV. CUMULATIVE ERROR

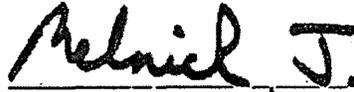
Salsbery argues that, cumulatively, effects of the errors at trial were so prejudicial that they denied him his right to a fair trial.

"Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). Cumulative error "does not apply where the errors are few and have little or no effect on the trial's outcome." *Venegas*, 155 Wn. App. at 520.

Because we conclude there was no error, Salsbery is not entitled to relief under the cumulative error doctrine.

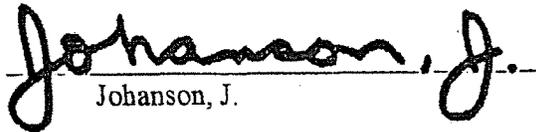
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

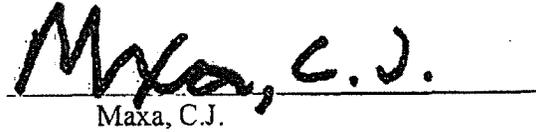


Melnick, J.

We concur:



Johanson, J.



Maxa, C.J.

APPENDIX B

21
NW

FILED
DEC 03 2018

Scott G. Weber, Clerk, Clark Co.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LEROY F. SALSBERY,

Appellant.

No. 48843-4-II

MANDATE

Clark County Cause No.
13-1-01430-1

The State of Washington to: The Superior Court of the State of Washington
in and for Clark County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 19, 2018 became the decision terminating review of this court of the above entitled case on October 31, 2018. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 27th day of November 2018.

Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

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Case #48843-4-11
Mandate

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February 26, 2020 - 1:57 PM

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Superior Court Case Number: 13-1-01430-1

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