

No. 35070-3-III

**COURT OF APPEALS, DIVISION III**  
**OF THE STATE OF WASHINGTON**

---

**THE STATE OF WASHINGTON,**

**Respondent**

**v.**

**KEVIN JOHN HUBBARD,**

**Appellant**

---

**ON APPEAL FROM THE SUPERIOR COURT OF THE**  
**STATE OF WASHINGTON FOR BENTON COUNTY**

**NO. 15-1-00918-8**

---

**BRIEF OF RESPONDENT**

---

**ANDY MILLER**  
**Prosecuting Attorney**  
**for Benton County**

**Terry J. Bloor, Deputy**  
**Prosecuting Attorney**  
**BAR No. 9044**  
**OFFICE ID 91004**

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS .....2

III. ARGUMENT .....6

    A. The evidence that the defendant sexually abused S.A.L. before her 14<sup>th</sup> birthday was sufficient to support convictions for Rape of a Child in the Second Degree and Child Molestation is the Second Degree. ....6

---

        1. Standard of review .....6

        2. There was sufficient evidence for a rational jury to conclude the defendant had intercourse with S.A.L. prior to her 14<sup>th</sup> birthday. ....7

    B. There was no prosecutorial misconduct, much less anything that could have affected the verdicts.....9

        1. Standard on appeal.....9

        2. The prosecutor’s arguments do not constitute misconduct.....10

            a. In the context of the defendant’s admission of some of the crimes, but not all, the prosecutor’s reference to a “dog and pony show” is not an improper argument.....10

            b. Argument regarding defendant’s thinking process .....11

c.	In any event, there was no prejudice.....	12
C.	There was sufficient evidence to support the jury’s finding that the defendant provided LSD to the victim for sexual motivation. ....	12
1.	Standard on appeal.....	12
2.	A rational jury had sufficient facts to find that the defendant gave S.A.L. the drug for his sexual motivation. ....	13
IV.	CONCLUSION.....	13

---

TABLE OF AUTHORITIES

WASHINGTON CASES

*State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012).....11

*State v. Chanthabouly*, 164 Wn. App. 104, 262 P.3d 144 (2011).....13

*State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992) .....7

*State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011) .....9

REGULATIONS AND COURT RULES

RAP 2.5(a) .....11

---

OTHER AUTHORITIES

WPIC 1.02.....12

## I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. (“The defendant’s conviction for second degree child rape and second degree child molestation is not supported by the evidence.” Br. of Appellant at 1.) **Response:** There was sufficient evidence. All parties, S.A.L., her mother, and the defendant, agree the family moved to Washington State when S.A.L. was 13.
- B. (“The prosecutor committed misconduct during closing argument by disparaging defense counsel and by suggesting to the jury that the defendant is not entitled to the benefit of reasonable doubt.” Br. of Appellant at 1.) **Response:** The argument was proper; it did not suggest relieving the State of its burden. It had no effect on the verdict.
- C. (“The defendant’s sentence enhancement for sexual motivation is not supported by the evidence.” Br. of Appellant at 1.) **Response:** The evidence demonstrates that the defendant giving S.A.L. LSD went hand-in-hand with his getting sex from her.
-

## II. STATEMENT OF FACTS

**The relevant timeline includes the following:**

**August 8, 1998:** S.A.L. was born. Report of Proceedings (RP)<sup>1</sup> at 51. Her father is Robert Luke and her mother is Elena Guerrero. RP at 51, 181.

**2001:** Ms. Guerrero met the defendant and they had an on-again, off-again relationship. RP at 51.

**Summer 2011:** While living on Antelope Trail in Billings, Montana, the defendant began touching S.A.L. RP at 53, 184. S.A.L. states this occurred in the summer of her 6<sup>th</sup> grade. RP at 184. The defendant fondled her private parts and eventually began having oral sex with her. RP at 185-86.

**Halloween 2011:** The defendant grazed his hand across S.A.L.'s vagina while carving a pumpkin. RP at 188. She told her mom (RP at 188), but Ms. Guerrero states it did not register with her (RP at 63).

**March 2012:** The family moved from Montana to West Richland, Washington. RP at 57. S.A.L. enrolled at Enterprise Middle School and attended the 7<sup>th</sup> grade. RP at 55.

---

<sup>1</sup> "RP" refers to the verbatim report of proceedings volumes I and II dated as follows: November 28, 2016; November 29, 2016; November 30, 2016; December 1, 2016; December 2, 2016; and February 3, 2017.

**Summer 2012 to before August 8, 2012 (S.A.L.'s 14<sup>th</sup> birthday):**

S.A.L. testified that during the summer of her 7<sup>th</sup> grade and before her birthday, the defendant gave her marijuana. RP at 189, 192. He drove her home while caressing her vagina on the outside of her pants. RP at 190-91. Once home, they had sex on a couch. RP at 191.

**Early 2013:** The defendant suggested putting S.A.L. on birth control. RP at 59. Her mother, Ms. Guerrero, was not aware that S.A.L. was sexually active. RP at 59. However, the defendant wanted S.A.L. to be put on birth control because, he told Ms. Guerrero, she was getting to an age where she might become sexually active. RP at 59. S.A.L. states the real reason the defendant wanted her on birth control was so he could ejaculate in her. RP at 221.

The defendant admitted to ejaculating in S.A.L. after she was on birth control. RP at 280-81.

**July 2013:** The defendant gave S.A.L. LSD in tablet form and then in a vial while at a fair in Oregon. RP at 204. Her LSD trip lasted on into the next day, when the defendant had sex with her in the back of a truck. RP at 205.

**Ongoing sexual abuse from 2012 to 2015:**

S.A.L. described numerous episodes of sexual abuse from the 7<sup>th</sup> grade, through the 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> grades. RP at 193. The abuse included

sex in the laundry room, the floor of her mother's bedroom, her room, in a warehouse, and a room the family referred to as a "smoke room." RP at 194, 214. The abuse included intercourse, oral sex, and the defendant's use of a sex toy on S.A.L. RP at 195-97.

**April 20, 2014:** Ms. Guerrero walks in on the defendant having sexual intercourse with S.A.L. He told Ms. Guerrero that it was the first time this happened, that he and S.A.L. were on LSD and begged her not to call the police. RP at 63-64, 208. Ms. Guerrero did not kick the defendant out of the house or call the police. RP at 64.

---

**August 3, 2015:** The last sexual intercourse between S.A.L. and the defendant occurs. RP at 77. This occurred in the warehouse, when she was on LSD, and included oral sex and intercourse. RP at 227-28.

**August 5, 2015:** S.A.L. tells her mother that she is suicidal. RP at 66. S.A.L. concluded the sex abuse would continue happening; she could either tell her mother or she would end her life. RP at 230. This time Ms. Guerrero decided to go to the police the next day, since the defendant would be at work. RP at 66.

**August 6, 2015:** The West Richland Police Department responds and finds a sex toy as described by S.A.L. RP at 30, 197. The police also take possession of some underwear worn by S.A.L. and a bed sheet from

S.A.L.'s room. RP at 28, 37. A couch in the warehouse was also processed for DNA. RP at 254-55.

**DNA evidence:**

Brittany Noll, forensic DNA scientist with the Washington State Patrol Crime Laboratory (RP at 236-37), testified that the bed sheet from S.A.L.'s room contained male semen. RP at 252-53. S.A.L.'s underwear (exhibit 8) had a match of the defendant's DNA with odds of a random person having the same DNA calculated at 1 in 860 quadrillion. RP at 253-54. There were three spots on the couch that were positive for semen and matched the defendant's DNA, also with odds of a random person having the same DNA calculated at 1 in 860 quadrillion. RP at 256-63.

**Evidence of drug use:**

There was much evidence about the defendant and S.A.L. using drugs. The police found drugs and drug paraphernalia in a cabinet in the residence (RP at 33); there were kits for testing drugs, including LSD (RP at 34); and S.A.L.'s mother and the defendant got S.A.L. a medical marijuana card when she was 15 in order to have a larger marijuana grow operation (RP at 59-60). There was a butane hash oil lab at the residence (RP at 98) and in a warehouse (RP at 117-21), which S.A.L. helped the defendant process (RP at 203). S.A.L. missed school because she had to trim the marijuana in the grow operation in the warehouse. RP at 218.

S.A.L. smoked marijuana with the defendant prior to having sex with him during the summer after she got out of the 7<sup>th</sup> grade. RP at 189.

The defendant gave S.A.L. LSD, which went “hand-in-hand” with sex. RP at 206. She recalled only one time the defendant gave her LSD and did not have sex with her. RP at 206. The defendant gave her LSD on the camping trip to Oregon in July 2013 when he had sex with her in a truck. RP at 204-05. She was on LSD, fading in and out of consciousness, on April 20, 2014, when her mother discovered the defendant having sex with her. RP at 207. Although she has friends who use LSD, S.A.L. has never done the drug with them. RP at 232.

**Defendant’s testimony:**

The defendant admitted having sex with S.A.L. twice when she was 15. RP at 275. He continued having sex with her past her 16<sup>th</sup> birthday. RP at 276.

He stated that S.A.L. was 13 when the family moved to Washington State. RP at 281.

**III. ARGUMENT**

**A. The evidence that the defendant sexually abused S.A.L. before her 14<sup>th</sup> birthday was sufficient to support convictions for Rape of a Child in the Second Degree and Child Molestation in the Second Degree.**

**1. Standard of review**

When sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id.* The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

---

**2. There was sufficient evidence for a rational jury to conclude the defendant had intercourse with S.A.L. prior to her 14<sup>th</sup> birthday.**

The defendant's argument is based on an offhand comment from Ms. Guerrero about when a table was purchased.

The defendant states, "S.A.L.'s mother testified that she purchased the kitchen table with her tax returns in 2014, most likely in March." Br. of Appellant at 4. However, what Ms. Guerrero actually said was:

1 Q. Do you know when that table was purchased?  
2 A. I bought that with my tax returns about what? Couple  
3 years ago. I'm not sure exactly.  
4 Q. So 2014?  
5 A. Um, for -- yeah, probably.  
6 Q. And when did you get your tax return in 2014, if you can  
7 recall?  
8 A. I usually get it about March. Let's see. January,  
9 February, so it would have been probably like March 2014  
10 maybe. I'm not sure exactly.  
11 MR. HANSON: Thank you. I have no more questions.  
12 Thank you.

RP at 73.

Also, S.A.L. did not give a recorded answer when asked if the table was there when the defendant first had sex with her.

22 A. Yeah, and it looks like all how I remember. So, yeah.  
23 Q. The table was there?  
24 A. Yeah. That's the way my mom always had it set up.  
25 Q. OK. So this table was there the first time you and Kevin  
1 had sex?  
2 MR. HANSON: No more questions.

RP at 234-35.

The defendant's argument is based on a false premise. Ms. Guerrero did not give a specific, definite year in which she purchased a table.

Further, the defendant's argument overlooks the testimony that the defendant had sexual intercourse and sexual contact with S.A.L. in her bedroom, in the smoke room, in the warehouse, on the floor of her mother's bedroom, and in a vehicle. Also, everyone—S.A.L., her mother, and the defendant—agree that she was 13 when they moved to the Tri Cities.

The jury could reasonably have concluded that Ms. Guerrero's estimate of when she bought the table was just that—an estimate. The jury could have also been satisfied that the defendant, Ms. Guerrero, and S.A.L. moved to West Richland, when they all said they did, in March 2012 when S.A.L. was 13. Finally, even if the jury accepted the argument about the table, the jury could have accepted S.A.L.'s testimony about other sexual encounters around the residence.

**B. There was no prosecutorial misconduct, much less anything that could have affected the verdicts.**

**1. Standard on appeal**

The defendant has the burden of proving that there was misconduct and that there was a substantial likelihood the misconduct affected the jury's verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

**2. The prosecutor’s arguments do not constitute misconduct.**

**a. In the context of the defendant’s admission of some of the crimes, but not all, the prosecutor’s reference to a “dog and pony show” is not an improper argument.**

The context is important. The prosecutor’s full comment regarding a “dog and pony show” was:

11 |           Now Count III is going to be easy, because we all know  
12 | what dog and pony show you saw today.

RP at 309.

---

The prosecutor was referring to Count III, Rape of a Child in the Third Degree. The defendant admitted while testifying that he committed this crime, twice. RP at 274-75. But, the defendant denied the other charges.

According to the Online Slang Dictionary, a “dog and pony show” means “a sales pitch.” *See* App. A. In that context, the prosecutor’s comment was accurate: Count III would be easy for the jury because the defendant admitted it. The defendant suggested/offered/made a sales pitch that he only committed the offenses when S.A.L. was 15, but no others. There is nothing about this comment that shifts the burden to the defendant or improperly impugns the defense attorney.

**b. Argument regarding defendant's thinking process.**

The defendant also argues that the following is improper argument:

2 | dishonest with you about this man? Who is the only person in  
3 | this courtroom that has a personal interest in this case?  
4 | Ding ding ding. He's the only one. Do you think he has  
5 | motive to be dishonest with you when he got up there? Do you  
6 | think he's got a motive to be dishonest with you? He  
7 | listened to all the evidence. "Ooh, boy. That DNA. This is  
8 | looking bad. I'm going to have to admit to that rape III.  
9 | Oh, wait. My wife came and testified and said, 'I watched  
10 | you --' oh, I -- that's looking bad. I'm -- oh. Oh, but I  
11 | didn't do that. I didn't touch her when she was 13. Oh, no,  
12 | no, no." Are you buying what he's selling? Don't give in to  
13 | that. The fact that he has a motive to be dishonest with you  
14 | is something you can take into consideration regarding his  
15 | credibility, regarding whether you believe him. Any biases  
16 | or prejudice brought out?

RP at 324.

First, the defendant did not object to this at trial and should not be allowed to raise this on appeal. RAP 2.5(a). Second, the prosecutor is allowed to argue that the defendant has tailored his testimony with the known facts where there is reason to believe that tailoring has occurred. *State v. Berube*, 171 Wn. App. 103, 116, 286 P.3d 402 (2012). Here, the defendant attempted to tailor his testimony to explain Ms. Guerrero's discovery of him having sex with S.A.L., the DNA found on the couch,

the LSD and marijuana evidence, and S.A.L.'s testimony of the length of the sex abuse. The argument focused on the defendant's credibility and motive and was proper.

**c. In any event, there was no prejudice.**

Regarding the "dog and pony show" and Count III, there was no prejudice. The defendant admitted he committed that offense. Regarding the argument that the defendant tailored his testimony, the prosecutor's comment focused on the jury instruction allowing for considering the motives of witnesses, demeanor, and credibility. *See* WPIC 1.02; CP 102-03.

The evidence against the defendant was overwhelming. He was caught in the act of raping S.A.L. when she was 15 years old; he offered nothing challenging S.A.L.'s motives; and her testimony was not discredited on cross-examination. The evidence convicted the defendant, not the prosecutor's closing argument.

**C. There was sufficient evidence to support the jury's finding that the defendant provided LSD to the victim for sexual motivation.**

**1. Standard on appeal**

Where the sufficiency of the evidence is challenged regarding a special verdict finding, the appellate court reviews the evidence in the light most favorable to the State to determine whether any rational trier of

fact could have found the presence of the aggravating factor beyond a reasonable doubt. *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144 (2011).

**2. A rational jury had sufficient facts to find that the defendant gave S.A.L. the drug for his sexual motivation.**

The jury rejected the defendant's testimony that he had never given LSD to S.A.L. RP at 279. The jury found the defendant guilty of Distribution of a Controlled Substance to a Minor. That conviction has not been challenged on appeal. So, the issue is why the defendant gave LSD to S.A.L. The only reasonable explanation is that he gave LSD to S.A.L. for sex.

The evidence supports this conclusion. S.A.L. stated the defendant giving her LSD went "hand-in-hand" with his sexually abusing her. LSD played a key role in the time Ms. Guerrero caught him having sex with S.A.L. S.A.L. did not do LSD with her friends. The jury had sufficient evidence to make the sexual motivation finding.

#### **IV. CONCLUSION**

There is much that is rare about this evidence. It is rare that an eyewitness catches a perpetrator in the act of sexually abusing a child. It is rare that a defendant testifies he committed a sex offense. It is rare, perhaps increasingly less rare, that DNA corroborates a victim's

allegation. It is rare the defendant's drug use is so elaborate or so integral in committing the sexual abuse. It is rare a child victim can relate as accurately as S.A.L. incidents of rape and sex abuse occurring over a period of years.

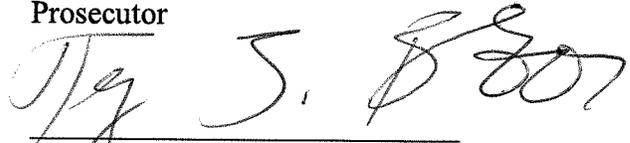
The evidence against the defendant was overwhelming. The prosecutor's arguments were appropriate. The sexual motivation allegation was established. The convictions and enhancement should be affirmed.

**RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of August, 2017.

---

**ANDY MILLER**

Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", written over a horizontal line.

Terry J. Bloor, Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

**CERTIFICATE OF SERVICE**

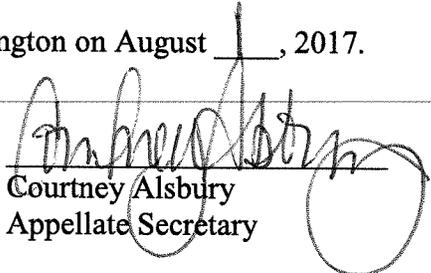
I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

**Cathy Helman**  
Burke Law Group PLLC  
221 N. Wall St., Ste. 624  
Spokane, WA 99201

E-mail service by agreement was made to the following parties: cathy@burkelg.com and stephanie@burkelg.com

Signed at Kennewick, Washington on August 1, 2017.

---

  
Courtney Alsbury  
Appellate Secretary

## APPENDIX A

---

G+ Like 20K

Login Register Forgot password Resend confirmation

Search

- Dictionary home
  - New words
  - Random
  - Word list
  - Browse by letter
  - Slang ("urban") thesaurus
- Submit

← Previous - Dog and phony show      **dog and pony show**      dog ate (one's) lunch - Next →

### Definition of dog and pony show

dog and pony show

noun

- a sales pitch.
- See more words with the same meaning: [business \(related to\)](#).

*Last edited on Jan 04 2011. Submitted by E. R. from Merrill, WI, USA on Mar 15 2002.*

+ [Add a definition for this slang term](#)

	<b>More info:</b>	<b>Interactive stats:</b>
Share	R	
Tweet		
E-mail		<a href="#">Related words</a> <a href="#">Usage</a> <a href="#">Vulgarity</a> <a href="#">SlangMap</a>

### Related words

### Slang terms with the same meaning

#### Other terms relating to '[business \(related to\)](#)':

- **brand ambassador**      Definitions include: in marketing, a satisfied customer who tells others about his positive experience with products of a particular brand name.
- **pizza profitable**      Definitions include: [more than ramen profitable](#).
- **exec**      Definitions include: "executive."

- **corporate speak** Definitions include: speech commonly found in corporations, often filled with buzzwords, jargon, and "verbed" nouns.
- **open the kimono** Definitions include: to share business details.
- **shark** Definitions include: To copy or plagiarize, commonly used by emcees to indicate a plagiarist.
- **busy work** Definitions include: work (in a professional or educational setting) that is designed to keep a person busy, but to not permit that person to accomplish anything of note.
- **turn-key** Definitions include: fully equipped and ready to go.
- **drone** Definitions include: an unenthusiastic worker, especially in an office setting.
- **cat** Definitions include: a female.
- **troops** Definitions include: workers.
- **case of the Mondays** Definitions include: general malaise felt on the first day back to work after the weekend.
- **glory vulture** Definitions include: a person attaches themselves to high profile task or project in order to enhance their own career.

- **MAFIAA, the** Definitions include: a pejorative term for both the MPAA (Motion Picture Association of America) and RIAA (Recording Industry Association of America), likening them to the mafia.
- **bini** Definitions include: shortened form of "business."
- [\(show 71 more\)](#)

### Slang terms with the same root words

#### Other terms relating to 'and':

- **AAB** Definitions include: acronym for "assault and battery".
- **Abel and Cain** Definitions include: "rain".

**BENTON COUNTY PROSECUTOR'S OFFICE**

**August 01, 2017 - 3:30 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35070-3  
**Appellate Court Case Title:** State of Washington v. Kevin John Hubbard  
**Superior Court Case Number:** 15-1-00918-8

**The following documents have been uploaded:**

- 350703\_Briefs\_20170801152943D3909238\_0341.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was 35070-3 Hubbard - Brief of Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- andy.miller@co.benton.wa.us
- cathy@burkelg.com
- stephanie@burkelg.com

**Comments:**

---

Sender Name: Courtney Alsbury - Email: courtney.alsbury@co.benton.wa.us

**Filing on Behalf of:** Terry Jay Bloor - Email: terry.bloor@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:  
7122 W. Okanogan Place  
Kennewick, WA, 99336  
Phone: (509) 735-3591

**Note: The Filing Id is 20170801152943D3909238**