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Division III
State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DOUGLAS DEAN SCYPHERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT -Supplemental

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I. PROCEDURAL HISTORY

An Information was filed on August 22, 2014, charging Douglas Dean Scyphers with multiple child sex offenses. CP 1. After an amended information was filed on July 15, 2015, Scyphers absconded and a bench warrant was issued for his arrest. CP 29, 35. He was arrested, and tried on a second amended information. CP 45. Trial commenced on December 4, 2017.

On December 14, 2017, Scyphers was found guilty of Counts V through X.¹ CP 266. The jury returned a special verdict as to each count, with the exception of the bail jumping, that an aggravating circumstance was involved. CP 206-16. Scyphers was sentenced on January 26, 2017. CP 266-82. He timely appealed his conviction. CP 283.

Scyphers was appointed appellate counsel. After reviewing the entire record, appellate counsel for Scyphers filed an *Anders* brief.² On

¹ Count V: rape of a child in the third degree; Count VI: child molestation in the third degree; Count VII: sexual exploitation of a minor; County XIII: second degree possession of depictions of a minor engaged in sexually explicit conduct; Count IX: first degree incest; Count X: bail jumping. CP 46-47.

² Counsel properly requested to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 498 (1967), and *State v. Hairston*, 133 Wn.2d 534, 946 P.2d 397 (1997).

October 12, 2018, the State appropriately filed a response to the *Anders* brief.

Thereafter, appellate counsel for Scyphers filed a supplemental brief noting that the \$200 filing fee should be vacated because the legislature amended RCW 36.18.020(2)(h) in 2018 to bar imposition of the mandatory criminal filing fee for defendants who were indigent at the time of sentencing under RCW 10.101.010(3)(a)-(c). Laws of 2018, ch. 269, § 17. This amendment applies prospectively to cases on direct appeal when the law changed. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). On October 24, 2018, the State, by letter, conceded the new \$200 filing fee argument.

However, by Order filed February 29, 2019, this Court found that “[t]he effect of counsel’s raising an additional issue which he deems meritorious is to negate his earlier *Anders* motion to withdraw based upon his assessment no meritorious issue existed for the Court to review.” The Court then denied appellate counsel’s motion to withdraw and referred the appeal to a panel for decision. This Court also directed appellate counsel to file an opening brief in this appeal within 30 days of February 20, 2019, and, “[i]n addition, to facilitate the panel’s consideration of Mr. Scyphers’ appeal, [directed the State] to file a respondent’s brief that addresses both

the opening brief and the issues raised in Mr. Scyphers' Statement of Additional Grounds for Review.”

II. APPELLANT’S ASSIGNMENT OF ERROR

Appellate counsel raises one issue on appeal - whether the \$200 filing fee should be vacated?

Response to appellant’s assignment of error.

The State concedes the imposition of the filing fee was in error because the legislature amended RCW 36.18.020(2)(h) in 2018 to bar imposition of the mandatory criminal filing fee for defendants who were indigent at the time of sentencing under RCW 10.101.010(3)(a)-(c), and, thereafter, *Ramirez*, 191 Wn. 2d at 747, held this amendment applies prospectively to cases on direct appeal when the law changed.

III. SAG ISSUES PRESENTED

1. The trial court allowed the prosecutor to explore the defendant’s previous divorce, yet did not allow his attorney to explore the divorce/marriage.
2. The State violated a court order to obtain an expert witness and the defendant was unable to obtain an expert witness.
3. Detective Buell did not do a thorough investigation. He also gave expert testimony and defendant was denied the right to a medical expert.

4. Victim A. Myers gave conflicting statements.
5. The evidence of the the defendant's skin markings contained in the pictures does not match the defendant.
6. The jury was biased and the bailiff was prejudicial.
7. At sentencing, the judge used non-conviction testimony/counts that were subject to the mistrial and dismissal and this prejudiced his sentencing.
8. The 240-month sentence was excessive.

IV. STATEMENT OF THE CASE

At trial, A.M.³ took the stand and testified that Mr. Scyphers assaulted and molested her. In support of its case, the State entered into evidence numerous pornographic photographs that were found on a computer that was seized from Scyphers' home. A.M. testified that Scyphers took photos of her partially nude and nude. RP 592-93. Detective Buell identified that A.M. was the subject of the seized photos and that the photos had been taken at the residence where Scyphers molested A.M. RP 290-91. In several of these photos, male genitalia were

³ Pursuant to General Orders of Division III dated June 18, 2012, stating that victims "known to have been under the age of 18 at the time of any event in the case," the State refers to the victim by initials in abundance of caution. At the time of the offenses, the victim was under the age of 18, but did not report the crimes until after the age of 18. The State would note that in all pleadings below, the victim is identified by her full name.

visible. *Id.* Scyphers denied molesting A.M., and denied that it was his genitalia in the photos.

Prior to trial, defendant moved to prevent the State from using or attempting to use a dermatologist to testify a mark on the defendant's penis was of recent origin. RP 121-130. The trial court granted Scyphers' motion and removed Dr. Dixon as a State's witness.

As part of his direct testimony, Detective Buell identified certain physical features on the portion of the male's body that was visible in the photos. He then testified that as part of his investigation he had taken photos of Mr. Scyphers' genitalia and upper thigh in 2015 and 2017. RP 316-18. Detective Buell proceeded to describe similarities between Mr. Scyphers' genitalia and upper thigh that he believed matched the genitalia and upper thigh visible in the photos with A.M. RP 316-40. He also explained that a mark that was visible in the 2017 photo of Mr. Scyphers was not present in 2015. *Id.*

On cross-examination, defense counsel Robert Cossey thoroughly reviewed the photos with Detective Buell and focused on the physical differences between the 2017 photos and the other earlier photos. Defense counsel asked numerous questions about how the 2015 photos were from fewer angles and did not show the full surface area of Mr. Scyphers' penis.

Consequently, Detective Buell agreed the mark in the 2017 photos could have been present in 2015, but not visible to Detective Buell. RP 384-90.

Mr. Scyphers testified and denied ever molesting A.M. RP 731. He also testified that the penis in the photos with A.M. was not his, and that the 2017 photos of the shaft of his penis shows a birthmark that he has always had. RP 731. He went on to testify that his erect penis did not look like the erect penis in the photos with A.M. RP 732. During Mr. Scyphers' cross-examination, the State went through the photos in question with him and noted that he owned the type of camera that was used to produce the images. The State also called attention to the fact that the mark was only visible in the 2017 photos, after he had been criminally charged, and that Mr. Scyphers and his defense team produced the photos to call into question the identification of the genitalia in the photo with A.M. The State also discussed the mole on the thigh in the 2015 photos and how it closely resembled a mole on Mr. Scyphers' thigh. Mr. Syphers testified during cross-examination that the man with A.M. could be anyone. RP 780-87.

V. ARGUMENT

A. THE TRIAL COURT ALLOWED BOTH THE PROSECUTOR AND DEFENSE COUNSEL TO EXPLORE THE DEFENDANT'S PREVIOUS DIVORCE.

The defendant claims, without citation to the record, that the trial court allowed the State, but not the defendant, to explore his divorce proceedings with A.M.'s mother. This is incorrect.

During the cross-examination of A.M., counsel for defendant, Mr. Robert Cossey, was able to effectively establish that A.M.'s declaration used in that divorce, alleging child abuse, was not filed until the over one-year after the divorce proceedings had been initiated, during which period of time *A.M.'s mother had been paying the defendant* pursuant to the divorce proceedings. RP 601-642 (especially 641-42).

Defense counsel also discussed the divorce in his cross-examination of Detective Buell. RP 379-80. Through Detective Buell, he established that there was a contentious divorce underway, and that the defendant had gained primary placement of A.M.'s brothers and was being paid \$2300 per month by his wife. RP 379. Furthermore, counsel established that the detective had not even looked at the pleadings involved in the divorce, nor had he designated someone else to look into the divorce proceedings.

Defense counsel examined defendant Scyphers regarding the divorce. Scyphers explained he filed the divorce in July 2013. RP 711. He

informed the jury the court “awarded [him] the home, the vehicles, the business, the children, custody of -- of the three boys, and most all the assets with inside the home.” RP 712. He established that it was not until almost one year later that the allegations by A.M. arose and he was interviewed by police. RP 713-14. He testified that the allegations changed the whole divorce proceeding. RP 728-29.

The State cross-examined Scyphers on the divorce and then, in rebuttal, called his ex-wife, Ms. Kecia Washburn. She testified little as to the divorce or divorce proceedings.

Defendant’s claim that he was denied the opportunity to explore the divorce is without basis in the record. It is apparent that his attorney, Mr. Cossey, was able to raise the issue of the divorce at will throughout the case. The only objections made by the State to his testimony were “nonresponsive”⁴ objections when the defendant began to narrate without a direct question.

Defense counsel was more than able to advantageously use the timing of the filing of A.M.’s divorce declaration, the potential bias of his former wife due to the monetary payments she was ordered to pay, as well as other issues such as Detective Buell’s improvident lack of investigation

⁴ RP 684, 687, 692, 715.

into this area prior to trial. *See* RP 1004 (defendant's closing argument).⁵

There was no error here, nor is there a showing of prejudice.

B. THE DEFENDANT'S CLAIM THAT THE STATE VIOLATED A COURT ORDER TO OBTAIN AN EXPERT WITNESS AND THE DEFENDANT WAS UNABLE TO OBTAIN AN EXPERT WITNESS IS WITHOUT MERIT.

The defendant claims he was unable to obtain an expert witness and that the State violated a court order to obtain an expert. Without knowing more, the State would discern that this claim relates to the State's failure to obtain an expert witness - a dermatologist. Indeed, the State requested more time to obtain an expert. RP 110-11. However, in this regard, the State was unable to timely obtain a witness, a dermatologist, that prosecutors claimed may be able to testify regarding the markings on the defendant's penis; whether these were, or may have been, self-inflicted, or whether they were related to moles that may or may not develop later in life. RP 110-11.⁶

⁵ Mr. Cossey [during closing]:

We all know that Mr. Scyphers filed for divorce and won primary placement on a temporary basis of his two twin boys and Kaleb and got the home and she had to pay him. Nothing in the divorce papers by Kecia, at the time Scyphers, talked about any of the issues that she talked about on the stand, none of those issues about comments or anything like that, nothing.

⁶ Apparently, dermatologists had been contacted by the State in this regard, but the State's requests for assistance were unsuccessful, other than the prosecutor's personal dermatologist, a Dr. Dixon, who apparently would be willing to render an opinion. RP 128.

The defendant objected to this late disclosure of an expert witness, an expert with personal ties to one of the prosecutors. RP 121-30. The trial court granted the defendant's motion to exclude the State's potential expert, and ruled it was not going to allow the dermatologist as a witness. RP 130. No dermatologist was called.

The defendant cannot complain regarding the State's failure to obtain an expert where he objected to the State using and consulting an expert. Any such error is invited. The invited error doctrine precludes a criminal defendant from seeking appellate review of an error he helped create. *State v. Studd*, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999), *as amended* (July 2, 1999). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996).

To determine whether the invited error doctrine is applicable to a case, the court considers whether the petitioner affirmatively assented to the error, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009); *In re Copland*, 176 Wn. App. 432, 442, 309 P.3d 626 (2013). Here, the error was invited. Here, defendant's counsel made a strategic decision to prevent the State's potential expert from voicing an opinion as to the similarities between the penile pictures found on his computer and those taken by the State and his

counsel. It also prevented any expert opinion as to why the pictures may be different.

Similarly, it is unknown from the record whether Mr. Cossey sought out an expert opinion on this issue, or whether, under the circumstances of the case, he sought to avoid obtaining an expert. There is no showing by the defendant that such an expert would have aided his defense, rather than have aided the State's case. Therefore, this claim is without merit.

C. THE DEFENDANT'S COMPLAINT THAT DETECTIVE BUELL DID NOT DO A THOROUGH INVESTIGATION PROVIDES HIM NO RELIEF. HIS CLAIM THAT DETECTIVE BUELL GAVE EXPERT TESTIMONY IS UNDEVELOPED AND UNDERCUT BY THE FACT THAT THERE WAS NO OBJECTION TO SUCH TESTIMONY, IF IT EXISTS.

The only argument relating to this SAG claim of error is Scyphers' claim that "When the prosecution used Detective Buell's testimony as an expert in place of a medical expert of their own, I was denied my right to have my own medical expert." SAG at 4. He fails to identify what expert opinion was given by Detective Buell. If it relates to testimony regarding similarities or differences in the penile photos, Detective Buell admitted he was not an expert as to why the pictures looked different, and admitted he was not a dermatologist. RP 341.

Scyphers fails to establish, within the record that he was denied an expert, and if this is part of his claim, it must arise from evidence outside

the record, and would be a more appropriate claim to raise in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995) (to be “manifest,” claim of error, facts supporting such error must be contained in the trial record. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest). Again, his experienced trial counsel fought to keep the State from introducing any expert dermatological testimony. Scyphers fails to establish cognizable error in this regard.

D. THE VICTIMS CONFLICTING STATEMENTS WERE SUBJECT TO SCRUTINY BY THE JURY.

Scyphers’ claims that A.M. gave conflicting statements. This is true, and her attorney was able to use this to Scyphers’ benefit. The jury failed to convict him of any of the first four child sex counts (I-IV). The fact that the jury did not believe him as to the other counts is not a basis for an appeal. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987). There is no error in this regard.

E. SCYPHERS CLAIMS THE EVIDENCE OF THE DEFENDANT'S SKIN MARKINGS CONTAINED IN THE PICTURES DOES NOT MATCH THE DEFENDANT.

This claim is one of fact, with witnesses testifying from both viewpoints. His wife of 20 years testified the pictures matched. He testified that the pictures did not match. He went on to testify that his erect penis did not look like the erect penis in the photos with A.M. RP 732. His mother testified as to her memory of his having a birth mark in that area.

During Mr. Scyphers' cross-examination, the State went through the photos in question with him and noted that he owned the type of camera that was used to produce the images. The State also called attention to the fact that the mark was only visible in the 2017 photos, after he had been charged, and that Mr. Scyphers and his defense team produced the photos to call into question the identification of the genitalia in the photo with A.M. The State also discussed the mole on the thigh and how it closely resembled the mole on Mr. Scyphers' thigh. RP 780-87.

This is, apparently, a sufficiency of the evidence complaint. The standard for determining whether a conviction rests on insufficient evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Walton*, 64 Wn. App. 410, 415, 824 P.2d 533 (1992). This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury. *Id.* at 415-16. There was more than sufficient evidence, both testimonial and tangible photographic evidence, to support all of the convictions.

F. NO EVIDENCE SUPPORTS THE CLAIM THAT THE JURY WAS BIASED AND THE BAILIFF WAS PREJUDICIAL.

Scyphers fails to establish any claim from within the record that the jury was biased, or that the bailiff was “prejudicial.” This claim is without merit.

G. SCYPHERS’ SENTENCING WAS PROPER WITHOUT REGARD TO WHETHER THE JUDGE CONSIDERED THE TRIAL TESTIMONY IN TOTAL OR CONSIDERED ONLY PORTIONS OF THE TESTIMONY. THE TRIAL COURT SPECIFICALLY RELIED ON THE JURY’S FINDING THAT EACH OF SCYPHERS’ CRIMES WAS PART OF A GREATER ONGOING PATTERN OF SEXUAL ABUSE INVOLVING ONE VICTIM, A.M. HIS 240-MONTH SENTENCE WAS NOT LEGALLY EXCESSIVE.

The Judgment and Sentence was entered on January 30, 2018. The Court assessed the maximum penalty on Counts V, VI and VII. The counts were run consecutively for a total of two hundred and forty (240) months. Counts VIII, IX and X were ordered to run concurrent with each other and

concurrent with Counts V, VI and VII. Thirty-six (36) months of community custody were imposed. CP 266.

Counts VII and IX are class B felonies with a maximum penalty of one hundred and twenty (120) months as to each offense. The other offenses are class C felonies with a maximum punishment of sixty (60) months. No single count exceeds the statutory maximum.

The jury found that each of the crimes was part of an ongoing pattern of sexual abuse involving one victim, A.M. *See* CP 206, 208, 210, 212, 214 (guilty verdicts); and CP 207, 209, 211, 213, 215 (finding ongoing pattern of sexual abuse for each respective count). It is an aggravating factor that the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 manifested by multiple incidents over a long period of time. RCW 9.94A.535(3)(g). The trial court relied on the jury's finding to impose consecutive sentences. RP 1078.

The "ongoing pattern of sexual abuse" factor is an exception to the rule against basing an exceptional sentence on facts that establish elements of an additional crime. RCW 9.94A.530(2). This exception is specifically provided for in RCW 9.94A.535(3)(g).

This factor can be applied even though the defendant was convicted on multiple counts, if each count was based on multiple acts of sexual abuse. When multiple current convictions are based on acts comprising a pattern

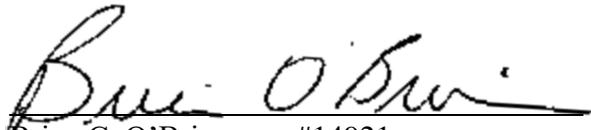
of sexual abuse, consecutive sentences may be imposed. RCW 9.94A.589(1)(a) (citing exceptional sentence provision of RCW 9.94A.535). There was no error committed by the trial court in the sentencing of Scyphers.

VI. CONCLUSION

The \$200 filing fee should be vacated by order of the trial court. The lower court should be affirmed in all other respects. The defendant has failed to establish error in any of his raised statements of additional grounds for relief.

Dated this 26 day of June, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS SCYPHERS,

Appellant.

NO. 35851-8-III

CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on June 26, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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6/26/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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