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No. 36001-6-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

JUAN JOSE LUNA HUEZO,

Appellant

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

NO. 17-1-00142-6

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

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

II. STATEMENT OF FACTS .....1

III. ARGUMENT .....4

A. Allowing B.O. and T.O. to answer some questions in writing was within the trial court’s discretion .....4

1. The issue is not whether the defendant’s confrontation rights were violated, but whether the court failed to exercise reasonable control over the mode of interrogating witnesses under ER 611 (a).....5

2. Standard of review for trial court exercising reasonable control over interrogation .....6

3. The trial court did not abuse its discretion by allowing written answers on some limited questions .....6

B. The trial court did not abuse its discretion in holding there was not a sufficient foundation to admit evidence of the defendant’s sexual morality.....7

1. Standard on review: Abuse of discretion .....7

2. The trial court was correct to not allow evidence of sexual morality because there was no foundation for such evidence.....7

C. There was sufficient evidence to convict the defendant.....9

1. Standard on review .....10

2.	There was sufficient evidence for the three convictions.....	10
IV.	CONCLUSION.....	11

TABLE OF AUTHORITIES

WASHINGTON CASES

*State v. Callahan*, 87 Wn. App. 925, 943 P.2d 676 (1997) .....8  
*State v. Chanthabouly*, 164 Wn. App. 104, 262 P.3d 144 (2011).....10  
*State v. Dye*, 170 Wn. App. 340, 283 P.3d 1130 (2012).....5  
*State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998).....5  
*State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006) .....8  
*State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000) .....9  
*State v. Hakimi*, 124 Wn. App. 15, 98 P.3d 809 (2004) .....6  
*State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984).....8  
*State v. Thach*, 126 Wn. App. 297, 106 P.3d 782 (2005) .....8  
*State v. Woods*, 117 Wn. App. 278, 70 P.3d 976 (2003) .....7, 9

## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. The trial court did not err when it allowed two child witnesses to provide written answers to some questions.
- B. The trial court did not err when it excluded the defendant's request to present evidence of his sexual morality.
- C. There was sufficient evidence to convict the defendant of one count of Child Molestation in the First Degree regarding B.O., one count of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree regarding T.O.

## **II. STATEMENT OF FACTS**

### **The prosecution case:**

The case came to light when two classmates of T.O., who was then in the 5th grade, saw her crying alone. RP at 24-25, 35. After talking to T.O., they went to their teacher. RP at 25, 35. The teacher contacted the school counselor, who spoke with T.O. RP at 47. After speaking with her, the counselor called the police about concerns with T.O. and her sister, B.O. RP at 48.

T.O., born April 5, 2005, testified that her stepfather, the defendant, had touched her sexually in several locales, including an apartment the family used to rent, her aunt's residence, their house, and a car. RP at 67, 249, 256-57, 267. The touching included putting his hand on

her private part, putting his private part on her body, and putting his penis in her mouth. RP at 251, 254, 265.

T.O. stated that the defendant once duct-taped her hands when he got on top of her. RP at 257-58. She also said that the defendant used a condom he obtained from a backpack in the bedroom, and that he put oil on his penis. RP at 262, 265. The police confirmed that the backpack did contain condoms and duct tape. RP at 190, 278. The defendant also confirmed he uses condoms and oil when having intercourse. RP at 402.

T.O. did not respond when the deputy prosecutor asked her to describe the defendant's private part. RP at 263. The prosecutor then asked her to write the answer. *Id.* T.O. did— "it was long and tiny hair." RP at 264.

T.O. discussed the sexual contact with her sister, B.O. RP at 271. To T.O.'s surprise, B.O. said the defendant was doing the same thing to her. *Id.* T.O. asked her stepfather if he was also touching B.O. and he admitted it. *Id.*

B.O., who is one year younger than T.O., with a birth date of July 31, 2006, testified but many of her answers were "I don't remember," "I don't know," or she simply did not respond. RP at 68, 223, 225, 236. The trial court noted that B.O. had extreme difficulty testifying. RP at 234.

However, B.O. did state that the defendant on one occasion touched her private part. RP at 230, 235.

The deputy prosecutor asked B.O. why she not tell her mother. RP at 232. When B.O. did not respond, the deputy prosecutor asked her to write the answer. *Id.* She wrote that she thought her mother would not believe her. Ex. 55; RP at 235.

B.O. also testified that she saw the defendant touch T.O.'s private parts while T.O. was asleep in bed. RP at 236. She also saw the defendant take T.O. into his bedroom and then heard T.O. crying. RP at 237-38. The deputy prosecutor asked B.O. why she did not tell her mother about T.O. crying while alone with the defendant in his bedroom. RP at 240. B.O. said she was scared. *Id.* B.O. did not respond when asked why she was scared, and the prosecutor asked her to write out her response. Ex. 56; RP at 240-41.

**The defendant's attempt to introduce character evidence of his sexual morality.**

The defendant argues that the trial court erred by not allowing testimony from "four witnesses regarding his sexual morality or decency. The trial court excluded the testimony and most of the witnesses." Br. of Appellant at 9. Actually, the defendant conceded that the testimony from his two sisters-in-law, Nancy Morales Enriquez and Niashia Morales

Enriquez, did not establish a foundation for their knowledge of his sexual morality. RP at 305, 335. The defendant did not ask any questions of his daughter, Alexis Huezo, regarding her knowledge of his sexual morality. RP at 307-13. The defendant's ex-wife, Laura Martinez, moved to Arizona in 2009. RP at 282, 286. Her own experience with the defendant led her to the opinion that he was incapable of committing the offense. RP at 284, 287.

The trial court did not allow Ms. Martinez to testify regarding her observations of the defendant around B.O. and T.O. because she was in Arizona during the relevant times. RP at 293. Regarding Nancy Morales Enriquez, her knowledge of the defendant was limited to family get-togethers over the holidays and visiting her sister once every one or two weeks. RP at 301-02. The trial court held that her testimony about general observations was not relevant because she had not visited with the defendant when he was alone with the children. RP at 306. But the trial court did allow Niashia Morales Enriquez and Alexis Huezo to testify about whether they observed defendant inappropriately touching anyone. RP at 354, 369.

### **III. ARGUMENT**

- A. Allowing B.O. and T.O. to answer some questions in writing was within the trial court's discretion.**

**1. The issue is not whether the defendant's confrontation rights were violated, but whether the court failed to exercise reasonable control over the mode of interrogating witnesses under ER 611 (a).**

Both B.O. and T.O. testified in front of the defendant. There were no hearsay statements, other than from a doctor who examined T.O. The defendant was not limited in his cross-examination of either witness. As stated in *State v. Dye*, 170 Wn. App. 340, 346, 283 P.3d 1130 (2012) the confrontation clause is normally satisfied if the defendant receives wide latitude at trial to question witnesses. Here, the defendant did not cross-examine B.O. at all. T.O. was not cross-examined about her written answer to the question, "What did the defendant's private part look like?" RP at 264. The issue is whether the trial court abused its discretion in allowing the mode of direct examination to include written answers.

Although it does not matter for this analysis, the defendant is incorrect in stating that the Washington Constitution provides greater confrontation rights than the U.S. Constitution. *State v. Foster*, 135 Wn.2d 441, 465, 957 P.2d 712 (1998) held that the defendant's state and federal right to confront witnesses are identical under the federal and state constitutions.

**2. Standard of review for trial court exercising reasonable control over interrogation.**

ER 611 (a) gives the trial court control over the mode of interrogating witnesses and presenting evidence. The standard of review for alleged violations of a trial court's authority over witnesses is manifest abuse of discretion. *State v. Hakimi*, 124 Wn. App. 15, 22, 98 P.3d 809 (2004).

**3. The trial court did not abuse its discretion by allowing written answers on some limited questions.**

B.O. was having difficulty describing what occurred. The trial court noted B.O.'s problems with the questions. RP at 228, 234. Courts have noted the need to avoid trauma to child victims. In *Hakimi*, two alleged child sexual assault victims were allowed to carry dolls with them when they testified. *Id.* The Legislative History of RCW 9A.44.150 recognizes the trauma that child sexual abuse victims may endure when testifying. The trial court did not abuse its discretion in allowing B.O.'s written answers on questions about why she did not tell her mother about her own abuse or seeing and hearing T.O.'s abuse.

T.O. was asked to describe the defendant's penis. That task would make anyone uncomfortable, especially a 12-year-old girl who was sexually abused. The trial court has the authority under ER 611 (a) to

protect witnesses from undue embarrassment, and that is an embarrassing question and the court was right to do so.

In any event, the written answers were in response to questions that were not central to the case. To T.O.: “What did his private look like?” RP at 263. To B.O.: “Why didn’t you tell your mom (about your abuse),” and “Why were you scared to tell your mom (about hearing T.O. crying while with the defendant in his bedroom)?” RP at 232, 240. The defendant would have been convicted if T.O. and B.O. were not asked these questions.

**B. The trial court did not abuse its discretion in holding there was not a sufficient foundation to admit evidence of the defendant’s sexual morality.**

**1. Standard on review: Abuse of discretion.**

A trial court’s ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Woods*, 117 Wn. App. 278, 280, 70 P.3d 976 (2003).

**2. The trial court was correct to not allow evidence of sexual morality because there was no foundation for such evidence.**

The defendant had two sisters-in-law make an offer of proof, but he concluded that there was not a sufficient foundation for their testimony on his sexual morality. RP at 305, 335. He did not ask his daughter questions about her knowledge of his reputation for sexual morality. RP at

307-313. The only witness the defendant even attempted to qualify as able to testify about the defendant's trait of sexual morality was his ex-wife, Laura Martinez, and the foundation was not adequate.

Proof of sexual morality may be made through testimony of a character witness who is knowledgeable about the defendant's reputation in the community for sexual morality. *State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997). A person seeking to admit reputation testimony must lay a foundation that the witness is familiar with the person's reputation and that her testimony is based on the community's perception of that person with respect to the character trait at issue during a relevant time period. *Id.* at 934-35.

The reputation evidence must be shown to exist within a neutral and generalized community and a defendant's reputation among family members is generally not admissible. *State v. Thach*, 126 Wn. App. 297, 315, 106 P.3d 782 (2005). A witness's personal opinion is not competent testimony. *State v. Kelly*, 102 Wn.2d 188, 194-95, 685 P.2d 564 (1984). Evidence must be based on knowledge obtained during the relevant time frame. Reputation evidence based on knowledge obtained several years earlier is inadmissible. *State v. Gregory*, 158 Wn.2d 759, 804-05, 147 P.3d 1201 (2006).

So, for evidence concerning a defendant's sexual morality to be admissible it must (1) be based on reputation for that trait, (2) in a neutral and generalized community, and (3) from a relevant time period. Ms. Martinez's testimony misses all of these elements. She did not base her testimony on his reputation, but on "this guy has the biggest heart," and that "he was never in any perverted way with me." RP at 284, 287. She is not from a neutral community. She divorced the defendant and moved to Arizona in 2009, eight years before the allegations in this case.

The cases cited by the defendant actually support the State's argument. In *State v. Woods*, 117 Wn. App. 278, 70 P.3d 976 (2003) at issue was a psychologist's evaluation of the defendant which found he had no sexual impulsivity and no sexual attraction to children. The court did not allow the admission of this testimony, concluding it was opinion evidence and that opinion evidence is not admissible as proof of character. *Id.* at 280.

In *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000) the court found that foundation for admission of sexual morality evidence was lacking. "A defendant has a constitutional right to present a defense consisting of relevant and admissible evidence. However, a proper foundation is necessary." *Id.* at 829.

**C. There was sufficient evidence to convict the defendant.**

**1. Standard on review:**

When there is a challenge to the sufficiency of evidence, courts review the evidence in the light most favorable to the State to determine if a rational jury could find the elements of the crime. *State v. Chanthabouly*, 164 Wn. App. 104, 143, 262 P.3d 144 (2011).

**2. There was sufficient evidence for the three convictions.**

The defendant argues there was not sufficient evidence because Dr. Phillips did not find physical evidence of abuse on T.O. But Dr. Phillips testified that such a finding does not negate sexual abuse. RP at 154. The defendant also argues that T.O. and B.O. testified they could not remember what happened or that nothing happened. True, both girls had an extremely difficult time testifying, but B.O. did state the defendant touched her private part one time. RP at 235. T.O. was able to describe several times the defendant touched her and one time he put his penis in her mouth. RP at 250-51, 257-58, 262, 265, 267-68.

This was not a simple “he said/ she said” case. In addition to T.O. and B.O.’s testimony the following evidence was before the jury.

- T.O. said the defendant used a condom, which he obtained from a backpack. RP at 262. The police found condoms in that backpack. RP at 190.

- T.O. said the defendant used oil on his penis. RP at 265. The defendant admitted he uses oil in intercourse. RP at 402.
- T.O. said the defendant duct taped her hands on one occasion. RP at 257. The police found duct tape and zip ties in the defendant's backpack. RP at 278.
- T.O. and B.O. cross-corroborated each other. B.O. testified that she saw the defendant touching T.O.'s private part and heard T.O. crying while alone in a bedroom with him. RP at 236, 238. T.O. testified that she confronted the defendant about abusing B.O. and he admitted doing so. RP at 271.

But perhaps the State's best evidence was something this Court could not judge from the transcript: the power of T.O.'s and B.O.'s testimony. Consider what they gave up to testify. The defendant married their mother more than seven years before they testified. RP at 70. They had two aunts who took the side of the defendant. They were worried about whether their mother would believe them. They both referred to the defendant in personal terms—"dad" for T.O., "Tia Juan" for B.O. RP at 222, 249. The jury may have found their testimony compelling by itself.

#### **IV. CONCLUSION**

The defendant's convictions should be affirmed.

**RESPECTFULLY SUBMITTED** on April 6, 2020.

**ANDY MILLER**

Prosecutor

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

Terry J. Bloor, Deputy

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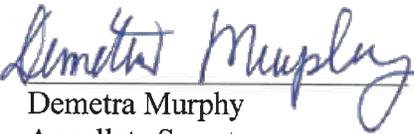
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Demetra Murphy  
— Appellate Secretary

**BENTON COUNTY PROSECUTOR'S OFFICE**

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