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NO. 36019-9-III

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

STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

JOSE ENRIQUE GONZALEZ PALOMARES

DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

ARIAN NOMA
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

Arian Noma, WSBA: 47546
Prosecuting Attorney

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STATEMENT OF THE CASE

The State/Respondent agrees with the basic recitation of facts provided by the Appellant, but has provided a brief overview of the facts below.

Between December 1, 2011 and November 15, 2012, Appellant, Mr. Jose Enrique Gonzalez (DOB: 01-01-2001), raped N.R.E. (DOB: 01-01-2003) a minor. RP 210, 218-220, 234-35, 237-39, 255-56. Mr. Gonzalez coaxed N.R.E. into the closet of his bedroom declaring that they were going to play a game. RP 417, 218, 237, 255-56, 341-42. Mr. Gonzales then forced N.R.E. down on all fours, got behind her, took her clothes off, and forcefully penetrated her with this penis. RP 225, 230, 417, 421, 470-90, 512-17. Mr. Gonzalez used a black garbage bag as a barrier between his penis and N.R.E.'s privates. RP 417, 470-80, 491, 237-38, 263-65, 318. After the rape, victim did not report it. RP 421, 470, 472, 482-90, 514-15. Around November 15, 2012, victim and her family moved away from the Okanogan County area. RP 266-68, 318-19, 486, 490.

Approximately five years later, victim wrote a letter to her mother in order to confess to her that Mr. Gonzalez raped her. RP 334, 614-616; RP 252, 261, 317, 324. N.R.E. told her mother

about the rape in the form of a poem/letter. RP 332, 334-35, 371, 616-18. As a result, N.R.E.'s mother reported the rape to the Omak Police Department in Okanogan County on or about September 16, 2017. RP 13, 15, 336, 371, 618, 641

Officer Knutson was assigned to the case and interviewed, N.R.E., N.R.E.'s mother, N.R.E.'s father, R.R., Mr. Gonzalez, and Theresa Calderon, and all other witnesses. RP 270-74, 415-16, 217, 246-47, 257, 264-66. Officer Knutson also collected evidence consisting of the poem/letter N.R.E. wrote, photos of the crime scene, and photos of texts that Mr. Gonzalez sent to his family shortly after his interview with the Omak Police Department. RP 239-40, 242-43, 245-46, 343. Furthermore, right after picking up his paycheck from his place of employment, Mr. Gonzalez disappeared for about a day and a half prompting his spouse to file a missing person's report. RP 247, 348. Mr. Gonzalez eventually turned himself into police once he knew that charges issued. RP 85-86, 349.

The Defendant was charged by a filed information on this matter on or about September 21, 2017. CP 11-12. The first trial in this matter was set to be heard on the merits on or about November 7, 2017. RP 364-65. The State sought a postponement on

November 6, 2017 citing reasons pursuant to CrR 3.3, which was granted and speedy trial time was extended to December 28, 2017. CP 23-31. At that time, trial was reset to November 28, 2017. CP 31.

On November 27, 2017, the State filed a motion to admit evidence at trial. CP 32-41. The motion was heard by Judge Culp on November 30, 2017. CP 42-43, RP 1-36. At the hearing to admit evidence, the trial court made preliminary decision regarding the admissibility of certain evidence during trial. RP 24-36.

On December 6, 2017, the date the trial was set to commence, the trial court advised the parties that he would be seeking to continue the matter to the next trial setting as he had a family emergency in that his brother was on hospice and his death was imminent. CP 88-92, RP 37. The trial court excluded the time from speedy trial under 3.3(e) as both for the administration of justice and for unavoidable or unforeseen circumstances. RP 44-48. The defense objected to the continuance but was unable to put forth any prejudice that might be suffered by the defense. *Id.* The trial was reset to January 9, 2018 but did not commence until January 28, 2018. RP 53.

After the evidence was completed in the first trial, and it was submitted to the jury on February 1, 2018. RP 128. The deliberations began at 10:59 a.m. and continued until the court received a note from the jury stating they were not able to come to a unanimous decision, reconvening at 4:05 p.m. RP 129-130. After receipt of the note from the jury, the trial court reconvened, explaining to the parties about the note and discussion of intent of the court regarding what would be done. RP 130 -131. The trial court stated that he would inquire of the jury whether there was a reasonable probability of reaching a decision during deliberations, and if there was a reasonable probability in reaching a decision, then he would send them back to deliberate further, but if not then the parties would deal with it then. RP 130-131. Neither party voiced an objection. RP 131. Once the jury foreman advised that there was no reasonable probability that they would reach a verdict within a reasonable amount of time, the trial court declared a mistrial, and again neither party objected. RP 132-133.

The second trial commenced on March 7, 2018. RP 181. The victim, N.R.E, testified that the defendant had raped her in the closet of his bedroom. RP 227 - 230. While she could not recall whether the penetration was anal or vaginal, she was clear that he

penetrated her with his penis. RP 231. She even recalled Mr. Gonzalez placing a black garbage bag over his penis prior to penetrating her. RP 231.

The State also introduced through law enforcement text messages from Mr. Gonzalez to his wife, which she shared with law enforcement when she reported him missing. EX S6, S7, S8; RP 310, 318. In these messages, Mr. Gonzalez admitted to his wife that he did something “horrible” and that it was coming back to haunt him. RP 318-320.

At the conclusion of the second trial, the jury found Mr. Gonzalez guilty of Rape of a Child in the First Degree. CP 259. The Appellant filed a motion for a new trial on March 23, 2018, based on “newly discovered evidence” in which the Appellant’s cousin would attempt to impeach the testimony of the victim if a new trial was granted. CP 265-67. The trial court denied the motion. CP 326, RP 417. The trial court then proceeded to sentencing of Mr. Gonzalez. Both the State and the Defense filed sentencing memorandums. CP 290 – 298; RP 420-21. During sentencing, Mr. Gonzalez requested a sentence of 10 months and the State requested the high-end of the standard range. RP 433; 422-23. The trial court, after hearing argument of counsel and

hearing a letter from the victim's mother, imposed the low-end of the standard range of 93 months. RP 438.

ARGUMENT

1. Mr. Gonzalez's right to a speedy trial under CrR 3.3 was not violated

Mr. Gonzalez's right to a speedy trial was not violated as the trial court held a preliminary hearing regarding admissibility of trial evidence prior to the expiration of his speedy trial time.

In reviewing whether a person's speedy trial rights were violated, the appellate court shall review "the speedy trial rule de novo." *State v. Kenyon*, 216 P.3d 1024, 1027, 67 Wash. App. 130 (2009). But, a trial court's "decision to grant or deny a motion for a continuance is within the discretion of the trial court and will not be disturbed absent an abuse of discretion." *State v. Ollivier*, 312 P.3d 1, 8, 178 Wash. 2d 813 (2013). Article I sec. 22 of the Washington State Constitution is substantially the same speedy trial right as found in the Sixth Amendment of the United States Constitution. *Id.* at 10.

The Appellant cites to *State v. Kenyon*, 167 Wn.2d 130, 216 P.3d 1024 (2009), to support their argument that Mr. Gonzalez's speedy trial rights were violated because court congestions and

unavailability of a judge does not constitute unavoidable and unforeseen circumstance. However, our case is not about court congestion and quite frankly that is a mischaracterization of the situation.

In Mr. Gonzalez's matter, the Trial Court, on its own motion, continued the trial of Mr. Gonzalez due to a family emergency i.e.: imminent death of the Judge's brother. CP 88; RP 37. However, of significant note, the Court had already held a preliminary motion hearing regarding admissibility of evidence in the matter thereby actually commencing the trial prior to the expiration of Mr. Gonzalez speedy trial. On November 30, 2017, the Thursday prior to the continuance on December 6, 2017, the trial court held a hearing regarding admissibility of certain evidence that the State wished to introduce and in fact made preliminary decisions regarding evidence. CP 32-41; RP 29. Speedy trial expiration at the time of the evidentiary hearing was December 28, 2017.

A judicial emergency as a reason for continuance was analyzed in the consolidated case of *State v. Andrews*, 66 Wash.App.804, 832 P.2d 1373 (1992). In *Andrews*, the defendant's trial was assigned to a judge, the trial court heard a preliminary motion made by the State to exclude witnesses and then advised

that he was finishing a civil trial and would be available to hear further motions the next day. *Id.* at 806. The civil trial concluded the next morning as planned, at which time the trial Judge explained to the parties in the Andrews matter he would not be able to conduct the trial due to a dental emergency. *Id.* In this consolidated appeal, Andrews argued that his speedy trial rights were violated because his trial was not commenced prior to the expiration of his speedy trial time under CrR 3.3. *Id.* at 809. A central issue was that the preliminary motion to exclude witnesses was merely pro forma and insufficient to toll the running of the speedy trial period. *Id.* at 810. Division I held that “in the absence of any showing of prejudice or undue delay in proceeding with the trial after it is assigned to a judge, a preliminary motion such as a motion to exclude witnesses is sufficient to toll the running of the speedy trial period provided for in CrR 3.3.” *Id.* at 812. Additionally, the court went on to state that the trial judge’s dental emergency is “an example of an unavoidable or unforeseen circumstance”. *Id.* at 812-13, *citing State v. Greene*, 49 Wash.App. 49, 55-56, 742 P.2d 152 (1987); *State v. Stock*, 44 Wash.App. 467, 473, 722 P.2d 1330 (1986). The Court also stated that “[t]he right to a trial does not mean that the defendant has a

right to all the court's time every day for as many consecutive days as it takes to complete a trial." Andrews, at 812.

In the instant case, Mr. Gonzalez's right to a speedy trial was not violated. Mr. Gonzalez was arraigned on September 25, 2017. CP 24. On or about October 2, 2017, an Omnibus Hearing was held. CP 13. Mr. Gonzalez did not disclose that he or his spouse would be asserting any spousal privileges despite the State's request in Omnibus. CP 18. Mr. Gonzalez speedy trial expiration would have been on November 27, 2017. CP 24. The State moved for a continuance on November 6, 2017, and the request was granted. CP 12. It was meritorious so the outside date for speedy trial was moved to December 28, 2017. CP 89. On November 30, 2017, the trial court held a hearing regarding admissibility of certain evidence that the State wished to introduce at trial and the trial court made preliminary decisions regarding evidence. CP 32-41; RP 29. On December 6, 2017, the Court postponed the trial on the grounds that the Trial Judge's brother's death was imminent, the only other Judge in the Courthouse was not even on the campus on December 6, 2017, and that the Defendant would not suffer any prejudice by the brief continuance. CP 90. The Court ruled that no actual prejudice to the Defendant would occur if the postponement

were granted and the trial was moved to the next available dates. CP 97-99. Clearly, if a dental emergency is an unavoidable and unforeseen circumstance then a death in the trial judge's family would be considered an unavoidable unforeseen circumstance requiring a postponement. Therefore, after hearing argument of counsel and hearing no prejudice to the defendant the trial court ruled there was no actual prejudice and the postponement was granted and the trial was moved to the next available dates. CP 97-99.

There was no prejudice to the defense and his speedy trial was not violated, therefore, his conviction should be upheld.

2. Mr. Gonzalez was not placed in double jeopardy after the first trial ended in a mistrial.

The Constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. A Defendant may be subject to double jeopardy in a situation where a mistrial is erroneously declared. *State v. Jones*, 97 Wn.2d 159, 164 641 P.2d 708 (1982). An example is the case of *State v. Robinson*, where a judge declared a mistrial once it learned that the bailiff responded to a jury a question regarding a review of specific items of evidence. *State v. Robinson*, 46 Wn. App. 471, 476, 191 P.3d

906, 909 (2008). In Robinson the Court declared a mistrial without finding a factual basis for juror misconduct, bailiff misconduct, or determining appropriate remedies. *Id.* at 481.

A genuinely “hung jury” *is* a valid basis for a Court to declare a mistrial. A “mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.” *Id.* at 509, 98 S.Ct. 824. State v. Strine, 176 Wn.2d 742, 754, 293 P.3d 1177, 1182 (2013).

There is no minimum period of time that a jury is required to deliberate on a verdict.

We have also explicitly held that a trial judge declaring a mistrial is not required to make explicit findings of “‘manifest necessity’ ” nor to “articulate on the record all the factors which informed the deliberate exercise of his discretion.” Washington, supra, at 517, 98 S.Ct. 824. And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse.

Renico v. Lett, 559 U.S. 766, 775, 130 S. Ct. 1855, 1863–64, 176 L. Ed. 2d 678 (2010).

When a Court declares a mistrial due to jury deadlock, the decision should be accorded great deference by the reviewing court. When a jury acknowledges through its foreman, and on its

own accord, that it is hopelessly deadlocked, there is a factual basis sufficient to constitute the “extraordinary and striking” circumstance necessary to justify discharge. Some of the factors a judge should consider in determining whether to discharge the jury include the length of deliberations in light of the length of the trial, and the volume and complexity of the issues. State v. Fish, 99 Wn. App. 86, 90, 992 P.2d 505, 507–08 (1999). The trial court is not necessarily required to make express findings of “manifest necessity”. State v. Melton, 97 Wn. App. 327, 331, 983 P.2d 699, 702 (1999).

In the instant case the jury began deliberations at approximately 10:59 a.m. RP 128. It was approximately five hours later when they submitted their inquiry to the Court regarding their inability to reach a verdict. The Court, in open court and on the record, answered the jury’s question by inquiring if the jury could reach a verdict if given a reasonable amount of time. The Court’s question was answered in the negative by the foreman. RP 130-132.

The full record indicates that the jury was deliberating for approximately 5 hours. Regardless of the length of time, the Court

acknowledged that “these cases obviously are difficult”. RP 131. The Court also correctly indicated that there is no set period of time for a jury to deliberate. RP 130. Neither party disagreed. The Court appropriately considered the various factors and properly declared a mistrial. There is no basis to reverse Mr. Gonzalez’s conviction because of this issue.

3. No reversible error occurred when the trial court admitted text messages between Mr. Gonzalez and his wife.

A trial court’s evidentiary ruling is reviewed under an abuse of discretion standard. *State v. Williams*, 137 Wash.App. 736, 743, 154 P.3d 322 (2007). A trial court abuses its discretion if it makes an evidentiary ruling that is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* at 743. The challenging party of an evidentiary ruling bears the burden of proving that the trial court abused its discretion. *Id.* Here, the trial court did not abuse its discretion in allowing the text messages into evidence.

Under RCW 5.60.060, a defendant has a spousal privilege.

RCW 5.60.060(1) reads in relevant part:

A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic

partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership.

RCW 5.60.060(1). There are two parts to this privilege. First, is the privilege that no spouse shall be examined as a witness for or against the other spouse without the consent of such other spouse. State v. Thorne, 43 Wn.2d 47, 55 (1953). Second, is the privilege that neither spouse can, without the consent of the other, be examined as to confidential communications made by one to the other during marriage. Id. The State introduced the text messages via testimony from law enforcement not through testimony of the Appellant's wife.

In State v. Clark, 26 Wn.2d 160 (1946), the Court examined the testimonial privilege aspect of RCW 5.60.060. The Court made only a superficial analysis as to whether a third party could testify to statements of a wife that implicated the husband. Id. at 168. Citing State v. Winnett, 48 Wn. 93 (1907), the Court stated that it is not "proper to permit a third person to relate a statement made by one spouse against the other which that spouse would not be allowed to relate if called as a witness... Testimony should not be permitted to

enter through the back door which the statute forbids to enter through the front door.” Clark, 26 Wn.2d at 168.

However, the case relied upon, Winnett, was a case where the prosecution used the defendant’s wife as an exhibit in their case.

In the case, the defendant was charged with statutory rape.

Winnett, 48 Wn. at 94. Between the time of the commission of the crime and the trial, the victim and the defendant were married and she was his wife at the time of trial. Id. While the doctor was testifying as a witness for the State, the State sought to have her brought into the courtroom to be identified by the doctor as the person he had examined in the case. Id. This was allowed by the trial court over the defendant’s testimonial spousal privilege objection. Id. The Supreme Court held that this was error because compelling the wife to be brought into the courtroom and identified in such a manner essentially made her an exhibit for the State. Id. The wife was a witness against him by being brought in sight of the jury where her condition as to pregnancy, which was a fact the State sought to prove, could be observed and noted by the jury. Id.

The Court in Clark, referenced the Winnett case, but such a reference was essentially dicta as the Court went on to say that

both the defendants (husband and wife) had previously agreed that their statements to the officer would be admitted at trial and therefore they had already waived any claim of spousal privilege. Clark, 26 Wn.2d at 169.

In State v. Thorne, 43 Wn.2d 47, 54 (1953), a child molestation case, the defendant moved to exclude his wife as a witness under the testimonial spousal privilege. The Court recognized the two distinct parts to the spousal privilege and the reasons for them. Id. at 55. The reason for the testimonial privilege is that it fosters domestic harmony and prevents discord. Id. The confidential communication privilege endeavors to encourage the free exchange of confidences between spouses that is necessary for mutual understanding and trust. Id. The spousal communication privilege is similar to the attorney-client, priest-penitent, and physician-patient privileges. Id. "It applies to all actually successful confidential communications made between the spouses while they are husband and wife." Id. at 56. "If the communication is heard by a third party, even if by eavesdropping, the third party may testify to it, since the privilege protects only successful confidences." Id. See also State v. Slater, 36 Wn.2d 357, 363 (1950) ("The authorities, with great unanimity, hold that a

third person may testify as to a communication between husband and wife which he has overheard, whether accidentally or by design.”)

In Thorne, the defendant relied upon Clark in his assertion that the Court should not have permitted the officer to testify to the conversation he overheard where the defendant’s wife asked him how he could molest his own daughter and the defendant replied by saying he was drunk and didn’t know what he was doing. Thorne, 43 Wn.2d at 56. Thorne differentiated Clark, saying that Clark involved a situation where the State was indirectly admitting statements by the wife to a third party and Thorne involves a situation where a third party overheard a conversation between the husband and wife. Id. at 57.

The conversation between husband and wife, having been overheard, was not a confidential communication; and to hold that it cannot be testified to by the person who heard it, if otherwise admissible, would be to add a restriction to the statute relative to marital privilege. ***We hold again, as in the Slater case [] that testimony by third parties who have overheard a conversation between husband and wife is not barred either as a confidential communication or by the marital privilege.***

Thorne, 43 Wn.2d at 56 (emphasis added).

In State v. Burden, 120 Wn.2d 371 (1992), the defendant and his wife were involved in a cash refund scam. The defendant's wife had made statements to third persons including statements to her pastor, her brother, police officers, and various store cashiers. Id. at 373. The defendant asserted spousal privilege seeking to exclude all statements made by his wife to the third parties. Id. Burden addressed the testimonial privilege, but did not address the communications privilege. Id. at 374. The defendant asserted that the admission of his wife's statements would violate the testimonial privilege and place him in the position of having to waive the privilege to refute the testimony or allow the testimony without cross examination. Id. However, citing State v. Kosanke, 23 Wn.2d 211 (1945), the Court rejected this argument. In Kosanke, the Court stated

[T]he court [has not gone] so far as to hold that relevant and material evidence could not be adduced merely because, in order to refute the same, the wife of a defendant might have to be called as a witness. In this case the wife or appellant was not called as a witness by respondent, nor was the attention of the jury called to her in such a way as to require objection on the part of appellant in order to preserve his rights under the statute...[T]he fact that refutation of competent evidence would require the wife being a witness does not make it erroneous to adduce the testimony. The statute [testimonial privilege] was not violated either directly or indirectly.

Burden, 120 Wn.2d at 374 citing *Kosanke*, 23 Wn.2d at 217-

18.

The Court in *Burden* also held that third party admission of the wife's statements would not undermine the purpose of the spousal privilege. *Burden*, 120 Wn.2d at 375. The purpose of the testimonial privilege is to "foster[] domestic harmony and prevent[] discord". *Id.* It reflects the "natural repugnance" of having one spouse testify against the other, and prevents the testifying spouse from having to "choose between perjury, contempt of court, or jeopardizing the marriage." *Id.* However, these purposes will not be affected by allowing third person testimony because the spouse is not testifying in court. *Id.* Furthermore, the marital harmony rationale behind the testimonial privilege has been extensively criticized as "lacking modern justification." *Id.* "Privileges are narrowly construed to serve their purposes so as to exclude the least amount of relevant evidence." *Id.*

A person holds no privilege to prevent his or her spouse from making adverse statements abroad in the world, and if this occurs and is revealed in court [by a third person], it is the fact of the out-of-court conduct of the spouse, not the advent of the trial, which is the source of any strain upon the marriage."

Burden, 120 Wn.2d at 376 citing US v. Tsinnijinnie, 601 F.2d 1035, 1039 (9th Cir. 1979).

Burden specifically addressed Clark's reliance on Winnett stating, "The summary statement in Clark regarding the exclusion of such testimony is supported only by a citation to State v. Winnett, 48 Wash. 93 (1907)...That case holds only that a wife may not indirectly testify against her husband through her own presence in the courtroom." Burden, 120 Wn.2d at 377. Burden recognized that Thorne's allowance of third party testimony of overheard communications and Clark's holding that third parties should not be permitted to testify to statements that the spouse would be prohibited from testifying to are inconsistent. Id. The Court then held that "construing the testimonial privilege to exclude only in-court testimony of a spouse [] reconciles this inconsistency by allowing third person testimony only if not excluded under either the testimonial or the communications privileges". Id. The purposes behind the testimonial privilege are not served by excluding third person testimony of a spouse's extrajudicial statements and hold the admission of such testimony does not violate RCW 5.60.060(1). Id.

In this case, the Appellant's wife called law enforcement to report her car stolen and that the defendant went missing after he was questioned by law enforcement about this incident. RP 296. Sergeant Tallant went to Mrs. Gonzalez's house and she showed the officer text messages that the defendant had sent her. RP 299-301. When Mrs. Gonzalez disclosed the text messages to law enforcement, the communication was no longer confidential. As stated in Burden, a person has no privilege against their spouse making adverse statements to the world and if those are revealed in court by a third party, the spousal privilege is not violated. Burden, 120 Wn.2d at 376. The confidential communication privilege protects only successful confidential communications. Thorne, 43 Wn.2d 56. If a third party overhears the conversation, even inadvertently or by eavesdropping, it is not a successful confidential communication and a third party may testify to it. Id. Here, the communication was not obtained by eavesdropping or an inadvertent disclosure. Mrs. Gonzalez intentionally disclosed these two communications to law enforcement, who then testified as to the content and conversation.

Also, the admission of this testimony and evidence is not contradictory to RCW 5.60.060. The Court's primary duty in

interpreting any statute is to discern and implement the intent of the Legislature. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point must always be the statute's plain language and ordinary meaning. Id. When the plain language is unambiguous- that is, when the statutory language admits only one meaning- the legislative intent is apparent, and the court will not construe the statute otherwise. Id. The court may not add words or clauses to an unambiguous statute when the Legislature has chosen not to include that language. Id.

When the court interprets a criminal statute, it gives it a literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2002). "[The court] cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." Id. "[The court] assumes the legislature means exactly what it says." Id. The court will not add or subtract from the clear language of a statute even if it believes the legislature intended something else but did not adequately express it. State v. Castillo, 144 Wn. App. 584, 591, 183 P.3d 355 (Div. 3, 2008).

In RCW 5.60.060(1), the Legislature elected to prohibit a spouse from being examined as to the communications between

the spouses. Had the Legislature intended that the communications themselves could not be admitted, the Legislature could have just as easily stated that communications between spouses shall not be admissible without the consent of the spouses. However, they chose only to prohibit a spouse from being examined regarding the communication. The statute is unambiguous and provides for only one interpretation; therefore, the court may not add language to the statute. Following the plain language of RCW 5.60.060(1), the trial court correctly allowed the State to introduce evidence of the communications between the defendant and Mrs. Gonzalez through law enforcement.

However, even if this was an error made by the trial court, it is not an error requiring reversal of the conviction. A defendant cannot avail himself of error as a ground for reversal unless it has been prejudicial. *State v. Cunningham*, 93 Wn.2d 823, 832, 613 P.2d 1139 (1980) citing *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974).

Appellate courts long ago rejected the notion that reversal is necessary for any error committed by a trial court. Our judicial system is populated by fallible human beings, and some error is virtually certain to creep into even the most carefully tried case. The ultimate aim of the system, therefore, is not unattainable perfection, but rather fair and correct

judgments When a court blindly orders reversal of a judgment for an error without making any attempt to assess the impact of the error on the outcome of the trial, the court encourages litigants to abuse the judicial process and bestirs the public to ridicule it As a practical response to the realities of the trial process, therefore, appellate courts have developed a series of doctrines for analyzing whether error in various types of cases was harmless. The fundamental premise of this sort of analysis is that a defendant is entitled to a fair trial but not a perfect one.

5 Wash. Prac., Evidence Law and Practice § 103.24 citing United States v. Blevins, 960 F.2d 1252 (1992).

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of unsubstantial errors.

State v. Jamison, 93 Wn.2d 794, 800-801, 613 P.2d 776 (1980)

citing State v. Martin, 73 Wn.2d 616, 440 P.2d 429 (1968). A

violation of the defendant's right to control his own defense may be

subject to review for harmless error. State v. Lynch, 178 Wn.2d

487, 494, 309 P.3d 482 (2013).

Even if the error is of a constitutional nature, the error will be deemed harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 636, 160 P.3d 640 (2007). A constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error. Id. citing Neder v. United States, 527 U.S. 1, 19 (1999). The appellate court looks at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. citing State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985).

If the error is not of a constitutional magnitude, the error is not prejudicial unless, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Cunningham, 93 Wn.2d at 832 citing Rogers, 83 Wn.2d 553; State v. Rhoads, 35 Wn.App. 339, 343, 666 P.2d 400 (Div.3 1983), aff’d, 101 Wn.2d 529 (1984).

In our case, there was no error committed by allowing the testimony and evidence of the text messages between Mr. and Mrs. Gonzalez, but even if there was an error by the trial court in allowing the text messages into evidence, it was not an error

requiring reversal as there was other overwhelming evidence for the jury to rely on to support the conviction.

4. There was sufficient evidence introduced at trial to convict Mr. Gonzalez of Rape of a Child in the First Degree.

The standard of review on a challenge to the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); *State v. McPherson*, 111 Wn.App. 747, 756, 46 P.3d 284 (Div. 3, 2002). When the sufficiency of evidence is challenged on appeal, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201; *McPherson*, 111 Wn.App. at 756. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201; *Mines*, 163 Wn.2d at 391; *McPherson*, 111 Wn.App. at 756.

The reviewing court considers circumstantial evidence equally reliable as direct evidence. *McPherson*, 111 Wn.App. at 756. Finally, credibility determinations are for the trier of fact and

are not subject to review. Mines, 163 Wn.2d at 391. The jury is the sole and exclusive judge of the evidence. State v. Johnson, 159 Wn.App. 766, 774, 247 P.3d 11 (2011). The appellate court's role is not to reweigh the evidence and substitute its judgment for that of the jury. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court will affirm a conviction if *any rational trier of fact could have* found the essential elements of the crime. State v. Trout, 125 Wn.App. 403, 409, 105 P.3d 69 (Div.3 2005). A jury can infer the specific criminal intent of a criminal defendant where it is a matter of logical probability. *Id.* citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

RCW 9A.44.073(1) provides the framework for the conviction of Rape of a Child in the First Degree, and states that “[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 not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.” We next look at the definition of “sexual intercourse” which is found in RCW 9A.44.010(1), which states, in part, sexual intercourse “(a) has its ordinary meaning and occurs upon any penetration, however

slight.” It is under this framework that the provided evidence in this matter to sufficiently prove that Mr. Gonzalez raped N.R.E.

The Appellant disputes that there is sufficient evidence to show penetration in the case at hand. However, N.R.E testified that he put “his private parts inside of me.” RP 231. It is true that she had difficulty stating where inside of her Mr. Gonzalez put his penis, but she was very clear that he penetrated her body by putting his “private parts” inside of her regardless of whether she recalls if it was her vagina or anus.

The Appellant cites to State v. A.M., 163 Wash.App. 414, 260 P.3d 229 (2011) but that case is factually distinct from the case at hand. In A.M., the victim specifically testified that the defendant’s penis “touched the outside of the parts where it’s almost inside”. *Id.* at 417. There was no testimony that there was any penetration of the anus. In our case the victim specifically testified that there was penetration. While she cannot identify whether the penetration occurred in her vagina or anus, she clearly testified that he penetrated her body. RP 231.

The Appellant would have the Court believe that there was no penetration as there is a possibility that Mr. Gonzalez’s penis only penetrated N.R.E’s buttocks or inside of her thighs rather than

her anus or vagina. However, that is not supported by the testimony as N.R.E stated that Mr. Gonzalez put his penis inside of her. Likewise the Appellant argues that Mr. Gonzalez's inexperience with sexual intercourse, evidenced by the use of a garbage bag as a condom, suggests a lack of penetration. But, quite frankly, the use of the garbage bag as a condom not only demonstrates knowledge of sexual intercourse in providing for protection it also shows intent to penetrate the victim, and begs the question of why else would he cover his penis.

In viewing the evidence in the light most favorable to the State and not violating the purview of the jury in determining credibility, it is clear that there was sufficient evidence for the charge of Rape of Child First Degree as there clearly was testimony regarding penetration that the jury believed occurred. This Court should not now reweigh the evidence and disregard the decision made by the jury. Mr. Gonzalez conviction should be upheld.

5. The trial court properly denied Mr. Gonzalez motion for a new trial based on newly discovered evidence.

A motion for new trial was made in this matter pursuant to CrR 7.5(a)(3), alleging new evidence discovered post-conviction. It is well established that a trial court has broad discretion in granting

or denying a motion for new trial. State v. Williams, 96 Wash.2d 215, 221, 634 P.2d 868 (1981). "The exercise of that discretion will not be disturbed on appeal absent an abuse of discretion." *Id.* citing State v. Marks, 71 Wash.2d 295, 301-02, 427 P.2d 1008 (1967). "A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds." State v. Larson, 160 Wash.App. 577, 586, 249 P.3d 669, citing State v. Roche, 114 Wash.App. 424, 435, 59 P.3d 682 (2002). "A 'discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" Larson, 160 Wash.App. at 586, 249 P.3d 669, citing State v. Quismundo, 164 Wash.2d 499, 504, 192 P.3d 342 (2008). "A trial court's ruling on a motion for new trial will not be disturbed absent a manifest abuse of discretion, and a much stronger showing of abuse of discretion is ordinarily required to set aside an order granting a new trial than one denying new trial." State v. York, 41 Wash.App. 538, 543, 704 P.2d 1252 (1985).

A trial court may grant a new trial under CrR 7.5(a)(3), based on newly discovered evidence, only when the defendant shows the evidence "(1) will probably change the results of the trial; (2) was discovered since the trial; (3) could not have been discovered

before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” Larson, 160 Wash.App. at 586, 249 P.3d 669 (2011), citing State v. Williams, 96 Wash.2d at 223, 634 P.2d 868 (emphasis omitted). “The absence of any one of these five factors is grounds to deny a new trial.” Id.

Under the first prong, when the court is considering whether newly discovered evidence will probably change the trial’s outcome, the trial court considers the credibility, significance, and cogency of the proffered evidence. Id. at 587, 249 P.3d 669 (2011), citing State v. Barry, 25 Wash.App. 751, 758, 611 P.2d 1262 (1980).

“Moreover, a new trial is not warranted unless the moving party can demonstrate that the new evidence will probably change the results of the trial.” State v. Sellers, 39 Wash.App. 799, 807, 695 P.2d 1014 (1985) review denied, citing State v. Koloske, 100 Wash.2d 889, 898, 676 P.2d 456 (1984).

“Where...the state has produced strong and convincing evidence of guilt and the defendant little or no evidence of innocence, a new trial should not be granted on unsupported, uncorroborated testimony of an accomplice or codefendant, nor upon the offer of any new evidence unless it appears that the newly discovered evidence is of such significance and cogency that it will

probably change the results of the trial.” *State v. Peele*, 67 Wash.2d 724, 732, 409 P.2d 663 (1966). “Hardly a case can be supposed but what, by diligent search, some additional evidence will be found that would, if offered at trial, have been admissible on one theory or another. But to grant a new trial on the showing merely that such evidence could not by reasonable diligence have been discovered before trial would leave the law in a state where there would be virtually no end to the litigation of an issue of fact, for each succeeding trial inevitable leaves new avenues for investigating the facts anew. The test, therefore, that the newly discovered evidence must be the kind that will probably change the result of the trial, is a sensible one and essential to the efficient administration of justice.” *Id.* at 732-33.

What is being called “new evidence” in this matter is a declaration submitted by Y.A.B.C, Mr. Gonzalez’s cousin, stating that about 5 years ago the victim, N.R.E, told her that a man living in her house had touched her private parts and hurt her. CP 265-267. However, under the first prong of the test, whether this evidence would likely change the outcome of the trial, it fails. This information is vague and likely only to be used to impeach the

credibility of the victim in this matter. There is no reason to believe that this information would change the outcome of the trial.

The second and third prongs of the test for a new trial are whether the evidence was discovered since the trial and whether this evidence could have been discovered before trial by the exercise of due diligence. There is no dispute that this declaration and information came to light after the trial had ended, but there is concern regarding whether this could have been discovered by the exercise of due diligence. It would stand to reason that if there were more individuals possibly present during the time frame of this rape that could possibly refute the allegations of rape that this would have been investigated by the defense and thereby discovered prior to trial. However, even if this could not have been discovered by due diligence the new evidence does not require a new trial as it fails to pass the test under other prongs.

The fourth prong is whether this new evidence is material. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceedings would have been different. A 'reasonable probability...is a probability sufficient to undermine confidence in the outcome.'" *State v. MacDonald*, 122 Wash.App. 804, 809-810,

95 P.3d 1248 (2004) (citation omitted). The new evidence fails under this prong as well as it is not likely that the outcome of the trial would have been different even with this evidence. N.R.E testified, and the jury weighed her credibility and the evidence regarding whether Mr. Gonzalez raped her and found that he did. However, even if this evidence passed the fourth prong it would fail under the fifth prong of the test.

The fifth, and final prong, is whether the new evidence is merely cumulative or impeaching. "When the only purpose of new evidence is to impeach or discredit evidence produced at trial, a new trial cannot be properly granted." *Sellers*, 39 Wash.App. at 807, 695 P.2d 1014 (1985) review denied, citing *State v. Edwards*, 23 Wash.App. 893, 898, 600 P.2d 566 (1979). The evidence that would potentially be produced would only be used to impeach the credibility of the victim and attempt to cast doubt onto her testimony and her identification of Mr. Gonzalez as the man who raped her in his closet. Despite the assertion that this evidence is critical and not merely impeaching, this evidence is only merely impeachment. The declarant, Y.A.B.C, cannot say that Mr. Gonzalez did not rape N.R.E, nor can she state that she did or did not witness their encounter. All she can say is that N.R.E told her that she had been

touched inappropriately by some unnamed person who may have lived in her home at some point in time. Besides basic impeachment and attacking the victim credibility, there is no other basis for the evidence and therefore it fails under the fifth prong.

Based on the above reasoning, it is clear that the trial court did not abuse its discretion when it denied Mr. Gonzalez's motion for new trial as there is clearly no new evidence to be submitted, and the information that is being thrust to the forefront as new evidence is merely statements that may be used to attempt to impeach the victim after the jury convicted Mr. Gonzalez. Appellant has failed to carry his burden and meet prongs 1, 3, 4 and 5 of the test and therefore the motion for new trial was properly denied.

6. The trial court did properly exercise its sentencing discretion when imposing sentence on Mr. Gonzalez.

The Trial Court did properly exercise its discretion when sentencing Mr. Gonzalez to the low end of the standard range for his conviction for Rape of a Child.

The State agrees that given recent US Supreme Court cases and Washington Supreme Court cases that a trial judge has discretion to impose a sentence below the standard range on a juvenile charged in adult court. *Miller v. Alabama*, 567 U.S. 460,

469, 132 S.Ct. 2455 (2012); Roper v. Simmons, 543 U.S. 551, 560, 125 S.Ct. 1183 (2005), Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010); State v. Ramos, 187 Wn.2d 420, 434, 387 P.3d 650 (2017); State v. Houston-Sconiers, 188 Wn.2d 1, 12-13, 391 P.3d 409 (2017). Roper concluded that the Eighth Amendment categorically barred the death penalty for juvenile offenders. Roper, 543 U.S. at 569-575. Graham extended that prohibition to juveniles who were sentenced to life-without-parole for non-homicide cases. Miller then prohibited a literal life-without-parole sentence for any juvenile under the Eighth Amendment without first holding a hearing to consider the mitigating circumstances of a juvenile's maturity. Miller, 567 U.S. at 466, 469. Ramos, then extended Miller to apply to de-facto, not just literal, life-without-parole sentences. Ramos, 187 Wn.2d at 434.

In Houston-Sconiers, the juvenile defendants were sentenced for multiple underlying crimes with corresponding firearm enhancements. Houston-Sconiers, 188 Wn.2d at 12. The court noted that one defendant faced 41.75-45.25 years, of which 31 of those years were attributable to enhancement time that would be served as "flat time." Id. The other defendant faced 36.75-40.25 years, of which 26 were attributable to enhancement time that

would be served as “flat time.” *Id.* The court actually did hold what, in effect, was a *Miller* hearing, as the court heard mitigating evidence for the defendants based on their youth. *Id.* at 13. However, the sentencing judge did not believe that he had the authority to depart from the statutory sentencing guidelines with regard to the imposition of the firearm enhancements. *Id.* at 21.

The Court stated “the Supreme Court has not applied the rule that children are different and require individuated sentencing consideration of mitigating factors in exactly this situation, i.e., with sentences of 26 and 31 years for Halloween robberies.” *Id.* at 20. *Houston-Sconiers* held that a trial judge has the discretion, based on juvenile mitigating factors, to depart from the sentencing guidelines including mandatory enhancements. *Id.* at 21.

A trial court’s ability to consider the mitigating factors of youth in sentencing does not require the court to impose an exceptional sentence downward. It simply requires the court to consider the defendant’s level of maturity and culpability at the time of the offense and the trial court did just that in this case.

The trial court stated that Mr. Gonzalez “maybe a typical teenager” at the time of this offense. RP 436. But the court states that there was nothing submitted to the court about “immaturity,

impetuously, or failure to appreciate risk or consequences” and all that was argued is his age at the time of the offense. *Id.* No further mitigating factors were presented by defense counsel or Mr. Gonzalez. The trial court, having considered the information provided, stated that upon consideration of the testimony that the crime committed by the Mr. Gonzalez required some sophistication and planning and “not just some spur of the moment plan.” RP 436. When he took all that into consideration, and Mr. Gonzalez’s age and lack of criminal history, he sentenced Mr. Gonzalez to the low end of the standard range. This was clearly within his discretion and the trial court exercised his discretion in sentencing appropriately and therefore the sentence imposed by the trial court should be upheld.

CONCLUSION

Based on the foregoing, Respondent requests that this court affirm Appellant’s convictions and sentence.

Dated this 15th day of April, 2019.

Respectfully Submitted:



Melanie Bailey, WSBA# 38765
Deputy Prosecuting Attorney
Okanogan County, Washington

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

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