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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36436-4-III

STATE OF WASHINGTON, Respondent,

v.

JOSE MARIO LOPEZ, Appellant.

APPELLANT'S BRIEF

Andrea Burkhardt, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd #789
Kennewick, WA 99336
Phone: (509) 572-2409
Andrea@2arrows.net
Attorney for Appellant

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I. INTRODUCTION

As her parents' marriage was crumbling, A.L. accused her neighbor, Jose Mario Lopez, of molesting and eventually raping her over a period of several years. Because no physical evidence supported her allegations and because A.L. did not exhibit any changes in her behavior toward Lopez, with whom she had a long-standing relationship, the State bolstered its case against Lopez by presenting, over his objection and in its case in chief, expert testimony on the phenomenon of "delayed reporting" to contend that A.L.'s behavior was consistent with the behavior of rape victims generally. Because the probative value of the evidence was minimal and it was unfairly prejudicial because it tended to imply that A.L. was truthful and Lopez was guilty, the evidence should have been excluded from the State's case in chief. Here, because its admission likely affected the jury's verdict, a new trial should be granted.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in admitting expert testimony on delayed reporting that constituted an improper opinion on Lopez's guilt and was unfairly prejudicial, when its probative value was nominal.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether expert testimony about delayed reporting that is used to argue that an accuser matches a profile of a rape victim is unfairly prejudicial under ER 403.

ISSUE NO. 2: Whether the admission of victim profile testimony in the present case likely affected the verdict when the evidence of guilt was inconclusive and the State relied upon the evidence to argue that the accuser was “a perfect example” of the profile.

IV. STATEMENT OF THE CASE

Fifteen-year-old A.L. first met Jose Mario Lopez when the Lopez family moved in next door when she was 6. I RP¹ 61, 63, 101-02.

Residing with Lopez was his wife Tracy Lopez, their daughter Julie and her husband Eric, their son Joe, and their granddaughter Josie. I RP 64, II RP 279-80. A.L. and Josie quickly became friends, and A.L. would go to her house almost every day and would spend the night on the weekends. I RP 64, 103. A.L. also became close with Lopez, whose relationship with

¹ The Verbatim Reports of Proceeding in this case consist of two volumes of pretrial proceedings, reported respectively by Barbara Scoville, CCR and LuAnne Nelson, CCR (ret.), and three volumes of consecutively paginated pretrial, trial, and sentencing proceedings reported by Karen Komoto, CCR. Because this brief will only reference the volumes reported by Karen Komoto, citations to the record will identify the volume and page number without further elaboration.

her was like a grandfather. I RP 72, 104. A.L. and other neighborhood kids often came to the Lopez's house, and Lopez would buy them ice cream and play soccer with them. I RP 151, II RP 286, 309, 313. Nobody ever witnessed any strange or inappropriate behavior between A.L. and Lopez. I RP 104, 122, 150, 181-82, II RP 286, 289.

In 2014, Lopez divorced his wife and moved into an upstairs apartment at A.L.'s house. I RP 74, 106-07, II RP 314. A.L. and her mother continued to spend time with Lopez and often went to his apartment to watch television, and A.L. would bring her friends to sleep over at Lopez's house. I RP 75, 107, 176-78, II RP 323-24. Sometimes A.L.'s mother would come up to the apartment in the morning after she had slept over, and she always saw A.L. sleeping separately from Lopez with her own blanket. I RP 124.

Not long after Lopez moved upstairs, A.L.'s parents had their own marital troubles and A.L.'s father moved out of the house in February 2017. I RP 107, 150. The separation took A.L.'s mother by surprise and she became depressed and reclusive, often going up to Lopez's apartment to lay on his couch or talk to him about the divorce process. I RP 105, 117. The separation also seemed to affect A.L., who stopped communicating with her father and became quiet. I RP 88, 115, 154-55.

Around the same time that A.L.'s father moved out of the family home, A.L. told her mother that Lopez had sex with her and she was afraid she was pregnant. I RP 81-83, 108-09, 150. She asked her mother not to tell the police because she did not want to get Lopez in trouble, and her mother agreed. I RP 84, 110. Sometime later, A.L.'s friend was staying over and asked why they were not sleeping upstairs, and A.L. told her Lopez had been having sex with her. I RP 86. The friend told her mother, and eventually a counselor at A.L.'s school learned about the allegation and reported it to Child Protective Services. I RP 87, 163-64. Around two months after A.L. first accused Lopez to her mother, police began to investigate. I RP 87, 113, 214-15.

The State ultimately charged Lopez with one count each of child molestation in the first and second degree and one count of rape of a child in the third degree. CP 55-57. Each charge carried special allegations of aggravating circumstances that (1) the offense involved multiple incidents per victim, (2) the victim was particularly vulnerable and that vulnerability was a substantial factor in the commission of the offense, and (3) the conduct manifested deliberate cruelty. CP 55-57.

In the subsequent jury trial, A.L. testified that when she was in fifth grade, Lopez approached her while she was sleeping on a couch and

pulled up her shirt, touching and kissing her intimately. I RP 69. She said that it happened frequently, usually every weekend, and the touching progressed to Lopez putting his hands in her pants and inserting a finger in her vagina. I RP 70, 72, 74. When she was 14, in December of 2016, she was sleeping in Lopez's apartment and woke up to him pulling her pants down. I RP 76. On this occasion, A.L. said that Lopez put his penis in her vagina for about ten minutes until he finished. I RP 76. Saying that it happened at least four times, she described other incidents occurring in his home where she feigned sleep while Lopez had sex with her. I RP 77-80. Police testified that due to the lapse in time between the report and the last incident she described, a sexual assault examination would not be viable. II RP 220. They did, however, obtain a search warrant for Lopez's apartment and recovered some bedding material that was submitted to the crime lab for DNA testing. II RP 221-22, 226. A DNA analyst testified that while he was able to identify biological staining on some of the blanket, it did not contain seminal fluid. II RP 257, 260, 262, 265. Police recovered no other inculpatory evidence in their search.

Lopez testified at trial and denied that he had ever touched A.L. or any other child inappropriately. II RP 304, 312, 327. He also presented evidence, including testimony from his treating physician, that in October 2015, he contracted Legionnaire's disease. II RP 291, 299-300, 319, 349.

He was initially hospitalized for two weeks and later suffered additional complications that necessitated surgery to remove a part of his colon in December 2015. II RP 290, 300, 335, 352-54. In December 2016, Lopez told his doctor that his sex life was suffering. II RP 357, 361. Lopez's wife confirmed that after he contracted Legionnaire's disease, he was not able to perform sexually and they were told that some nerves were cut during his surgery that could take several years to heal. II RP 292-93, 320-21. After the charges against him were filed in April 2017, Lopez was referred to a urologist, who diagnosed him with erectile dysfunction and prescribed medication, but Lopez continued to be unable to achieve an erection. II RP 292-93, 20-21, 362-66. Lopez's doctor indicated that such complaints after the type of surgery he had undergone would not be uncommon. II RP 358-59, 374.

Before the conclusion of the State's case in chief, Lopez objected to a State's witness who was proffered as an expert. I RP 167. He argued that anticipated testimony about grooming would amount to profiling that would unfairly influence the jury by suggesting Lopez was more likely to have committed the offense if he fit the profile. I RP 168-69. He contended that such evidence could be admissible in rebuttal and that the State was free to argue grooming without presenting expert testimony, which would constitute an improper opinion on Lopez's guilt. RP 169-70,

183-84, 190-91. The State indicated that in addition to testifying about grooming, it sought to proffer the witness as an expert in delayed reporting and emotional trauma of child victims. I RP 171. It contended that the evidence was needed to explain A.L.'s continuing interactions with Lopez and why she believed the escalating touching was ok. I RP 185-86. It also argued the evidence was relevant to the "vulnerable victim" aggravator. I RP 188-89. After Lopez conceded that the defense might argue in closing that A.L. was lying, the trial court allowed the State to proffer the witness to testify only about delayed reporting and excluded the grooming evidence. I RP 193-94.

Accordingly, the State presented testimony from Jessica Johnson, the executive director of a domestic violence and sexual assault crime victims assistance center. I RP 198. She testified that based upon her training, she learned that in most cases, victims of rape will not report it within the first week. II RP 205-06. She described various reasons why victims would not report, including fear of consequences, concern that they will not be believed, shame, or not knowing that it was wrong. II RP 206-07. She testified that an accusation against a family member tends to affect the reporting period because the accusation will change the family dynamic forever, and financial considerations can affect reporting if they believe it will affect their financial security. II RP 207. She described a

wide range of responses to trauma that sex assault victims can experience, including denial and minimization, dissociation, anger or sadness, and other emotional reactions. II RP 208-09. Lastly, she testified that children were more apt to delay reporting than adults. II RP 209.

Subsequently, the State submitted only the “multiple acts” aggravator to the jury, declining to present the “vulnerable victim” aggravator it had argued justified Johnson’s testimony. II RP 389, CP 77-79. In its closing argument, it drew the jury’s attention to Johnson’s testimony, contending that A.L. was “a perfect example” of why people did not want to come forward. III RP 417-18.

The jury found Lopez guilty on all three charges and found the aggravator to be true only on the second and third counts. III RP 454-55, CP 86-91. The court imposed a high-end indeterminate sentence of 120 months to life on counts one and 2 and 60 months on count 3. III RP 489, CP 98.

Lopez appeals, and has been found indigent for that purpose. CP 113-16, 118.

V. ARGUMENT

The sole issue in this case is whether the State's presentation of expert testimony from Jessica Johnson and its reliance on that testimony in closing argument improperly influenced the jury's consideration of A.L.'s accusations of molestation and rape against an impotent man. Because Johnson's testimony amounted to profile evidence that improperly suggested A.L. was more likely to have been victimized because she fit the profile, it constituted an improper opinion on Lopez's guilt and should have been excluded. Moreover, the evidence had little to no probative value, which was significantly outweighed by the unfair prejudice resulting from placing the imprimatur of an "expert" on testimony whose purpose was to suggest to the jury that A.L. was in fact a rape victim, and that Lopez was therefore guilty. In light of the evidence presented in this case, it is highly probable that the testimony influenced the jury's consideration of the charges. Accordingly, the convictions should be reversed and a new trial ordered.

"No witness may express his opinion that the defendant is guilty." *State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). Although experts may testify to their opinions on an ultimate issue, such an opinion may not be based solely on the expert's determination of a witness's veracity. *State v. Fitzgerald*, 39 Wn. App.

652, 657, 694 P.2d 1117 (1985). The admissibility of expert testimony generally is governed by ER 702, which allows the introduction of specialized knowledge when it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” However, such evidence must also be evaluated under ER 403 when its potential for unfair prejudice may outweigh the value of admitting it. *State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983).

In considering the admissibility of expert testimony concerning an alleged victim’s conduct or credibility, some of the cases distinguish between instances when the witness expressly offers an opinion as to the defendant’s guilt or the accuser’s credibility, and those in which the witness describes a phenomenon without directly opining whether it applies to the circumstances of the case. *See, e.g., Madison*, 53 Wn. App. at 763; *State v. Stevens*, 58 Wn. App. 478, 496-97, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990). In a case in which an expert testified that a child’s conduct was “typical of a sex abuse victim,” the Court of Appeals agreed that the statement probably should not have been made but because it was not objected to at trial, it declined to find the testimony to be error. *Madison*, 53 Wn. App. at 762. However, expert testimony generally observing that delay in reporting is not unusual and correlates

with the relationship between the abuser and the child was not improper. *State v. Petrich*, 101 Wn.2d 566, 575-56, 683 P.2d 173 (1984).

Although this distinction may be clear in concept, it is far from evident in application, where the relevance of the expert's testimony necessarily depends upon an inference that it describes the accuser. Here, Johnson offered her testimony in generalities, disclaiming any knowledge of Lopez, A.L., or the facts of the case. II RP 212. But just as the expert in *Madison* took the step of concluding that the accuser's conduct was typical of a rape victim, the State here provided the link between Johnson's testimony and A.L.'s credibility by arguing in closing that A.L.'s conduct was "a perfect example" of Johnson's testimony. III RP 418. Indeed, had the testimony not been intended to refer to A.L., it would not have been relevant to any fact at issue in the case. The admissibility of testimony suggesting that an accuser's conduct is consistent with a profile of rape victims generally cannot rest upon whether the expert uses particular magic words or stops just short of stating the impermissible inference when the inference is the only conceivable use for the testimony. *See, e.g., Maule*, 35 Wn. App. at 296, ("If no correlation between particular characteristics and established cases of sexual abuse is shown . . . such testimony amounts to a discussion of child sexual abuse in general and is therefore collateral to the question of

whether a particular child was sexually abused.”); *State v. Braham*, 67 Wn. App. 930, 937-38, 841 P.2d 785 (1992) (“[I]t is insignificant that [the expert] herself never testified that she believed Braham was guilty of abuse.”).

Moreover, profile evidence generally is inadmissible due to the risk of unfair prejudice and the false impression the jury might receive about the value of the inferences to be drawn from the testimony. *Braham*, 67 Wn. App. at 935. Although such evidence might be admissible to rebut claims raised on behalf of the defense, this does not allow the State to present it in its case in chief to prove that abuse did in fact occur. *Id.* at 938. There is no reasonable basis for distinguishing between profile evidence that attempts to compare a defendant to characteristics of known offenders and profile evidence that attempts to compare an accuser to characteristics of known victims – the purpose of both is to generate an inference that the defendant is guilty, and the crime was committed, because of the similarity with the profile. *See, e.g., State v. Black*, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987) (testimony that accuser suffered from “rape trauma syndrome” and fit a specific profile for rape victims constituted an improper opinion on guilt and was unfairly prejudicial).

In the present case, the testimony was presented in the State's case in chief, not in rebuttal to any particular argument or issue raised in cross-examination by the defense. The State used the evidence to argue that A.L. was a perfect example of the generalized profile of a delayed reporter, thereby bolstering her credibility and indicating that Lopez was guilty. Under the circumstances presented in this case, the testimony was not particularly helpful except to the extent it unfairly suggested that A.L. was credible and Lopez was guilty. Accordingly, it was error to admit the testimony and Lopez's motion to exclude it should have been granted.

When evidence has been improperly admitted, reversal is required when, within reasonable probability, the outcome of the trial would have been materially affected if the error had not occurred. *Braham*, 67 Wn. App. at 939. When the evidence of guilt is not conclusive and the State relies upon the improper evidence in its arguments to convict, it is probable that the verdict was affected. *See id.* at 940. Here, the evidence of Lopez's guilt was far from conclusive; it rested solely upon A.L.'s testimony and was unsupported by any physical corroboration, any observations of third-parties of any untoward behavior, and was directly contradicted by Lopez's medical evidence of his impotence. Thus, testimony that tended to bolster A.L.'s credibility by suggesting her behavior was "a perfect example" of how rape victims ordinarily behave is

highly likely to have influenced the jury's deliberations. Thus, a new trial is required.

VI. CONCLUSION

For the foregoing reasons, Lopez respectfully requests that the court REVERSE his convictions and REMAND the case for retrial.

RESPECTFULLY SUBMITTED this 8 day of April, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class postage pre-paid, addressed as follows:

Jose Mario Lopez
c/o Julie Godfrey
517 Okanogan Ave.
Wenatchee, WA 98801

Douglas J. Shae
Attorney at Law
PO Box 2596
Wenatchee, WA 98807-2596

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 8 day of April, 2019 in Kennewick, Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

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