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Court of Appeals  
Division III  
State of Washington  
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No. 36436-4-III

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

Chelan County Superior Court  
Cause No. 17-1-00219-5

STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

JOSE MARIO LOPEZ,  
Defendant/Appellant.

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BRIEF OF RESPONDENT

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## **A. ASSIGNMENTS OF ERROR**

**Issue 1: Whether the Court erred in its decision to allow expert testimony regarding sexual assault trauma response and delayed reporting.**

**Issue 2: Whether the defendant was denied effective assistance of counsel and due process when the Court refused to grant a second interview of the child victim.**

## **B. STATEMENT OF THE CASE**

The State accepts the appellant's recitation of facts regarding the relationship of the parties with a few key additions. A.L.'s first disclosure of the abuse was to her mother because she believed she might have become pregnant by Mr. Lopez. RP 81. She discussed her plan to disclose to her mother the abuse to which Mr. Lopez responded, "My life is in your hands." RP 97. Her mother then confronted their housemate, Mr. Lopez, about the allegations which he neither admitted nor denied. RP 110-111. A.L.'s mother testified that she did not report the abuse nor force him to move because they needed the rent money from Mr. Lopez. RP 111. Her mother testified at trial about her shame for not reporting the abuse and the

financial strain she was under since her husband left the family. RP 110, 116-117. A.L. testified that she knew about the family's financial difficulties and those difficulties contributed to her not reporting the abuse earlier. RP 74-75. She also had an ongoing and close relationship with Mr. Lopez and expressed confusion about how she should handle the situation given her close relationship with him. RP 71-72. She also detailed the anxiety and social issues she has suffered as a result of the ongoing abuse by Mr. Lopez. RP 88-89. A.L. eventually disclosed to a school friend about the abuse and then to a school counselor. RP 86.

The State presented testimony from Jessica Johnson, the Executive Director at SAGE, a local community-based advocacy center for domestic violence and sexual assault. Ms. Johnson described in detail her many years of advocacy in the areas of sexual assault, delayed reporting, and trauma response of crime victims. RP 198-212. Ms. Johnson was offered as a blind expert who had no previous interactions with the victim in the case at hand. During motions in limine, Mr. Lopez objected to her testimony under the premise that it would be confusing to the jury and that it was

prejudicial to allow the testimony. The Court, prior to her testimony, conducted a lengthy analysis and ultimately limited her testimony to the specific area of delayed reporting/trauma response. RP 191-194.

Mr. Lopez testified at trial that he suffered from a number of medical issues that made engaging in sexual intercourse impossible. RP 320-321. Mr. Lopez called as a witness his primary care doctor, Dr. Bethany Lynn, who testified that while Mr. Lopez may have had difficulty achieving erection, it was not impossible. RP 372-373. She also testified on cross examination that the issue of erectile dysfunction was not addressed as a part of her ongoing care of Mr. Lopez until their November 2017 meeting, seven months after the allegations were filed. RP 359-365.

Earlier in the pretrial stages of the case, Mr. Lopez made a motion to terminate his first representation due to a break down in communications. RP 3-12. The State objected at that time to a change in counsel because the case was already approaching a year old and the mother and the victim had already been interviewed as a part of pretrial discovery. RP 6. Mr. Lopez's counsel at that time informed the Court that there would not be a need for another

interview, and represented that an investigator was also present at the time of the interview and could relay any necessary information to new counsel. RP 7-9. The Court granted Mr. Lopez's request to have new counsel, but warned him that he would not likely have the opportunity to re-interview the alleged victim. RP 11. Subsequently, Mr. Lopez's new counsel made a motion to re-interview the victim. CP 52, RP 29. It was represented to the Court that the victim and her mother staunchly objected to any further interviews. RP 16-17. The Court inquired as to the reasons for counsel's request to which vague answers were given, other than the need to "observe her demeanor." RP 29-31. The Court denied the request to re-interview and reiterated the warnings that were given to Mr. Lopez previously regarding that specific issue. RP 41-43.

### **C. ARGUMENT**

**Issue 1: The Court applied prior legal analysis in qualifying the expert testimony as helpful to the jury and it did not abuse its discretion.**

The determination of whether expert testimony is admissible is within the discretion of the trial court. Unless there has been an

abuse of discretion, this Court will not disturb the trial court's decision. State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990), *cert. denied*, 111 S. Ct. 752 (1991). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” State v. Hudson, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). The appellant bears the burden of proving an abuse of discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The initial determination to allow expert testimony requires the trial court to find that the testimony presents information likely to help the jury to understand the evidence. *See*, ER 702; Swartley v. Seattle Sch. Dist. 1, 70 Wn.2d 17, 421 P.2d 1009 (1966). The trial court must evaluate both the relevance of the testimony and its prejudicial impact, excluding unnecessarily cumulative or unfairly prejudicial testimony. *See*, ER 402, 403. We will not disturb a discretionary admission of expert testimony absent abuse. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1994).

The testimony of Ms. Johnson was admissible for purposes of discussing delayed reporting in sexual assault cases and trauma response of victims. After the testimony of the victim and prior to the expert's testimony, the Court analyzed the relevant parts of Ms. Johnson's proposed testimony and the testimony to exclude other capacities such as grooming. The allowable testimony centered on the reasons victims delay reporting sexual assault and the surrounding trauma. The credibility of witnesses is often a central issue in cases of sexual assault; however, Ms. Johnson never testified to the direct credibility of the particular witness in this case. The Court found her to have relevant and helpful information for the jury's consideration of the facts, given that the victim had an ongoing relationship with Mr. Lopez after the assault and did not report the assaults for years.

The credibility of the victim was questioned in many capacities during the trial, including her recollection of how many times the abuse happened, if at all, and the absence of witnesses to the abuse. These themes were brought up throughout the trial to include the cross examination of the State's witnesses, defense

witnesses, and referenced in closing arguments. Mr. Lopez cites Braham and Petrich as comparable cases. State v. Braham, 67 Wn. App. 930, 841 P.2d 785 (1992); State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). Petrich is certainly comparable in that expert testimony involving a similar purpose was offered regarding delayed reporting. Mr. Lopez contends that the evidence would only be allowable once the victim's credibility was attacked. The court in Petrich found that an attack on credibility is not found merely by evaluating cross examination tactics; several factors taken in conjunction may show a challenge to credibility. State v. Froehlich, 96 Wn.2d 301, 635 P.2d 127 (1981). In particular cases, the credibility of a witness may be an inevitable, central issue. United States v. Arroyo-Angulo, 580 F.2d 1137, 1146-47 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978). Cases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged and the child asserts their commission. Petrich, 101 Wn. 2d at 575. An attack on the credibility of these witnesses, however slight, may justify corroborating evidence. In this case, as in Petrich, Mr. Lopez argues

that the State's case rests on the credibility of the victim's testimony. In the trial of Mr. Lopez, A.L. was probed as to the circumstances surrounding the incident and whether her explanations of the events were plausible. RP 89-98. It is clear from the record that the victim's credibility was at issue and her behavior regarding the delayed reporting and continued relationship with Mr. Lopez could be confusing, and an explanation of delayed reporting could be helpful to the jury.

The testimony of Ms. Johnson was helpful to the jury in the capacity it was presented at trial. The Court also showed its carefulness in its analysis by tailoring the information to be presented. There is no substantial likelihood that the statements that were allowed by the Court had a substantial likelihood of affecting the jury's verdict. The additional corroborating evidence of the defendant's guilt included: the detailed descriptions of the abuse by A.L., Mr. Lopez's statements to A.L. when she told him she wanted to disclose the pregnancy to her mother, Mr. Lopez's response when confronted about the abuse by A.L.'s mother, the disclosure to a school friend, and the self-admitted failure of the mother to report

the abuse to law enforcement. The Court analyzed the proposed testimony as required by the aforementioned case law and did not abuse its discretion by allowing the testimony.

**Issue 2: The trial court properly denied the defendant's request for a new interview of the child victim.**

Mr. Lopez submits additional grounds for appeal on the basis he was denied due process and effective counsel when he was not allowed a second opportunity to interview the victim. A defendant does not have a constitutional right to a pre-trial interview of a witness. There is no pre-trial right to confrontation or to cross-examination. A judge may place reasonable limits on interviews looking at the age of the child, whether the child's prior interviews were videotaped, etc. Issues relating to the scope of discovery in criminal cases are analyzed under the due process clause rather than the confrontation and compulsory process clauses. State v. Knutson, 121 Wn.2d 766, 771-772, 854 P.2d 617 (1993).

The due process analysis of a discovery issue starts from the premise that due process affords a criminal defendant a right of access to evidence that is "both favorable to the accused and material

to guilt or punishment,” at least where the court or the prosecution team is in possession of the evidence. Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (citing United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83, 87 (1963)). This due process rule of disclosure applies equally to substantive evidence and to impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985). An issue not briefed is deemed waived. Kadoranian v. Bellingham Police Dep’t, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (citing Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)).

For purposes of the due process rule, evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Knutson, 121 Wn.2d at 772 (quoting In re Rice, 118 Wn.2d 876, 887, 828 P.2d 1086 (1992)). This standard is drawn from the Brady family of cases. A “reasonable probability” has been defined as “a probability sufficient to undermine confidence in the outcome.” In re Rice, 118 Wn.2d at 887 (quoting Bagley, 473 U.S. at 682). What is required is more than a “mere possibility” that

evidence “might have affected the outcome of the trial.” Knutson, 121 Wn.2d at 773.

Wrapped up in this standard of materiality are issues of admissibility; if evidence is neither admissible nor likely to lead to admissible evidence, it is unlikely that disclosure of the evidence could affect the outcome of a proceeding. Knutson, 121 Wn.2d at 773. *Accord*, Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995) (inadmissible evidence will not be “material” as its disclosure will not alter the result at trial). The rules against the use of hearsay evidence, statutory privileges, and relevancy all must be considered when a defendant makes a discovery request.

Mr. Lopez was explicitly warned by the State and the Court at the time of his request to terminate his first representation. He was told that his new counsel would not likely have an opportunity to re-interview the alleged victim and to consider the prospect prior to requesting new counsel. Despite these warnings, Mr. Lopez chose to move forward with being appointed new counsel. Mr. Lopez’s second attorney advised the Court of a request to interview the alleged victim a second time in order to “see how she presents.” The

Court reminded Mr. Lopez of the prior warnings and denied his request for a new interview. Mr. Lopez has failed to point to any relevant or admissible information that could have or would have been obtained by a second interview of the victim and has failed to cite authority to support his position. Mr. Lopez has also failed to show that the additional witness interview would have impacted the outcome of the trial.

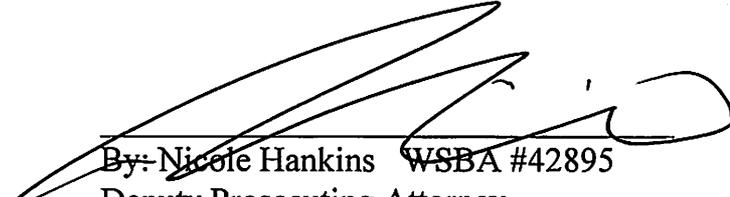
#### **D. CONCLUSION**

The lower Court did not err when it allowed the expert testimony of Jessica Johnson and the appellant has failed to show that the Court abused its discretion in allowing the testimony. The Court also did not err in refusing to order a second interview of the child victim and the appellant has failed to point to any relevant or admissible information that could have or would have been obtained by a second interview. Therefore, this Court should deny the appellant's request for a new trial and uphold his convictions.

DATED this 8 day of August, 2019.

Respectfully submitted,

Douglas J. Shae  
Chelan County Prosecuting Attorney

  
By: Nicole Hankins WSBA #42895  
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,	)	No. 36436-4-III
Plaintiff/Respondent,	)	Chelan Co. Superior Court No. 17-1-00219-5
vs.	)	DECLARATION OF SERVICE
JOSE MARIO LOPEZ,	)	
Defendant/Appellant.	)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 8th day of August, 2019, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 8<sup>th</sup> day of August, 2019.



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Cindy Dietz  
Legal Administrative Supervisor  
Chelan County Prosecuting Attorney's Office

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# CHELAN COUNTY PROSECUTING ATTORNEY

August 08, 2019 - 4:07 PM

## Transmittal Information

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**Appellate Court Case Title:** State of Washington v. Jose Mario Lopez  
**Superior Court Case Number:** 17-1-00219-5

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