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NO. 242536

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

TIMOTHY SCOTT FISHER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Judy Ward was married to the defendant, Timothy Fisher in 1996. (RP at 313). Ms. Ward and the defendant bought a house together at 1600 McKinley Court in Kennewick, Washington. (RP at 301). Ms. Ward's children, Brett and Brittany, immediately began living at the house on McKinley Ct. (RP at 301). Soon thereafter, Ms. Ward's oldest child, Melanie, began living at the house on McKinley Ct. (RP at 302).

Around Melanie's seventh grade year in 1996, the defendant began taking her upstairs to her room to "discipline" her. (RP at 56, 58-59). The discipline consisted of the defendant telling Melanie to take her pants off and lift up her shirt, and the defendant would then open and close the outer portion of Melanie's vagina. (RP at 61-65). The defendant would also pluck Melanie's pubic hairs and twist her breasts. (RP at 63-65). The defendant would assign a point system to certain sexual acts that Melanie would

have to work off before she was done with her discipline. (RP at 69-70). Melanie testified that this happened five days a week during 1997. (RP at 68). She specifically testified that this happened more than four times on more than four different days during 1997. (RP at 69).

The defendant and Ms. Ward separated in 1999. (RP at 313). Melanie had not told anyone about the sexual abuse because of her fear for the defendant. (RP at 54). Melanie eventually told her boyfriend about the sexual abuse several days after her 18th birthday. (RP at 74-76). At her boyfriend's urging, Melanie told her mother about the abuse. (RP at 76). After discussing the matter with her mother, Melanie made the decision to make a report to police about the abuse. (RP at 77).

On June 26, 2003, the defendant was charged with one count of second degree child molestation against Melanie Lincoln. (CP at 139-40). The information was amended on June 28, 2004 to

include four separate counts of second degree child molestation, instead of only one count. (CP at 126-28). The trial for the defendant began on July 13, 2004. (RP at 1).

Prior to trial, the court held an ER 404(b) hearing on June 8, 2004. (RP, 6/8/04). The court ruled that evidence of prior acts of physical violence committed by Mr. Fisher against Melanie and her siblings was admissible to explain Melanie's delay in reporting the sexual abuse. (RP at 2-3).

At the end of the trial, the jury found the defendant guilty of four counts of second degree child molestation. (CP at 104-107). After the verdict, defense counsel moved for a new trial based on prosecutorial misconduct and errors in evidentiary rulings. (RP, 12/21/04; CP at 82-103; CP at 56-72). Defense counsel filed a number of affidavits in support of its motion. (CP at 77-81). The State's deputy prosecutor also filed an affidavit concerning his conduct

during the trial. (CP at 75-76). The court denied the motion, ruling that the court would let the record speak for itself with regard to the evidentiary rulings and the prosecutor's conduct during trial was not of a nature that would undermine the jury's impartiality or seriously prejudice either side. (CP at 17-20; RP, 12/21/04 at 4).

The trial court imposed a sentence within the standard range. (CP 21-31). The defendant subsequently filed a timely Notice of Appeal. (CP at 5-16).

ARGUMENT

A. TRIAL COURT PROPERLY RULED ON EVIDENTIARY MATTERS DURING THE TRIAL

A trial court's decision to admit evidence of a defendant's prior acts is reviewed for abuse of discretion. State v. Barragan, 102 Wash. App. 754, 759, 9 P.3d 942 (2000). "An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly

unreasonable." State v. Zunker, 112 Wash. App. 130, 140, 48 P.3d 344 (2002) (citing State v. Valdobinos, 122 Wash. 2d 270, 279, 858 P.2d 199 (1993)), review denied, 148 Wash. 2d 1012 (2003).

1. **ER 404(b) evidence was used to show delay in reporting abuse, not to show propensity**

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person or to show that a person acted in conformity with that character. ER 404(b). However, such evidence may be admissible for other purposes, including intent, knowledge, or absence of mistake. ER 404(b).

In sexual assault cases, evidence of a defendant's prior violent acts towards the victim is relevant to explain a victim's delay in reporting. State v. Wilson, 60 Wash. App. 887, 891, 808 P.2d 754 (1991). Admittedly, the rationale works best when the physical abuse was directed at the sexual abuse victim. This shows that a victim's fear, and the consequent delay in

reporting, is more likely because violence has been visited on the victim before. However, the Wilson rationale also logically works where the abuse victims/objects are different.

A sexual abuse victim's knowledge of her abuser's prior violence, whether that violence was aimed at a person, animal, or inanimate object, could generate retributive fear in the victim, thus explaining the failure to disclose the abuse. The object of the violence, in the victim's mind, is not as important as the fact that it occurred. See State v. Barragan, 102 Wash. App. 754, 759, 9 P.3d 942 (2000) (in a harassment case, evidence of an inmate's prior fights and 'battles' with other inmates admissible to show victim's fear).

Here, the court properly allowed evidence of physical abuse against Tyler, Brittany, and Melanie, all of which Melanie witnessed, to explain her delay in reporting. (RP at 291). Melanie further explained that this violence kept

her from telling about the abuse even after the defendant left the home because she was still fearful of him. (RP at 72). Thus, the court did not abuse its discretion in allowing testimony regarding prior acts of physical violence during the trial.

2. Trial court did not err in failing to give limiting instruction when defendant did not request one

A limiting instruction should be given when evidence of prior bad acts is admitted to show something other than propensity. State v. Saltarelli, 98 Wash. 2d 358, 362, 655 P.2d 697 (1982). However, if the complaining party fails to request a limiting instruction, there is no error. State v. Hess, 86 Wash. 2d 51, 52, 541 P.2d 1222 (1975). Here, there was no such request, and thus, no error.

3. Child Protection Services (CPS) Reports

The defendant's entire argument is misplaced solely because the CPS report was never admitted into evidence, nor was it even marked as an

exhibit by the State. The State questioned the defendant as to his knowledge of a CPS complaint against him involving his current stepdaughters. (RP at 566-67).

Failure to object at trial waives an issue on appeal. RAP 2.5; State v. Guloy, 104 Wash. 2d 412, 421, 705 P.2d 1182 (1985). This line of questioning occurred without defense counsel objection. (RP at 566-68). Only after the State came back to this line of questioning did the defense object on hearsay grounds. (RP at 568). However, at that point, the defendant had already answered the questions regarding his knowledge of CPS involvement with his stepdaughters. Accordingly, this issue is not properly before this court.

Lastly, this testimony was not hearsay. "Hearsay" is a statement that is offered in evidence to prove the truth of the matter asserted. ER 801. The State was not offering the CPS report as evidence that the physical

abuse by the defendant towards his current stepdaughters actually occurred; the State was simply inquiring into whether the defendant was aware that a complaint had been lodged against him and whether the complainant was the victim, Melanie Lincoln or her family. (RP at 572). Thus, there was no error by the trial court in allowing testimony about the CPS report because it was not being offered as evidence of the truth of the matter asserted.

4. Impeachment testimony regarding the defendant's good character with children

The long-standing rule in this state is that a criminal defendant who places his character in issue by testifying as to his own past good behavior, may be cross-examined as to specific acts of misconduct unrelated to the crime charged. State v. Avendano-Lopez, 79 Wash. App. 706, 716, 904 P.2d 324 (1995); State v. Renneberg, 83 Wash. 2d 735, 738, 522 P.2d 835 (1974); State v. Studebaker, 67 Wash. 2d 980,

986, 410 P.2d 913 (1966); State v. Emmanuel, 42 Wash. 2d 1, 14, 253 P.2d 386 (1953). A prosecutor can cross-examine a defendant who chooses to testify in the same manner as any other witness, and can examine the defendant to qualify, rebut, or explore issues raised in the defendant's testimony. State v. Graham, 59 Wn.App. 418, 427, 798 P.2d 314 (1990). The proper scope of cross-examination is within the sound discretion of the trial court. Id. The appellate court does not disturb a trial court's ruling allowing the cross-examination of character witnesses absent manifest abuse of discretion. State v. Styles, 93 Wash. 2d 173, 176-77, 606 P.2d 1233 (1980).

The cross-examination of Peggy Fisher was within the proper scope of direct examination. Defense counsel questioned Ms. Fisher as to whether she was comfortable leaving her daughters alone with the defendant in light of the sexual abuse allegations. (RP at 472). The State's cross examination of Ms. Fisher focused on

whether she knew of other allegations of abuse with his children and step-children and whether that knowledge affected her statement that she would leave the defendant alone with her daughters. (RP at 472-76). This reputation testimony was within the proper scope of cross-examination that was directly related to a question asked by the defense. Thus the examination of relevant specific instances of conduct was simply a legitimate inquiry into the knowledge and credibility of the witness, and not as proof of prior misconduct. Accordingly, the State was allowed to ask about reports of prior abuse to rebut the witness's testimony that she would leave her daughters alone with the defendant.

Similarly, the questioning of the defendant was within the proper scope of cross-examination because the defendant opened the door by testifying that he never abused his children or stepchildren. Defense counsel questioned the

defendant on specific acts of physical abuse against Melanie, Brett and Brittany. (RP at 521, 523, 536, 538, 539). He testified about the slapping incident in 1993, which caused him to be criminally charged in Pasco. (RP at 546). He also testified that Ms. Fisher was aware of prior abuse accusations and the allegations of sexual abuse. (RP at 546).

The rationale underlying the "open door" policy was expressed in Michelson v. United States, 335 U.S. 469 (1948):

The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

The defendant opened up the door for the State to cross-examine him on any of the subjects he testified to in direct examination. The trial court did not abuse its discretion in ruling that the defendant opened the door to testimony regarding his current family life. Thus, there

was no error in the trial court allowing the cross examination into such matters.

B. TESTIMONY REGARDING THE DEFENDANT'S GASTRIC BYPASS SURGERY AND SEXUAL HISTORY WITH EX-WIFE WAS RELEVANT TO SHOW SEXUAL MOTIVATION IN CHARGE OF MOLESTATION

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence of the determination of the action more probable or less probable than it would be without the evidence. ER 401. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Stenson, 132 Wash. 2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

One of the elements the State had to prove to prove child molestation was that the defendant had sexual contact with Melanie Lincoln. (CP at 118). Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party. RCW 9A.44.010(2).

A defense failure to object to the admission of evidence at the time of trial or to testimony precludes appellate review. State v. Perez-Cervantes, 141 Wash. 2d 468, 482, 6 P.3d 1160 (2000); State v. Guloy, 104 Wash. 2d 412, 421, 705 P.2d 1182 (1985). The State questioned the defendant about his gastric bypass surgery and his sexual relationship with Judy Ward for 12 questions to which the defendant answered. (RP at 590, Line 20-25, 591, Line 1-20). After the answers had been given, defense counsel did object on grounds of relevance. At that point the objection came too late and is not grounds for appeal.

In addition, the testimony regarding the defendant's sexual relationship with his wife at the time the molestation was occurring was relevant to show the sexual motivation of the defendant. The State had to prove that sexual contact occurred for the purpose of sexual

gratification. Thus, this testimony went directly to prove that element of the crime.

Likewise, the rebuttal testimony of Judy Ward regarding her sexual history with the defendant was used to rebut the defendant's assertion that the defendant and Ms. Ward had sex three to four times a week as the defendant testified. The question to Ms. Ward whether the defendant was "too fat for sex" came from defense counsel himself. (RP at 636). The State never used such language in questioning Ms. Ward about her sexual relationship with the defendant.

Accordingly, the testimony regarding the defendant's gastric bypass surgery and sexual relationship with Judy Ward was relevant admissible evidence.

C. THERE WAS NO PROSECUTORIAL MISCONDUCT THAT DENIED THE DEFENDANT A FAIR TRIAL

To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wash. 2d 471, 533, 14 P.3d 713

(2000). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. Id. Failure to object to improper conduct constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Russell, 125 Wash. 2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). The absence of a contemporaneous objection strongly suggests that the conduct did not appear critically prejudicial to the defendant in the context of trial. State v. Swan, 114 Wash. 2d 613, 661, 790 P.2d 610 (1990).

1. Impugning the integrity of defense counsel

The United States Supreme Court has determined that cross-examination constitutes a proper method to address the issue of an attorney's possible improper influence on a witness' testimony or the possibility that an

attorney coached a witness. See Geders v. United States, 425 U.S. 80 (1976).

The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses. A prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Id. at 89.

Here, the record is clear that the State's cross-examination of the defendant was properly confined to permissible subjects of impeachment, namely, whether the defendant had been "coached" in preparation of his testimony. (RP at 586-588).

The cross-examination did not violate the defendant's attorney-client privilege because none of the questions actually elicited the substance of any communication between the

defendant and his attorney. Although the court did ask the prosecutor to "move on" from questions about coaching, the State's last comment that "You've been coached well" was not so improper that it caused any prejudice to the defendant. (RP at 588).

There were many times during the trial that the court advised both attorneys to not make comments during examinations and only ask questions. In the overall context of the trial, this single comment cannot be shown to be flagrant and ill-intentioned. The overall questioning by the State on whether the defendant had been coached was proper to impeach the defendant's credibility. The defendant admitted to having practiced answering questions with his attorney. (RP at 585). Thus, the questioning elicited the impeachment testimony the State was seeking. The single comment by the prosecutor after the court asked the prosecutor to move on was not flagrant and ill-intentioned and did not

cause prejudice to the defendant. Thus, this line of questioning did not constitute prosecutorial misconduct.

2. Eliciting testimony about sentencing consequences of conviction

Failure to object at trial waives an issue on appeal. State v. Guloy, 104 Wash. 2d 412, 421, 705 P.2d 1182 (1985). The only error that can be raised for the first time in the appellate court is a manifest error affecting a constitutional right. RAP 2.5(a).

Here, the defendant did not object to the State's question as to whether the defendant knew he would have to register as a sex offender if convicted. (RP at 611). Further, the jury was likely aware that a consequence of being convicted of child molestation was the requirement of registering as a sex offender. Finally, the jury's final instructions before deliberation is that "[the jury has] nothing whatsoever to do with [the sentencing

consequences]". (CP at 111). Thus, this error does not rise to the level of a manifest error affecting a constitutional right. Since the defendant failed to object to the State's question, the issue is not properly before this court.

3. Testimony regarding defendant's physical abuse of his children and step children

As has been discussed previously, all the testimony regarding the defendant's prior physical abuse of his children, of Ms. Ward's children, and of Ms. Fisher's children was properly admitted to the jury. (See A(1), A(2), A(3), and A(4) of this brief). A prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence in closing argument. State v. Neslund, 50 Wash. App. 531, 562, 749 P.2d 925 (1988).

The defendant is incorrect in stating that the *only* purpose for evidence of prior physical abuse was to establish the reasoning for the

victim delaying her accusations. As was discussed above, the defendant opened the door to testimony about prior physical abuse by asserting that he did not abuse his children or stepchildren. (RP at 521-46). Thus, the testimony regarding prior physical abuse with Tyler in 1993 and 1999, physical abuse of Ms. Ward's children during their marriage, and reports of abuse of the defendant's current stepchildren were all admissible testimony. The prosecutor was simply arguing facts in evidence and drawing reasonable inferences from that evidence that was presented. Furthermore, the jury was instructed that the comments and arguments of the attorneys are not evidence and are intended to help the jury understand the evidence. (CP at 111). The prosecutor's comments during closing were not improper or prejudicial to the defendant.

4. Commenting on credibility of witnesses

In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record. State v. Hoffman, 116 Wash. 2d 51, 94-95, 804 P.2d 577 (1991); State v. Knapp, 14 Wn. App. 101, 110-11, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). A prosecutor must not, however, express a personal belief as to the credibility of witnesses. State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983).

Where a jury must necessarily resolve a conflict in witness testimony to reach a verdict, a prosecutor may properly argue that, in order to believe a defendant the jury must find that the State's witnesses are mistaken. State v. Wright, 76 Wash. App. 811, 825, 888 P.2d 1214 (1995). This argument is not objectionable because it

does no more than state the obvious and is based on permissible inferences from the evidence. Id.

Here, the prosecutor properly argued that the jury had to resolve the conflict between the testimony of Melanie Lincoln and Timothy Fisher in order to reach a verdict. (RP at 655). The arguments during closing were proper comments on the credibility of witnesses and the prosecutor properly argued inferences of credibility based on evidence presented at trial.

The defendant misstates the record by saying the prosecutor argued that in order to acquit the defendant, the jury would have to find him truthful and Ms. Lincoln untruthful. The prosecutor at no time expressed a personal belief as to the credibility of any State witnesses. Nor did he argue any particular witness was lying or telling the truth. The prosecutor's closing arguments dealt solely with the credibility of the witnesses. As such, the State's closing arguments were not improper and were within the

wide latitude afforded the prosecutor in drawing and expressing reasonable inferences from the evidence.

5. Gestures by prosecutor during trial

The Oregon Supreme Court has held that the trial court's decision not to declare a mistrial based on prosecutor's alleged nonverbal conduct was not an abuse of discretion. State v. Lotches, 331 Or. 455, 496, 17 P.3d 1045 (2000).

Because the trial court clearly was in the best position to consider the effect of the prosecutor's alleged gesticulations on all of the participants, the court's perception of the comparative effects of that conduct and any remedy that the court might have fashioned in entitled to deference, even though that court did not observe that conduct. The trial court's comments on the matter satisfy us that that court adequately considered the potential for prejudice to the defendant and took steps to minimize the prejudice. Assuming the prosecutor's conduct to have been as improper as Plazak asserted, that conduct was not so prejudicial that the trial court's decision not to grant a mistrial or to question the allegedly affected juror can be said to have denied defendant a fair trial.

Id. at 496-97.

Similarly, the California Supreme Court held in People v. Espinoza, that the prosecutor's behavior, though on occasion rude and intemperate, did not comprise a pattern of egregious misbehavior making the trial fundamentally unfair. 3 Cal. 4th 806, 838 P.2d 204, 211 (1992).

None of the instances that defendant characterizes as prosecutorial misconduct appears to have been either intended or likely to deceive the jury on any material issue. Moreover, it is not reasonably likely that the jury would have understood the prosecutor's bickering with defense counsel, or his use of facial expressions or gestures to express dismay or disbelief, to be a personal attack on defense counsel's integrity. In all likelihood, the jury viewed such behavior as expressing merely a clash of personalities. Thus, it is not reasonably probable that the prosecutor's occasional intemperate behavior affected the jury's evaluation of the evidence or the rendering of its verdict.

Id. at 211-12.

In the defendant's Motion for New Trial, he claimed prosecutorial misconduct based in part on facial expressions and gestures of the

prosecutor. (CP at 82-103). The trial court considered these matters and determined that, although the court did observe reactions and gestures by the State, they were not of a nature that would undermine the jury's impartiality or seriously prejudice either side. (CP at 20; RP, 12/21/04 at 4). The court further found that the comments or gestures by the prosecutor were not "so flagrant or ill intentioned that no curative instruction could have obviated any prejudice engendered by the misconduct". (CP at 20; RP, 12/21/04 at 4). The trial court also pointed out that the jury was specifically instructed to disregard comments or actions by either counsel or the judge as they were not evidence. (CP at 111; 12/21/04 RP at 5).

All people, including attorneys, are susceptible to exhibiting normal human reactions in response to events that occur during trials. It would be unreasonable to require that all

persons in the courtroom remain stone-faced and emotionless throughout the course of the trial.

Here, the trial court saw the gestures and facial expressions of the prosecutor during the course of the week long trial. There is no record that can be preserved for the appellate court to review gestures and facial expressions that occurred during trial. Thus, the trial court was in the best position to determine what effect, if any, this conduct had on the jury. This court should give deference to the trial court's finding that the conduct did not undermine the jury's impartiality or seriously prejudice either side. Thus, the prosecutor's conduct did not create an unfair trial for the defendant.

D. THERE WAS NO ERR IN ALLOWING THE STATE TO CALL THE DEFENSE INVESTIGATOR AS A WITNESS

Recorded or transcribed interviews of the prosecution witnesses are unlikely to contain the "opinions, theories, or conclusions" of defense counsel that would be protected under the work

product doctrine. State v. Strandy, 49 Wash. App. 537, 540, 745 P.2d 43 (1987), review denied, 109 Wash. 2d 1027 (1988). Testimony regarding notes of the interview with the complaining witness do not contain opinions, theories, or conclusions of the defense. It is simply a factual inquiry into what the witness's answers were. Thus, the testimony of the investigator did not violate the work product doctrine.

The law allows cross examination of a witness into matters that will affect credibility by showing bias, ill will, interest, or corruption. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). The scope of such cross examination is within the discretion of the trial court. State v. Robbins, 35 Wn.2d 389, 396, 213 P.2d 310 (1950); Roberts, at 834. While the State subjected the defense investigator to cross examination regarding her hourly rate and how much she was paid for the

amount of work she had done, the questions were designed to emphasize her position as part of the defense team and to show her bias as a witness. See State v. Russell, 125 Wash. 2d 24, 882 P.2d 747 (1996) (questions of defense investigator designed to emphasize her position as part of the defense team and to show that her investigative techniques were often suggestive and incomplete were within the proper scope of cross examination). Here, the inquiry was within the proper bounds of cross examination.

ER 801(d)(1)(ii) reads, in part:

(d) Statements Which are Not Hearsay. A statement is no hearsay if
(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, ...

The victim, Melanie Lincoln, testified that during a telephone conversation with defense counsel, at which the investigator was present

and listening, she did not tell the officer about the sexual assault. (RP at 103). The following is the exchange between Ms. Lincoln and defense counsel.

Q Didn't you, in fact, use the words, "I lied to Officer Manthey", during the interview? Didn't you say, "Yeah, I lied about everything"?

A I said I didn't tell him about the sexual assault. If he asked me about it, I said I would have lied to him because I didn't want anybody to know about it. But like I said earlier, I don't remember specific question that is he asked me.

Q Okay. This is a hard one, and I don't want to start out being really unfair to you, but I want to know if you can remember whether I asked you if, in fact, you lied to Officer Manthey. Because I believe your answer was, yes, I lied.

MR. JOHNSON: Well, I object, Your Honor, to the form of that question. If Mr. Klein wants to testify, he can get up and testify.

MR. KLEIN: My investigator will testify, Judge. I want to see what her answer is.

(RP at 103).

These questions charge Ms. Lincoln with fabrication. The testimony of the investigator, who listened in on the interview, was an attempt to show Ms. Lincoln's prior consistent statements in rebuttal to the charge of fabrication. Such testimony is specifically defined as nonhearsay and is admissible under ER 801(d)(1)(ii).

Furthermore, under ER 801, a prior out-of-court statement is not hearsay and is admissible for impeachment purposes if it is offered only to show that the statement was made and not to prove the truth of the matter asserted. Defense counsel told the court and the jury that he would be calling his investigator to show that the statement "I lied" was made in the prior interview. The defendant cannot now claim that it was inadmissible hearsay when the defendant himself was going to call the investigator to impeach Ms. Lincoln's testimony. It does not matter that the State is the party who called the investigator for this purpose. The testimony was

admissible by either side, for impeachment purposes. Thus, the court did not err in allowing the testimony.

E. THE TRIAL COURT DID NOT ERR IN ALLOWING THE COUNSELOR OF THE COMPLAINING WITNESS TESTIFY

An expert may not offer an opinion on an ultimate issue of fact when it is based solely on the expert's perception of the witness' truthfulness. State v. Fitzgerald, 39 Wash. App. 652, 657, 694 P.2d 1117 (1985). An expert's opinion as to the defendant's guilt invades the jury's exclusive function to weigh the evidence and determine credibility. Id.

During the counselor's testimony at trial, the counselor never gave a diagnosis of Melanie or her siblings. (RP at 338-40). The State several times during the examination explained it was not asking for a diagnosis. (RP at 337, Ln.17-18; 338, Ln. 18-20). The State also advised the court that the counselor had been cautioned against commenting on Melanie's

credibility by not discussing malingering. (RP at 340, Ln. 3). The counselor's testimony consisted mainly of Melanie's overriding concern for her family. (RP 339-40). The counselor testified that Brett also expressed concern for his family. (RP at 341).

At no time during her testimony did the counselor give an impermissible diagnosis of whether Melanie had suffered sexual abuse. Nor did the counselor testify as to whether or not she believed Melanie during the counseling sessions. The counselor's testimony did not rise to the level of either of the cases cited by the defendant, State v. Jones, 71 Wash. App. 798, 863 P.2d 85 (1993) (CPS worker's testimony that she felt the child had been sexually molested by the defendant at a particular point in the child's story impermissible comment on defendant's guilt) and State v. Florczak, 76 Wash. App. 55, 882 P.2d 199 (1994) (witness opinion that posttraumatic stress was secondary to sexual abuse

impermissible comment that invaded the province of the jury).

The defendant would like this court to draw the conclusion that this testimony made a clear inference that the counselor believed the abuse had occurred. However, that inference can not be drawn from the testimony, nor should this court make that giant leap.

The testimony shows that the counselor did not even testify about the sexual abuse aspect of the session. The record is clear that the counselor's testimony was solely focused on Melanie and Brett's concern for their family. This testimony did not in any way comment on the guilt of the defendant, nor did the testimony invade the province of the jury by commenting on the ultimate issue that is to be decided by the jury. Thus, there was no error in the trial court allowing the testimony of the counselor of the victim.

F. THE TRIAL COURT DID NOT ERR IN PROHIBITING TESTIMONY REGARDING FINANCIAL MATTERS OF THE DIVORCE BETWEEN THE DEFENDANT AND THE COMPLAINING WITNESS'S MOTHER

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. State v. Stenson, 132 Wash. 2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). The cross-examination of a witness to elicit facts which tend to show bias, prejudice or interest is generally a matter of right, but the scope or extent of such cross-examination is within the discretion of the trial court. State v. Robbins, 35 Wash. 2d 389, 213 P.2d 310 (1950). A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Jones, 67 Wash. 2d 506, 512, 408 P.2d 247 (1965).

Here, the defendant's offer of proof was that the complaining witness' mother had a motive

or bias against the defendant due to financial reasons stemming from a long, drawn out divorce. (RP at 297-98). The court allowed testimony about the long, drawn out divorce and Ms. Ward's dislike for the defendant. (RP at 314-15). However, the court limited the defense's ability to cross-examine Ms. Ward on financial matters because Melanie made the accusation in 2003, which was after all divorce proceedings were finished. (RP at 24, 298). The court further reasoned that "[t]he reason person who making these allegations is Melanie...". (RP at 331). Thus, the defendant was allowed to cross-examine Ms. Ward on her bias. However, the court was within its discretion to limit the examination based on speculation and remoteness of the financial aspects of the divorce the defendant wanted to cross examine on.

In addition, the offer of proof that Ms. Ward made a statement to a colleague that she would "get" Mr. Fisher any way she could is

inadmissible hearsay. ER 801. Therefore, the court properly excluded that testimony because it would have been inadmissible and there are no hearsay exceptions that would have allowed the statement in.

Accordingly, the trial court did not abuse its discretion in limiting the cross-examination of Ms. Ward. The defendant was still able to cross-examine Ms. Ward on her dislike for the defendant due to a long, drawn out and bitter divorce.

G. THE JURY WAS PROPERLY INSTRUCTED ON EACH CRIME CHARGED

1. Four separate counts of molestation

Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. State v. Mark, 94 Wash. 2d 520, 526, 618 P.2d 73 (1980). The wording of instructions is a matter for the trial court's

discretion. Jensen v. Beaird, 40 Wash. App. 1, 15, 696 P.2d 612, review denied, 103 Wash. 2d 1038 (1985).

Here, the defendant was charged with four separate counts of child molestation. (CP at 126-27). Instruction No. 7 informed the jury that they had to find the defendant committed the crime of molestation on four separate days between the time period of January 1, 1997 and December 30, 1997. (CP at 118). The jury was given four different verdict forms that corresponded with the four separate counts of molestation charged. (CP at 122-125). These instructions, taken as a whole, properly informed the jury that they had to find each element of the crime was proved beyond a reasonable doubt for each separate count of molestation. In addition, these instructions allowed the defendant to argue his theory of the case that none of these acts ever occurred. Therefore, the instructions clearly instruct the jury that all

four separate counts of molestation must be proved beyond a reasonable doubt.

2. Unanimity Instruction

Instructions are sufficient if they are supported by substantial evidence. Flink v. Hart, 82 Wash. App. 209, 223, 917 P.2d 590 (1996). In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Stephens, 93 Wash. 2d 186, 190, 607 P.2d 304 (1980). When the State presents evidence of several acts that could form the basis of one count charged, there is a potential for violation of the defendant's federal and state constitutional rights to a jury trial and a unanimous jury verdict. State v. Kitchen, 110 Wash. 2d 403, 756 P.2d 105 (1988) (citing U.S. Const. amend. VI; Wash. Const. art. I, sec. 22, amend. 10); State v. Badda, 63 Wash. 2d 176, 182, 385 P.2d 859 (1963). When this happens, the State must make an election as to

which act it is relying on for a conviction, or the trial court must tell jurors they must agree unanimously that the same underlying act has been proven beyond a reasonable doubt. State v. Petrich, 101 Wash. 2d 566, 683, 683 P.2d 173 (1984) (emphasis added). The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt. Id. In reasoning why the State did not have to elect specific dates to correspond with each charge, the Washington Supreme Court held that

These options are allowed because, in the majority of cases in which this issue will arise, the charge will involve crimes against children. Multiple instances of criminal conduct with the same child victim is a frequent, if not the usual pattern.

Id. at 572.

Here, Instruction No. 5 properly instructed the jury on unanimity of the charges. (CP at 116). Instruction No. 5 properly informed the jury that they had to agree unanimously that the

same underlying act had been proved beyond a reasonable doubt for each charge. (CP at 116).

This instruction was also supported by substantial evidence. The victim testified that throughout 1997, the abuse happened on a daily basis. (RP at 68). She specifically testified that it happened more than four times and on more than four separate days. (RP at 69). The victim testified the abuse followed the same pattern each time: The defendant would take the victim upstairs, have her lay on her back and tell her to open her legs, with her underwear off. (RP at 63). The defendant would partially remove the victims shirt, in order to expose her breasts. (RP at 63). The defendant would then touch the sides of the victim's vagina and would pluck her pubic hairs. (RP at 64). There was never a specific date given to correspond with the four counts of second degree child molestation because the same events occurred in a procedural manner on a daily basis. A reasonable trier of fact

could have found each count proved, beyond a reasonable doubt. Thus, the jury was properly instructed.

H. THE CONVICTION SHOULD BE UPHOLD BECAUSE THE DEFENDANT RECEIVED A FAIR TRIAL

Under the cumulative error doctrine, the accumulation of nonreversible errors may combine to deny the defendant a fair trial. State v. Perrett, 86 Wash. App. 312, 322, 936 P.2d 426, review denied, 133 Wash. 2d 1019 (1997).

As has been discussed above, there have not been any nonreversible errors that occurred during the defendant's trial. Since all the evidence and testimony admitted at trial was admissible, there was no prosecutorial misconduct, and the jury was properly instructed, the defendant received a fair trial.

CONCLUSION

The defendant received a fair trial. The trial court did not abuse its discretion in any of its evidentiary rulings. The prosecutor's conduct was proper and did not prejudice the defendant. The jury was properly instructed on the law. There was no cumulative error that denied the defendant a fair trial. The defendant's conviction on all four counts of second degree child molestation should be affirmed.

Respectfully submitted this 14th day of March, 2006.

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Ofc. Id. 91004