

67109-0

67109-0

NO. 67109-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JAMES SLY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

RANDI J. AUSTELL  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. ISSUE PRESENTED**

Whether the trial court exercised proper discretion by denying a motion for mistrial after it determined that two vague and isolated remarks did not affect the outcome of the case or deny the defendant a right to a fair trial.

**B. STATEMENT OF THE CASE**

**1. FOSTER CARE, ADOPTION, AND APPALLING PHYSICAL ABUSE.**

A few years after L.L.S. (date of birth 11/27/1990) and her younger sister, L.R.S. (date of birth 11/21/1992), were born in Mississippi, their birth mother moved to Washington and decided that she could not raise them.<sup>1</sup> 4RP 168-70.<sup>2</sup> For some time, the sisters moved from one foster home to another. 4RP 168-69. In 1996, Sandra Sly and her partner of twenty years, Curtis Adams Sr., became L.L.S.'s and L.R.S.'s foster parents. 4RP 171-72. When L.L.S was about nine years old, Sandra adopted her and L.R.S.<sup>3</sup> 4RP 175.

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<sup>1</sup> L.L.S. never met her biological father. 4RP 169.

<sup>2</sup> The State adopts the appellant's designation of the verbatim report of proceedings. See Br. of Appellant at 1 n.1.

<sup>3</sup> For clarity, the State refers to Sandra, Curtis Sr. and James by first name.

Sandra has one biological child: James Sly.<sup>4</sup> CP 5. Curtis Sr. has three biological children: Jamel Adams<sup>5</sup>, Curtis Adams, Jr.<sup>6</sup> (“Junior”) and Naquaia Adams<sup>7</sup>. CP 5; 4RP 171. Sandra treated the couples’ biological children much better than she treated L.L.S. (or L.R.S.). 4RP 41, 57. Sandra forced L.L.S. and L.R.S. to do most of the housework and family chores. 4RP 47-48, 57, 191-92. L.L.S. could never play with friends, go the park, or watch television; yet, Sandra’s and Curtis Sr.’s biological children had no such restrictions. 4RP 48, 75, 143, 192-93, 235.

Often, when Sandra thought that L.L.S. had misbehaved, she ordered L.L.S. to go into the backyard and get a switch – a switch that Sandra lashed across L.L.S.’s bare skin. 4RP 159, 177. Several times a week, Sandra beat L.L.S. on her back, thighs or buttocks with a belt.<sup>8</sup> 4RP 71, 177, 234. Frequently, James and

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<sup>4</sup> Date of birth 2/24/1983.

<sup>5</sup> Date of birth 12/26/1986.

<sup>6</sup> Date of birth 4/21/1985.

<sup>7</sup> Date of birth 1/17/1989.

<sup>8</sup> Sandra also made L.L.S. run up and down the stairs, often while Sandra lashed her with a belt. 4RP 199. Sandra forced L.L.S. to do many, many sit-ups and push-ups as punishment. 4RP 199. A doctor who examined L.L.S. after the abuse came to light, commented that for someone 4’9” and less than 100 pounds, L.L.S. had “really strong abdominal muscles.” 4RP 344.

Junior held L.L.S. down while Sandra beat her. 4RP 177-78, 289. Sandra punched L.L.S. in her face and ribs and choked her.<sup>9</sup> 4RP 71, 143, 177-78, 199. As punishment, Sandra ordered L.L.S. to squat, her back against a wall for a long time (up to an hour). 4RP 156, 177. Once, when L.L.S. tired and started to slip down, Sandra threw a full can of food at her head, which resulted in a serious injury to her eyebrow that required a doctor to glue it together. 4RP 98, 200.

L.L.S. wet her bed occasionally. 4RP 98, 179. Sandra “whoop[ed L.L.S] for peeing the bed.” 4RP 230. L.L.S. always tried to awaken by 3:00 A.M., before she had an accident. L.L.S. had to then awaken Sandra to tell her that she had used the bathroom. 4RP 179-80, 230-32. When L.L.S. awakened after 3:00 A.M. – whether she had wet the bed or not – Sandra punished her. 4RP 179-80, 232.

## **2. THE CHARGED CRIME.**

One night, when L.L.S. was about ten years old, James waited at his bedroom door as she headed to the bathroom.

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<sup>9</sup> On one occasion, when Sandra punched L.L.S. in the face, her rings scarred L.L.S.'s face. 4RP 71.

4RP 103-04, 157, 180-81. James grabbed L.L.S., pulled her to the ground, raised her nightgown and tugged her underwear off.

4RP 182-84. James unclothed himself. 4RP 184. He got on top of L.L.S. and held her down. 4RP 185. James put his penis against her vagina.<sup>10</sup> 4RP 182-86. James tried to penetrate L.L.S., but she moved too much for him to insert his penis. 4RP 186, 297. L.L.S. asked James to get off her, to stop. 4RP 183. James ignored her. His sole response was, "Don't tell mom." 4RP 157, 187.

Afterward, L.L.S. awakened Sandra – as she did every night – to tell her that she had used the bathroom. 4RP 187. L.L.S. did not tell Sandra about the sexual abuse. 4RP 187.

James stopped molesting L.L.S. only after he moved out (L.L.S. was approximately eleven or twelve years old.). 4RP 188-90, 263-64. Then, Junior started sexually abusing L.L.S. 4RP 193-97. Junior's only concern: "Don't tell mom." L.L.S. said, "That's what they all said, 'Don't tell mom.'" 4RP 197, 277.

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<sup>10</sup> L.L.S. was uncertain whether James penetrated her on this occasion. The State thus proceeded on a child molestation charge, rather than a rape of a child charge.

### 3. THE INVESTIGATION AND L.L.S.'S DISCLOSURE.

On October 29, 2007, Sandra picked L.L.S. up by her shirt and slammed her into the entryway wall.<sup>11</sup> CP 8. The next day, L.L.S. ran away to a friend's house where an adult called the police. The Federal Way Police Department called Child Protective Services ("CPS") and both agencies opened an investigation into the alleged abuse. 4RP 31, 121.

That same day (October 30, 2007), Federal Way Police Detective Deyo spoke to 14 (almost 15)-year-old L.L.S. 4RP 29-30, 202. L.L.S. denied being abused; she said, "[E]verything was fine, and none of the stuff that was going on happened, and that my sister was lying." 4RP 201-02. Before Detective Deyo spoke to L.L.S., Sandra had instructed her not to tell the police "about the stuff that's going on inside the house."<sup>12</sup> 4RP 34, 89, 202-03. Federal Way police officers removed L.L.S., L.R.S. and five other foster children that afternoon and placed them into protective custody. 4RP 31, 39, 65, 200-01.

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<sup>11</sup> Police officers later saw the damaged wall. Sandra explained to the police officers that L.L.S. had been running through the house when she slipped and fell into the wall. CP 8.

<sup>12</sup> Once admonished, L.L.S. was too scared to say anything to Detective Deyo. 4RP 159.

One day later, L.L.S. called home. 4RP 65, 74, 203. She told Curtis Sr.'s daughter, Naquaia, that she was scared. 4RP 203. L.L.S. ran away, back to Sandra's house, because she was frightened of what Sandra would do to her.<sup>13</sup> 4RP 207. Curtis Sr. and Naquaia picked L.L.S. up at a bus station and took her back to their house. 4RP 203.

CPS did not know that L.L.S. had returned home because Sandra kept L.L.S. hidden. 4RP 66, 145, 206-07. When CPS employees showed up to look for L.L.S., Sandra forced L.L.S. to hide in a cubby so small that she had to squat.<sup>14</sup> 4RP 58, 124, 136, 206. L.L.S. could have come out while the CPS workers were in the house, but she did not. 4RP 58, 74-75, 100, 207. L.L.S. said, "I was scared, because I was given direct – directions not to move from that place. And I was already frightened of Sandra." 4RP 207-08.

After L.L.S. returned home (on October 31, 2007), her life became one of near solitary confinement. 4RP 128. Because

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<sup>13</sup> Sandra, Curtis Sr. and Naquaia, encouraged L.L.S. to run away. 4RP 99, 103.

<sup>14</sup> L.L.S. described it as "really small" – "a little closet inside of another closet" in Sandra and Curtis Sr.'s bathroom. 4RP 206.

L.L.S. liked school, Sandra no longer permitted her to attend.<sup>15</sup> 4RP 155, 200, 204. Sandra forbade L.L.S. to leave the home alone; another family member had to accompany her. 4RP 145, 204.

On December 10, 2007, after 17-year-old L.L.S. returned to the Federal Way home from a two-day family trip to Portland Oregon, she ran away again.<sup>16</sup> 4RP 60, 208-09, 213. L.L.S. waited until everyone fell asleep. 4RP 210. Then, she fled to a Fred Meyer store's parking lot. 4RP 209. Someone called the police to do a welfare check on L.L.S., who appeared so much younger than 17 years old.<sup>17</sup> 4RP 10-11, 15, 31, 209.

Federal Way police officer Shon Lunt arrived just after midnight on December 11. 4RP 10-12. L.L.S. told him that she ran away from her foster home. 4RP 10-12, 209. She disclosed the years of merciless physical and sexual abuse. 4RP 13-16, 209. Officer Lunt discovered that Detective Deyo had an open case on L.L.S. 4RP 14. He called Detective Deyo, who, along with

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<sup>15</sup> L.L.S. had missed many prior school days because she had visible welts and bruises. 4RP 200.

<sup>16</sup> In Oregon, Jamel Adams sexually abused L.L.S. 1RP 8-12. That abuse was the proverbial straw that broke the camel's back. L.L.S. ran away later the same night that the family returned to Washington. 4RP 208-10; 5RP 6.

<sup>17</sup> The doctor who performed a sexual abuse examination on L.L.S. at the end of December said that L.L.S. was "very small," unusually small. 4RP 339-40.

Lieutenant Murphy, interviewed L.L.S. 4RP 33-36, 210-11. They mostly asked L.L.S. about Sandra's physical abuse. 4RP 35-36, 211. But, in response to some questions regarding sexual abuse, L.L.S. disclosed that James and Junior had molested her.<sup>18</sup> 4RP 35, 211. L.L.S. "felt really uncomfortable" discussing the sexual abuse with Detective Deyo and Lieutenant Murphy, especially because they were male. 4RP 211-12. After the interview, L.L.S. was taken to a shelter. 4RP 213.

Later that same day, two CPS case workers (Steve Spero and Geri Ishii) questioned L.L.S. about her physical abuse by Sandra and her sexual abuse by James and Junior.<sup>19</sup> 4RP 122-23, 136-38, 213. At trial, L.L.S. did not specifically recall Ms. Ishii having been present because she had "just so many interviews" and talked to "so many people."<sup>20</sup> 4RP 213-14.

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<sup>18</sup> This was the first time that L.L.S. discussed the sexual abuse with anyone other than family. 4RP 211-12.

<sup>19</sup> Mr. Spero is an investigative social worker with CPS. 4RP 118. Ms. Ishii works for CPS in the Division of License Resources, which licenses foster homes. 4RP 134.

<sup>20</sup> One week later, Detective Deyo, Mr. Spero, Ms. Ishii, a King County Deputy Prosecutor and some other people interviewed L.L.S. 4RP 37, 56, 72-73, 139, 228. L.L.S. stated that James's penis had touched her vagina. 4RP 56, 72. In late December 2007, L.L.S. talked to Dr. Sugar, who did a sexual assault exam at Harborview Medical Center. 4RP 215-16, 287-88, 303. The exam did not prove prior intercourse, but the results were "certainly very consistent with prior intercourse." 4RP 345. Dr. Sugar asked L.L.S. only general questions because she knew that a detective would conduct an in-depth interview. 4RP 340. On December 3, 2011, both defense counsel interviewed L.L.S. 4RP 228-29.

After L.L.S. turned 18 years old, she had to leave the shelter. 4RP 218. L.L.S. had no stable place to live, no stable employment, no high school diploma or G.E.D. 4RP 218. L.L.S. said, “[S]ince I was 18, they (CPS) kind of threw me out to the world, basically.”<sup>21</sup> 4RP 218-19.

#### **4. THE CHARGES.**

The State charged James with one count of rape of a child in the first degree (victim L.R.S.) and one count of child molestation in the first degree (victim L.L.S.). CP 3-4. The State also charged Junior with one count of child molestation in the first degree (victim L.R.S.) and one count of rape of a child in the first degree (victim L.L.S.).<sup>22</sup> CP 2-3, 5. Pre-trial, the State asked the court to dismiss without prejudice counts four and seven because L.R.S. had not remained in contact with the State, and without her testimony, the

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<sup>21</sup> Given L.L.S.'s dire predicament, the jury may not have put too much weight on L.L.S.'s three shoplifting convictions. See Br. of Appellant at 30 (arguing why the jury should not have found L.L.S. credible).

<sup>22</sup> The State charged James's other brother, Jamel Adams, with one count of attempted rape in the third degree (victim L.L.S.) and one count of rape in the third degree (victim L.L.S.) (King County Cause No. 08-1-13007-6 KNT). 2/23/11 RP 8-12. The trial court severed Jamel's case from James's and Junior's cases. 3/1/11 RP 5-6; CP 160. A jury convicted Jamel as charged. 5RP 5.

Under King County Cause No. 08-1-13005-0, the State charged Sandra with two counts of assault in the fourth degree (victims L.R.S. and L.L.S.) and one count of tampering with a witness. CP 1-2. Sandra pleaded guilty to one count of assault in the fourth degree and one count of attempted witness tampering. 1RP 8, 42-44.

State could not proceed on the charges. 1RP 7-8. The jury convicted James as charged.<sup>23</sup> CP 23. The trial court sentenced James to 77 months of total confinement.<sup>24</sup> CP 81. James timely appeals. CP 28.

**C. ARGUMENT**

**THE TRIAL COURT PROPERLY DENIED THE MOTION FOR MISTRIAL AFTER FINDING THAT L.L.S.'S REMARKS DID NOT DENY JAMES A FAIR TRIAL.**

James contends that the trial court abused its discretion when it denied a joint defense motion for a mistrial after two remarks by L.L.S violated a pretrial ruling. James characterizes the violations as a "serious trial irregularity," which he claims denied him a fair trial.

This Court should reject James's argument for three reasons. First, neither defense counsel asked for a curative instruction; thus, the issue has not been preserved. Second, there was no "serious trial irregularity." The pretrial ruling that James

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<sup>23</sup> The jury was unable to reach a verdict as to Junior, who currently awaits a re-trial.

<sup>24</sup> Had James been convicted as a juvenile (when he molested L.L.S), he would have served less than one year in a juvenile detention facility. Br. of Appellant at 3; 5RP 12. The trial court thus imposed the low-end of the standard range sentence to be fair. The court noted that, "It is not anybody's fault that it (the case) got delayed." 5RP 13. In a letter to the trial court, James asked for leniency and promised that, "Under no circumstances will there be anymore (*sic*) mistaes (*sic*)." CP 178. James took some responsibility for his acts, however, it is a misnomer to refer to his repeated molestations as mistakes.

claims L.L.S. violated concerned inadmissible hearsay by Detective Deyo; it did not pertain to L.L.S.'s testimony.<sup>25</sup> Moreover, the trial court specifically found that one remark was vague and would not result in any prejudice, and the other remark was "very unlikely" to "result in any prejudice to the defendants." 4RP 223-24. Finally, error, if any, was harmless.

Trial irregularities are irregularities that occur during a criminal trial that implicate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984). In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the claimed trial irregularity; (2) whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987).

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). An abuse of discretion occurs only if no reasonable judge would have reached the same conclusion. State v.

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<sup>25</sup> The State is not suggesting that L.L.S.'s remarks were proper. Rather, the State is clarifying the scope of the pre-trial ruling.

Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A “trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); see also State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991) (denial of a mistrial will be overturned only when there is a “substantial likelihood” the prejudice affected the jury’s verdict). Generally, the trial court is best suited to determine the prejudice of a statement. Lewis, 130 Wn.2d at 707; State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

1. Facts.

- a. The pretrial rulings.

After the State asked the trial court to dismiss the counts in which L.R.S. was the named victim, the parties held very brief discussions about previous statements made by her.<sup>26</sup> Junior’s counsel sought to exclude testimonial hearsay by Detective Deyo that Sandra and Curtis Sr. told him that L.R.S. had previously

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<sup>26</sup> The first instance was in the context of whether the court should sever Jamel’s case from James’s and Junior’s cases or if the cases were tied together by a common scheme or plan. 1RP 17-24. Additionally, James’s counsel brought a motion to exclude testimony by L.R.S. because of her “willful disregard of all attempts to interview her pre-trial, including a subpoena.” CP 16-17. However, counsel conceded that the motion had in effect “been dealt with” by the dismissal of charges. 1RP 50.

disclosed James's sexual abuse.<sup>27</sup> 1RP 45-48. After the State said that it was not calling Sandra or Curtis Sr. as witnesses, Junior's counsel conceded – and the deputy prosecutor and the trial court agreed – that the issue was “moot.”<sup>28</sup> 1RP 46-48.

b. Testimony.

L.L.S. testified that, immediately after the first time James molested her, she awakened Sandra and told her that she had used the bathroom. 4RP 180-87. The deputy prosecutor asked,

And when you woke your mom up to tell her that you went to the bathroom, did you tell your mom (about James's molestation)?

4RP 187. L.L.S. replied,

No, I didn't, because that wasn't the first incident that he did something. It was -- well, I probably can't bring anything up about my little sister.

Id. The deputy prosecutor then said,

Okay. So, in terms of -- so you didn't tell your mother about that?

Id. L.L.S. answered, “No, I didn't tell my mother.” Id.

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<sup>27</sup> The motion related to testimony only by the detective as to L.R.S.'s disclosures to Sandra and Curtis Sr. Supp. CP \_\_ (sub. No. 82 (under Curtis Adams, Jr.'s, cause number), defendant's trial brief). See 1RP 45 (Junior's counsel refers the trial court to page 12, section 10 of his trial brief). The State has attached the pertinent section as an appendix for the Court's convenience.

<sup>28</sup> Neither defense counsel brought any other pre-trial motions concerning any other statements made by L.R.S. to anyone other than Detective Deyo. See CP 156 (trial court's rulings on motions in limine).

Later, L.L.S. testified about her initial meeting with Detective Deyo on October 30, 2007. The deputy prosecutor asked L.L.S., "Do you remember him asking you about any abuse in the home?" L.L.S. responded, "Yes, I do." The prosecutor followed up, "Okay. And did you tell him you were being abused?" L.L.S. replied, "No. I said everything was fine, and none of the stuff that was going on happened, and that my sister was lying." 4RP 202. L.L.S. then explained that she denied the abuse because Sandra had instructed her not to tell the police "about the stuff that's going on inside the house." 4RP 202-03. And, Sandra scared L.L.S. 4RP 159.

c. Motion for mistrial.

After the State completed its direct examination, James's counsel made a motion for mistrial. 4RP 220-21. Counsel said,

Twice, during the witness' testimony before the jury, she mentioned her sister, and contrary to the ruling of the case. I think the first time was when she was talking about my client and the sexual assault on her.

And I can't recall what the question was that triggered it, but I have quotes around her answer, "I can't bring up the incident with my little sister." And I wanted to say something at the time, but I didn't want to highlight it.

4RP 220-21. Counsel also objected to L.L.S.'s testimony about her first meeting with Detective Deyo, when she denied any abuse and said that everything was fine and that her sister was lying.

4RP 221. Counsel conceded that the last remark was vague, but still argued that a mistrial was warranted because these remarks went to the "heart of the case, the number of allegations and the inflammatory nature of it all."<sup>29</sup> 4RP 221.

The State acknowledged that L.L.S. mistakenly and unexpectedly commented about her little sister. 4RP 222-23. The State argued that a mistrial was unwarranted because the comment was not highlighted and the State immediately moved on with another question. 4RP 223. The State agreed with James's counsel that L.L.S.'s comment to Detective Deyo was less inflammatory than the first statement because the jury heard much testimony concerning Sandra's abuse of L.L.S., L.R.S. and other foster children. 4RP 223.

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<sup>29</sup> Junior's counsel joined in the motion for a mistrial. He acknowledged that the testimony came in through no fault of the deputy prosecutor. "I'm not saying Ms. Weston led her into any of that answer; she didn't." 4RP 222, 224-25.

d. The trial court's ruling.

The trial court said, "I'm less concerned about the second statement and tend to agree that it would not result in any prejudice." 4RP 223. The court continued,

With respect to the earlier statement, while *it's troubling*, we know so much about the case, I don't think the jury is going to understand what she was talking about; so *I think it's very unlikely that that could result in any prejudice to the defendants*, although, again, that's the area where she especially needs to be careful.

I don't know if there's the ability to talk to jurors afterwards. I think it inheres in the verdict, and I doubt you can. But if there's any legal basis to do that, if one of them or both of them are found guilty, I would certainly allow the attorneys the opportunity to do that, and that -- I don't think that's a possibility. Obviously, if it's not guilty, it doesn't matter.

4RP 223-24 (italics added).

The court denied the joint motion for mistrial.

2. James Failed To Preserve This Issue For Appellate Review.

As a preliminary matter, even if the trial court erred in admitting L.L.S.'s references to L.R.S, the error is waived because James failed to request a curative instruction. See State v. Crawford, 21 Wn. App. 146, 584 P.2d 442 (1978) ("When error may be obviated by an instruction to the jury, it is incumbent upon the

defendant to request such an instruction. Absent such a request, the error is deemed waived.” (Citation omitted)). Although James’s counsel did not contemporaneously object to the remark because she did not want to “highlight it,” neither she nor Junior’s counsel requested a curative instruction (nor did counsel state that she did not want a curative instruction because it might emphasize the remark).<sup>30</sup> 4RP 220-25. Consequently, James did not preserve the issue for review.

3. L.L.S.’s Remarks Were Not A “Serious Trial Irregularity.”

Even if this Court reviews James’s claim, he loses on the merits.

a. L.L.S. did not violate the pretrial ruling.

As discussed above, the scope of the pretrial ruling concerned Detective Deyo’s testimony. The defense sought to exclude inadmissible hearsay by Detective Deyo as to what L.R.S. told Sandra and Curtis Sr. about James’s sexual abuse. But there is a distinction between a witness violating a pretrial ruling, which often creates a “serious trial irregularity,” and a witness making a vague, unsolicited and unexpected remark.

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<sup>30</sup> Post-verdict, neither counsel brought a motion for a new trial on this or any other basis.

This Court's decision in State v. Clemons<sup>31</sup> is instructive. In Clemons, an officer violated a motion in limine by testifying about his "prior contacts" with the defendant. Finding the trial court did not abuse discretion in denying a mistrial motion, the Court said in pertinent part:

Great weight is placed on the sound discretion of the trial court. . . . From a review of the record, it is apparent that this comment was not intentionally solicited and was not in any way expanded upon. Defense counsel did not request a curative instruction, nor accept the court's offer for him to question the jurors as to the effect of the remark. While being known to a police officer may be suggestive of bad acts, it is certainly not conclusive. Against the backdrop of all the evidence, this incident is insignificant.

Clemons, 56 Wn. App. 57, 62, 782 P.2d 219 (1989).

Similarly, the unintentional, unexpected statements at issue here were vague and did not necessarily suggest that James had molested L.R.S. The prosecutor immediately asked another question and did not expand on L.L.S.'s reference to her little sister. While L.L.S.'s remarks might have been suggestive of bad acts, it is certainly not conclusive. And, the remarks did not constitute a serious trial irregularity.

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<sup>31</sup> 56 Wn. App. 57, 62, 782 P.2d 219 (1989).

- b. The trial court specifically found that the remarks did not prejudice James.

Even if this Court determines that L.L.S.'s isolated and unexpected remarks technically violated a pretrial ruling or a court rule, such determination does not necessarily constitute grounds for a mistrial. See State v. Thompson, 90 Wn. App. 41, 950 P.2d 977 (1998) (while police officer's testimony violated a pretrial order in limine, it was not so prejudicial as to deny the defendant a fair trial; thus, no abuse of discretion in denying motion for mistrial); State v. Jones, 26 Wn. App. 551, 556-57, 614 P.2d 190 (1980) (holding that the trial judge in a first-degree murder prosecution did not abuse his discretion in denying a motion for a mistrial made after an inadvertent reference was made to another homicide investigation, even though the trial judge had ordered that no mention of the second homicide be made during the retrial); State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390, 396 (2000) (concluding that there is not a "substantial likelihood" that the State's violation of CrR 4.7 affected the outcome at trial).

Here, the trial court found that the second remark – when L.L.S. told Detective Deyo that her sister was lying about abuse in the Sly/Adams household – was, as all parties agreed, vague. The

court found it “would not result in any prejudice.” 4RP 223. The court found L.L.S.’s remark – that she probably could not “bring anything up about [her] little sister” – “troubling,” but also “very unlikely” that the remark “could result in any prejudice to the defendants.” 4RP 223-24. The trial court concluded that L.L.S.’s inadvertent remarks did not affect the outcome of the case.<sup>32</sup> 4RP 223-24. When viewed against the evidence of James’s molestation of L.L.S., the improper comment was not so inherently prejudicial that it denied James the right to a fair trial. The trial court’s ruling was not an abuse of its considerable discretion.

James contends that the trial irregularity was serious because it violated the court’s pretrial ruling and it constituted “the kind of ‘other bad act’ evidence” that is “particularly prejudicial in a trial like this.” Br. of Appellant at 26-27. But, as discussed above, the pretrial ruling applied to hearsay testimony by Detective Deyo, not to L.L.S.

Moreover, the cases upon which James relies are inapposite because here there was no evidence of other bad acts. See Br. of Appellant at 27 (citing State v. Dawkins, 71 Wn. App. 902, 863 P.2d

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<sup>32</sup> The analysis does not turn on whether the remark was deliberate or inadvertent but whether the defendant was denied a fair trial. Weber, 99 Wn.2d at 165 (citing State v. Gilchrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)).

124 (1993) (defense counsel was ineffective for failing to object to three prior uncharged acts of sexual abuse involving one of the two named victims) and State v. Baker, 89 Wn. App. 726, 950 P.2d 486 (1997) (finding no abuse of the discretion where trial court admitted evidence of the defendant's sexual abuse of his daughter from 11 to 15 years ago as evidence of a common scheme or plan)). The jurors in this case did not hear about James's molestation of L.R.S. Rather, the jurors heard an oblique, isolated remark by L.L.S. And, contrary to James's contention, the trial court did not recognize the remark as a "serious irregularity."<sup>33</sup> The court found the remark "troubling" but "very unlikely" to result in prejudice.<sup>34</sup>

James next contends that the trial court erred as a matter of law by stating that counsel could speak to the jurors post-verdict to determine if the challenged remark had any effect on the verdict. 4RP 28. James states that this was a "conscience-salving placebo with no chance to cure the prejudice." Br. of Appellant at 28.

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<sup>33</sup> See Br. of Appellant at 27 (citing 4RP 223-24).

<sup>34</sup> James also claims that the trial court's ruling was "internally inconsistent" because it reasoned that if the deputy prosecutor had caused the irregularity, the trial would end and double jeopardy would preclude a re-trial, whereas the witness's unsolicited remark would permit a re-trial. Br. of Appellant at 28 (citing 4RP 225). James has misread the record. The trial court was paraphrasing the State's position, not stating the court's position. See 4RP 225.

The court did not err. Here, as in Clemons, the trial court discussed with counsel the possibility of talking to the jurors afterward. See Clemons, 57 Wn. App. at 62 (“Defense counsel did not request a curative instruction, *nor accept the court’s offer for him to question the jurors as to the effect of the remark.*”). The trial court in this case said,

I don’t know if there’s the ability to talk to jurors afterwards. I think it inheres in the verdict, and I doubt that you can. But if there’s any legal basis to do that, if one of them or both of them are found guilty, I would certainly allow the attorneys the opportunity to do that, and that -- I don’t think that’s a possibility. Obviously, if it’s not guilty, it doesn’t matter.

4RP 224. The court expressed its doubt that there would be a legal basis to determine if the remark influenced the verdict. 4RP 224. But, the court also left open the possibility that counsel could provide such a basis. There was no error.<sup>35</sup>

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<sup>35</sup> James states on appeal that the next two mistrial criteria are quickly analyzed (testimony was not cumulative and trial court did not instruct the jury to disregard the improper testimony). Although the jury did not hear about James’s sexual abuse of L.R.S., the jury heard much about Sandra’s physical abuse of L.L.S. and L.R.S. The trial court believed that the jurors were unlikely to understand what L.L.S. was talking about, which was why the remark was not prejudicial. The trial court did not instruct the jury to disregard the remarks because neither counsel asked for a curative instruction.

4. Error, If Any, Was Harmless.

Ultimately, the Court must determine whether the remarks, when viewed against the background of all the evidence, so prejudiced the jury that the defendant did not get a fair trial. Weber, 99 Wn.2d at 164-65; Escalona, 49 Wn. App. at 254.

James contends that the error here cannot be harmless because the State's case was based solely on L.L.S.'s credibility. While that may be true, James does not cite to any authority that prohibits a jury from determining a defendant's guilt based solely on the complaining witness's testimony. Indeed, the law does not require that, in order to convict a defendant of rape, the testimony of the alleged victim be corroborated. See State v. Malone, 20 Wn. App. 712, 714, 582 P.2d 883 (1978) (finding an instruction telling the jury that an alleged rape victim's testimony did not need to be corroborated to find the defendant guilty of rape was not a comment on the evidence and that it was a correct statement of the law).

It is the jury's function to assess a witness's credibility and the reasonableness of the witness's responses. See State v. Whelchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990). The jury heard evidence and argument concerning L.L.S.'s inconsistent

statements.<sup>36</sup> L.L.S. steadfastly maintained that James molested her when she was about ten years old.<sup>37</sup> It was then up to the jury to determine whether L.L.S. credibly explained that she (1) initially denied any abuse because she feared repercussions from Sandra, (2) was evasive in her interview with defense counsel because she did not want to help them defend two of the men who had repeatedly molested her, (3) did not know whether Junior ejaculated because, "I wasn't waiting to find out or watching --"<sup>38</sup> or that she did not feel pain during intercourse because "I was so used to it"<sup>39</sup>, and (4) did not volunteer information<sup>40</sup> or respond with more

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<sup>36</sup> Some "inconsistent statements" resulted from people asking L.L.S. questions about James and Junior collectively without specifying which brother. For example, Detective Deyo asked L.L.S. if "they" penetrated her without distinguishing between James and Junior. 4RP 97. Likewise, when Ms. Ishii asked L.L.S. questions, she did not clarify whether L.L.S. was referring to James, Junior or both. 4RP 153-54. Additionally, the sexual abuse by James and Junior spanned several years and occurred at three different residences, one in Des Moines, one in West Seattle and one in Federal Way. Even Ms. Ishii could not keep the events straight. 4RP 150, 161, 172.

<sup>37</sup> On re-direct, despite defense counsel's repeated attempts to impeach L.L.S. with prior statements, L.L.S. remained resolute. She said that James and Junior had molested her. L.L.S. said, "I wouldn't make up anything." 4RP 319.

<sup>38</sup> 4RP 273.

<sup>39</sup> 4RP 276.

<sup>40</sup> 4RP 327.

than a question called for because it made her uncomfortable to discuss her years of sexual abuse.<sup>41</sup>

Distilled to its essence, James's argument is simply a tacit request to supplant his view of L.L.S.'s credibility for that of the jury. It is a request that the Court must deny.

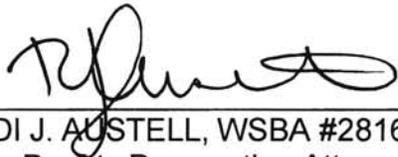
**D. CONCLUSION**

For the reasons stated above, the State asks the Court to affirm James's conviction for one count of child molestation in the first degree.

DATED this 2 day of October, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
RANDI J. AUSTELL, WSBA #28166  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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<sup>41</sup> See 4RP 211, 311, 317 (L.L.S. told both defense counsel during the interview that she did not want to talk about the allegations because it was too embarrassing).

# APPENDIX

**X. SIXTH AMENDMENT RIGHT TO CONFRONTATION**

The detectives asserted Sandra Sly and Curtis Adams, Sr. made certain statements that implicated Curtis and Jamel of having participated in corporal punishment of L.R.S. and L.L.S. As to these statements, the State will seek to discredit Curtis' credibility through his denial. The detectives also asserted that Curtis Adams, Sr. stated L.R.S. disclosed, while living in the Des Moines residence. James had touched her inappropriately.

"Our cases have thus remained faithful to the Framers' understanding: testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine."

*Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354 (2004).

"The text of the Confrontation Clause [. . .] applies to "witnesses" against the accused -- in other words, those who "bear testimony." 1 N. Webster, *An American Dictionary of the English Language* (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51.

"Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52. "[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.* at 53.

In short, the Sixth Amendment prohibits the use of the testimonial hearsay statements of Sandra Sly and Curtis Adams, Sr. This applies to their recorded interviews and references to their statements from those recorded interviews by the detectives during Curtis' March 12, 2008 interview. Absent the opportunity to cross-examine Sandra Sly and Curtis Adams, Sr. on their hearsay statements, such statements ought to be excluded from mention and redacted from the transcript and audio recording of the March 12, 2008 Curtis Adams, Jr. interview.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JAMES SLY, Cause No. 67109-0-1, in the Court of Appeals, Division I, for the State of Washington.

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



\_\_\_\_\_  
Name  
Done in Seattle, Washington



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Date