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NO. 70968-2-1

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

STATE OF WASHINGTON

Respondent

v.

R.D.M.,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Was it error to exclude testimony of an expert witness when that witness did not have relevant qualifications to render an opinion about the quality of the interview conducted by a child interview specialist and his proposed testimony constituted an impermissible opinion?

2. Was it an abuse of discretion to exclude testimony that was proffered as impeachment of a witness when that evidence related to a collateral matter?

3. Was R.D.M. denied his right to present a defense by the trial court's ruling excluding testimony from his expert witness and witnesses who were offered to impeach the complaining witness?

II. STATEMENT OF THE CASE

In April 2012 C.M., DOB August 8, 2008, moved with her parents to a new neighborhood in Everett. The defendant, R.D.M., and his family lived next door and were the first people C.M.'s family met when they moved in. R.D.M., DOB November 1, 1997, had two younger sisters, Natalie and Lily. C.M. often played with R.D.M. and his sisters. C.M. liked R.D.M. and looked upon him as an older brother. 9/23/13 RP 31-34, 78-79, Ex. 1.

Occasionally R.D.M. babysat C.M. On July 6, 2012 he was babysitting C.M. at his home. C.M., R.D.M., and Natalie were watching "My Little Pony" on television when the defendant put a blanket over him and C.M. R.D.M. then touched C.M.'s vagina while under the blanket. The defendant had C.M. touch his penis over his clothes as well. When F.M., C.M.'s mother came to pick up C.M. one of R.D.M.'s sisters commented to F.M. that C.M. really enjoyed being under the heating blanket. 9/23/13 RP 41-42; 9/24/13 RP 42-43; EX. 3.

On July 8, 2012 C.M. and R.D.M were playing together outside. F.M. was working in her kitchen while M.M., C.M.'s father, was in another room of the house. R.D.M. and C.M. came inside and played a card game with F.M. for a time. R.D.M. and C.M. went upstairs to the playroom while F.M. continued to work in the kitchen after they finished playing the game. A short time later F.M. heard C.M. shout "no!" F.M. ran upstairs and asked what was wrong. C.M. assured her mother that she was fine, so F.M. went back to working in the kitchen. Within a short time R.D.M. came downstairs and said that he had to leave. F.M. told C.M. to thank R.D.M. for playing with her. C.M. hugged R.D.M. and then told her mother that R.D.M. said that C.M. was the "best three-year-old girl

he's ever known." R.D.M. then left quickly without saying goodbye. 9/23/13 RP 26-27, 36-38, 80; Ex. 3.

After R.D.M. left F.M. did not ask C.M. about what happened upstairs. However, C.M. spontaneously told her mother that R.D.M. stroked her "tushy" and demonstrated by putting her hands between her legs. When F.M. asked C.M. to clarify, C.M. repeated that R.D.M. had stroked her tushy, and she again put her hands between her legs. F.M. had taught C.M. the anatomical names for body parts and so she corrected C.M. stating "honey that's not your tushy. What body part is that?" C.M. then clarified that R.D.M. touched her vulva. C.M. said R.D.M had touched her over her clothing. 9/23/13 RP 37-40.

F.M. asked C.M. to tell M.M. what C.M. had said. C.M. then told M.M. that R.D.M. had been stroking her "girly parts." C.M. showed her parents where R.D.M. touched her by patting in between her legs again. C.M. stated that R.D.M. touched her there on purpose when M.M. asked if R.D.M. had touched her there accidentally. F.M. asked C.M. if this ever happened before. C.M. told her mother that it happened the last time R.D.M. babysat while they were under a blanket. For a period of time C.M. daily repeated that R.D.M. had touched her "girly parts." 9/23/13 RP 41-44. 80-83.

After C.M. disclosed that R.D.M. had touched her vagina, F.M. talked to a neighbor, Laura Gould, about what happened. F.M. explained that R.D.M. was no longer allowed to have unsupervised contact with C.M. and was no longer welcome in their home. Ms. Gould contacted CPS who reported the incidents to the police on July 16, 2012. 9/23/13 RP 45-46, 125.

III. ARGUMENT

A. NO ERROR OCCURRED WHEN THE TRIAL COURT EXCLUDED TESTIMONY FROM A PROPOSED DEFENSE EXPERT WITNESS.

Police arrange to have C.M. interviewed by Gina Coslett, a child interview specialist (CIS). Ms. Coslett has worked as a CIS since 1997. She has specifically interviewed children regarding sexual abuse complaints since 2003. 9/23/13 RP 91-92, 125-126.

Ms. Coslett interviewed C.M. on July 20, 2012. During the interview C.M. said R.D.M. touched her vulva over her clothes at C.M.'s home while they were playing in the play room. She said that he touched her vulva while they were on the sofa at R.D.M.'s home watching My Little Pony on television. C.M. also said that R.D.M. had her touch his "vulva" over his clothes. C.M. said the defendant peed out of his "vulva" but she did not see it. She

described her vagina as small, but R.D.M.s “vulva” as big. 9/23/13 RP 105; Ex. 3.

Dr. Daniel Rybicki had prepared a report pretrial addressing three areas. The report covered a psychological evaluation of R.D.M, a critique of Ms. Coslett’s interview of C.M., a summary of the doctor’s own interview with C.M., and a section entitled “summary and conclusions.” At trial the defense sought to call Dr. Rybicki to testify about a mental diagnosis and the quality of interview conducted by Ms. Coslett. The defense later amended its position to offer the doctor’s testimony only on the issue of the quality of the child interview. 9/23/13 RP 5, 11; 9/24/13 RP 61, 67; 2 CP 86-98.

The State moved in limine to exclude Dr. Rybicki’s testimony on the basis that his opinions expressed in his report were inadmissible legal conclusions and that they were outside the doctor’s area of expertise. 9/23/13 RP 4. In response the defense pointed to a presentation the doctor had given regarding sexual abuse allegations in the context of divorce and custody cases. The defense also pointed out the doctor had testified in criminal cases, including cases involving sexual assaults. 9/23/13 RP 7-9; 2 CP 50-51, 60, 62-63.

The defense then presented Dr. Rybicki's testimony in an offer of proof. 9/24/13 RP 68-91. At the conclusion of the hearing the court excluded that witness' testimony. The court reasoned that the doctor was not qualified to give an opinion that would be helpful to the trier of fact because he did not have the same kind of training, experience, and peer review in forensic child interviewing that Ms. Coslett had. The court noted that Dr. Rybicki's main experience related to family law and not criminal law. Finally the court found the doctor's testimony would not be helpful to the trier of fact because his report expressed an opinion on the ultimate question of innocence or guilt, and it expressed an opinion about the credibility of a witness. Both of those opinions would be excluded by the rules of evidence. 9/24/13 RP 95-98. The defendant argues that it was error to exclude testimony from his expert witness.

1. Standard For Admission Of Expert Testimony.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. Whether evidence is admissible

under ER 702 depends on (1) whether the witness qualifies as an expert, and (2) whether the witnesses' testimony would be helpful to the trier of fact. State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007), cert. denied, 554 U.S. 922 (2008).

A trial court has broad discretion to admit or exclude expert testimony. State v. Rafay, 168 Wn. App. 734, 783, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023, cert denied, 134 S.Ct. 170 (2013). The court's decision will be reversed only if the trial court abused its discretion. In re McGary, 175 Wn. App. 328, 337, 306 P.3d 1005, review denied, 178 Wn.2d 1020 (2013). "A trial court abuses its discretion if it relies on unsupported facts, applies the wrong legal standard, or adopts a position no reasonable person would take." Id. It is not an abuse of discretion to exclude expert testimony where it is debatable whether the proffered testimony would be relevant and helpful to the trier of fact. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

2. The Findings Of Fact Regarding The Expert Were Supported By Substantial Evidence. The Trial Court Did Not Abuse Its Discretion When It Concluded The Witness' Proposed Testimony Was Not Helpful To The Trier Of Fact.

The appellant assigned error to the trial court's findings of fact regarding Dr. Rybicki's qualifications as an expert. BOA at 2; 1

CP 3-4. The Court will uphold the trial court's findings of fact if they are supported by substantial evidence. State v. Moore, 73 Wn. App. 805, 810, 871 P.2d 1086 (1994). Evidence is substantial if there is sufficient evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

With respect to Dr. Rybicki's qualifications the court found that (1) Dr. Rybicki had not done the 40 hour training on the standard protocol for child interviews (CADC) conducted through Harborview that Ms. Coslett had participated in, (2) that he was not aware of the 2012 updates to that protocol, (3) that he had never done a CAC interview, (4) that he was not peer reviewed (regarding interviews he conducted using that protocol) (5) that he would test the CAC interview conducted for error, taint and quality, (6) that the purpose of a CAC interview is to gather information, (7) and that Dr. Rybicki's expert experience relates largely to family law and not criminal law. 1 CP 4; 9/24/13 RP 96-97. These findings are supported by substantial evidence.

Ms. Coslett testified that her training included a 40 hour course through Harborview and the Washington State Criminal Justice Training Center. That training emphasized investigative

interviews with children. She completed that training in 2012. That training was designed to meet the requirements set out in RCW 43.101.224. The curriculum included pre-class and post class proficiency testing. Ms. Coslett followed the most current guidelines for investigative child interviews from 2012. Although those guidelines had not been officially published, they were available to child interview specialists through webinars and peer review meeting. Ms. Coslett participated in both in order to obtain the most up to date information regarding her field. She testified that the purpose of a forensic child interview was to interview children regarding an incident that may or may not have occurred, and to obtain "as factual based information as possible." She also testified that as a child interview specialist she was sensitive to developmental differences between very young children and older children. With very young children she may not go through the rules of the interview that she would with an older child because younger children have shorter attention spans. 9/23/13 RP 92-96, 99-103; 2 CP 127-130.

In contrast Dr. Rybicki testified that he had not taken the 40 hour course that Ms. Coslett took in 2012. Instead he took a 1 day class in 2004 in which the Harborview method of child interviews

was addressed. According to his Curriculum Vitae that training also addressed other topics. Dr. Rybicki had not seen the most recent protocols that were available. He was not aware whether there had been any substantive changes in the 2012 protocol. Dr. Rybicki criticized Ms. Coslett's interview because it lacked some preliminary questions unrelated to the allegations. 9/24/13 RP 71-74, 82; 2 CP 81, 94-95.

Dr. Rybicki testified that he had never done a CAC interview. Nor had he ever been involved in peer review of that kind of interview. 9/24/13 RP 80-81. Dr. Rybicki's Curriculum Vitae and testimony established that the majority of his training and forensic work involved family law and not criminal law. 9/24/13 RP 70-71, 84-86; 2 CP 53-59, 72-84.

The finding that Dr. Rybicki would test the CAC interview conducted for error, taint, and quality is supported by his report and his testimony. In the "Background and Referral Information" section of his report Dr. Rybicki states that part of what he may testify to regards "sources of error or taint which may detract from the quality and validity of data obtained in that CAC child interview." 2 CP 88. Dr. Rybicki differentiated the kind of interview that he had experience reviewing with the CAC interview conducted by Ms.

Coslett. He characterized Ms. Coslett's interview as a "substantiation interview". He believed that the CAC interview she conducted was only to provide sufficient information to produce a chargeable case for the prosecution. In contrast Dr. Rybicki's testimony focused on "sources of error and taint and sources that can confound the quality of the investigation. 9/24/13 RP 78-80, 87-88.

The appellant also assigns error to the trial court's findings of fact I.C.1 which he characterizes as Dr. Rybicki's proposed testimony. BOA at 2. The court found

Dr. Rybicki stated in his report that he would not form an opinion on the ultimate issue of guilt or innocence on page 3 of his report. On page 12, he stated there is 'little empirical evidence that the allegations are truthful because of the absence of a confession and/or physical evidence.' That statement goes directly to the credibility of the victim and the doctor's evaluation of the evidence. There would be little likelihood of physical evidence in a child molestation case. In addition, no victim would be seen as credible according to the expert's reasoning. This was either a deliberate attempt to mislead the court or a totally misguided act. Dr. Rybicki also states that it would be inappropriate to give the Respondent the 'life-long label of a sex offender," which is a direct comment on the ultimate question of guilt or innocence. This is a fundamental misunderstanding of criminal proceedings or a deliberate attempt to mislead the court.

1 CP 3-4.

The factual statements are drawn directly from Dr. Rybicki's report. 1 CP 88 (last paragraph), 97 (first and third paragraphs under summary and conclusions). Substantial evidence supports these two findings. The remainder of the paragraph calling the witnesses' statement a comment on witness credibility and the ultimate question of guilt or innocence were reasons for excluding the witnesses' testimony.

Based on these findings the trial court concluded that Dr. Rybicki's testimony would not be helpful to the trier of fact and should not be admitted. This ruling is supported by two bases. First, Dr. Rybicki did not possess the necessary qualifications to render an opinion about the CAC interview Ms. Coslett conducted. Second, in spite of Dr. Rybicki's testimony to the contrary, the evidence showed his testimony was offered for improper purposes.

a. The Expert Did Not Possess The Qualifications Necessary To Render An Opinion About the Quality of the Child Interview.

The trial court has discretion to determine a witness' qualifications as an expert. In re Detention of A.S., 138 Wn.2d 898, 917, 982 P.2d 1156 (1999). An expert may be qualified to testify to specialized knowledge if he has training and experience in a relevant field. State v. McPherson, 111 Wn. App. 747, 761-762, 46

P.3d 284 (2002). 761-762. Practical experience alone may also qualify a witness as an expert in a particular field. Yates, 161 Wn.2d at 765. (A witness who provided outreach services to prostitutes for 13 years was qualified to testify regarding the subculture and practices of prostitutes).

However a witness may not testify to matters that go beyond his area of expertise. Queen City Farms, Inc. v. Central National Insurance Company of Omaha, 126 Wn.2d 50, 102-103, 882 P.2d 703 (1994). In Queen City Farms a witness was called to testify as an expert regarding what an insurance company would have done when it wrote a particular insurance policy. The Court held it was improper for the trial court to permit testimony from the witness when he had no relevant practical experience, and who had no personal knowledge of what those who did have relevant practical experience would have done in relation to writing the policy. Id. at 103-104.

In this case the record showed that Dr. Rybicki's training did not qualify him to critique Ms. Coslett's interview with C.M. He did not have the same kind of training that Ms. Coslett had. Training for the protocol that Ms. Coslett operated under was far more extensive than the training Dr. Rybicki had gone through. Ms.

Coslett was familiar with and utilized advancements in that protocol when interviewing C.M. Dr. Rybicki was not even aware of those advancements. What little training Dr. Rybicki did have occurred almost 10 years before the trial.

Dr. Rybicki was also not qualified as an expert to criticize Ms. Coslett's interview as a result of his own personal experience. He had no experience using even the outdated Harborview protocol that he had minimal training on. As a result no one had ever peer reviewed his work in that area.

Dr. Rybicki's testimony regarding his understanding of the purpose of a CAC interview also suggest that he is not qualified as an expert to critique that kind of interview. He did not understand that the purpose of the interview was to gather fact based information regarding an incident without regard to whether something did or did not happen, and without regard to whether that information ultimately resulted in a criminal prosecution. 9/23/13 RP 92-93. Instead his testimony revealed his misunderstanding that the CAC interview was solely for the purpose of future prosecution. He believed that the interviewer only got enough information from the child to support charging a case. 9/24/13 RP 9/24/13 RP 72, 78. This basic misunderstanding of the

nature of Ms. Coslett's interview also supports the court's conclusion that the witness did not possess the necessary qualifications to testify as an expert on CAC interviews.

The defendant argues that Dr. Rybicki did have relevant experience, noting that he had done 45 child interviews and reviewed 35 other interviews of children. BOA at 19. However Dr. Rybicki testified that there was a difference between the kind of interviews he conducted and the CAC interview that Ms. Coslett conducted. Specifically he characterized the kind of interview he did as "broader in scope in that they look at plausible rival hypotheses, history and context, developmental issues, et cetera." 9/24/13 RP 72. In addition to this testimony the doctor's opinion that Ms. Coslett's interview was deficient because she did not address ground rules with a pre-school child support the trial court's conclusion that he did not possess sufficiently relevant experience to qualify him to critique a child interview conducted under the Harborview protocol. That opinion fails to take into account the developmental differences pre-school age children have from other children that was considered when modifying the interview done with C.M. 9/23/13 RP 103-104.

The defendant also points to Dr. Rybicki's testimony in another court case to argue the trial court erred in excluding the doctor's testimony. BOA at 21. The trial court was not bound by another judge's evaluation of proposed expert witnesses' qualifications in relation to the issue raised in that trial. Instead this Court has recognized that trial courts can reasonably differ in concluding whether an expert's testimony will be helpful to a trier of fact in a particular case. Stedman v. Cooper, 172 Wn. App. 9, 18, 292 P.3d 765 (2012).

b. The Trial Court Had a Tenable Basis On Which To Conclude The Expert's Testimony Was Offered For An Improper Purpose.

An expert witnesses' testimony may also be excluded when the proffered testimony is otherwise inadmissible. State v. Swagerty, 60 Wn. App. 830, 836, 810 P.2d 1 (1991). Thus a witness may not testify either directly or by inference regarding his opinion as to the guilt or innocence of the defendant. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Nor may a witness offer an opinion on the credibility of another witness. State v. Demery, 144 Wn.2d 753, 764, 30 P.3d 278 (2001). That testimony is not helpful to the trier of fact since the trier of fact has as good as if not better ability to assess another witnesses'

credibility. State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). This court found it was not error to exclude the testimony of an expert witness called to testify about false confessions where it was at least debatable that testimony was a comment on the credibility of a confession. Rafay, 168 Wn. App. at 790.

The appellant offered Dr. Rybicki's report as part of its offer of proof to establish his qualification as an expert as to a mental diagnosis. Appellant's counsel asked the court to reserve ruling on the admissibility of his testimony until after it reviewed the report and heard from the witness. 9/23/13 RP 5-6. Dr. Rybicki testified that he did not intend to make a statement about guilt or innocence. 9/24/13 RP 87. But he also testified that his testimony related to "sources of error and taint and components that have to do with quality assurance." 9/24/13 RP 87-88.

After reviewing the report and hearing from the witness the court concluded that Dr. Rybicki's opinions regarding the credibility of other witnesses and on the issue of guilt or innocence showed bias; i.e. that his testimony was not intended to assist the court but rather to influence the court. 9/24/13 RP 97-98. In its written findings the court concluded that Dr. Rybicki's statements were

either a deliberate attempt to mislead the court or a fundamental misunderstanding of the criminal proceeding. 1 CP 4.

The courts conclusions are supported by the record. In addition to the conflicting statements made about his proposed testimony in the report, Dr. Rybicki's explanation about what he would testify to constitutes a comment on the credibility of C.M.'s statements during her interview with Ms. Coslett. If there was some error or taint then the inference is that her statements were not reliable and therefore not credible. The trial court had a tenable basis for excluding Dr. Rybicki's testimony on the basis that his proposed testimony was an improper attempt to influence the court as the trier of fact.

The appellant argues that the trial court should have allowed Dr. Rybicki to testify, and judge his credibility on the basis of his expert opinion, rather than excluding it on the basis of the portions of the report that the defense was not offering into evidence. BOA at 17. But the defense offered the entire report as its offer of proof as to why the witness should testify without excising any portion of it for purposes of the pretrial hearing. 9/23/13 RP 5. When questioned about those portions of the report the defense stated that it would not offer testimony regarding those opinions. 9/24/13

RP 61-62. However the opinions remained before the court on the preliminary question of whether the witness should be allowed to testify as an expert. If it was error to consider those portions of the report that the judge relied on then the error was invited. A party may not set up an error at trial and then complain about the error on appeal. State v. Korum, 157 Wn.2d 614, 647, 141 P.3d 13 (2006). The Court should reject the argument for that reason.

The Court should also reject the argument because the trial judge was the trier of fact. Because it was a bench trial the judge served the dual role as arbiter of the law and finder of fact. State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002). By the nature of his or her function a trial judge necessarily has knowledge of evidence that may ultimately be inadmissible when making evidentiary rulings. Id.

Even if the court should have permitted Dr. Rybicki to testify, exclusion of his testimony was harmless. As discussed below the defendant's constitutional right to present a defense was not violated, so if error occurred it was in the application of ER 702 to the facts of this case. Error resulting in violation of an evidence rule is non-constitutional error. State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511 (2005), review denied, 156 Wn.2d 1014 (2006). Non-

constitutional error is harmless if, within reasonable probability it did not affect the verdict. State v. Pavlik, 165 Wn. App. 645, 656, 268 P.3d 986 (2011), review denied, 174 Wn.2d 1009 (2012).

In his dual role the trial judge evaluated Dr. Rybicki's testimony at every stage of the proceedings. It found Dr. Rybicki not credible and unqualified to render an opinion about the child interview during the offer of proof, and therefore not helpful to him as the trier of fact. It is not likely that the court would have found Dr. Rybicki's opinion any more persuasive had the court permitted him to testify regarding his critique of the child interview. Thus, because the court found Dr. Rybicki's testimony not helpful to the trier of fact, it was harmless to exclude his testimony during the fact finding portion of the hearing.

B. EXCLUDING EVIDENCE THAT AMOUNTED TO IMPEACHMENT ON A COLLATERAL MATTER WAS A PROPER EXERCISE OF DISCRETION.

R.D.M. cross examined F.M. about several statements she allegedly made to neighbors. R.D.M. asked F.M. if she told Ms. Allison and Ms. Gamble that C.M. had undergone a rape kit and that C.M. had put her own fingers in her vagina. F.M. denied making those statements. He asked F.M. about what she told Ms. Mulchiski and Ms. Fjuui regarding who was present during each

incident. F.M. explained there were two incidents; one in which others were present and one in which no one was present. He asked F.M. about telling Ms. Martinez that R.D.M. touched C.M. under her clothes. F.M. stated she never said R.D.M. touched C.M. under her underwear, only under her dress. He asked F.M. about the number of incidents and who was present that she talked about to Ms. Key. F.M. said she told Ms. Key about one incident, but got side tracked before discussing the second incident. 9/23/13 RP 67-75.

During the defense case R.D.M. attempted to call witnesses to impeach F.M.¹ The State objected when R.D.M. attempted to elicit testimony from Ms. Allison that F.M. told Ms. Allison that C.M. had undergone a rape kit as a means of impeaching F.M. 9/24/13 RP 4-7. The court sustained the State's objection to that testimony on the basis that it was hearsay and it constituted impeachment on a collateral matter 9/24/13 RP 12-13, 22, 26.

Defense counsel also argued that if the court ultimately admitted child hearsay statements F.M.'s credibility as the reporter of those statements was at issue. The defense sought to elicit

¹ Ms. Fujii testified about what she had been told about the incident but was unable to recall whether F.M. or some other neighbor was the source of that information. 9/23/13 RP 136-137. The State did not object to her testimony.

testimony from Ms. Allison about what F.M. said regarding C.M. sticking her fingers in her own vagina. 9/24/13 RP 25. Counsel also sought to offer testimony from Ms. Martinez and Ms. Gamble regarding what F.M. told them about R.D.M. digitally penetrating C.M. and touching her on her vagina under her underwear. The court excluded that testimony on the basis that it was hearsay. It reasoned that the proposed testimony did not relate to C.M.'s child hearsay statements but to F.M.'s own impressions. 9/24/13 RP 14, 25-29.

R.D.M. argues the trial court abused its discretion because it misapplied the law when it excluded testimony from the witnesses offered to impeach F.M. He argues that when a prior inconsistent statement is offered to challenge a witnesses' credibility it is not offered for to prove the truth of the matter asserted, and is therefore not hearsay. BOA at 34-35.

A trial witnesses' prior inconsistent statement that is offered to cast doubt on the credibility of a witness and which is not offered to prove the truth of the matter asserted is not hearsay. State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995). Thus, in a prosecution for attempted second degree murder, it was permissible to impeach the complaining witnesses' trial testimony

that the defendant had not shot her intentionally with her prior statements to police that contradicted that statement. State v. Newbern, 95 Wn. App. 277, 292, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999).

However, even if the proposed evidence is not hearsay, it is inadmissible if it relates to a collateral matter. State v. Rosborough, 62 Wn. App. 341, 349, 814 P.2d 679, review denied, 118 Wn.2d 1003 (1991). Whether a matter is collateral depends on whether it could be introduced for any purpose independent of the contradiction. State v. Oswald, 62 Wn.2d 118, 121, 381 P.2d 617 (1963). This Court affirmed the trial court's decision to exclude evidence on that basis in State v. Carr, 13 Wn. App. 704, 537 P.2d 844 (1975). On cross examination the victim of an assault denied telling a polygraph examiner that he had ingested Valium before taking the test. The Court prohibited the defendant from introducing testimony that the victim had made that statement because it concerned a purely collateral matter. Id. at 707-708.

The testimony offered to impeach F.M. was like that rejected in Carr. In order to prove R.D.M. committed first degree child molestation the State was required to prove that R.D.M. touched C.M.'s sexual or intimate parts for the purpose of gratifying his or

her sexual desire or the desire of a third person. RCW 9A.44.083, RCW 9A.44.010(2). Whether F.M. told anyone that C.M. had undergone a rape kit exam did not make it more or less likely that R.D.M had molested her. Thus testimony that contradicted F.M. on that point would have been impeachment on a collateral matter. The trial court acted within its discretion when it excluded that testimony.

Likewise the trial court did not abuse its discretion when it excluded the proffered testimony from the witnesses to challenge F.M. as a reporter of C.M.'s statements. Although the defense offered it to attack F.M.'s credibility as a reporter of what C.M. said, F.M. was not asked about what C.M. said, but rather what F.M. said to other people. 9/23/13 RP 69-70. Any alleged statement F.M. made regarding those matters would not shed light on either the veracity of any statement C.M. made to F.M. or on F.M.'s ability to recall and accurately report them. Whether F.M. did or did not tell others that C.M. had stuck her fingers in her own vagina, or that R.D.M. had touched C.M. on her skin was not relevant to whether R.D.M. had molested her or not. Therefore the trial court properly excluded the evidence as impeachment on a collateral matter. 9/24/13 RP 26-29.

C. THE CUMULATIVE ERROR DOCTRINE DOES NOT WARRANT A NEW TRIAL WHEN NO ERROR OCCURRED. R.D.M. WAS NOT DEPRIVED OF HIS RIGHT TO DEFEND AGAINST THE CHARGES AS A RESULT OF EVIDENTIARY RULINGS.

R.D.M. argues that he is entitled to a new trial either under the cumulative error doctrine or on the basis that he was deprived of his constitutional right to present a defense. Neither ground justifies a new trial.

1. Where It Was Not Error To Exclude Evidence The Cumulative Error Doctrine Will Not Justify Granting A New Trial.

Under the cumulative error doctrine the cumulative effect of trial errors may justify granting a new trial even where individually each error would be considered harmless. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995). That doctrine does not apply when there was no error, or when there are few errors which had no effect on the trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000), State v. Hodges, 118 Wn. App. 668, 674, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004).

Here the trial court had tenable grounds on which to exclude the testimony from the expert witness and from the other witnesses offered to impeach F.M. For that reason the trial court did not

abuse its discretion, and no trial error occurred. Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). Because no error occurred, the cumulative error doctrine does not justify granting a new trial.

2. The Trial Court's Evidentiary Rulings Did Not Deprive R.D.M. Of His Constitutional Right To Present A Defense.

R.D.M. argues that his right to present a defense was abridged when the court excluded Dr. Rybicki's opinion about the CAC interview and the testimony from witnesses offered to impeach F.M.'s testimony through prior inconsistent statements. Since he was not precluded from presenting otherwise relevant admissible evidence his right to present a defense was not violated.

In a criminal case a defendant has a constitutional right to present relevant evidence that is not otherwise inadmissible. Rafay, 168 Wn. App. at 794-795. A defendant has no constitutional right to present irrelevant evidence. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 971 (2004). A defendant's right to present a defense is abridged when he is completely denied the right to present evidence supporting his defense. Thus, where a trial court did not permit a defendant to present evidence about the circumstances of his confession after the court found that confession voluntary in a pre-trial hearing, the defendant's right to a

fair trial had been violated. Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). In contrast a defendant was not deprived of his right to present a defense by application of a court rule barring polygraph testimony when the defendant was allowed to present other relevant evidence factual evidence. United State v. Scheffer, 523, U.S. 303, 317, 118 S.Ct. 1261, 140 L.E.2d 413 (1998). This Court found no violation of that right when the trial court excluded expert testimony offered to attack the credibility of the defendants' confessions when the defense was afforded broad latitude to explore the circumstances surrounding the confessions including cross examining State's witnesses. Rafay, 168 Wn. App. at 796.

R.D.M. argues Dr. Rybicki's testimony was relevant to explore influences that may have affected the reliability of C.M.'s statements to Ms. Coslett. He states that a child's memory of sexual abuse may be influenced by others and is therefore unreliable. Since the effects of specific interview techniques may be beyond the knowledge of jurors, expert testimony may be admissible. BOA at 26-27 citing In re Dependency of A.E.P., 135 Wn.2d 208, 230, 956 P.2d 297 (1998), State v. Willis, 151 Wn.2d 255, 87 P.3d 164 (2004). Neither of these propositions supports the

conclusion that excluding Dr. Rybicki's proposed testimony denied R.D.M. the opportunity to present a defense.

R.D.M. points to three things that possibly suggest that C.M.'s statements to Ms. Coslett were suspect; C.M.'s first report was equivocal, C.M.'s report was translated by her mother, and at trial C.M. could not testify to any detail regarding either alleged incident of molestation. BOA at 27. Other than pointing out no competency questions were asked, Dr. Rybicki opined that the CAC interview was not suggestible. Rather he examined C.M.'s statements during the interview to suggest that prior discussions with C.M.'s parents may have affected her statements during that interview. 2 CP 93-96.

The defense was permitted to thoroughly explore the circumstances of C.M.'s initial report and subsequent statements on cross-examination. Counsel questioned F.M. about how C.M. learned the terms she used when she reported the second incident. F.M.'s reaction and response to C.M.'s statements after this disclosure was also explored. In particular R.D.M. established what C.M.'s parents told her about disclosing after she made the disclosure. R.D.M. also explored whether C.M.'s interview may have been tainted by overhearing her parents discussing the

situation with R.D.M.'s parents. 9/23/13 RP 57-62, 89. R.D.M. was also not precluded from presenting any other witness that could testify regarding the circumstances surrounding any other report of abuse C.M. made.

R.D.M. asserts that Dr. Rybicki was qualified to offer a critique of Ms. Coslett's interview techniques. He states that testimony would have demonstrated that those statements made in the child interview were "completely unreliable" and that "leading and suggestive questions were used in eliciting important, inculcating answers from C.M." BOA at 41. However Dr. Rybicki found as to the interview itself "there were no indications of strong demand characteristics or suggestibility from the interview process which would invalidate or interfere with the statements which were gathered." 2 CP 96. If Dr. Rybicki had testified otherwise he would have been subject to impeachment by his conclusions contained in his written report.

What Dr. Rybicki did opine was a concern that C.M. had been subjected to influences before the interview that could have influence her statements in the interview. 2 CP 96. The sequence of events leading to C.M.'s disclosures and evidence she repeated those statements several times before the interview was before the

court. There was no evidence of “coaching” on C.M.’s parent’s parts. The defense conceded as much in closing argument when counsel said the defense was not arguing that F.M. coached or told C.M. what to say. 9/25/13 RP 26. Dr. Rybicki’s report did not point to any specific known fact which would have led him to conclude C.M. had been influenced by anyone other than the manner in which she responded to questions. 2 CP 96. In the absence of those facts his opinion is based on speculation. An expert may not testify to matters that are based on conjecture or speculation. Queen City Farm, 126 Wn.2d at 104.

R.D.M. argues that “as a matter of fairness” the defense should have been allowed to present Dr. Rybicki’s testimony to counter Ms. Coslett’s testimony which he characterized “cloaked [C.M.’s] testimony with an aura of reliability” citing Barlow v. State, 507 S.E.2d 416 (Ga. 1988).² In Barlow the court held that a defendant should not be prohibited from introducing relevant and otherwise admissible expert testimony about the techniques used

² R.D.M. states that Ms. Coslett was not only a child interview specialist but that she was also a child advocate. BOA at 42. The record does not support this claim. Ms. Coslett testified that she was a child interview specialist working at Dawson Place Child Advocacy Center. 9/23/13 RP 91-92. She did not testify that she was an advocate. It does not necessarily follow that because she worked at a facility titled “advocacy center” that she herself was a child advocate.

when interviewing a child about sexual molestation. Id. at 418. It also stated that a trial court has discretion to exclude that evidence when the proffered testimony is not based on either the facts within the expert's knowledge or other facts admitted in evidence. Id. This is what happened here.

Finally R.D.M. argues that he was prejudiced when the court excluded Dr. Rybicki's testimony because his attorney was left to argue from common experience that Ms. Coslett's interview questions were leading.³ He states that whether questions were leading or suggestive was not a matter of common experience that the expert should have been allowed to testify to. BOA at 43. However leading questions are not permitted during direct examination. ER 611. Trial judges are frequently called upon to rule on objections on that basis. While it may or may not be beyond the common experience of a juror, it is well within the common experience of the trial judge who was the trier of fact in this case.

³ R.D.M. mischaracterizes the record when he states that the trial court criticized defense counsel's explanation for how Ms. Coslett's questions were leading as "too abstract." BOA. At 43. When counsel argued the questions were leading the trial court asked counsel to point to which questions in the transcript of the child interview he was referring to. When counsel attempted to proceed without reference to the transcript the court asked counsel to again refer it to the specific questions stating "let's not be abstract about it. Show me." 9/25/13 RP 30-31.

R.D.M. was not precluded from presenting expert testimony on the child interview techniques employed by Ms. Coslett had it presented a qualified expert whose testimony was otherwise helpful to the trier of fact. The trial court did not rule that no expert testimony could be admitted on suggestibility in a forensic child interview. Instead the trial court's ruling was limited to the specific witness proffered by the defense.

R.D.M. also argues that his right to present a defense was violated when he was precluded from presenting testimony from the neighbor witnesses who would have testified to statements F.M. allegedly made that he argues embellished the facts that C.M. described to her. BOA at 40. But R.D.M. asked F.M. what F.M. told others, not what F.M. told others C.M. had said. Whether F.M. personally made statements that were different from those made at trial was irrelevant to determine any fact that was of consequence in this case. Because R.D.M. only proffered irrelevant evidence his right to present a defense was not infringed when those witnesses were excluded.

A criminal defendant's right to present a defense is violated when he is completely precluded from presenting any relevant evidence in his defense that is not otherwise inadmissible.

Because the court did not preclude the defense from challenging the reliability of C.M.'s statements when it excluded testimony from his expert witness, and because the proposed testimony from other witnesses was irrelevant, his right to present a defense was not violated.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm R.D.M.s adjudication of guilt.

Respectfully submitted on October 9, 2014.

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