71811-8

NO. 71811-8-1

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

STATE OF WASHINGTON

Respondent

v.

CHRISTOPHER T. CHAVEZ,

Appellant

BRIEF OF RESPONDENT

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1. Did the trial court abuse its discretion in declining to conduct an in camera review of A.R.'s counseling records when the factual basis for seeking the records did not make a plausible showing that the records contained material and exculpatory information?

2. Did the court abuse its discretion in precluding the defendant from eliciting hearsay statements made by the defendant to Rayanne Grim?

II. STATEMENT OF THE CASE

A. THE CRIMES.

The defendant Christopher Chavez had known the 9 year-old victim A.R.[1] since she was an infant. RP 384. He was a close friend, and one-time intimate partner, of A.R.'s mother B.B. RP 385-387. The defendant remained close friends with B.B. and her three daughters after their brief dating relationship, and he even lived with them while B.B.'s husband J.B. was serving in the military

[1] The State referred to A.R. (born in April 2003) in trial court pleadings as A.R.-R.. For the sake of clarity and consistency on review by the Court of Appeals, the State will adopt the Appellant's use of the initials "A.R.". Likewise, the State will adopt the Appellant's conventions when citing to the trial court record. *See* Brief of Appellant at 4, fn. 1.

in Afghanistan from September 2011 through May 2012. RP 387. He was the officiant at J.B.'s and B.B.'s wedding ceremony. RP 318. In February 2013 the defendant asked them if he could move into their apartment in Mill Creek, and they agreed. RP 387.

The defendant developed a relationship with A.R. and her two younger sisters similar to an uncle. RP 388. He took A.R. out to dinner by herself roughly ten times a year, and A.R. seemed to enjoy his company. RP 391-392; RP 263.

The defendant took A.R. on two separate errands to the Arlington residence of his friend Rayanne Grim on February 16th, 2013 and March 3rd, 2013. RP 435-437. When A.R. returned from one of these outings, she tried to tell her mother something, but was interrupted by the defendant coming into the room. RP 393-394.

On one of the occasions when the defendant took A.R. to the Arlington property of Rayanne Grim, he molested A.R. on the couch inside a storage building full of the defendant's belongings. The defendant started by sitting with A.R. on a couch and "testing if [A.R.] could count by two's all the way to 100." The defendant then placed his hands on A.R.'s "boobs" and felt them by using all of his fingers in one motion, bringing his fingers towards his palm multiple

times. RP 271-272. This lasted a couple of minutes before A.R. pushed his hands away from her chest. RP 272-273. The defendant drove A.R. back home, and on the way he asked if she was OK. RP 274. A.R. didn't respond because she didn't want to talk to him; she didn't "feel like it was right what he did." Id. She decided not to tell her mom about it because she "wanted to give him a second chance." RP 275.

On the night of March 13th, 2013, the defendant was living with A.R., her sisters, and her parents at their apartment in Mill Creek. At one point in the evening A.R. and her younger sister S.R. (born in April 2007) went into the defendant's bedroom to watch movies. Meanwhile, J.B. fell asleep on the couch and B.B. fell asleep in her bedroom. RP 336-338.[2]

A.R. and her sister S.R. got onto the defendant's bed with the defendant. All three of them started watching the movie "Matilda." RP 279. She fell asleep about twenty minutes into the movie. *See* RP 279 (the last part A.R. remembered was when "the principal threw the kid by her pigtails"); RP 546-547 (Detective

[2] A.R.'s other sister S.R. (age eight at the time of trial) was spending the night at her grandmother's house. RP 278; RP 384)

Hamilton confirmed that this scene appears 20-25 minutes into the movie).

A.R. was "not fully asleep yet" and "kind of woke up." RP 280. She played a game with the defendant in which he drew letters on A.R.'s arm and she tried to guess the letters. A.R. taught the defendant to play the game on her arm, but he moved the game to her stomach. Id. A.R. told him it wasn't supposed to be played that way. She fell back asleep. Id.

The next thing A.R. remembered was waking up to the defendant touching her breasts with his hand, skin to skin with his hand under her shirt. RP 281-283. She realized that while she was sleeping, the defendant had switched places with her sister S.R. RP 287. She pushed his hand away. The defendant asked A.R. "Do you want me to stop or keep going?" RP 284. Instead of answering, A.R. ran out of the room. On her way out the door A.R. heard the defendant say, "Wait. Come back." Id.

A.R. approached her step-father, J.B., who was asleep on the couch just outside the defendant's bedroom. She told J.B. that "Christopher Chavez touched me," and although hesitant, when prompted, she motioned to her breast area. RP 339-340. She was extremely nervous and shaking.

J.B. brought A.R. to her mother's bedroom and informed B.B. what happened. B.B. wanted the defendant to leave the apartment, so J.B. knocked on the defendant's bedroom and told him "[A.R.} says you touched her. You have to go." RP 341-343. The defendant denied even touching A.R., and said nothing about an accident or a mistake. RP 343. Before he left the defendant asked J.B if he wanted to hit him. RP 345.

The defendant got into his car and called his friend Rayanne Grim at about 1:30 AM on March 14th, 2013. He wanted to come over, but would not explain why over the phone. RP 441. He would only say that he got kicked out of B.B.'s house. RP 442. When he got to Ms. Grim's house in Arlington the defendant joined her on the back porch and smoked a cigarette. He was pacing and nervous. He threw his hands in the air and said, "I touched [A.R.]." RP 444. He explained that he had been in his room with A.R. watching a movie on his iPad and he was drawing letters and words on her stomach and accidentally touched her chest. RP 445. He couldn't explain how the accident happened. Rayanne Grim allowed him to stay the night at her home, but informed him the next day that he had to leave because she was not comfortable with what he had done. RP 449.

Later on March 14th, 2013 the defendant met J.B. back at the apartment in Mill Creek. The defendant told J.B. that he felt like he should "make amends" for what he did. RP 361. He wanted to know if J.B. was going to call the police. RP 362. They did call the police the next day. RP 363.

Mill Creek Detective Kate Hamilton arranged for a forensic child interview specialist, Gina Coslet, to interview A.R. about what happened. The interview happened on March 18th, 2013, and it was during this video-recorded interview that A.R. disclosed for the first time that the defendant had molested her at Rayanne Grim's property in Arlington. Exhibit 3 at 5-12.

The defendant was arrested and invoked his right to remain silent. The Snohomish County Prosecutor's Office originally charged the defendant with one count of Child Molestation in the First Degree, but after negotiations failed the State charged the defendant with two counts of Child Molestation First Degree. See CP 125, 118. A jury returned unanimous verdicts of guilt on both counts. CP 49-50.

B. DEFENDANT'S PRETRIAL DISCOVERY MOTIONS.

Prior to trial the defendant sought either discovery of or an in camera review of A.R.'s Compass Health counseling records. The State did not have possession of the requested records, so the defendant asked the court to allow subpoenas to Compass Health. The court held two hearings on the issue. At the first hearing on January 16, 2014, the defendant claimed that "the government set [A.R.] up into counseling for sex abuse." 1/16/14 RP 3. The defendant asserted, without filing any third party affidavits to support his claim, that his expert witness "reviewed the videotape" of A.R.'s forensic interview during which A.R. disclosed for the first time the crime which occurred at the "spider house" in Arlington. Id. The defendant argued that the counseling records were necessary to vet his theory that "suggestive questioning" during counseling led to the disclosure during the forensic interview. Id. at 4. He declared that an in camera review of the records would be "harmless." Id.

The court did not reach the merits at the January 16th, 2014 hearing, instead granting the State's motion to continue the hearing so that A.R.'s personal attorney could file an objection to the defendant's request for counseling records. RP (1/16/14) 6. A.R.'s

attorney, Rhodi O'Loane, filed that response on February 5th, 2014. 2 CP__ (Sub. 61 Motion to Quash Subpoenas and for a Protective Order).

The next hearing on this issue was on February 13th, 2014. While many of the facts relevant to the motion were not in dispute, the court did take some testimony from victim advocate Annette Tupper, an employee of the Snohomish County Prosecutor's Office, to determine the reason why A.R. was referred for counseling services. 2/13/14 RP 20-22. The testimony of Ms. Tupper established that the referral was not related to the sexual abuse A.R. had suffered, but rather to address A.R.'s difficulty sleeping. Id. at 21.

Likewise, the court had information indicating that the content of the private counseling sessions between A.R. and her counselor, to the extent the contents were known at all, did not include A.R. discussing the facts of her abuse. Instead, the sessions included A.R.'s creation of a beaded item for use as a calming mechanism, or A.R. writing positive affirmations of her own character to build self-esteem. CP 175.

The court ruled that there was not a factual basis to conclude that evidence of the defendant's theory of the case would

be found within A.R.'s counseling records. RP (Court's Ruling on Motion 2/13/14) at 4. In doing so, the court pointed out that the timing of events in the case made the defendant's "suggestive questioning" theory much less likely. Id. *("...in a case like this, where there's an immediate disclosure and a forensic child interview within four days, that whatever has been said some number of months later . . .does not tend to infer that her memories have been somehow enhanced or molded or influenced through any other source, but, in fact, are less detailed than they were.")*

The trial court noted that the record contained very limited facts about the nature of the counseling resources provided to A.R., finding "how that resource has been used is not known to any of us apparently in this courtroom." 2/13/14 RP 4. Consequently, the court also found that defendant's belief that the records were material was "based upon supposition, it's based upon inference. It's not based upon any facts." Id.

III. ARGUMENT

A. THE DEFENDANT FAILED TO MAKE AN ADEQUATE SHOWING THAT THERE WAS INFORMATION MATERIAL AND FAVORABLE TO THE DEFENSE IN A.R.'S CONFIDENTIAL COUNSELING RECORDS.

The defendant argues that his access to pre-trial discovery

of A.R.'s counseling records was erroneously restricted when the court denied his motion to review A.R.'s records in camera, or to obtain the records himself. His argument is based on his Sixth Amendment right to confront witnesses and his constitutional right to Due Process. Brief of Appellant at 7.

With respect to materials that are not in the prosecutor's possession the court may grant disclosure of privileged materials under both CrR 4.7(e) and the Due Process clause of the constitution. Pennsylvania v. Ritchie, 480 U.S. 39, 58, n. 15, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006). Under both the rule and constitution the defendant must make a plausible showing that the records sought contain information that is material and favorable to the defense. Gregory, 158 Wn.2d at 791.

> Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial. A reasonable probability is probability sufficient to undermine confidence in the outcome. The decision whether to conduct an in camera review of privileged records is subject to abuse of discretion.

Gregory, 158 Wn.2d at 791 (citations omitted).

Speculation that requested records may contain information that is material and favorable to the defense is not sufficient to meet

this standard. State v. Diemel, 81 Wn. App. 464, 469, 914 P.2d 779, review denied, 130 Wn.2d 1008, 928 P.2d 413 (1996). The defendant must "advance some factual predicate which makes it reasonably likely" that the records are material and favorable to the defense. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017, 1021 (1993).

Courts should carefully enforce this standard when requested to review a crime victim's counseling records. The legislature has created privileges for a person seeking help from a psychologist or counselor in order to encourage the person seeking treatment to have confidence in the confidentiality of her communications with the professional. *See* RCW 5.60.060(9); Victims of Sexual Assault Act, RCW 70.125 *et seq.* "If the law were otherwise, many needing medical attention might go untreated for fear that what they told the doctor might not remain confidential." State v. Tradewell, 9 Wn. App. 821, 824, 515 P.2d 172, review denied, 83 Wn.2d 1005 (1973), cert. denied, 416 U.S. 985, 94 S.Ct. 2388, 40 L.Ed.2d 762 (1974).

Even an in camera review pierces that veil of confidentiality. A judge who is a virtual stranger to the victim can cause the same kind of embarrassment and fear on the victim's part when reviewing

those records in camera as when those records are revealed to the defense. This is especially true when the victim whose records are sought is a child.

A.R.'s counseling records were made confidential by statute. RCW 18.19.180. A.R.'s counselor had a duty to report any disclosures of abuse or neglect occurring during counseling sessions. RCW 26.44.030(1)(a). The record does not indicate whether A.R.'s counselor ever reported any information pursuant to that statute, but surely such a report, if it existed, would have been forwarded to the State and provided to the defendant during the discovery process. The absence of any mandatory reporter action is evidence that A.R.'s counselor never felt obligated to report A.R.'s in-session statements to law enforcement. See Hu Yan v. Pleasant Day Adult Family Home, Inc., P.S., 178 Wn. App. 1018, ___ P.3d ___ (2013)

A defendant made an insufficient showing to justify discovery of privileged records in State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993). There the defendant was charged with a series of rapes. Pre-trial he moved for an in camera review of one of the victim's counseling records from a rape crisis center. Defense counsel filed an affidavit in support of the motion asserting that he

believed such "notes may contain details which may exculpate the accused or otherwise be helpful to the defense." The Court held this was insufficient to sustain his burden to justify the need for in camera review of those records. Id. at 548-49.

Similarly this Court found the trial court acted within its discretion when it denied a motion for in camera inspection of a rape victim's counseling records in Diemel. There the victim denied having been intoxicated at the time of the rape, contrary to the defendant's version of events. The defense argued that because there was evidence the victim had been drinking after the fact she may have told her therapist something different about her drinking than she had previously stated. Additionally, the defense argued she may have told her therapist about consenting to sexual intercourse. The defense also asserted that the victim had admitted she had once been in an abusive relationship. The defense argued this fact might explain her behavior when she was contacted by police. Defense counsel supported this last argument by stating that he had contacted a therapist who said that post-traumatic stress disorder resulting from some kinds of abuse in conjunction with alcohol abuse could have explained the victim's behavior. Diemel, 81 Wn. App. at 466. This Court agreed with the

trial court that the affidavit in support of the in camera review was speculative. "A claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection." Id. at 469.

In contrast, the Court found the defendant had made a "more concrete" showing that evidence relevant to his theory of the case would likely be found in a rape victim's dependency files in State v. Gregory, 158 Wn.2d at 795 n. 15. There the defendant was charged with three rapes of R.S.. The defendant sought an in camera review of the victim's dependency files on the basis that they might contain evidence of recent prostitution, a fact that was relevant to his consent defense. At least one dependency action was active at the time R.S. was raped. The Court believed that if DSHS was aware of any recent prostitution activity it would be documented in the dependency records. Thus an in camera review of R.S.'s dependency files could confirm or refute R.S.'s statement that she ceased street walking three years earlier. Thus the trial court erred when it refused to conduct an in camera review. Id. at 794-95.

The defendant does not argue that the State failed to fulfill its discovery obligation, as the counseling records were never provided to the State. The only issue regarding the defendant's right to discovery then relates to whether the defendant made an adequate showing that there was information in A.R.'s counseling records that was material and favorable to the defense.

In this case defense counsel did not provide the trial court with any particularized factual showing that the requested records were material and favorable to the defense. He did not provide any expert affidavit that A.R. had a psychological disorder, or that such a disorder would have any impact on her ability to recall and relate past events. Much like the insufficient showing made in Diemel and Kalakosky, the bare assertions from counsel here regarding the purported content of A.R.'s counseling records were insufficient to establish there was anything in the records that would be material to the defense.

The declarations furnished by the defense failed to provide the court with anything more than speculation that A.R.'s Compass Health counseling records would be material to his defense. To support his motion for those records the defendant offered two declarations authored by defense counsel. CP 146-149; CP 170-

175. Neither declaration gave the court reason to believe that there would be evidence which bore on the reliability of A.R.'s disclosures in the Compass Health records. The declarations contained numerous conclusory statements unsupported by the record, such as:

- "AB (sic) has spoken to a counselor about the events alleged in this case. No other topics were discussed." CP 170.
- "In the medical community, it is an accepted truth, scientifically proven, psychological phenomena; children (and adults), can 'learn truths,' regardless of how imaginative it is." CP 149.
- "Ms. B. agreed to the defense obtaining these records." Id.

With regard to the last assertion about B.B. agreeing to waive her daughter's confidentiality interest in the records, the partially-reproduced transcript at CP 171-175 reveals that this characterization is highly misleading; in fact, Ms. B. first agreed to the defense request but soon retracted that agreement after learning that she could voluntarily choose to withhold the records. CP 173. When excised for conclusory and factually unsupported

content, the declarations supporting the defendant's motions to obtain A.R.'s counseling records provide no apparent link between A.R.'s disclosures and whether there was likely any material and exculpatory information in the Compass Health records. The declarations contain no credible assertion that A.R.'s memories of the defendant's abuse were influenced by counseling, nor do they provide any basis to conclude suggestive questions were posed in counseling. In fact, the record does not establish that A.R. even discussed her abuse at all during the two counseling sessions she attended in May of 2013, much less whether A.R. said anything different in counseling than she did in any of the interviews she did for law enforcement or for the defense. *See* CP 172-175. The trial court justifiably attributed little weight to the defense attorney's declaration to the contrary.

The defendant's declarations can best be described as mere speculation that the Compass Health records may show that A.R.'s statements were influenced somehow. The defendant did not make a plausible showing that the Compass Health records contained any information material and favorable to the defense. Not only did the defendant fail to produce any reason to believe that there was evidence material to the defense in any records not disclosed to

him, there was affirmative information showing there was likely nothing material to the defense in those records. See Id.

Gregory is the only case cited by the defendant wherein the Court even considered what circumstances would justify an in camera review of confidential records. Gregory applied the standard to justify an in camera review of confidential records articulated in Ritchie when considering whether the defendant was entitled to an in camera review of dependency records. Gregory, 158 Wn.2d at 791-95. The Court reaffirmed that speculation was not sufficient to justify an in camera review. Id. at 795, n. 15. Unlike the defendant in Gregory the defendant here failed to establish a "more concrete connection" between his theory of the case and what he expected to find in files that the court did not inspect in camera.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PROHIBITTING DEFENSE FROM INTRODUCING SOME HEARSAY STATEMENTS OF THE DEFENDANT DURING THE CROSS EXAMINATION OF RAYANNE GRIM.

The trial court properly limited the cross examination of Rayanne Grim when the State objected to extensive hearsay during her cross examination. The hearsay statements at issue were made by the defendant to Rayanne Grim in a conversation they had on her back porch just hours after A.R. reported being

molested, and then in two separate conversations between those parties later that day. While the defendant has conceded that the statements at issue are hearsay which would require an applicable exception for admissibility, the assertion is that the defendant's statements admitted on direct examination created a "partial and misleading" impression of the conversation requiring admission of additional self-serving hearsay statements under the rule of completeness doctrine. Brief of Appellant 22.

However, Ms. Grim's testimony about the defendant's words and reactions in the hours after his sexual assault of A.R. was neither partial nor misleading. As the trial court noted after careful review of a transcript of the direct testimony of Rayanne Grim, any characterization of her testimony as completely negative toward the defendant is "not true." RP 480. Rather, Ms. Grim's direct testimony contained "lots of exculpatory information." RP 481.

The record confirms that the trial court's assessment of Ms. Grim's direct testimony was correct. The testimony of Rayanne Grim on direct examination included her recollection of many statements the defendant made in the early-morning hours of March 14th, 2013. The defendant drove to Ms. Grim's home in Arlington after he was asked to leave A.R.'s home in Mill Creek.

The defendant was reluctant to discuss the issue over the phone or in front of Ms. Grim's husband. Instead he wanted to discuss the incident face to face with Ms. Grim and in private. When the defendant arrived at Ms. Grim's Arlington residence he appeared nervous and upset. The defendant was pacing back and forth on Ms. Grim's back porch before he could explain why he had come to her house so late at night. He then held his hands up in the air and said "I touched [A.R.]" with a crack in his voice, as if he was going to cry. RP 444. He did not say "I did it." He said nothing about having sexual motivation when he touched A.R.

The defendant then attempted to explain to Ms. Grim what had happened, all of which was elicited by the State on direct. According to Ms. Grim, the defendant said that "he had been in his room with [A.R.] watching a movie on his iPad and he was drawing letters and words on her stomach and *accidentally* touched her chest." RP 445, *emphasis* added. The prosecutor asked for confirmation that the defendant used the word 'accidental,' which Ms. Grim confirmed. Id. Ms. Grim then pressed the defendant on how such an accident could have happened and he replied, "I don't know." On the important issue of whether the supposedly accidental touching of A.R.'s chest occurred under or over A.R.'s

clothing, the defendant told Ms. Grim that A.R.'s shirt was pulled up just under her breasts, and that during the course of "writing" on her bare stomach his hand touched A.R.'s chest under her shirt. Id.

The defendant had questions for Rayanne Grim, such as "If this was your child, what would you do?" and "On a scale of 1 to 10, how bad is this?" Ms. Grim couldn't answer those questions. RP 446-447. After the defendant's conversation with Grim on her back porch, the two went inside to tell Grim's husband[3] what happened. Ms. Grim insisted on this condition if the defendant wanted to stay the night in her home. The defendant was reluctant and nervous, but told Ms. Grim's husband that he got kicked out of B.B.'s apartment because he "touched her daughter." RP 447-448. The defendant said nothing to Jeremy Grim about the location or nature of the touching, including no reference whatsoever to any sexual gratification associated with the touching. The Grim's allowed the defendant to sleep in their home for the rest of that night and they went to bed.

Ms. Grim went to work later on March 14th, 2013, but she asked to leave early because she did not sleep much the night

before. She testified about a phone conversation she had with the defendant on March 14th sometime before 1:00 PM. Ms. Grim said that she was doing most of the talking, and her testimony did not attribute any specific words to the defendant. The defendant did not protest when she explained why his explanation of the incident with A.R. made her too uncomfortable to allow him to keep staying at her home. RP 450-451.

The final conversation between the defendant and Ms. Grim on March 14th occurred when he returned to her Arlington home to retrieve some belongings. While the defendant and Ms. Grim discussed the incident with A.R. from the previous evening, the defendant was unsure how he touched A.R.'s breasts. He provided a new explanation that was different from his explanation about the words-and-letters game on A.R.'s stomach. Instead, he said that he was lying on the bed between A.R. and one of her sisters, and he was periodically checking on the iPad to see how much time was left in the movie they were watching. He thought "maybe he just wasn't watching where his hand had gone and wound up touching

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[3] Ms. Grim's husband Jeremy was not called as a witness by either party. Ms. Grim was a witness to the conversation and described her observations during her testimony.

her chest." RP 451-452. This rendition, supplied once again by the defendant, can best be described as an accidental touching with no mention of sexual motivation from any party.

The defense cross examination of Rayanne Grim elicited some hearsay statements of the defendant without objection from the State. For example, Ms. Grim confirmed that the defendant said it was an accident, and that he knew he touched A.R.'s chest but wasn't clear on how that came about. RP 455. Ms. Grim conceded that the defendant's specific admission to touching A.R.'s breasts *under* her clothes was a detail that was not included in her March 21st, 2013 two page written statement to the police. RP 463.

The State only objected to hearsay statements of the defendant when defense asked Ms. Grim about subsequent conversations in which she relayed the defendant's words to the defendant's step-father Ed Barrett. RP 466-469. The primary basis for the objection was hearsay. RP 469. A secondary basis for the objection was a discovery violation for defense's non-disclosure of the existence or content of those conversations. RP 471. The court recessed for the day and reserved ruling on those objections until the next morning. RP 473.

The trial court reviewed a transcript of Ms. Grim's testimony prior to ruling on the objections the next day. RP 476. While outside the presence of the jury defense counsel asked for a ruling on three questions he wanted to ask Ms. Grim:

> 1. Isn't it true that you told Mr. Barrett that you asked Chris if he did this, . . . and he said "no?" RP 478, ln. 16-17.
>
> 2. Isn't it also true that you told Mr. Barrett that Chris was adamant that he said he didn't do it, right? RP 478, ln. 22-23.
>
> 3. Isn't it true that you told Mr. Barrett that Chris told you that he thought [J.B.] was going to hit him? RP 481, ln. 21-23.

The court ruled that the first question was proper impeachment of Ms. Grim's prior testimony. See RP 479; RP 455. However, the court correctly observed that the second question, which focused on how *adamant* the defendant was in his denials, and the third question, which focused on the defendant's fear of being physically harmed by J.B., were not meant to impeach Ms. Grim's prior testimony and were more in the nature of self-serving hearsay. RP 479; RP 481-482.

Cross examination of Ms. Grim proceeded according to the court's rulings. Ms. Grim denied telling Ed Barrett that she asked the defendant if he "did it" and he said "no." RP 493 - 494. This was the second time she denied having that exchange with the

defendant. *See* RP 455. The defendant elected not to call any witnesses in its case in chief, or in rebuttal. RP 619.

1. There Was No Abuse Of Discretion In The Trial Court's Refusal To Allow Self-Serving Hearsay Under The Rule Of Completeness Doctrine.

Trial court rulings regarding the scope of cross-examination should not be reversed absent a manifest abuse of discretion, meaning a decision is manifestly unreasonable or based on untenable grounds or reasons. State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). Rulings on the admissibility of evidence are reviewed for abuse of discretion. State v. Simms, 151 Wn. App. 677, 692, 214 P.3d 919, 927 (2009) aff'd, 171 Wn.2d 244, 250 P.3d 107 (2011).

The Rule of Completeness as codified in ER 106 allows an adverse party to introduce the remainder of a "writing or recorded statement" at the time the other party introduces part of that writing or recorded statement, if the remainder "ought in fairness to be considered contemporaneously with it." ER 106. Although the language of the rule does not apply to unrecorded oral conversations such as the evidence at issue here, courts have applied the same principles to oral conversations. See State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241, 250 (2001). In an

effort to determine which omitted portions of an oral conversation are "needed to clarify or explain the portion already received," the Larry court adopted the four part test from United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir., 1992). The offered statement must be relevant and must:

1) Explain the admitted evidence,

2) Place the admitted portions in context,

3) Avoid misleading the trial of fact, *and*

4) Insure fair and impartial understanding of the evidence. Velasco, 953 F.2d at 1475. The test is conjunctive. Id.

Here, the trial court prohibited only two proposed questions during the cross examination of Ms. Grim. The first, regarding whether the defendant was "adamant" that he "didn't do it" does not satisfy the four part Velasco test. Ms. Grim never testified on direct that the defendant confessed to a crime or that he "did it." Rather, she testified that the defendant's exact words were, "I touched [A.R.]" followed by his explanation that it was an accident which occurred in the context of a game. RP 444-445. The direct testimony included nothing about the presence or lack of sexual motivation, and included no one's legal conclusions about the defendant's culpability of a crime. The defendant's effort to

introduce his own statements expressing that he didn't "do it" is at best a vaguely-worded effort to deny a sexual component to the touching, and to reach a broad conclusion that he did not commit a crime. This evidence, if allowed, would not have explained or provided necessary context for his admission that he touched A.R. and that it was an accident. Ms. Grim's testimony on the exact words spoken by the defendant was not misleading or presented in an impartial way. The court properly exercised its discretion in sustaining the hearsay objection.

The second prohibited cross examination question of Ms. Grim was even more unrelated to her direct testimony. The defendant wanted to elicit his own statement that when he was confronted by J.B. after A.R. disclosed what had happened, the defendant was afraid J.B. was going to hit him. RP 481. It is unclear how the defendant's perceived fear of potential violence from J.B. in the immediate aftermath of A.R.'s disclosure provides any context for the statements he made to Ms. Grim hours later while miles away from Mr. Barbosa. It is even less clear how the exclusion of this evidence could have changed the result of the trial, considering it was the defendant who asked J.B. if he wanted to hit him. The jury was not misled or provided with an unfair or impartial

picture of the defendant's conversation with Ms. Grim. The trial court was correct, or at the very least did not abuse its discretion, in prohibiting the defendant's attempt to introduce hearsay during the cross examination of Ms. Grim.

2. The Court's Discretionary Suppression Of Two Questions Did Not Violate The Defendant's 6th Amendment Right To Cross-Examine Witnesses.

As discussed above, the trial court restricted the defendant from cross examining Ms. Grim about whether the defendant was "adamant" that he didn't "do it," and about whether the defendant mentioned his own fear that J.B. was going to hit him. The trial court noted that these questions did not relate to her direct examination and were not designed to impeach Ms. Grim, but rather to introduce the defendant's own words to the jury without risking his own cross examination. RP 477-480.

The Defendant has cited Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1005, 39 L.Ed.2d 347 (1974), and Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 926 (1968), arguing that the suppressed cross examination questions prohibited the jury from fully considering the potential bias or credibility of Ms. Grim's testimony. These cases present different facts from the instant case because those courts suppressed basic facts about the witness

which would have been critical for the jury to understand their potential bias. *See* Smith v. Illinois, 390 U.S. at 131 (regarding the court's suppression of the true name and address of the witness: "*The witness' name and address open countless avenues of in-court examination and out-of-court investigation.*"); *and* Davis v. Alaska, 415 U.S. at 317 (regarding suppression of the witness's juvenile burglary conviction and probationary status when the defense theory involved the witness being worried that the police would view him as a suspect, "*jurors were entitled to have the benefit of the defense theory before them. . .*").

In contrast, this court suppressed two questions of Ms. Grim which were not the subject of any direct examination and did not touch on any fact about Ms. Grim which was critical to the jury's understanding of her motives or biases. See RP 479-480. The potential impeachment value inherent in the suppressed questions lies in the subsequent rebuttal of whether or not those statements were made at all. As the defendant acknowledged at trial, such rebuttal could have come from Ed Barrett. RP 471. The defendant chose not to call any witnesses in rebuttal. RP 619.

"The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the

trial court. It may exercise reasonable judgment in determining when the subject is exhausted." Smith v. Illinois, 390 U.S. 129, 132 (1968). The court's rulings in this case represent an appropriate demarcation between proper impeachment and inadmissible hearsay. The trial court did not abuse its discretion, and the limitation of cross examination did not violate the defendant's Sixth Amendment right to confront witnesses.

IV. THE DEFENDANT'S CLAIMED FIFTH AMENDMENT VIOLATION, RAISED FOR THE FIRST TIME ON APPEAL, IS NOT A MANIFEST CONSTITUTIONAL ERROR.

The defendant did not assert a Fifth Amendment violation at the trial court level, and instead raises the issue for the first time on appeal. The court may refuse to review this claim of constitutional error unless the error is "manifest." RAP 2.5(a)(3). 'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (citing State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); State v. McFarland, 127 Wn.2d 322, 333–34, 899 P.2d 1251 (1995)). To demonstrate actual prejudice, there must be a " 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.' " Kirkman, 159 Wn.2d at 935, 155 P.3d 125 (quoting WWJ Corp., 138 Wn.2d 595, 603, 980

P.2d 1257 (1999)). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. Id. at 935, 980 P.2d 1257. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333, 899 P.2d 1251.

The Fifth Amendment prohibits the use of coercion or "physical or moral compulsion" to obtain testimonial evidence. City of Seattle v. Stalsbroten, 138 Wn.2d 227, 235, 978 P.2d 1059, 1063 (1999) (quoting South Dakota v. Neville, 459 U.S. 553, 562, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). In this case, there was no Fifth Amendment violation because the defendant voluntarily chose *not to testify* after discussing that choice with both his counsel and the judge. RP 617. He provided no testimonial evidence at all, thus no evidence was coerced or compelled from him. The defendant has supplied no legal authority for the proposition that a Fifth Amendment violation exists when a defendant voluntarily chooses *not to testify* in his own defense. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn. App. 907, 911, 10 P.3d 504,

506 (2000) (citing DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

The Fifth Amendment operates independently from the Rules of Evidence, and vice versa. While it is true that the court's correct and discretionary evidentiary rulings limited the available methods by which the defendant could introduce his own statements, this does not mean that his choice to not testify in his own defense was impermissibly coerced by those rulings. The record before this Court contains no connection between the evidentiary rulings during the cross examination of Rayanne Grim and the defendant's election not to testify. Without such facts, the court must find that any alleged Fifth Amendment violation is not manifest. McFarland, 127 Wn.2d at 333.

V. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's convictions for two counts of first degree child molestation.

Respectfully submitted on March 30, 2015.

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

THE STATE OF WASHINGTON, Respondent, v. CHRISTOPHER T. CHAVEZ, Appellant.	No. 71811-8-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 30th day of March, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Washington Appellate Project, susan@washapp.org; david@washapp.org; wapofficemail@washapp.org; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of March, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office