32096-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD MICHAEL PAYNE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

Appellant's Brief appears to include aspects of the separate issues raised in the civil contempt proceeding concerning trial counsel's pre-trial actions which is the subject of a separate appeal. The issues raised in the civil contempt proceeding occurred prior to the jury being seated for the trial. The issues surrounding the civil contempt proceeding were neither known to nor impacted the jury's resolution of the issues raised at trial.

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Trial court erroneously admitted evidence of defendant's prior Attempted First Degree Child Molestation conviction under ER 404(b).
2. Trial court erred in its Factual Findings and Legal Conclusions supporting admission of defendant's prior conviction under ER 404(b).
3. Trial court erred in denying defendant's motion to stipulate to his prior conviction as an element of the offense in Count III.
4. Trial court erred in denying defendant the public funding to conduct pre-trial in-person interviews of out-of-state witnesses.
5. The trial court violated the Appearance of Fairness Doctrine.
6. Trial court erred in denying defendant the opportunity to confront his accuser for counts I and II.

7. Trial court erred in not dismissing Count I for lack of evidence.

8. Trial court erred in not dismissing the case for governmental misconduct under CrR 8.3(b)(3).

9. Trial court erred by conducting a critical pre-trial hearing without defendant being present.

10. Trial court erred in denying defendant's request for a missing witness jury instruction.

11. Trial court's errors require complete dismissal or a new trial.

12. Trial court erred in denying defendant's motion to suppress his statements and other evidence under CrR 3.5.

13. Trial court erred in entering Factual Findings and Legal Conclusions regarding the CrR 3.5 and CrR 3.6 hearings over defendant's objections.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion by admitting evidence of defendant's prior Attempted First Degree Child Molestation conviction as an element of the offense charged in Count III?

2. Did the trial court abuse its discretion by admitting evidence of defendant's prior sex offense conviction pursuant to ER 404(b)?

3. Did the trial court abuse its discretion in denying defendant's request to stipulate to his prior sex offense conviction as an element of the offense charged in Count III?

4. Did the trial court violate defendant's due process rights when it refused to use public funds to pay for out-of-state pre-trial in-person interviews of witnesses by defense counsel?

5. Did the trial court violate the Appearance of Fairness Doctrine?

6. Did the trial court deny defendant his right to confront his accuser when the five year old victim of Counts I and II did not testify?

7. Did sufficient evidence support the trial court's denial of defendant's motion to dismiss Count I?

8. Did the trial court abuse its discretion when it denied defendant's CrR 8.3 motion to dismiss the case for governmental misconduct?

9. Did the trial court violate defendant's right to be present when it conducted a civil contempt hearing against defendant's counsel in defendant's absence despite written acknowledgment of his required attendance?

10. Did the trial court erroneously deny defendant's request for a missing witness jury instruction?

11. Do the trial court judge's errors require complete dismissal, or a new trial?

12. Did the trial court abuse its discretion when it denied defendant's motion to suppress his statements and other evidence?

13. Did the trial court abuse its discretion by entering Factual Findings and Legal Conclusions regarding the CrR 3.5 and Suppression hearing?

III. STATEMENT OF THE CASE

On June 21, 2012, around 8:00 p.m., Officers responded to a call from Security at the NorthTown Mall regarding a male who had exposed himself and touched a five-year-old girl ("A.R.H.") earlier that day. 1RP[1] 616. Officers were advised that the incident occurred in the Bumper's arcade in the mall. Officers were advised by the business that it had a video surveillance system and it had found video of the incident. 1RP 622-625. A Bumper's employee identified defendant as the adult male in the surveillance video. 1RP 656-659.

When A.R.H.'s Mother, Heather Holland, viewed the video she became very upset and screamed. 1RP 625, 706-707, 833. Ms. Holland testified that she saw defendant's hand on her daughter's backside. 1RP 710. Ms. Holland testified that she initially thought that she saw defendant take out his penis when she watched the video. 1RP 712. That is

[1] The verbatim report of proceedings is referenced as follows: 1RP – 10/2/13; 2RP – 10/3/13; 3RP – 6/28/13; 4RP – 7/9/13; 5RP – 10/1/13; 6RP – 8/2/13; 7RP – 8/16/13; 8RP; 8/19/13

when she screamed and began crying. 1RP 712-714, 833. However, when she reviewed the video, she realized that it only depicted defendant fondling himself and that she did not see his penis. 1RP 712.

Aaron McArthur, the nineteen-year-old brother of A.R.H., testified that K.C.'s demeanor was scared and shocked, so he believed the incident had happened. 1RP 685. He also noted that his sister, A.R.H., was "blank." 1RP 685. He tried to find the suspect without success based upon K.C.s' description. 1RP 686-688. When he returned to the arcade, he viewed the surveillance video and testified that he saw defendant pull his penis out of his pants. 1RP 692-693, 695.

The eleven-year-old, K.C. testified that she was with A.R.H. in the Bumpers Arcade playing games when the incident occurred. 2RP 837. K.C. saw defendant come up to where she and A.R.H. were playing in the arcade. 2RP 838. K.C. identified defendant in open court as the person who had approached A.R.H. in the arcade. 2RP 838. Defendant told the girls that he was going to watch them play the games. 2RP 838. K.C. described defendant's actions as "kind of stalkerish" and told A.R.H. that they should "get away." 2RP 838. The girls went to another game trying to avoid defendant. 2RP 839. K.C. was on the skateboarding game with A.R.H. standing next to her when she saw defendant standing behind A.R.H. 2RP 840. K.C. testified that she saw defendant behind A.R.H.

rubbing her leg and pulling up her skirt while his penis was out. 2RP 840-842. K.C. felt uncomfortable, so she took A.R.H. and walked away. 2RP 840. K.C. testified that while defendant was touching A.R.H.'s legs and bottom, A.R.H. paled, freaked out, and was speechless. 2RP 840-841. When K.C. saw defendant's penis, she tried to get A.R.H. away from defendant as quickly as she could. 2RP 841. K.C. took A.R.H. to K.C.'s older sister, Brittany Counts. 2RP 842, 851. K.C. testified that when she saw defendant with his penis out that she felt scared. 2RP 842. On cross-examination, K.C. reiterated seeing defendant's penis. 2RP 848. K.C. also testified that she did not see the defendant's penis on the surveillance video because he was behind the pillar at the time. 2RP 848-849. Finally, K.C. testified that once defendant knew that she had seen him, he tried to avoid her and left the arcade as soon as he could. 2RP 853.

Spokane City Police Detective Hensley was assigned the follow-up investigation of the reported incident. Detective Hensley was able to identify the defendant as who he believed was the adult white male seen on the surveillance video. 1RP 646, 753. He contacted Detective Lebsock to accompany him to defendant's address to contact the possible suspect and make certain he had the right person. 1RP 754, 758.

At defendant's address, a ranch style house, Detective Hensley knocked on the front door and rang the doorbell without any response.

1RP 757. When there was no response to Detective Hensley's attempted contact, Detective Lebsock returned to the driveway and noted the 6' vinyl fence that extended to the west of the house. 1RP 804-805. It was a nice, sunny June day around midday, so Detective Lebsock thought that somebody might be in the back yard. 1RP 805. Detective Lebsock could see over the fence and observed someone in the yard. He identified himself and requested that the individual come talk to them. 1RP 805. Defendant readily exited the gate into the driveway and contacted the detectives. 1RP 758, 806.

Detective Hensley identified himself as an officer and indicated that he wanted to interview defendant regarding this incident. 1RP 758. Detective Hensley advised defendant of his constitutional rights, which defendant waived, and agreed to talk. 1RP 760. Defendant was calm, cooperative, did not appear under the influence, and gave answers that were responsive to the questions posed. 1RP 761, 806. Defendant admitted to being at NorthTown Mall on June 21, 2012, around 6:00 p.m. to kill time before going home. 1RP 762-763, 808. Defendant admitted going to the arcade and indicated that, "I should not have been there." 1RP 763-764, 788, 808-809. Defendant admitted touching A.R.H. on the thigh and buttocks while removing his penis from his shorts. 1RP 765, 809. Defendant claimed it was a random act. 1RP 765.

During the interview, defendant's girlfriend arrived home. 1RP 767. The Detectives introduced themselves and advised that she was welcome to remain. The defendant then looked at his girlfriend and, unsolicited, said, "I touched a girl" in the mall. 1RP 767-768, 788, 809-810. The girlfriend appeared upset and walked away crying. 1RP 768, 809-810. When asked, defendant admitted that he had committed the acts for his sexual gratification. 1RP 811, 816. The detectives advised defendant that he was not going to jail and they would get a warrant. 1RP 769, 791.

Pre-trial, the trial court conducted a hearing, then entered Findings of Fact and Conclusions of Law regarding the admission of defendant's 2001-Attempted First Degree Child Molestation conviction. The Court admitted the 2001-conviction as a charged element, which elevated Count III, Indecent Exposure, to a felony. The Court separately admitted evidence of the 2001-incident pursuant to the exceptions to ER 404(b) as proof of a common scheme or plan, motive or intent, and to refute a claim of accident of mistake. CP 628-630.

Pre-trial, the trial court conducted a hearing, then entered Findings of Fact and Conclusions of Law regarding the admission of defendant's statements wherein he confessed to the charged offenses. CP 623-627. The court concluded that defendant's statements to the detectives were made

freely, voluntarily, and intelligently after his having been advised of and waiving his constitutional rights per *Miranda.* CP 623-627,

Defendant was convicted of two counts of the First Degree Child Molestation of A.R.H. and one count of Felony Indecent Exposure with regard to K.C. CP 1273-1284, 1285-1299. Following sentencing on the convictions, defendant filed this appeal.

IV. ARGUMENT

A. EVIDENCE OF DEFENDANT'S ATTEMPTED FIRST DEGREE CHILD MOLESTATION CONVICTION WAS PROPERLY ADMITTED AS AN ELEMENT OF THE OFFENSE CHARGED IN COUNT III AND PURSUANT TO ER 404(B).

Defendant contends that the trial court erred in admitting evidence of defendant's prior conviction for the 2001 attempted First Degree Child Molestation of M.H. Defendant argues that the court only admitted evidence of defendant's 2001 conviction to prove that he acted in conformity therewith. Defendant's argument discounts that the court admitted evidence of defendant's 2001 Attempted First Degree Child Molestation conviction on two distinctly different bases.

First, as charged in Count III, the State had to prove that defendant had a prior conviction for a sex offense as an element of the offense. On that basis, the court admitted the evidence and limited the jury's use of that evidence by specific instruction.

Second, the State offered the factual aspects of the 2001-incident under three separate theories to: (1) establish a common scheme or plan, (2) prove motive or intent to commit a crime for defendant's sexual gratification, (3) refute a claim of accident or mistake. Pre-trial, defense proffered the theory that the surveillance video from the arcade proved that defendant had not even touched A.R.H. 3RP 6, 22. Hence, the State offered the factual basis of the 2001-incident under ER 404(b) to show that defendant acted pursuant to a common scheme or plan in perpetrating the sexual offenses charged in this case.

Defendant claims that the trial court erred admitting evidence of the 2001-incident because the prejudice of that conviction outweighed any probative value since defendant never touched A.R.H. ER 404(b) only prohibits the admission of evidence of other crimes or bad acts when such is offered to prove the character of a person to show action in conformity with such behavior. *State v. Foxhoven,* 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Otherwise, ER 404(b) explicitly provides for the admission of such evidence for other purposes, including proving motive, identity, or a common scheme or plan, or to dispute a defense to a crime. *Id.* Here, the State sought admission of the 2001 incidence to show that defendant's actions vis-à-vis A.R.H. were part of a common scheme or plan of action by which he achieved sexual gratification via sexual abuse of children.

As noted, defense argued that the 2001-incident evidence was only offered to prove defendant's conformity therewith. 3RP 22-24. However, the court properly applied ER 404(b). 3RP 24-28; CP 628-630. The court noted that to admit evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. 3RP 24-28. *See, State v. Fisher,* 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Once the court decided the general admissibility of the 2001-incident evidence, the court next had to determine whether it qualified for admission under the common scheme or plan exception of ER 404(b). 3RP 24-28. The court completed three of the four-step inquiry required by *State v. Lough,* 125 Wn.2d 847, 889 P.2d 487 (1995). 3RP 24-28. Ultimately, the court reserved its ruling on admissibility of the ER 404(b) evidence until it heard all the other evidence. Nevertheless, the court indicated that *if* it did find that the probative value outweighed the prejudice of the evidence of the 2001-incident, *then* the court would give the jury a limiting instruction. 3RP 27-28.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden,* 145 Wn.2d 612, 619, 41 P.3d

1189 (2002). That standard is well-recognized. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court's ruling regarding admissibility may be affirmed on any grounds adequately supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). A court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). Here, the trial court carefully identified the basis for its ruling, specifically noting that:

> [T]he probative value does outweigh the prejudicial effect… case law requires, a limiting instruction be given because this is a 404(b) issue…that means that jury cannot say, 'Well, there has been a prior conviction, therefore defendant must have committed this act.'…so…would give a limiting instruction.

4RP 177-178.

The court applied the required analysis before concluding that the 2001-incident was admissible pursuant to the common scheme or plan, as well as the proof of motive, intent, and lack of mistake exceptions to ER 404(b). 3RP 24-28, 4RP 177-178.

B. PROPER FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE ENTERED WITH RESPECT TO ER 404(B).

Defendant claims that the trial court erred when it entered its Findings of Fact and Conclusions of Law on the ER 404(b)

evidence over his objections.

A trial court's findings on disputed facts will not be disturbed on review if supported by substantial evidence. *State v. Black,* 100 Wn.2d 793, 802, 676 P.2d 963 (1984). Where there is a claim that the evidence conflicts, as here, the reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings. *Bland v. Mentor,* 63 Wn.2d 150, 154, 385 P.2d 727 (1963). Here, defendant has not established that insufficient evidence supported the court's Findings of Fact when viewed most favorable to the State as the prevailing party. The record contains more than sufficient evidence to support the factual findings entered by the court justifying its admission of evidence of the 2001-incident as an element of the crime charged in Count III and pursuant to ER 404(b).

C. DEFENDANT'S STIPULATION THAT HIS PRIOR SEX OFRFENSE CONVICTIONS QUALIFIED AS AN ELEMENT OF THE OFFENSE CHARGED IN COUNTY III WAS PROPERLY ACCEPTED

Defendant claims that the trial court erred by not allowing him to stipulate with regard to Count III that he had a qualifying prior sex offense conviction. Defendant cites to the reasoning set forth in *State v. Roswell,* 165 Wn.2d 186, 196 P.3d 705(2008) and *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), as supporting his claim.

Count III of the Second Amended Information charged defendant with the felony of Indecent Liberties, which required that the State prove that he had previously been convicted of the crime of "Attempted First Degree Child Molestation." RCW 9A.88.010 provides, in pertinent part:

> (1) A person is guilty of indecent exposure if he… intentionally makes any open and obscene exposure of his… person…knowing that such conduct is likely to cause reasonable affront or alarm…
>
> (2)(a) Except as provided in…(c) of this subsection, indecent exposure is a misdemeanor.
>
> …
>
> (c) Indecent exposure is a class C felony if the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030.

Id.

RCW 9.94A.030 provides a very broad list of qualifying felonies the conviction of which qualifies for elevating a charge of Indecent Exposure from a gross misdemeanor to a felony. Here, to avoid confusion or multiple elements instructions, the State specifically identified the prior sex offense in the Information. The State accepted the responsibility that it had to prove that defendant had been convicted of "Attempted First Degree Child Molestation" beyond a reasonable doubt. Hence, any stipulation for Count III concerning defendant's prior conviction had to

specifically note that the prior conviction was for "Attempted First Degree Child Molestation."

Under the circumstances of this case, defendant's reliance on *Roswell* and *Old Chief* is reasonable, yet not controlling. The courts in *Roswell* and *Old Chief* recognized that a defendant may stipulate to the fact of a prior conviction to thereby prevent the State from introducing evidence of the details thereof to the jury. However, the *Roswell* court then noted that "the prejudicial nature of evidence of prior convictions must be balanced against the crucial role that elements, even prior convictions elements, play in the determination of guilt." *State v. Roswell,* at 195. The court then observed that the case law acknowledges that a defendant cannot stipulate to the existence of an element and thereby remove it completely from the jury's consideration. *Id.*

Here, the trial court noted that ER 404(b) did not require the exclusion of the evidence of defendant's prior conviction because such evidence was admissible to prove motive, intent, or lack of mistake. 3RP 24-28, 4RP 177-178. Unlike in *Old Chief*, evidence of defendant's prior conviction was not admitted merely to prove the element of a prior conviction. It was admitted due to its high relevance in proving that defendant knew his conduct "was likely to cause reasonable affront or alarm" as required by RCW 9A.88.010(1).

The trial court concluded that sufficient similarities in the circumstances of the 2001-incident made it probative of sexual motivation, intent, common scheme or plan, lack of mistake, and to rebut a claim of no touching at all. CP 628-630. In a strikingly similar case, *State v. Vars*, 157 Wn.App. 482, 237 P.3d 378 (2010), this court held that facts of prior convictions were admissible in a prosecution for indecent exposure. *Id.* The *Vars* court concluded that the "common elements permit the reasonable inference that the same motivation underlies [Var's] offending behavior in each instance." *Id.* It found that "an objective trier of fact could logically infer from this record that Var's indecent exposure on this occasion was sexually motivated as well." *Id.* As the court found here, defendant had chosen a "commercial setting of the acts, the sexual touching of a minor female victim, targeting of an unknown victim, and targeting of a minor child while the child was separated from adult supervision. CP 628-630. The court made the requisite finding that the probative value of the evidence outweighed its prejudicial effect. Then the court limited the jury's use of that evidence by specific instruction.

Finally, absent a showing of manifest abuse of discretion, a reviewing court will not disturb a trial court's ruling on the admission of evidence. *State v. Halstein*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). As noted, a court is not required to accept a defendant's stipulation to the fact

of a prior conviction in a prosecution for felony indecent exposure when the facts of the prior conviction are relevant beyond proving the element of the existence of a prior conviction. Hence, the court did not abuse its discretion in not accepting defendant's offer to stipulate to the fact that defendant has a "prior conviction for a sex offense." Nor did the court abuse its discretion when it accepted defendant's stipulation that he had a 2001 conviction for Attempted First Degree Child Molestation to avoid sending the 2001 Judgment and Sentence, which included another conviction, to the jury during deliberations. 4RP 720-725, 823-824.

D. DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY COURT'S DENIAL OF PUBLIC FUNDS TO PAY THE TRAVEL COSTS OF DEFENSE COUNSEL TO CONDUCT IN-PERSON INTERVIEWS OF OUT-OF-STATE WITNESSES.

Defendant claims that the trial court's refusal to publicly fund the costs for defense counsel to travel to Boise, Idaho, and Butte, Montana, to conduct in-person interviews of witnesses violated his rights to due process, confrontation, and effective assistance of counsel.

Defendant cites to the holding in *State v. Burri*, 87 Wn.2d. 175, 550 P.2d 507 (1976), in support of his contention that the denial of public funds to cover the costs of defense counsel to travel out-of-state to conduct in-person interviews is presumed prejudicial.

With respect, defendant's reliance upon *Burri* is misplaced because the reasoning is inapposite to the case herein. In *Burri,* the prosecutor was found to have unlawfully conducted a special inquiry hearing with the defendant's alibi witnesses, precluded defense from attending the hearing, and advised the alibi witnesses to not discuss their testimony with defense. *State v. Burri,* at 176. The Court concluded that providing a transcript of the illegally obtained testimony was insufficient to protect defendant's right to a fair trial. Specifically, the Court ruled that "[t]he availability of a copy of the subject testimony without the benefit of personal interview of the witness is not necessarily an adequate substitute." *Id* at 179.

Here, unlike in *Burri,* the defense was neither precluded from any hearing nor deprived of any information available to the State. Counsel knew that the out-of-state witnesses were available for interviews, which the State tried to facilitate via telephone and video conferencing. Nothing prevented counsel from traveling to Boise, Idaho, and Butte, Montana, at his own expense to be in the same room with the witnesses when he conducted interviews. *Burri* does not stand for the proposition that a defendant charged with molesting a five-year-old girl is denied his right to a fair trial when he is not permitted to be in the same room during an in-person interview of out-of-state witnesses regarding an emotionally traumatized child at public expense. Here, counsel was provided the

opportunity and access to the out-of-state witnesses for interviews. Clearly, defendant was not denied his rights to assistance of counsel, a fair trial, and due process of law.

E. THE APPEARANCE OF FAIRNESS DOCTRINE DID NOT MANDATE THAT THE COURT RECUSE ITSELF FROM PRESIDING OVER DEFENDANT'S TRIAL.

Defendant claims that the trial court violated the appearance of fairness doctrine by not recusing itself and refusing to order the State to allow defense interviews of, or require, A.R.H. to testify at trial. Defendant also claims that the court raised her voice at counsel, personally attacked counsel's wife, conducted an important hearing without defendant being present, found counsel in contempt of court, tried to convince defendant to fire counsel, and cancelled counsel's scheduled prepaid vacation.

Recusal decisions are reviewed for abuse of discretion. *State v. Leon,* 133 Wn.App. 810, 812, 138 P.3d 159 (2006). Due process, the Appearance of Fairness Doctrine, and the Code of Judicial Conduct require disqualification if the judge is biased against a party or if impartiality reasonably may be questioned. *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *State v. Post,* 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992); CJC 3(D)(1). The test is objective: whether a reasonable person with knowledge of the relevant

facts would question the judge's impartiality. *Sherman v. State,* 128 Wn.2d 164, 206, 905 P.2d 355 (1995). "Prejudice is not presumed." *State v. Dominguez,* 81 Wn.App. 325, 328, 329, 914 P.2d 141 (1996). "Evidence of a judge's actual or potential bias is required before the appearance of fairness doctrine will be applied." *Id.,* 81 Wn.App. at 329, (citing *Post,* at 618-619, and n. 9).

Here, defendant has not cited evidence that the judge had either any actual or potential bias sufficient to trigger the appearance of fairness doctrine. Defense counsel appeared before the judge on multiple occasions in his capacity as an attorney without incident. For the most part, the circumstances that defendant cites occurred prior to the trial or outside the presence of the jury. The record did not support recusal.

F. DEFENDANT'S RIGHT TO CONFRONT THE FIVE-YEAR-OLD VICTIM OF COUNTS I & II WAS NOT VIOLATED SINCE SHE WAS NOT CALLED TO TESTIFY AT TRIAL.

On March 21, 2013, the State filed its RCW 9A.44.120 Notice that it intended to seek admission of statements made by A.R.H., a child then six years of age, to other witnesses describing acts of sexual contact performed by defendant upon the child. CP 60-61. However, the State later advised the court that A.R.H. would not be called as a witness and moved to withdraw the child hearsay motion. CP 616-617. The court

granted the motion and the State did not call A.R.H. as a witness nor did the State seek to admit any statements by A.R.H. at trial.

Nevertheless, the defense contended that even if A.R.H. did not testify, a *Crawford* confrontation issue still existed because he has the right to cross-examine that person. 4RP 156. The court noted that there is no confrontation issue if A.R.H. did not testify. 4RP 168-169. "She is not going to testify. Nobody is going to testify about what she said to them…So there is no child hearsay…no direct testimony so there is no *Crawford* issue…in this case." 4RP 169.

Now, defendant contends that the court denied his constitutional right to confront his accuser, the five-year-old A.R.H., by not *requiring* her to testify regarding the crimes charged in Counts I and II. Defendant argued to the court that A.R.H. was the only witness to the crimes charged in Counts I and II, so she had to testify or there would be insufficient evidence to support those charges. However, defendant's argument ignores the testimonies of K.C. (5RP 840-842, 845) and Heather Holland (5RP 704-712), wherein they identified the defendant and described his sexual contact with A.R.H. Defendant's argument also ignores his own admissions to Detectives Hensley and Lebsock that he had sexual contact with A.R.H. 5RP 762-768, 808-811, and 816.

Finally, defendant's argument that the only evidence of his molestation of A.R.H. could have come from her ignores the evidence provided by the surveillance video. The record provides ample evidence that defendant had sufficient opportunity to confront all the witnesses and evidence brought against him by the State. The State's decision not to call to the stand a vulnerable and emotionally distraught six-year-old girl did not deprive defendant of his rights of confrontation, due process, and a fair trial.

G. SUFFICIENT EVIDENCE SUPPORTED THE JURY VERDICT ON COUNT I.

Defendant claims that insufficient evidence was produced at trial to establish the elements of the crime charged in Count I. Defendant contends that the court should have dismissed Count I pursuant *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), because no witness testified that he had sexual contact with A.R.H. Defendant offers two separate and distinct arguments to support this assigned error.

Initially, a "*Knapstad* motion" requires that the parties agree there are no material issues of fact in the case. Then the only issue remaining is whether those undisputed facts support the elements of the charged offense. *State v. Knapstad*, at 352-353. Here, the record is clear that defendant maintained that he never touched A.R.H. and that there was no

evidence of a touching. However, other witnesses testified and defendant admitted that there was touching. 5RP 840-842, 845, 704-712, 762-768, 808-811, and 816. The record presented the court with material issues of fact disputed by the parties, so it had no basis to dismiss Count I pursuant to *State v. Knapstad.*

Alternatively, defendant argues that insufficient evidence supported the crime charged in Count I because A.R.H. did not testify that defendant touched her.

The standard for adjudging the sufficiency of the evidence to support a verdict is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Hagler*, 74 Wn.App. 232, 235, 872 P.2d 85 (1994). Application of that standard requires affirming the conviction found by the court pursuant to the jury verdict rendered regarding Count I.

Here, the evidence amply supported the court's determination that the defendant committed the offense charged in Count I. The evidence included testimony that defendant is the adult male depicted in the video

from the arcade (5RP 659), defendant's admissions to detectives and his girlfriend together with K.C.'s testimony that he touched A.R.H. on the thigh and buttocks (5RP 765, 767-768, 788, 809, 840-41, 842, and 845). The testimony was augmented by the surveillance video from the crime scene which showed defendant being near, interacting with K.C. and A.R.H., and then touching A.R.H. There was ample evidence from which a jury could find that defendant committed the crimes charged in Counts I and II beyond a reasonable doubt.

H. DEFENDANT'S MOTION TO DISMISS THE CASE FOR GOVERNMENTAL MISCONDUCT UNDER CRR 8.3 WAS PROPERLY DENIED.

Defendant claims the trial court erred when it did not dismiss the case for governmental misconduct under CrR 8.3 based upon the detective's failure to disclose that the arcade machines had been moved by the business for the scene photographs.

CrR 8.3(b) provides, in pertinent part:

> The court, in the furtherance of justice…may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Id.

Before a court may dismiss charges under CrR 8.3(b), the defendant must prove (1) arbitrary action or governmental misconduct,

and (2) prejudice affecting the defendant's right to a fair trial by a preponderance of the evidence. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003). It is not necessary that the governmental misconduct was evil or dishonest, mere mismanagement is sufficient. *State v. Blackwell,* 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). Nevertheless, CrR 8.3(b) requires the defendant to show *actual* prejudice, rather than merely speculative prejudice affecting the right to a fair trial. *State v. Rohrich,* at 657. The dismissal of charges pursuant to CrR 8.3(b) is an *extraordinary* remedy that is limited to truly egregious cases of mismanagement. *State v. Wilson,* 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Finally, a trial court's denial of a CrR 8.3(b) motion to dismiss is reviewed for an abuse of discretion. *State v. Blackwell,* at 830.

As noted, the reviewing court must determine whether the dismissal of charges pursuant to CrR 8.3(b) was based upon the conclusion that both elements (b)(1) and (b)(2) were proved. An abuse of discretion only occurs when the record reflects that the court's decision was manifestly unreasonable, or was based on untenable grounds, or made for untenable reasons. *State v. Blackwell,* at 830.

A trial court's decision is based "on untenable grounds" or made for "untenable reasons" if it is based on facts unsupported by the record or was reached by applying the wrong legal standard. *State v. Rundquist,*

79 Wn.App. 786, 793, 905 P.2d 922 (1995). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." *State v. Lewis,* 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990), and arrives at a decision "outside the range of acceptable choices." *Rundquist,* at 905. Clearly, such is not the circumstance presented by this record.

Here, defendant filed his CrR 8.3(b) motion to dismiss, alleging governmental mismanagement based upon the late disclosure regarding the crime scene photographs; however, the issue was fully explored with the jury during the trial. At that point, the issue went to the weight and credibility of the evidence, not its admissibility. The testimony was that the arcade games were moved after the incident, but were moved back to exactly the same position occupied during incident for the photographs. The court properly denied defendant's CrR 8.3(b) motion for a lack of evidence of actual prejudice cause by the alleged misconduct.

I. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO BE PRESENT AT THE SHOW CAUSE HEARING REGARDING DEFENSE COUNSEL'S CONTEMPT OF COURT.

Defendant claims that he was denied his constitutional right to be present during a "critical stage" of the criminal proceedings when the trial

court conducted the Show Cause hearing regarding the civil contempt charges against his trial counsel without his being present.

The Washington Supreme Court recently examined this issue of the constitutional right to be present in *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011).

> A criminal defendant has a fundamental right to be present at all critical stages of a trial…Although the right to be present is rooted to a large extent in the confrontation clause of the Sixth Amendment to the United States Constitution, the United States Supreme Court has recognized that this right is also 'protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.'…In that vein, the Court has said that a defendant has a right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'…The Court went on to indicate, however, that because the relationship between the defendant's presence and his 'opportunity to defend' must be 'reasonably substantial,' a defendant does not have a right to be present when his or her 'presence would be useless, or the benefit but a shadow.' Thus, it is fair to say that the due process right to be present is not absolute; rather 'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence. (citations omitted.)

Id., at 880-81.

The United States Supreme Court has cautioned that the exclusion of a defendant from a trial should be examined in light of the whole record. *Snyder v. Massachusetts*, 291 U.S. 97, 115, 54 S.Ct. at 335.

This Court recently noted in *State v. Jones*, 175 Wn.App. 87, 107, 303 P.3d 1084 (2013), that:

> Article I, section 22 of the Washington Constitution provides that '[i]n criminal prosecutions the accused shall have the right to appear and defend in person.' In *Irby*, our Supreme Court recognized that the state constitutional right to appear and defend is arguably broader than the federal due process right to be present…The *Irby* court based this determination in part on *State v. Shutzler*, 82 Wn.365, 367, 144 P. 284 (1914), *overruled in part on other grounds by State v. Caliguri*, 99 Wash,2d 501, 664 P.2d 466 (1983), in which the Supreme Court stated that "it is the right of the accused to be present at every stage of the trial when his substantial rights may be affected." Thus, in Washington, the right to appear and defend as guaranteed by article I, section 22 of the Washington Constitution is triggered at any time during trial that a defendant's substantial rights may be affected.

Id., at 107.

Nevertheless, a defendant's federal and state constitutional right to be present at trial may be expressly or impliedly waived. *State v. Garza*, 150 Wn.2d 360, 366, 77 P.3d 347 (2003). An implied waiver occurs when the court determines that the defendant voluntarily absented himself from the trial based on the totality of the circumstances. *Id.* The trial court makes that determination by (1) making sufficient inquiry into the circumstances of the defendant's disappearance to justify whether the absence was voluntary, (2) making a preliminary finding of voluntariness when justified, and (3) affording the defendant an adequate opportunity to explain his absence when he returns. *Id.*, at 367. A trial court's decision

regarding whether the defendant's absence was voluntary is reviewed for an abuse of discretion. *Id.,* at 365-66.

Here, defendant was advised on August 2, 2013, that a Show Cause hearing was set for August 16, 2013, to address defense counsel's failure to provide information to the court concerning his medical unavailability for a previously scheduled trial date. CP 8, 6RP 2, 14. The defendant signed the Scheduling Order notifying him of the hearing date and specifically advising that he was required to appear for all scheduled hearings. CP 8. The defendant failed to appear for the August 16, 2013, hearing and a warrant was issued for his arrest. CP 554-555, 7RP 271, 275, 282-283, 289, 293; 8RP 3-9.

Clearly, no evidence was presented to the trial court to support a finding that defendant was prevented from appearing for the hearing. The reasonable inference is that defendant voluntarily absented himself from the hearing and thereby waived his right to be present. The subject matter of the Show Cause hearing had no bearing on his opportunity to defend the charges, had no connection to the presentation or determination of the admissibility of evidence, and had no bearing on the defense theory of the case. The hearing did not concern the defendant's right to confront witnesses. Defendant has failed to show that his absence from the Show

Cause hearing had any effect on any other stage of the proceedings or the outcome at trial.

J. THE TRIAL COURT PROPERLY REFUSED TO GIVE A MISSING-WITNESS INSTRUCTION TO THE JURY.

Defendant claims that he was denied a fair trial when the trial court refused his request that the jury be instructed regarding a missing witness. Defendant contends that a Washington Pattern Instructions Criminal ("WPIC") 5.20 missing witness instruction should have been given since the five-year-old A.R.H. was not declared incompetent to testify.

The Washington Supreme Court has held that the missing witness doctrine applies only if (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of one party rather than equally available to both parties, (3) the witness's absence is not satisfactorily explained, and (4) application of the doctrine will not infringe upon a defendant's right to silence or shift the burden of proof. *State v. Montgomery,* 163 Wn.2d 577, 598-599, 183 P.3d 267 (2008). Here, A.R.H. was not a missing witness; rather, the State elected not to call her as a witness. Equally noteworthy is that neither of the offenses charged in Counts I and II required personal testimony by the alleged victim.

The first prerequisite to application of the missing witness doctrine concerns whether the potential testimony of the missing witness is material and not cumulative. Here, the record supports a finding that the potential testimony of A.R.H. would not be material and not necessarily cumulative even if an emotionally traumatized five-year-old could actually be *made* to testify. The second prerequisite, that the missing witness is particularly under the control of one party, is not supported by the record since the State did not call A.R.H. to testify and offered no statements she made. The defense chose not to place A.R.H. under subpoena and force her to appear for trial. The third prerequisite, that the witness's absence is not satisfactorily explained, is not supported by the record. The court was informed that the counselor who was treating A.R.H. for traumatization advised that it would not be in A.R.H.'s best interests to testify. Finally, the fourth prerequisite, that application of the doctrine will not infringe upon a defendant's right to silence or shift the burden of proof, is clearly not supported by the record since neither the defendant's silence nor the burden of proof was ever at issue. Defendant failed to satisfy the four prerequisites to qualify for the court to even consider giving a missing witness instruction to the jury.

Assuming, *arguendo,* that the defense satisfied the prerequisites for giving a missing witness instruction, review would focus on whether the

court abused its discretion in declining to give the instruction. Again, the question is whether the court denied the request based "on untenable grounds" or for "untenable reasons" based on facts unsupported by the record or was reached by applying the wrong legal standard. *Rundquist,* at 793. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." *State v. Lewis,* at 298-99, and arrives at a decision "outside the range of acceptable choices." *State v. Rundquist,* at 793. Again, clearly, such is not the circumstance presented by this record.

K. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERRORS.

Defendant claims that the cumulative error doctrine applies to the Judge's misconduct such that reversal of the conviction is warranted. Cumulative errors may warrant reversal, even if each error standing alone is considered harmless. *State v. Greiff,* 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, defendant has not established that any error was committed by the trial court. Defendant's bare claim that he has clearly explained each error and how each combined with the other errors to affect the result of his trial is insufficient to support application of the doctrine. The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Id.*

L. THE COURT PROPERLY ADMITTED DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT OFFICERS UNDER CRR. 3.5.

Defendant claims that his statements to Detectives Hensley and Lebsock were obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and coerced. Defendant contends that the detectives coerced his confessions to the child molestation by falsely stating that they had a video that showed defendant touching the five-year-old and exposing his penis, which forced him to agree or go to jail.

The United States and Washington Constitutions protect defendants against self-incrimination. U.S. Const. Amend. V; WN.Const. art. 1, § 9. *Miranda* warnings protect these rights when a defendant is in police custody. *State v. Lorenz,* 152 Wn.2d 22, 36, 93 P.3d 133 (2004). However, *Miranda* does not apply outside the context of custodial interrogation. *Roberts v. U.S.*, 445 U.S. 553, 560, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). Washington Courts determine whether an interrogation is custodial using an objective standard, which is "whether a reasonable person in the individual's position would believe he…was in police custody to a degree associated with formal arrest." *State v. Lorenz,* at 36-37, (citing *Berkemer v. McCarty,* 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)). The trial court's determination of whether it was

a custodial interrogation is reviewed *de novo*. *State v. Lorenz, supra,* (citing *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

Here, the evidence before the trial court was that the defendant was never arrested nor in custody when the detectives contacted him in his driveway. CP 623-627, 3RP 75; 4RP 82, 144. Hence, the dictates of *Miranda* did not apply to the contact. Nevertheless, when the detectives contacted defendant, they advised him of his constitutional rights pursuant to *Miranda* before asking any questions. CP 623-627, 3RP 75; 4RP 82, 145. Detectives noted that defendant appeared to understand his rights and agreed to give a voluntary statement. CP 623-627, 3RP 76; 4RP 82, 145-146. Detectives advised defendant that he was not under arrest and would not be going to jail at that time. CP 623-627, 3RP 75, 84. Defendant's girlfriend arrived at the house during the interview. Defendant admitted to his girlfriend that he touched A.R.H. on the thigh and buttocks. 3RP 81-83; 4RP 84. Accordingly, the court properly concluded that: defendant was not in custody when he made his statements, yet was provided his rights; defendant did not indicate that he did not understand his rights; defendant provided a knowing, voluntary, and intelligent waiver of his rights; defendant answered the questions; the statements defendant made under such circumstances were made freely and voluntarily. CP 623-627;

4RP 143-149. The court properly concluded that defendant's statements to his girlfriend were not subject to CrR 3.5 analysis. CP 623-627; 4RP 149.

Defendant also claims that the trial court erroneously denied his motion to suppress all the evidence obtained by the detectives during their contact with defendant because they violated the curtilage of his property without a warrant.

The "curtilage" is that area of the property that is "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *U.S. v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). Police with legitimate business may enter areas of the curtilage impliedly open to the public such as a driveway or walkway leading to a residence without first obtaining a warrant. *State v. Myers*, 117 Wn.2d 332, 344, 815 P.2d 761 (1991); *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Substantial departure from the area open to the public intrudes on a constitutionally protected area in which citizens have a reasonable expectation of privacy. *Seagull*, 95 Wn.2d at 903. Hence, when an officer does enter the curtilage, the officer must act as a "reasonably respectful citizen" would under the circumstances. *Id.*

Here, the detectives entered the driveway and Detective Hensley went onto the porch of the house to contact and confirm defendant's identity with respect to their observations of the surveillance video from

the arcade. CP 623-627, 4RP 149-153. Detective Lebsock noted the gated fence to the left of the home and crossed into the neighbor's yard to look over the fence into the backyard of defendant's residence. CP 623-627, 4RP 149-153. Detective Lebsock observed defendant in the back yard and asked him to "please" come to the front so they could talk. CP 623-627, 4RP 149-153. Defendant voluntarily exited the back yard and met with detectives in the driveway. CP623-627, 4RP 149-153. The record indicates that the detectives acted as would a "reasonably respectful citizen" under the circumstances. The detectives did not break down the defendant's front door nor did they enter the fenced back yard.

Detective Lebsock's actions in initially contacting the defendant were in compliance with the "open view doctrine" since he was lawfully present in the neighbor's yard and used his senses to detect defendant's presence. *State v. Seagull, supra.* Detective Lebsock's observation was made from a non-intrusive vantage point such that his observation of defendant did not violate a reasonable expectation of privacy since the neighbors could see into his backyard. The court's conclusion that the detectives' actions did not violate the curtilage of defendant's home was rationally based upon the record. Accordingly, the denial of defendant's motion to suppress was proper.

M. THE TRIAL COURT PROPERLY ENTERED ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE CRR 3.5 AND CRR 3.6 HEARINGS.

Defendant claims that the court erred when it entered Findings of Fact and Conclusions of Law with regard to the CrR 3.5 and CrR 3.6 hearing over his objections. As previously noted, a court's findings on disputed facts will not be disturbed on review if supported by substantial evidence. *State v. Black, supra*. The *Black* Court further noted that "this court is not a trier of fact." *Id.* Where there is a claim that the evidence conflicts, as here, the reviewing court must determine *only* whether the evidence most favorable to the prevailing party supports the challenged findings. *Bland v. Mentor, supra*. Here, defendant has failed to establish that substantial evidence did not support the court's Findings of Fact when viewed most favorable to the State as the prevailing party. The record sufficiently supports the Findings of Fact entered by the court with regard its admission of evidence of the defendant's statements to the detectives and his girlfriend. In turn, the trial court's conclusions of law are amply supported by the factual findings entered.

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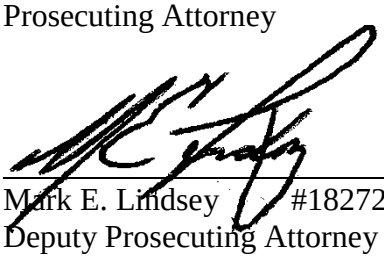
V. CONCLUSION

For the reasons stated above the defendant's convictions and sentences should be affirmed.

Dated this 28 day of December, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. RICHARD M. PAYNE, Appellant,	NO. 32096-1-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 29, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

David R. Hearrean
davidhearrean@gmail.com

and mailed a copy to:

Richard M. Payne DOC #832127
Washington State Corrections Center
1313 N. 13th Ave
Walla Walla, WA 99362

12/29/2014 (Date) Spokane, WA (Place) Crystal McNees (Signature)