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STATE OF WASHINGTON
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SUPREME COURT NO. 97831-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE RENE GOMEZ,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Rene-Gomez, No. 77561-8-I, filed October 7, 2019 (unpublished).

C. ADDITIONAL ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issues the State raised in the Court of Appeals, which were not reached by that Court:

1. The Court of Appeals held that a text message sent by D.D.O. to Gomez two months before her disclosure of the abuse to her father was admissible as a prior consistent statement rebutting a claim of fabrication. As alternative grounds to affirm, the State renews its arguments that the trial court properly concluded that the text message also was admissible as evidence of D.D.O.'s state of mind, her present sense impression, and as an adoptive admission by Gomez. The State also renews its argument that if the text message was improperly admitted, the error was harmless.

D. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Jose Rene Gomez, was charged with two counts of child molestation in the second degree and one count of felony communication with a minor for immoral purposes, contrary to RCW 9A.44.086 and RCW 9.68A.090(2). CP 35-36. A jury found Gomez guilty as to all counts. CP 60-62. The trial court imposed a standard range sentence. CP 119-30; RP 598-99.¹

The Court of Appeals affirmed the convictions in a unanimous unpublished opinion. State v. Rene-Gomez, 77561-8-1 (Wash. Ct. App. October 7, 2019) (unpublished).

2. SUBSTANTIVE FACTS

D.D.O.'s² parents were together for about ten years. RP 84-85, 141. Shortly after the relationship ended, D.D.O.'s mother moved in with defendant Gomez and brought her two daughters, D.D.O. and her younger sister, to live there. RP 146-48. It was

¹ The Report of Proceedings is in nine volumes, consecutively paginated, and will be referred to in this brief by page number only.

² In this brief, children are referred to by initials in an attempt to protect their privacy. For the same reason, the State will not use the names of the relatives of the children, instead identifying each relative by that relationship.

2011, and D.D.O. was going into fourth grade. RP 215, 240. The next year, when D.D.O. was about 11, Gomez began to touch her inappropriately on her breasts, her vaginal area and her butt. RP 244, 246, 269.

D.D.O. was uncomfortable with this touching and struggled to get away, on at least one occasion preventing Gomez's efforts to put his hand inside her pants. RP 259-60. One time Gomez came up behind D.D.O. when she was in her room and touched her breasts, holding her arm to prevent her from getting away. RP 261-63, 326. On a camping trip, Gomez kissed D.D.O. on the lips, not like a father kissing a daughter. RP 265-67. On another occasion, Gomez came up behind D.D.O. while she was washing dishes and touched her bottom; she turned and saw that he had touched her with his penis, although his penis was not exposed. RP 268, 277-299. During her testimony D.D.O. often described Gomez trying to touch her, and eventually explained that when she said "trying" she meant that there was at least a momentary touch but she was able to get away. RP 297-98, 320, 351, 363. She testified that Gomez touched her more than a hundred times and usually it occurred in the apartment where they lived. RP 318-19.

In April 2015, when D.D.O. was 13, she regularly exchanged text messages with Gomez. D.D.O. described the messages and their context in her testimony at trial, using photographic images of the messages as they appeared on her telephone. Ex. 6; RP 274-97. A Spanish interpreter provided a translation of the Spanish language messages. Exh. 12; RP 426, 433. A detective performed a forensic examination of D.D.O.'s telephone and produced a spread sheet that includes the date and time of each message, and its content. Exh. 15; RP 484-87.

The text messages admitted at trial began April 2, 2015, and ended on June 3, 2015. Ex. 15. In text messages beginning on April 21, Gomez asked D.D.O. for a picture of her in a particular pair of white underwear. Exh. 12, p. 36; RP 279-80. In the first such message, Gomez referred to this underwear as "shorts" – they were a girl's boy cut/ boxer-style brief – and later Gomez admitted to police that he was referring to that underwear. Exh. 12, p. 36; RP 280, 399-400. Gomez first told D.D.O. that he would let her go out and give her money if she sent a picture; later he said he would not give her permission to go out until she sent him that picture. Exh. 12, p. 38, 44; RP 281-83, 290-91, 294.

On April 24, when D.D.O. refused to send a picture, she said she didn't have to (in order to get permission to go out) because she could tell her mother. RP 283. In response, Gomez said he would tell her mother D.D.O. had a boyfriend, then said, "Are you sure you want to do this for just one pic." Exh. 12, p. 46; RP 284, 288. In response, D.D.O. sent a message stating: "I don't want to send a pic and you keep touching me when I told you to stop and you don't stop and you get mad because I don't like it and take it out on me even though I behave well." Exh. 12, p. 48; RP 289. The next day Gomez was asking for a picture again, saying "Please, please, please," and threatening, "Someday you're going to need something from me." Exh. 12, p. 52-54; RP 289-91. D.D.O. refused Gomez's repeated requests to send the picture, over several weeks. RP 281-83, 290-91, 294.

D.D.O. disclosed the abuse to her mother within a few days before June 30, 2015. RP 161-62, 173. D.D.O.'s mother said she did not believe D.D.O. RP 171-72. On June 30, because her mother had not helped her, D.D.O. told her father about the abuse, and her father reported it to police that day. RP 103-07. Police went to Gomez's home, where they took the two girls into protective

custody and allowed their father to take custody of them. RP 173-74, 374-75, 382.

When Gomez was interviewed by police, he denied inappropriately touching D.D.O. but said that a couple of months earlier he had touched her breast once accidentally while the two were playing. RP 393. He admitted that he had asked D.D.O. to send him a picture of herself in that specific white underwear, which he referred to as underwear that looked like shorts. RP 395-96, 399-400. Gomez said that he asked for a picture to confirm a claim by D.D.O. that the underwear did not fit. RP 399-400.

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Gomez in his petition for review. If review is accepted, the State seeks cross-review of alternative arguments it raised in the Court of Appeals but that the Court's decision did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if this Court grants review, in the interests of justice and full consideration of the issues, this Court also should grant review of

the alternative arguments raised by the State in the Court of Appeals, identified in the issue statement above. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. THE CHALLENGED TEXT MESSAGE, IN WHICH D.D.O. COMPLAINED TO GOMEZ ABOUT HIS REPEATED TOUCHING OF D.D.O., WAS PROPERLY ADMITTED.

Gomez contends that the trial court erred in denying his motion to exclude a text message from April 24, 2015, in which D.D.O. responded to Gomez's request for a picture of her in her underwear by referring to his repeated touching of her despite her objections. The Court of Appeals held that the message was admissible as a prior consistent statement to rebut a claim of fabrication. State v. Rene-Gomez, *supra*, slip opin. at 18-19. The State renews its arguments that the message also was admissible as an expression of D.D.O.'s state of mind and present sense impression of the event and as an adoptive admission by Gomez.

The message at issue was one in a series of messages between D.D.O. and Gomez, some in Spanish and some in English. Ex. 6; RP 247-48, 274-75. D.D.O. described the

messages and their context in her testimony, using images of the messages as they appeared on her telephone. Ex. 6; RP 274-97. A state-certified Spanish interpreter also provided a translation of the Spanish language messages. Exh. 12; RP 426, 433. A detective performed a forensic examination of D.D.O.'s telephone and produced a spread sheet that includes the date and time of each message, and its content. Exh. 15; RP 484-87.

In text messages beginning April 21, 2015, Gomez asked D.D.O. for a picture of her in a particular pair of white underwear. Exh. 12, p. 36; RP 279-80. He referred to this underwear as "shorts" – they were a girl's boxer-style brief – and later admitted to police that he was referring to that underwear. Ex. 12, p. 36; RP 280, 399-400. Gomez first told D.D.O. that he would let her go out and give her money if she sent a picture; later he said he would not give her permission to go out until she sent him that picture. Exh. 12, p. 38, 44; RP 281-83, 290-91, 294. D.D.O. refused Gomez's repeated requests to send the picture, over several weeks, telling Gomez it was "not a good thing" and "what you're doing is not okay." Exh. 12, p. 44, 74; RP 281-83, 290-91, 294.

On April 24, when D.D.O. refused to send a picture, she said she didn't have to (in order to get permission to go out) because

she could tell her mother. RP 283. In response, Gomez said he would tell her mother D.D.O. had a boyfriend, then said, “Are you sure you want to do this for just one pic.” Exh. 12, p. 46; RP 284, 288. Then he said, “We’ll talk later.” RP 289. In response, D.D.O. sent the message that Gomez sought to exclude: “I don’t want to send a pic and you keep touching me when I told you to stop and you don’t stop and you get mad because I don’t like it and take it out on me even though I behave well.” Exh. 12, p. 48; RP 41-42, 289. The next day Gomez was asking for a picture again, saying “Please, please, please,” and threatening, “Someday you’re going to need something from me.” Exh. 12, p. 52-54; RP 289-91.

The trial court concluded that the challenged message was probative, not unfairly prejudicial, and was admissible, saying Gomez could argue that the jury should not conclude it was an admission, that it was not hearsay because it was an expression of the victim’s then existing state of mind, and that the message had a place in terms of completeness of the communication. RP 47. The standard of review of a trial court’s ruling on a hearsay objection is for abuse of discretion. State v. Brush, 183 Wn.2d 550, 560, 353

P.3d 213 (2015); State v. Young, 160 Wn.2d 799, 805-06, 161 P.3d 967 (2007).³

- a. The Message Was Not Hearsay Because It Was A Prior Consistent Statement Offered To Rebut A Claim Of Recent Fabrication.

As the Court of Appeals held, the statement was properly admitted because it was not hearsay but was a prior consistent statement rebutting a claim of fabrication. ER 801(d)(1). A statement is admissible as a prior consistent statement under this rule if it rebuts a specific defense theory as to a witness's motive to lie. State v. Thomas, 150 Wn.2d 821, 864-67, 83 P.3d 970 (2004).

The defense claimed D.D.O. fabricated the claim after an argument with Gomez that occurred within days of the disclosure of the abuse. RP 204, 311-13, 536-37. D.D.O. disclosed the abuse to her mother within a few days before June 30, 2015. RP 161-62, 173. When D.D.O.'s mother refused to do anything about the abuse, D.D.O. told her father about it on June 30; he reported it to police that day. RP 103-07. The defense theory at trial was that

³ Some courts of appeal have stated that review is de novo. *Compare In re Det. of Peterson*, 197 Wn. App. 722, 727, 389 P.3d 780 (2017) (abuse of discretion) *with State v. Hudlow*, 182 Wn. App. 266, 281, 331 P.3d 90 (2014) (de novo). Under either standard, the court did not err in admitting this text message.

D.D.O. fabricated the claim of molestation so she could live with her father. RP 536-37, 544-45. The challenged text message was sent April 24, 2015, two months before the abuse was reported to the police and D.D.O. was removed from the home, and in the message D.D.O. complained to Gomez directly about the touching. Exh. 12, p. 48; RP 289. This rebuts the defense theory that the report of abuse was fabricated after an argument in late June.

b. The Message Was Admissible As A Present Sense Impression And Statement Of D.D.O.'S Then Existing Mental Or Emotional Condition.

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay generally is inadmissible but exceptions listed in ER 803(a) are not excluded. Two related exceptions apply to the statement at issue here: a present sense impression and a statement of then existing mental emotional or physical condition.⁴

A present sense impression is “a statement describing or explaining an event or condition made while the declarant was

⁴ Although the trial court mentioned only the latter, this court may affirm on any basis present in the record. State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

perceiving the event or condition, or immediately thereafter.” ER 803(a)(1). The statement at issue was admissible as a present sense impression because in it D.D.O. described her perception of the current request for a picture using an analogy: it was a request for a sexually inappropriate action that made D.D.O. uncomfortable, just like the repeated touching that she resisted.

Statements demonstrating the declarant’s state of mind also are admissible. They are defined in ER 803(a)(3) as “A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the ... declarant’s will.” The trial court properly ruled that the statement was admissible as evidence of a state of mind. RP 47. The statement indicated D.D.O.’s state of mind, her emotion, and her intent. It indicated that D.D.O. understood Gomez was asking for an improper photo, that it made her uncomfortable (just as the touching did), and that she did not intend to send it. RP 44. The message was material to Gomez’s claim that he asked for the photo for an innocent purpose, his defense of accidental touching,

RP 393, and his claim that D.D.O. fabricated the allegations that he repeatedly touched her inappropriately. RP 543-45.

c. The Message Was Not Hearsay Because It Was An Adoptive Admission By Gomez.

The trial court also properly admitted the message because it was an adoptive admission. RP 45. Under ER 801(d)(2), a statement is not hearsay if it is “offered against a party and is ...(ii) a statement of which the party has manifested an adoption or belief in its truth....” Silence constitutes adoptive admission of a statement if (1) the party-opponent heard the accusatory statement and was mentally and physically able to respond, and (2) the statement and circumstances were such that it would be reasonable to conclude that an innocent person would have responded. State v. Israel, 113 Wn. App. 243, 282 n.11, 54 P.3d 1218 (2002) (citing State v. Neslund, 50 Wn. App. 531, 551, 749 P.2d 725 (1988)). The trial court’s decision as to admissibility is only a threshold determination; the jury is primarily responsible for determining whether the defendant actually heard, understood, and acquiesced in the statement. Neslund, 50 Wn. App. at 551-52.

The trial court did not use the term “adoptive admission” in its ruling, but stated that the defense could argue the jury should not draw any inference because Gomez did not reply to that text, making it clear the State could argue that the jury should draw an inference from his silence. RP 47. This is a ruling of conditional relevance as an adoptive admission, as Neslund described, leaving it for the jury to determine the appropriate inference to draw.

Both components for admissibility as an adoptive admission existed. This message was in the midst of an ongoing exchange of texts and there was no suggestion that Gomez did not receive the message or was unable to respond. An innocent person would have responded immediately to the shocking allegations in the message. Even in closing argument, Gomez argued only that he was “speechless,” not that he did not receive the message or was unable to respond. RP 542-43. The trial court thus properly admitted the message so the jury could determine whether the defendant’s silence implied an admission of the allegation.

d. If The Message Was Improperly Admitted, The Error Was Harmless.

Even if admission of this text message was error, it was harmless and does not warrant reversal. Gomez concedes that any error in admitting the message was only evidentiary error. Petition at 11. Evidentiary error is harmless “unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

This message was not the only one that was incriminating. Gomez’s messages asking for a picture of D.D.O. in her underwear established his sexual interest in her. Gomez continued to ask for the picture for weeks, never referring to the fit of the underwear, or his excuse to police, that D.D.O. wanted to buy more underwear and he wanted proof those did not fit. Exh. 12; RP 399-400. That excuse also is inconsistent with his message offering her money for the picture and his threats to retaliate if she did not provide the picture. Exh. 12, p. 38, 44, 52-54; RP 281-83, 290-91, 294, 289-91.

In other text messages, D.D.O. also stated that what Gomez was doing was not right and that she was going to tell her mother. Exh. 12, p. 44, 74; RP 281-83, 290-91, 294. These messages also

corroborate his inappropriate sexual attention to her. If the jury believed D.D.O. was fabricating the molestation, there is nothing about the preservation of her allegations in a text message that gave them additional credibility.

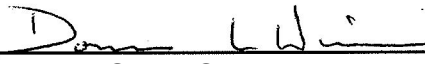
F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issues identified in Sections C and E, supra.

DATED this 2d day of December, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Office WSBA #91002

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