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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER POINDEXTER, Appellant.	)	No. 81213-1-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Christopher Poindexter appeals his conviction of three counts of first degree child molestation and one count of second degree child molestation. He argues retrial is required because (1) the court admitted inadmissible hearsay, (2) his constitutional right to confront the witnesses against him was violated, (3) the court erred by admitting impermissible opinions from witnesses, and (4) the court prejudiced him by allowing an amendment to the charging document. We affirm.

FACTS

In May 2018, the State charged Poindexter with five counts of first degree child molestation and two counts of second degree child molestation for acts committed years earlier on his stepdaughters, J.D. and K.S. Trial began in November of 2019. J.D. and K.S., who were 21 and 18 years old respectively at the time of trial, both testified.

J.D. testified that when she, K.S., their mother, and Poindexter lived on Grove Street in Bellingham, "[e]verything was going normal, then it started to get weird." When J.D. was 10 or 11, she and Poindexter were watching television in his bedroom. Poindexter told J.D. to come closer, climb on top of him, and lay on him. J.D. complied. Poindexter held her hips and rubbed her behind against his genitals for 20 to 25 minutes. She told no one about it because Poindexter said to keep it just between themselves, and, as her father, she listened to him.

In early 2010, the family moved to a house in Sudden Valley. J.D. was now in sixth grade, and K.S. was in third grade. J.D. testified that when she was 12 or 13, Poindexter molested her again. K.S. testified that when they lived in Sudden Valley, Poindexter molested her 10 to 15 times, "like a routine." She was not yet 12. Poindexter would call her over to sit on his lap after he arrived home from work. He would caress K.S.'s body, including her vagina, over her clothes. Poindexter would also rub K.S. against his genitals, as he did to J.D. On several occasions, including once when J.D. and her mother were in an adjacent room, Poindexter open-mouthed kissed K.S. with his tongue. K.S. did not tell anyone about being molested.

After Poindexter and the victims' mother separated in 2014, J.D. and K.S. disclosed Poindexter's predations to each other. They did not tell their mother, however, because they were afraid of hurting her. J.D. continued to communicate with Poindexter because he "was all I had as a father, so I didn't want to lose it." They communicated through text or Facebook messages. Poindexter sometimes sent messages to J.D. that made her uncomfortable, such as calling her "hot stuff," asking what she was wearing, and asking for a picture of her wearing body paint. J.D.

eventually showed the messages to her boyfriend, who told her to stop communicating with him because Poindexter was a "creep." J.D. texted Poindexter to say "good-bye" and explain her boyfriend's reaction. That strong reaction also prompted J.D. to disclose Poindexter's molestation.

J.D. and K.S. simultaneously disclosed to their mother that Poindexter molested them. The same day, their mother reported to the police that J.D. and K.S. had been molested. After a three-month investigation, Poindexter was arrested and charged.

During the State's case-in-chief, it moved to amend the information by dropping two charges against Poindexter and expanding the charging periods on the remaining counts. The court allowed the amendment over Poindexter's objection. Poindexter also objected to testimony from J.D. and her mother on hearsay grounds. The jury found Poindexter guilty on three counts of first degree child molestation, guilty on one count of second degree child molestation, and not guilty on one count of first degree child molestation.

Poindexter appeals.

ANALYSIS

A. Hearsay

Poindexter challenges testimony from J.D. and her mother as prejudicial and inadmissible hearsay. We disagree.

We review the court's decision to admit evidence for abuse of discretion. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 870 (2004). A court abuses its discretion when its decision rests on untenable grounds or reasons. State v. Lee, 188 Wn.2d 473, 486, 396 P.3d 316 (2017).

Hearsay is generally inadmissible. ER 802. "Whether a statement is hearsay depends upon the purpose for which the statement is offered. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay." State v. Garcia, 179 Wn.2d 828, 845, 318 P.3d 266 (2014).

Poindexter argues the court erred by letting J.D. testify to her boyfriend's reaction to Poindexter's messages. J.D. testified to her boyfriend's statements to explain why she finally disclosed Poindexter's history of abuse. J.D.'s boyfriend's statements were not admitted to prove the matter asserted and were, therefore, not hearsay. Garcia, 179 Wn.2d at 845.

Poindexter contends the court erred when the victims' mother was allowed to testify to statements made by J.D. and K.S. when disclosing Poindexter's abuse. A prior consistent statement admitted through ER 801(d)(1)(ii) "is not hearsay if it is consistent with the declarant's testimony and is used to rebut an allegation of recent fabrication." Peralta v. State, 191 Wn. App. 931, 952, 366 P.3d 45 (2015), rev'd on other grounds, 187 Wn.2d 888, 904, 389 P.3d 596 (2017).

In relevant part, the victims' mother testified:

> That there had been instances where if she was alone with him that there, you know, it was suggested that she—and both cases—go change clothes or go change into something different other than pants, maybe shorts. There was touching, inappropriate touching. Having her—and this goes for both—to sit on his lap or come lay next to him. I can't recall the exact instances. . . . But that's, that was, you know, the brunt of what they had told me. And it was multiple instances, it wasn't just one or two times. . . . It had started in Grove Street . . . I don't recall, you know, bedrooms or places. They didn't go into that kind of detail. Sudden Valley it was like downstairs in the rec room, or, I'm not sure exactly what locations they were in.
>
> . . . .

> They wanted to try to keep that semblance of normalcy. They also didn't know how to tell me. I asked them why, what took so long. They didn't know. They were scared. They didn't know how to tell me. They said they didn't know, either one of them, about the other's.

J.D. and K.S. both testified extensively about Poindexter's predations and testified about disclosing them to their mother, including why they did not disclose having been molested until years later. Poindexter cross-examined both victims and repeatedly questioned their recall of the years when they had been molested. Poindexter also asked many pointed questions to highlight inconsistencies between J.D.'s trial testimony, text and Facebook messages, and her pretrial interview responses. He did the same with K.S. It was apparent Poindexter's defense theory, as he explained in closing argument, was that J.D. and K.S.'s inconsistencies demonstrated they lied and had a motive to lie:

> Kids don't lie, right? Kids don't lie. We heard that initially in this case. Kids don't lie and they should be believed. Well, we heard a different dimension of that, which is really the fundamental request the prosecutor makes that you believe for proof that kids don't lie and they have nothing to gain, ergo, Mr. Poindexter is guilty. That's essentially his argument: they have nothing to gain and that kids don't lie.
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> . . . .
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> Now, you have to ask yourself[,] are the hallmarks of credibility inconsistencies, internal [inconsistencies] with yourself? . . . Is that a hallmark of credibility? . . . Is a hallmark of credibility [a] complete lack of recollection of anything at all, anything at all in that time period by either alleged victim of anything else? One of the instructions says that you are the sole judges of credibility and can consider the manner in which someone testifies, their memory as to the alleged events.
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> . . . .
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> So, you have to ask yourself why would that attorney representing [Poindexter] illustrate that [J.D.] made additional allegations [in pretrial interviews] that she didn't say in testimony? Well, for the simple reason is that it illustrates, it illuminates, it demonstrates that she is not consistent. We have the same thing with [K.S.] as well.

The circumstances here are similar to Thomas. In Thomas, an employee convicted of burglary and murder argued that ER 801(d)(1)(ii) did not permit testimony from his girlfriend about having previously told others about his crimes because he did not allege she was lying. 150 Wn.2d at 830, 864-66. The girlfriend had helped the employee execute his plan to rob and murder his employer. Thomas, 150 Wn.2d at 831, 835-36. The girlfriend later told her sister and a friend that the employee had murdered and robbed his employer. Thomas, 150 Wn.2d at 837. The girlfriend later pleaded guilty to robbery and rendering criminal assistance in exchange for testifying against the employee. Thomas, 150 Wn.2d at 839. At trial, the girlfriend testified about the employee's role in the murder and about telling others of his role. Thomas, 150 Wn.2d at 864. On cross-examination, the employee asked a series of questions about the girlfriend's plea agreement and the sentenced she received. Thomas, 150 Wn.2d at 865-66. He also pointed out inconsistencies between the girlfriend's pretrial interviews and trial testimony. Thomas, 150 Wn.2d at 866. Because his series of questions implied she had a motive to fabricate her testimony, the Supreme Court held that ER 801(d)(1)(ii) applied. Thomas, 150 Wn.2d at 866.

Like Thomas, Poindexter's cross-examination was intended to demonstrate both victims were inconsistent because they had fabricated their allegations. ER 801(d)(1)(ii) applied.

Poindexter cites State v. Bates, 196 Wn. App. 65, 383 P.3d 529 (2016), to argue that the confrontation clause permits testimony about prior consistent statements from the declarant only. Poindexter misunderstands Bates.

In Bates, Division Three of this court quoted State v. Rohrich, 132 Wn.2d 472, 478, 939 P.2d 697 (1997) to explain the confrontation clause requires that "the declarant [must] have been generally subject to cross-examination," specifically "subject to cross-examination concerning the out-of-court declaration." 196 Wn. App. at 74-75. In Rohrich, our Supreme Court concluded retrial was required where the victim testified, but all of the testimony about the alleged sexual acts was introduced through third-party witnesses. 132 Wn.2d at 474, 481. But the Bates court affirmed the defendant's convictions on two counts of child rape because the victim's testimony on direct examination was sufficient to allow the defendant to cross-examine her about statements also testified to by third-party witnesses and admitted under ER 801(d)(1)(ii). 196 Wn. App. at 75-77. Thus, the apt understanding of Bates is that ER 801(d)(1)(ii) allows a prior consistent statement to be admitted regardless of which witness testifies to it when the declarant is also a witness and gives testimony sufficient to allow cross-examination about the statement. 196 Wn. App. at 71, 76-77.

J.D. and K.S. testified about being molested and about disclosing the molestation to their mother. Poindexter strongly implied they fabricated the allegations. The victims' mother's testimony of her daughters' prior consistent statements was properly admitted for nonhearsay purposes through ER 801(d)(1)(ii). The court did not abuse its discretion.

B. Right to Confrontation

Poindexter contends three evidentiary rulings violated his right to confront the witnesses against him. We disagree.

We review alleged violations of the confrontation clause de novo. Bates, 196 Wn. App. 65, 72, 383 P.3d 529 (2016). The confrontation clause prohibits admission of testimonial hearsay from an absent witness whom the defendant has not had an opportunity to cross-examine. State v. Scanlan, 2 Wn. App. 2d 715, 724, 413 P.3d 82 (2018). It also prevents the State from introducing adverse testimony using tactics that deprive a defendant of the opportunity to cross-examine the declarant about their accusations. Bates, 196 Wn. App. at 75.

Poindexter argues the State violated his right to confrontation by eliciting testimony from the victims' mother recounting her daughters' disclosure about Poindexter molesting them. As discussed, this testimony was admissible under ER 801(d)(1)(ii) and, therefore, not hearsay. The confrontation clause was not implicated. Scanlan, 2 Wn. App. 2d at 724. Even if the testimony was hearsay, Poindexter had ample opportunity to cross-examine J.D. and K.S. about their allegations. Testimony from the victims' mother about her daughters' disclosures did not violate the confrontation clause. Scanlan, 2 Wn. App. 2d at 724.

Poindexter also argues his confrontation clause rights were violated when J.D. testified about her boyfriend's reaction to Poindexter's messages. As discussed, J.D.'s boyfriend's statements were not hearsay. They were admitted to show how they affected J.D. and not to prove the truth of the matter asserted. These statements did not implicate the confrontation clause. Scanlan, 2 Wn. App. 2d at 724.

Poindexter contends his right to confrontation and right to present a defense were violated by the court limiting his cross-examination of K.S. about her memory. The scope of cross-examination is within the trial court's discretion, and the court abuses its

discretion by restricting a defendant's cross-examination without lawful justification. Garcia, 179 Wn.2d at 844 (citing State v. Lamb, 121, 127, 285 P.3d 27 (2012); State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002)).

The right to confrontation and the right to present a defense are not unlimited. State v. Blair, 3 Wn. App. 2d 343, 349, 415 P.3d 1232 (2018). "The defendant's right to present a defense is subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" Blair, 3 Wn. App. 2d at 350 (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The right to confrontation does not allow the introduction of otherwise inadmissible evidence. Blair, 3 Wn. App. 2d at 349 ("and 'the Constitution permits judges to exclude evidence that is repetitive . . . only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" State v. Orn, No. 98056-0, slip op. at 9 (Wash. Mar. 18, 2021) (alterations in original) (internal quotation marks omitted) (quoting Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)), https://www.courts.wa.gov/opinions/pdf/980560.pdf.

Poindexter cross-examined K.S. extensively about her memory and recall of the time period she alleged having been molested. He questioned her inability to specify a date or season of the year when she was first molested. He asked about her teachers' names and the subjects she studied during fourth and fifth grade. He asked where she celebrated Christmas during those years. K.S. remembered her teachers' names but otherwise could not recall or gave uncertain answers. Poindexter then asked K.S. general questions about fourth and fifth grade:

> Q: Can you tell us one thing that you did in fourth grade, one thing of significance that you remember about fourth grade?
>
> A: Of significance, I cannot recall.
>
> Q: Do you have best friends in fourth grade that you remember?
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> A: Yes, her name was [K.R.].
>
> Q: Okay. And then how about fifth grade? Can you tell us anything of significance that you remember about fifth grade, apart [from] what you've testified to?
>
> A: I can't remember anything significant from fifth grade.
>
> Q: Okay. And did you have a best friend in fifth grade?
>
> A: I did. Her name was [R.].
>
> Q: Okay. How about other friends in fifth grade that you can recall?

At this point, the State objected, and the court limited Poindexter to "one or two more questions of this sort," explaining "you're getting to the end of this line of questioning."

The parties do not dispute that K.S.'s credibility and memory were relevant. Thus, the question is whether a lawful justification existed to restrict cross-examination. Darden, 145 Wn.2d at 625. Under ER 403, relevant evidence may be excluded if its probative value is outweighed "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

K.S.'s credibility was central to the charges against Poindexter and her ability to recall being molested was closely related. But the court gave Poindexter considerable latitude to demonstrate that K.S. struggled to recall details from the two years when Poindexter allegedly molested her. With each new question about K.S.'s memories, Poindexter made the same point: K.S. was not credible because her recall was faulty. He made this point repeatedly. Under these circumstances, the court had the discretion

to stop Poindexter from continuing to elicit the same evidence on cross-examination. See Orn, slip op. at 9 (the constitution permits exclusion of repetitive evidence).

C. Opinion Testimony

Poindexter argues that Detective Francis and the victims' mother improperly bolstered the victims' credibility, thus requiring a retrial.[1]

We review a court's decision to admit testimony for abuse of discretion. Thomas, 150 Wn.2d at 856. "A witness may not offer testimony in the form of an opinion regarding the guilt or veracity of the defendant." State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

During direct examination of Detective Francis, the prosecutor asked, "Do you recall anything about your initial impression of meeting [the victims' mother] and the girls?" and Detective Francis responded, "No, I think they all presented pretty accurately with the way they testified." Poindexter objected to this answer for commenting on the victims' credibility.

Understood in context, it is clear Detective Francis was commenting on the victims' demeanor, not their testimony or credibility. Just before Detective Francis testified, the State asked the victims' mother about K.S.'s demeanor during her police interview. Before asking the question that yielded the objectionable response, the

[1] Poindexter appears to argue the prosecutor also commented on the victims' credibility. He does not argue the prosecutor committed misconduct nor does he allege any specific prejudice, so we decline to review it.

prosecutor asked about the circumstances in which Detective Francis and his partner first met and interviewed the victims. After the court overruled Poindexter's objection, the prosecutor asked, "Do you remember anything in particular about either [the victims' mother] or the girls' demeanor when you first met them going to do the interviews?" When Detective Francis's partner testified, the prosecutor asked about K.S.'s demeanor in his interview with her. Because Detective Francis's response was an inference from his observations and did not touch on the victims' veracity, he did not comment on their credibility. Heatley, 70 Wn. App. at 578.

Poindexter argues the victims' mother improperly opined about his guilt. The prosecutor asked, "Any question in your mind about who had done this to your daughters?" The victims' mother replied, "No." The State concedes the response was improper and opined on Poindexter's guilt.[2]

We review admission of an improper opinion on guilt using the constitutional harmless error standard. City of Seattle v. Levesque, 12 Wn. App. 2d 687, 711, 460 P.3d 205 (2020). Under this standard, we presume the error was prejudicial, and the State bears the burden of establishing the error was harmless. Levesque, 12 Wn. App. 2d at 711. "If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless." State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009).

[2] The State urges review under the "manifest constitutional error" standard, contending Poindexter did not object to this question. The record does not support it. Poindexter objected twice to this line of questioning, including for comment on the victims' credibility. His second objection was to "all of this testimony" and was made moments before the question at issue on appeal. Poindexter preserved this issue for review. See State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (citing ER 103(a)(1)) (review of a question not specifically objected to is proper when the "ground for objection is readily apparent from the circumstances").

In Levesque, this court concluded a driver convicted of driving under the influence was prejudiced by several police officers' improper opinion testimony. 12 Wn. App. 2d at 691. Two officers were dispatched to a car accident, and one arrested the driver. Levesque, 12 Wn. App. 2d at 691-92. At trial, the arresting officer opined the driver had appeared "impaired by a stimulant" and "was definitely impaired at the time of the accident." Levesque, 12 Wn. App. 2d at 693. The driver's defense theory was that he was on prescription medication for past injuries, and a reaction to that medication explained his appearance and behavior when arrested. Levesque, 12 Wn. App. 2d at 694. The driver's physician testified in his defense about his medical conditions, his medications, and how the two could cause the driver to appear impaired, consistent with the officer's testimony. Levesque, 12 Wn. App. 2d at 711-12.

The Levesque court concluded the State failed to demonstrate the arresting officer's opinion was harmless. 12 Wn. App. 2d at 711. First, the opinion was from a police officer, whom a jury may view as particularly reliable. Levesque, 12 Wn. App. 2d at 711. Second, the officer's credibility was bolstered by his role as the arresting officer and by the State's questioning about his training and experience, including with field sobriety testing. Levesque, 12 Wn. App. 2d at 692, 711. Third, the physician's testimony could have reasonably let the jury accept the driver's defense theory. Levesque, 12 Wn. App. 2d 711-12.

Unlike the police officer in Levesque, whose experience and objectivity lent an aura of reliability, the victims' mother was not presented as specially trained or objectively reliable. She testified that she reported Poindexter to the police after her

daughters disclosed his predations. The jury knew she believed her daughters and, therefore, also believed in Poindexter's guilt.

Also unlike Levesque, the State presented overwhelming evidence demonstrating Poindexter's guilt absent the improper comment and rebutting his defense theory. J.D. and K.S. both testified about Poindexter molesting them when they were children. The jury could have found them credible and convicted Poindexter on their testimony alone.

The State's evidence effectively rebutted Poindexter's defense theory, which was that both victims were lying because he "simply wasn't there" and lacked the opportunity to molest them. Poindexter testified that he was never alone with either victim, despite being their stepfather. He explained he was never home alone with the victims because he worked for ten hours each day for five or six days every week, commuting from Sudden Valley to Seattle, and returning home around six or seven o'clock at night. But J.D. and K.S. testified consistently that Poindexter would regularly be alone in the house with them. Poindexter's theory does not account for testimony from both victims explaining that he molested them when others were home. J.D. testified Poindexter first molested her when K.S. was in the room but was too young to realize anything inappropriate was happening. K.S. testified Poindexter molested her at least once when her mother and sister were home. And even if the jury believed Poindexter was never home alone with the victims because he worked long hours, K.S. testified Poindexter would most often molest her after coming home from work. Under these circumstances, the State demonstrates the error from admitting the comment on Poindexter's guilt was harmless beyond a reasonable doubt.

D. Amended Charging Document

After J.D. and K.S. testified about when and how frequently they were molested, the State moved to amend the information by dropping two counts alleging Poindexter molested J.D. when they lived on Grove Street and by extending the charging periods for the remaining counts to include the entire time they lived in Sudden Valley. The court granted the motion. Poindexter argues the amendment was a substantive change affecting his entire trial strategy. We disagree.

CrR 2.1(d) allows amendment of an information any time before the verdict if the substantial rights of the defendant will not be prejudiced. We review a decision to grant a motion to amend an information for abuse of discretion. State v. Brooks, 195 Wn.2d 91, 96, 455 P.3d 1151 (2020) (citing Lamb, 175 Wn.2d at 130; State v. Brett, 126 Wn.2d 136, 155, 892 P.2d 29 (1995)).

A constitutionally permissible charging document must allege "all essential elements of a crime to inform a defendant of the charges against him and to allow for preparation of his defense." Brooks, 195 Wn.2d at 97 (citing U.S. CONST. amend. VI; WASH. CONST. art. I, § 22). Neither first nor second degree child molestation include time as an essential element. See RCW 9A.44.083 ("a person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim."); RCW 9A.44.086 (same but prohibiting sexual contact with a person between 12 and 14); see also State v. Goss, 186 Wn.2d 372, 379, 378 P.3d 154 (2016) (essential elements are those necessary to establish the illegality

of the behavior charged). Where, as here, time is not an element of the crime charged, "amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." State v. DeBolt, 61 Wn. App. 58, 60-62, 808 P.2d 794 (1991). Poindexter has the burden of proving prejudice because essential elements of the charges were not amended. Brooks, 195 Wn.2d at 98.

Poindexter is incorrect that amending the charging periods prejudiced him by substantively changing the crimes charged.[3] Poindexter did not raise an alibi defense and fails to demonstrate any prejudice from the amendment. Although he argues the amendment implicated "[a]ll aspects of trial preparation, trial strategy, voir dire, [and] cross-examination," Poindexter knew he had been charged with several counts of molesting J.D. and K.S. "on or about . . . and/or between" the dates in the first information. Those dates encompassed when the family moved to Sudden Valley and the first year they lived there. Poindexter was apprised he was being charged for allegedly molesting his stepdaughters when living in Sudden Valley. Amending the information to reflect the two years the victims lived in Sudden Valley did not change the substance of the charges. Poindexter fails to show prejudice from the amendment.

Affirmed.

[3] Poindexter does not argue he was prejudiced by the State's decision to drop two of the charges against him.

Mann, C.J.

WE CONCUR: